

LILCO, May 23, 1984

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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OFFICE OF SECRETARY
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

LILCO'S RESPONSE TO FEMA'S APPEAL OF
MAY 18, 1984 ASLB DISCOVERY ORDER ON RAC DOCUMENTS

Pursuant to the Appeal Board's telephone order of May 21, 1984 extending the Atomic Safety and Licensing Board's stay of its May 18, 1984 "Memorandum and Order Ruling on Suffolk County Motion to Compel Production of Documents by FEMA" ("Licensing Board Order") through the morning of May 23 and requiring written submissions by 9:00 a.m. that day, Long Island Lighting Company responds as follows to FEMA's May 21, 1984 notice of appeal and to FEMA's "Memorandum in Support of FEMA's Appeal of an Order of the [ASLB] and Request for a Stay."

The current discovery dispute is nominally between FEMA and Suffolk County. LILCO is potentially affected, however, by its outcome since the involvement of FEMA's Regional Assistance Committee (RAC) in emergency planning at Shoreham is not complete. In addition to providing testimony through its Chairman

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in the ongoing hearings at Shoreham, the RAC will have to evaluate LILCO's corrections of the 32 deficiencies listed in the RAC's March 15, 1984 evaluation of the LILCO Transition Offsite Emergency Plan for Shoreham (the "RAC Review"). The RAC will thereafter observe and grade an exercise for Shoreham. Thus LILCO has a vital interest in the ability of the RAC to function efficiently and effectively, and would be damaged by any events that crippled that functioning. Since the affidavits of Drs. Kowieski and McIntire attached to FEMA's appeal papers, as well as the earlier affidavit of FEMA's Director, Louis O. Giuffrida, all assert such an impairment of FEMA's functioning if RAC deliberative documents are released, LILCO is concerned that the Appeal Board weigh carefully all appropriate factors before compelling an independent federal agency serving as a consultant to the NRC to release documents it considers necessary to protect.

LILCO has not, of course, seen the 30 documents in question^{1/} and therefore will not attempt to make arguments based on their actual contents. However, the Licensing Board upheld FEMA's claim that the documents were entitled to executive privilege, against Suffolk County's arguments to the contrary. Licensing Board Order at 6. Thus the only question before the

^{1/} Of the 37 documents sought to be protected by FEMA, the Licensing Board's Order of May 18 required the release of 30 and protected 7 against disclosure. Thus the actual number of documents at issue is now 30.

Appeal Board is whether the privilege is overcome in the circumstances of this case.

The generally accepted means for deciding whether executive privilege can be overcome with respect to documents is to determine whether a compelling need has been shown by the party seeking the information contained in the documents in question, and if so, to balance that need against the agency's need to preserve confidentiality. Long Island Lighting Company

(Shoreham Nuclear Power Station), LBP-83-72, 18 NRC 1221, 1227-28 (1983). In determining the need of a party seeking discovery to the documents, the availability of other means of obtaining the same or equivalent information, and the importance of the information in the documents themselves to the party's case, should be considered. Long Island Lighting Company
(Shoreham Nuclear Power Station), LBP-82-82, 16 NRC 1144, 1164-65 (1982).

In the current dispute, the facts do not demonstrate a compelling need to overcome an admittedly well-founded assertion of executive privilege. The 30 documents in question are not the only means available to, or availed by, Suffolk County to obtain discovery of FEMA. Suffolk County filed with FEMA, on April 4, 1984, a broad Freedom of Information Act request concerning Shoreham; on May 1, 1984, FEMA complied, disgorging a 1130-page stack of documents approximately six inches high. Some forty of these documents were subsequently designated by

FEMA as being directly responsive to Suffolk County's motion to compel production of documents relating to the RAC Review.

FEMA's Response to Suffolk County Request for Production of Documents, May 14, 1984, at 1-4. At the same time FEMA designated, and provided to Suffolk County, eight additional documents relating to the RAC Review. Id. at 4-5.

Furthermore, even this extensive document discovery is not Suffolk County's sole basis for discovery of FEMA: the agency has agreed to make available FEMA witnesses (RAC Chairman Dr. Roger Kowieski, Regional Division Chief Dr. Philip McIntire) and RAC consultants (Joseph Keller of INEL, Peter Baldwin of ANL) for two days of depositions. The depositions will apparently take place as soon as they can be scheduled following the Appeal Board's decision in this matter. In short, the 30 documents at issue contain merely a corner of the information on the RAC's review of the Shoreham Emergency Plan available to Suffolk County.

A second aspect of inquiry into the existence of "compelling need" consists of the centrality of the documents in question to the issues available for litigation. At Shoreham, those issues are framed by the contentions of the parties, not by the RAC Review. The parties have been in hearings nearly continuously on these contentions since early December 1983 on the basis of several thousands of pages of prefiled testimony, with several more weeks of hearings likely. The mere fact that

many of the contentions are framed in terms of asserted violations of NUREG-0654 does not necessarily shift the center of gravity of the proceeding, nor of Suffolk County's own case, to the RAC Review, even though it also is framed in terms of compliance with elements of NUREG-0654. Much less does the center of gravity shift to the predecisional opinions and observations of individual RAC members: while the RAC Review is attached to and relied on by FEMA in its direct testimony, it is still a collegial, consensus document. There is no reason to believe a priori that the conclusions in FEMA's testimony, including the RAC Review, cannot be probed adequately through the document discovery already had, plus two days of depositions, only then followed by cross-examination in open hearings.

Against this less-than-clear demonstration of "compelling need" is the uncontroverted certainty, expressed in three affidavits of FEMA employees, of delays and disruptions in the RAC process. Here, as the affidavits point out, FEMA and its RAC work continually with, and critique, members of State and local governments. The inability to protect the confidentiality of predecisional observations is asserted to have an inevitably chilling effect on the agency's ability to carry out its functions free of undue pressure. While LILCO cannot appraise this assertion independently, it should not be overlooked by the Appeal Board.

The FEMA affidavits also note that numerous RAC members and consultants are not FEMA employees. The Licensing Board acknowledged this fact, Licensing Board Opinion at 8, but appears to have misunderstood it. While the fact that a RAC member or consultant is not a FEMA employee may alleviate intra-FEMA pressure on him or her, it also means that FEMA cannot ensure that RAC member's cooperative participation in RAC matters in an atmosphere of contention.

With respect to the merits of FEMA's appeal, the ready availability elsewhere of massive information about FEMA and the RAC review, from other documents and depositions, suggests strongly that a "compelling need" cannot be shown by Suffolk County for the 30 documents at issue. However, the Licensing Board's Order, despite its recognition of the relevance of the actual importance of the documents at issue and of the availability of the information elsewhere in determining "compelling need" (Licensing Board Order at 4), makes no reference to either the other documents already provided to Suffolk County or to the availability of depositions. (Indeed, in apparently considering, and rejecting, cross-examination at the hearing as a substitute for release of the documents at issue (id. at 4-5), the Licensing Board ignored the function of depositions entirely).

LILCO believes that the Licensing Board's failure to analyze the necessity for compelled release of the 30 RAC

documents in the context of the other discovery available to Suffolk County for penetrating the FEMA/RAC evaluative process, and its apparent evaluation of the 30 documents as though they were the only documents bearing on that subject, was error.

Part of the process in determining whether to overcome a privilege is examination of the other available means of providing the information sought. The Licensing Board's Opinion, while acknowledging that test, reveals no evidence of having applied it. LILCO believes that that failure, whether one of articulation or substance, was wrong and that the documents should thus not have been ordered to be released.

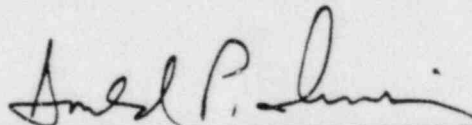
Further, the affidavits of Messrs. Kowieski and McIntire substantiate the assertion of harm to the RAC process from release of the 30 RAC documents made initially in the affidavit of General Giuffrida. The Licensing Board did not have these later affidavits before it; thus its finding of harm to the agency from disclosure of the 30 documents at issue could not have comprehended this additional level of detail and extent of asserted harm. However, these affidavits would appear to affect substantially the measure of harm to FEMA from compelled release of the RAC documents, and weigh against any release of the 30 requested documents.

CONCLUSION

LILCO, having not seen the documents at issue, cannot opine on factual issues in this matter. However, the Licensing Board clearly failed to articulate (and apparently to consider) the 30 RAC documents at issue in context; and the late-filed affidavits before the Appeal Board substantiate and expand the measure of harm to FEMA from release. Under the circumstances, LILCO believes that the Licensing Board was incorrect in concluding that Suffolk County had demonstrated "compelling need" for the 30 RAC documents, or that such a need as may exist outweighs FEMA's interest in preservation of their confidentiality. LILCO urges that the Appeal Board reverse the Licensing Board's decision and order that the documents not be required to be released.

Respectfully submitted,

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DATED: May 23, 1984

LILCO, May 23, 1984

CERTIFICATE OF SERVICE

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

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I hereby certify that copies of LILCO'S RESPONSE TO FEMA'S APPEAL OF MAY 18, 1984 ASLB DISCOVERY ORDER ON RAC DOCUMENTS were served this date upon the following by first-class mail, postage prepaid, or by hand (one asterisk), or by telecopier (two asterisks).

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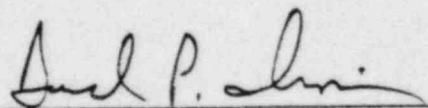
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