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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

Docket No. 50-322-OL-3
(Emergency Planning)

MEMORANDUM TO SHOW CAUSE WHY
SUFFOLK COUNTY'S JULY 26 APPEAL
SHOULD NOT BE DISMISSED

On July 26, 1984, Suffolk County filed a notice of appeal and supporting brief from the Atomic Safety and Licensing Board's ("ASLB's") July 10, 1984 oral Order denying the County's Motion to Compel Production of Documents by FEMA, and to Postpone the Cross-Examination of FEMA's Witnesses, and for Issuance of Subpoenas to the Members of the RAC, dated July 6, 1984 (hereinafter, the "July 6 Motion"). The following day, on July 27, 1984, this Board issued an Order directing the County to show cause, in a memorandum to be filed by noon, Wednesday, August 1, 1984, "why the appeal should not be summarily dismissed in light of the prohibition in the Rules of Practice against interlocutory appeals." Order, at 1. The County was also requested to address the question whether, "assuming that the July 10 oral order is appealable, the appeal nonetheless should be dismissed because it was not filed within ten day of

*add. from
G. J. OCA*

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the entry of that order." Order, at 1-2. In accordance with the Appeal Board's July 27 Order, the County hereby submits this Memorandum.

I. The Issues Underlying the County's Appeal and the Interests of the Parties Are of Sufficient Importance to Warrant Review by This Board

As this Board has pointed out, the Commission's Rules of Practice contain a general prohibition against interlocutory appeals. 10 CFR 2.730(f). See, e.g., Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258 (1973). Nevertheless, there are exceptions to this prohibition. For example, discretionary interlocutory review is permitted when it is demonstrated that failure to resolve an issue promptly will cause "detriment to the public interest or unusual delay or expense." See 10 CFR 2.730(f). See also Public Service Co. of Indiana (Marble Hill), ALAB-405, 5 NRC 1190, 1192 (1977), and cases cited therein.

In addition, the Commission has encouraged appellate review of interlocutory appeals "if a significant legal or policy question is presented." Statement of Policy on Conduct of Licensing Proceedings, 46 Fed. Reg. 28533, 28535. Moreover, interlocutory review may be appropriate where the ruling in question affects "the basic structure of the proceeding in a

pervasive and unusual manner," Houston Lighting and Power Co. (Allens Creek Station), ALAB-635, 13 NRC 309, 310 (1981), or "threatens the party adversely affected by it with immediate and serious irreparable impact" which, as a practical matter, can not be alleviated by a later appeal. Houston Lighting and Power Co. (South Texas Project), ALAB-608, 12 NRC 168, 170 (1980).

In the County's view, the issues involved in its appeal to this Board from the ASLB's July 10 ruling meet all of the above standards, any one of which is sufficient to justify appellate review of interlocutory rulings.^{1/} For example, the public interest would be served by prompt resolution of the issues now before this Board. The County's need for the FEMA documents at issue is substantial and compelling. The documents sought are the factual findings which underlie and form the basis for the RAC findings upon which the FEMA witnesses rely for the opinions and conclusions stated in their testimony. Without access to these documents, the County has been unable to cross-examine fully and completely the FEMA witnesses, to probe, challenge,

^{1/} The arguments and background materials contained in previous filings made on the Board by the County will not be repeated here, but are incorporated by reference. See, e.g., the brief filed by the County in support of its July 26 appeal.

or impeach their conclusions, or otherwise to present on the record of the emergency planning proceeding before the ASLB all the relevant facts pertaining to the opinions of the FEMA witnesses.^{2/} To deny the County access to the documents, as the ASLB has done, therefore constitutes a violation of the County's rights under NRC regulations (see, e.g., 10 CFR 2.743(a) and 50.47(a)(2)) and, in effect, has accorded special preferential treatment to FEMA's witnesses by shielding them from any meaningful inquiry or challenge.

It must be understood that the documents here at issue involve FEMA's review of the offsite emergency response plan at issue in the proceeding before the ASLB -- a plan which, according to LILCO, provides "reasonable assurance" that adequate protective measures can and will be taken in the event of a radiological emergency at Shoreham. Clearly, the public interest would be served by permitting meaningful inquiry to be made of the witnesses chosen by FEMA to submit testimony regarding the LILCO Plan's adequacy. This, however, is not possible without providing the County and the other parties

^{2/} As this Board is no doubt aware, the FEMA witnesses were cross examined by the County and the other parties during the week of July 10. At this time, the FEMA witnesses are scheduled to testify again during the week of August 14.

access to the underlying documents -- documents which involve the actual RAC review of the LILCO Plan conducted by FEMA. This review, and, more specifically, the findings upon which the FEMA witnesses rely for the opinions and conclusions contained in their testimony, perhaps constitute a rebuttable presumption in the proceeding before the ASLB, and both the parties and the ASLB must be able to probe their bases and assess their accuracy.

The County is also entitled to the issuance of subpoenas against the RAC members so that they can be deposed. The FEMA depositions which have been taken have made apparent that FEMA's witnesses are unable or unwilling to explain what individual members of the RAC did in reviewing LILCO's Plan or what their opinions were as a result of that review. Clearly, therefore, the public interest would be served by permitting the County to depose the RAC members, especially since it would appear that such depositions may provide the only way for information highly relevant to the RAC review process concerning the adequacy of the LILCO Plan to be discovered.

In addition to raising issues that, if left unanswered, will cause detriment to the public interest, the County's appeal involves issues that raise significant legal and policy

questions. Indeed, to the County's knowledge, the pending appeal raises significant legal issues of first impression concerning the proper scope and interpretation to be given to FEMA's claim of executive privilege as a means to keep secret the methods and findings involved in FEMA's RAC process.

If this Board were not to hear the County's appeal and reverse the ASLB's ruling, it would be sanctioning FEMA's inexplicable and groundless claim that the public is not entitled to know about, or inquire into, the workings or conclusions of the RAC -- a group comprising the public's representatives, responsible for determining whether the public can and will be adequately protected in the event of a radiological emergency, and upon whose findings the NRC may base its conclusion that the operation of a nuclear power plant will not endanger the public health and safety. Such a ruling would defy logic as well as law. Further, a decision by this Board not to hear the pending appeal would be inconsistent with the position taken earlier by the Board, when it exercised its discretion in favor of reviewing FEMA's interlocutory appeal from the ASLB's May 18 Order compelling FEMA to produce the documents in question.

The ASLB's July 10 ruling has also affected the basic structure of the proceedings below in a pervasive and unusual

manner. The FEMA witnesses have been presented to testify on almost every contention before the ASLB -- contentions which have so far taken over 60 days to litigate. Their testimony is based largely upon the findings of the RAC review process; yet the County has been barred from inquiring into that process. By hearing and promptly granting the County's appeal, this situation can be remedied without delay to the proceedings below, since the County will have an opportunity to cross examine the FEMA witnesses when they return to the hearings during the week of August 14. However, should this Board fail to reverse the ASLB's ruling, the County's right to discovery will have been violated, and the County will have been effectively prohibited from making a true and complete factual record at the hearings, since there are no means other than through the documents at issue and deposition of the RAC members for the County to obtain the information it has requested from FEMA.

Furthermore, reversal of the ASLB's ruling -- holding in-violate and untouchable the FEMA testimony by prohibiting inquiry into the bases for the FEMA findings -- is necessary if the County is not to be deprived of its right to a hearing, which is guaranteed by NRC regulations. The Board should therefore hear the appeal filed by the County in order to prevent the immediate and serious irreparable impact to the

County's case which has resulted from the ASLB's decision to award preferential treatment to FEMA's witnesses. In circumstances such as are present here, where FEMA's testimony touches virtually every issue before the ASLB, it makes no sense to await an initial decision to remedy this harm.

Moreover, in the County's opinion, the issues involved here concern not merely an isolated ruling on a discovery dispute, but raise generic issues affecting all the contentions admitted by the ASLB upon which FEMA has filed testimony in this case. Thus, there is a substantial likelihood that, without review by the Appeal Board at this time, the ASLB's ruling will ultimately be determined after hearing and on appeal to be incorrect, and very substantial delay and expense will have been unnecessarily incurred.

Perhaps most significantly, the issues involved in the pending appeal may affect the rights of parties in other cases to inquire into the bases and conclusions of FEMA's review, through the the RAC process, of other offsite emergency response plans. In other words, the issues involved here have a high potential for being raised in future proceedings, now that they have been raised before this Board. Therefore, there should be clear guidance from the Appeal Board on these issues. In this way, the public interest would best be served.

II. Good Cause Exists for the County's Failure to Have Filed its Appeal Within Ten Days of the ASLB's July 10 Ruling

In its July 27 Order, the Board requested the County to address whether its July 26 appeal should be dismissed, assuming the ASLB's ruling is found to be appealable, because it was not filed within ten days of the entry of that ruling. Order, at 1-2.

The only two provisions of the Commission's Rules of Practice specifically authorizing appeals from Licensing Board action both provide a ten-day period for the filing of the appeal. See 10 CFR 2.714a, 2.762(a). These provisions, however, pertain specifically to appeals from Licensing Board decisions on petitions for leave to intervene (2.714a) and from initial decisions on the issuance of a license (2.762(a)). Neither provision is applicable to the present appeal, which is concerned with a ruling of the ASLB which has impaired the County's ability to conduct meaningful cross examination of FEMA's witnesses. In fact, to the County's knowledge, no provision of the NRC regulations specifically establishes a time limit for appeal from such a ruling. Thus, there is no regulatory basis to conclude that the instant appeal is untimely.

Nevertheless, even assuming that a ten-day appeal period applies to the instant appeal, it is not jurisdictional in the sense that the Appeal Board lacks the power to entertain an appeal which is not filed within ten days after the ruling in question. Rather, a belated appeal may be accepted when good cause is shown for the failure to have filed on time. See Houston Lighting and Power Co. (Allens Creek, Unit 1), ALAB-547, 9 NRC 638, 639 (1979). See also Nuclear Engineering Company (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 160 (1980).

Here, the notice of appeal and brief in support thereof were filed 16 days after the issuance of the ASLB's July 10 ruling -- a ruling which was made on the first day of a two-week session of the emergency planning hearing in which counsel for the County were required to participate. The County could not have filed the appeal any earlier, because the emergency planning hearings in which cognizant counsel for the County were involved did not adjourn until Friday, July 20. In light of the complexity and the number of the issues which were required to be addressed by the County's counsel in preparing and filing its appeal, the fact that the appeal was brought six days after the time arguably permitted under the Commission's Rules of Practice should not bar the appeal and this Board's consideration of the significant issues raised by the appeal.

III. Conclusion

For the reasons stated above, Suffolk County respectfully requests that the Appeal Board exercise its discretion to review the County's July 26 appeal from the ASLB's July 10 ruling. Such review is warranted by the importance of the issues underlying the County's appeal and the interests of the parties in having those issues promptly resolved. Further, there is good cause for the County's failure to have filed its appeal after the time arguably permitted under the Commission's Rules of Practice and therefore this appeal should be heard by this Board. If necessary to the County's request for appellate review, the County requests that this Memorandum be treated as a motion for certification or referral under the Commission's Rules of Practice.^{3/} Similarly, if deemed necessary by this Board, the County requests that this Memorandum be treated as a request for extension of time within which to have filed the appeal at issue. See 10 CFR 2.711(a).

Respectfully submitted,

^{3/} The Rules appear to contemplate "certification" under 10 CFR 2.718(i) where a board does not first decide the disputed question, and "referral" under 10 CFR 2.730(f) where the board first rules and then requests interlocutory review. The distinction, however, appears to be unimportant. See Southern California Edison Company (San Onofre), LBP-81-36, 14 NRC 691, 699, n. 7 (1981).

Respectfully submitted,

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Dated: August 1, 1984

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NUCLEAR REGULATORY COMMISSION

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LONG ISLAND LIGHTING COMPANY)

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CERTIFICATE OF SERVICE

I hereby certify that copies of Memorandum to Show Cause Why Suffolk County's July 26 Appeal Should Not be Dismissed have been served to the following this 1st day of August 1984 by U.S. mail, first class, except as otherwise noted.

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