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LILCO, June 5, 1984

UNITED STATES OF AMERICA
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 MEMORANDUM ON RESTRICTIONS ON COMPELLED DISCOVERY OF OTHER FEDERAL AGENCIES IN NRC PROCEEDINGS

This Board's May 30, 1984 Order requested parties to address (1) the permissibility and (2) the advisability of one federal agency's requiring another to disclose documents in the context of an NRC licensing proceeding. The Order requested that the discussions address the question both generally and with reference to the November 4, 1980 Memorandum of Understanding between NRC and FEMA, 45 Fed. Reg. 82713 (1980).

1. Permissibility of Requiring Production of Documents by Another Federal Agency

The NRC possesses authority under § 161(c) of the Atomic Energy Act to require the appearance of, and production of documents by, any "person"; the term "person", at § 11(s) of the Act, includes any "Government agency other than the Commission."1/ 42

1/ The "Government" being referred to is apparently the federal government, cf. AEA § 11(a), defining "agency of the Unit-

(Footnote continued)

add: J. Gorn
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U.S.C. §§ 2201(c), 2014(s).

The Commission has implemented this power in its Rules of Practice with respect to issuance of subpoenas in § 2.720, and with respect to discovery in adjudicatory proceedings in §§ 2.740 (general), 2.740a (depositions), and 2.741 (production of documents). The Commission's regulations establish further protections regarding compelled discovery against NRC personnel by subpoena (§ 2.620(h)), discovery generally (§§ 2.740(f)(3), 2.720(h), 2.744), depositions (§§ 2.740a(j), 2.720(h)), and production of documents (§§ 2.741(e), 2.744). FEMA personnel, when reviewing an emergency response plan in an NRC licensing proceeding pursuant to the NRC-FEMA Memorandum of Understanding, have already been held in this case to be acting as NRC consultants, and thus entitled to the same protections on discovery as NRC personnel. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-83-81, 18 NRC 700, 703-04. See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-519, 9 NRC 42, 43 note 2 (1979) (as applied to ACRS).

Absent a claim of privilege, therefore, discovery against another agency than the NRC would be governed under the Commission's

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ed States" as including "any Government agency." 44 U.S.C. § 2C14(a). The "persons" to whom the Commission's subpoena power extends also include "any State or any political subdivision of, or any political entity within a State. . . ." 42 U.S.C. § 2014(s).

regulations, by either the general discovery rules or by those applicable to NRC personnel.2/

2/ At least one Atomic Safety and Licensing Board has required another federal agency to produce documents over an assertion of privilege. Houston Lighting and Power Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-79-30, 10 NRC 594 (1979). In that brief opinion, the Licensing Board granted the applicant's motion to compel production of drafts of expert testimony which had been sent to counsel at the Justice Department for review, over an assertion of privilege (whether the attorney-client or lesser attorney work product privilege cannot be discerned from the opinion). In that case, however, the opinion strongly suggests the presence of special facts going to the independence of the expert opinions there being proffered and the possibility of undue influence by counsel:

> The causes of potential bias of a witness are not sanitized because they emanate from or involve counsel; in fact, the converse may be true. The objectivity of expert opinions might be subject to question if witnesses are indeed expected by counsel to be "attempting to reconcile [new] information with his earlier conclusions,"1/ or to "defend and explain conclusions which even when recorded he may not have endorsed."2/ A witness is not expected to be so supple concerning prospective testimony under oath, whether written or oral. If our ruling does indeed have a "chilling effect" upon possible complaisant witnesses, that is all to the good.
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> 1/ Answer of the Department of Justice In Opposition to the Motion of HL&P to Compel Production by the Department of Justice of Certain Drafts of Testimony Prepared by William E. Scott, p. 12.
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> 2/ Id., at 13.

Applying that case to the present one, its analysis is consistent with LILCO's belief that the NRC's power to order discovery extends to discovery against other agencies. However, the special

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The working relationship between NRC and FEMA regarding licensing review of emergency response plans is addressed at 10 CFR § 50.47(a)(2) and in the Memorandum of Understanding, particularly paras. II and III.A. While these discussions allocate responsibility between FEMA and NRC for various sub-aspects of emergency plan review and establish a consultative and collaborative relationship, nothing in these sections provides a clear ground for altering otherwise applicable discovery standards.

Research has not disclosed any rules or doctrines beyond those noted above that restrict, as a matter of law, access to discovery against other federal agencies in NRC proceedings, or affect, as a matter of law, determinations of interagency claims of executive privilege.

2. Advisability of Requiring Production of Documents by Another Federal Agency

The internal integrity of any agency's functioning is a matter recognized as deserving legal protection; this is the genesis of the notion of executive privilege. In agency proceedings, normally the agency claiming executive privilege is the same agency as that hearing the claim. In that case, the tribunal can be

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facts apparent in that case make its result inapplicable here, where there has been no assertion, much less any showing, of irregularities in the RAC process that would justify intrusion into it (as distinguished from probing the factual and analytical support for the RAC Report).

expected to have some expert, if informal, sense of the agency's dynamics, goals and sensitivities and thus be able to make informed judgments about the strength of the agency's claims. In addition, long-term internal agency corrective mechanisms operate to even out the effects of aberrant decisions.

When an agency tribunal is called upon to hear the internal claims of privilege of another agency, truly expert knowledge can no longer be presumed and long-term self-righting mechanisms cannot be assumed to function so smoothly. In addition, the situation may be further complicated by the existence of relatively complex collaborative arrangements (such as that between NRC and FEMA set in motion by the Memorandum of Understanding) which presume the due regard and deference for other, independent participants' sensibilities that is inherent in productive voluntary arrangements. The continued functioning of NRC and FEMA under the Memorandum of Understanding must be presumed to be a policy goal of both agencies, and FEMA's representation about the threat to the functioning of its Regional Assistance Committees from disclosure of the documents at issue cannot lightly be disregarded. Nevertheless, the executive privilege is a qualified one; and an agency aggrieved by an adverse decision before another agency still has access to the courts.

Interagency claims of executive privilege require, both as a matter of comity and good sense, that the agency called upon to adjudicate them give high presumptive deference to the full

measure of the factual allegations of harm by the agency asserting them (particularly where, as here, they are essentially unrebutted). However, if that allegation of harm, so measured, is overcome by the demonstrated need for the material sought to be discovered, notions of interagency comity and deference alone should not automatically bar discovery otherwise available by law.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

Donald P. Irwin
Lee B. Zeugin

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

DATED: June 5, 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

I hereby certify that copies of LILCO'S MEMORANDUM ON RESTRICTIONS ON COMPELLED DISCOVERY OF OTHER FEDERAL AGENCIES IN NRC PROCEEDINGS were served this date upon the following by first-class mail, postage prepaid, or by hand (one asterisk), or telecopier (two asterisks).

Alan S. Rosenthal, Esq.,*
Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
East-West Tower, 3rd Floor
4350 East-West Highway
Washington, D.C. 20555

Howard A. Wilber*
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
East-West Tower, 3rd Floor
4350 East-West Highway
Washington, D.C. 20555

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

Gary J. Edles, Esq.*
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
East-West Tower, 3rd Floor
4350 East-West Highway
Washington, D.C. 20555

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.*
Edwin J. Reis, Esq.
U.S. Nuclear Regulatory
Commission
7735 Old Georgetown Road
(to mailroom)
Bethesda, MD 20814

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

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

Fabian G. Palomino, Esq.
Special Counsel to the
3045 Porter Street
Governor
Executive Chamber
Room 229
State Capitol
Albany, New York 12224

Herbert H. Brown, Esq.*
Lawrence Coe Lanpher, Esq.
Christopher M. McMurray, Esq.
Kirkpatrick, Lockhart, Hill
Christopher & 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

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

Stephen B. Latham, Esq.
Twomey, Latham & Shea
33 West Second Street
Post Office Box 398
Riverhead, NY 11901

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

James B. Dougherty
3045 Porter Street
Washington, D.C. 20008

Johnathan D. Feinberg, Esq.
New York State Public Service
Commission, Staff Counsel
3 Rockerfeller Plaza
Albany, New York 12223

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

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

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

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

Donald P. Irwin

Hunton & Williams
707 East Main Street
Post Office Box 1535
Richmond, Virginia 23212

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