

RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

DOCKETED

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

OFFICE OF SECRETARY
DOCKETING & SERVICE
Docket No. B50-322-OL-3
(Emergency Planning)

MOTION TO COMPEL LILCO TO
PRODUCE FRANK M. RASBURY,
A LILCO WITNESS, FOR DEPOSITION

Pursuant to 10 CFR §2.740(f),^{1/} Suffolk County hereby moves this Board to compel LILCO to produce Frank M. Rasbury, a new LILCO witness on the relocation center issues (Contentions 24.0, 74 and 75), for a deposition to be taken during the week of August 6-10 (except August 9,^{2/}), 1984. In the alternative, the County moves that Mr. Rasbury be stricken from LILCO's witness panel, and that all testimony sponsored by him be similarly stricken. The facts underlying the County's motion are set forth below.

^{1/} It is the County's understanding that under circumstances such as these where a party refuses to produce its own witness for a deposition, 10 CFR §2.740(f) applies. If, however, the Board determines that the County must obtain a subpoena to depose Mr. Rasbury, the County requests that the Board treat this motion as an application for a subpoena under 10 CFR §2.720. The County will provide a draft subpoena immediately to the Board should the Board determine that one is required.

^{2/} A deposition of the FEMA witness panel is already scheduled for August 9.

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PDR ADOCK 05000322
PDR

DS03

Facts

On July 13, 1984, the Board issued an oral Order requiring LILCO, if it decided to file any revised or supplemental testimony on the relocation center issues (Contentions 24.0, 74 and 75), to file such testimony prior to July 31, 1984. Tr. 12,831-32. In a telephone conversation held on Tuesday, July 24, counsel for LILCO informed counsel for the County that LILCO intended to file revised testimony. LILCO's counsel also stated, in response to inquiries by counsel for the County, that LILCO's witness panel on the relocation center issues would include a panel member not on the original witness panel. LILCO's counsel, after questioning, identified this new witness as someone affiliated with the Nassau County Chapter of the American Red Cross. However, counsel for LILCO could not identify this new witness by name.

Subsequent to that telephone call, the County requested by letter (see Attachment 1) that LILCO identify its new witness as soon as counsel for LILCO knew the witness's identity. Although the need to depose the witness was not certain at that time (since the County had not yet received LILCO's revised testimony and did not know the witness's identity), the County's letter also informed LILCO that the County "may request that you make the witness available to be deposed prior to the recommencement of trial on August 14." Counsel for LILCO responded by letter

the next day (see Attachment 2) stating that LILCO did "not intend to identify the witness prior to filing the testimony," but that the identity of the witness would be known to the County "shortly," when LILCO's testimony was filed.

The County received LILCO's revised testimony^{3/} on July 30, 1984. Only upon receipt of LILCO's revised testimony did the County learn that LILCO's witness panel sponsoring the revised testimony now includes Mr. Frank M. Rasbury, Executive Director of the Nassau County Chapter of the American Red Cross. Mr. Rasbury has not previously appeared before this Board as a witness, nor has Mr. Rasbury ever been deposed by the Courty. Indeed, his identity was unknown to the County prior to July 30, 1984. Mr. Rasbury sponsors a substantial portion of LILCO's revised testimony, including an explanation of LILCO's revised relocation scheme. As described in LILCO's revised testimony at pages 15-16 and as clarified by a conversation with counsel for LILCO, the LILCO Plan, when next revised, will designate a center or centers not yet identified which "might" be a "relocation center" or which "might" be used as an "emergency center" from which evaucees will be funneled to other undesignated "shelters." Revised testimony at 15.

^{3/} LILCO's Motion To Admit Revised Testimony On Phase II Emergency Planning Contentions 24.O, 74 and 75 (Relocation Centers) (July 30, 1984) [hereinafter "revised testimony"].

In order to discover the bases for the opinions expressed by Mr. Rasbury and to understand the revised relocation scheme set forth in LILCO's revised testimony, the County requested on July 31 that LILCO make Mr. Rasbury available on Friday, August 3, for a deposition. (See Attachment 3). In the afternoon of the next day, LILCO informed that County that LILCO was refusing to produce Mr. Rasbury voluntarily. (See Attachment 4).

In a telephone conversation held on August 2, the County inquired into the reasons behind LILCO's refusal to produce Mr. Rasbury for deposition. Counsel for LILCO replied that Mr. Rasbury was not a LILCO consultant, was not being paid by LILCO, that the matter has already taken a lot of Mr. Rasbury's time, and that Mr. Rasbury would be available to the County to cross examine, thus obviating somehow the County's need for discovery. Counsel for LILCO also informed the County that Mr. Rasbury would be on vacation during the weeks of August 6 and August 13^{4/} and that if the County wanted to depose Mr. Rasbury, it should go to the Board for relief.

^{4/} From conversations with counsel for LILCO, the County has received the impression that Mr. Rasbury's vacation may not take him out of town.

Discussion

Under NRC regulations, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matters involved in the proceeding. . . ." 10 CFR §2.740. The purpose underlying the NRC's discovery rules are well summarized in Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-31, 10 NRC 597, 599-600 (1979):

In Discovery Memo I, we attempted to outline both the NRC rules governing discovery and the underlying purpose which discovery is intended to serve in an NRC licensing proceeding. We stated inter alia (at pp. 5-6) that

the purpose of discovery is to enable each party prior to hearing to become aware of the positions of each adversary party on the various issues in controversy, and the information available to adversary parties to support those positions [emphasis supplied].

We went on to observe that Commission licensing proceedings "are not to become the setting for 'trial by surprise,' and the discovery mechanism is the major means used to avoid that situation." Id. at 6.

Accordingly, it has been the practice in this proceeding for each party's witnesses to be made available for discovery prior to being cross-examined. In this way, each party has been given an

opportunity to discover the bases for the opinions of other parties' witnesses and prospects for "trial by surprise" have been diminished.

The revised testimony offered by LILCO is now its third opportunity to submit testimony on the relocation center issues. This is the first time, however, that LILCO has identified Mr. Rasbury as a witness on its behalf. Furthermore, it appears from LILCO's testimony that LILCO is revising the manner in which evacuees are going to be relocated. The County thus has a clear need and right to depose Mr. Rasbury. Nevertheless, LILCO has refused to make him available to be deposed prior to his cross-examination. LILCO's intransigence in this matter cannot be condoned.

LILCO offers no good reasons for its failure to produce Mr. Rasbury. It is apparently LILCO's belief that, since Mr. Rasbury will be available for cross-examination, there is no further need for discovery. This position is absurd. Every witness sponsoring written direct testimony in this case has been made available for cross-examination; otherwise, the witness's direct testimony would not be admitted. The point is that other witnesses have been made available for deposition prior to cross-examination in accordance with established NRC procedure. In this way, the parties have been able to discover the facts underlying a witness's opinion and have been able to conduct more focused cross-

examination. To say that the need for discovery is obviated by the opportunity to conduct cross-examination is to ignore the very purpose of discovery and to throw these hearings back to the days of "trial by surprise." Those days are long past. LILCO must be compelled to comply with the NRC's discovery rules.

Furthermore, the fact that Mr. Rasbury is a busy man is no excuse. LILCO obviously knew well in advance of filing its testimony that Mr. Rasbury would be a witness and that he would be subject to a request to take his deposition. (See Attachment 1). Therefore, it could have and should have informed him of the need to make some time available for that purpose and, further, should have contacted the County in an attempt to work around Mr. Rasbury's busy schedule. LILCO, however, never informed the County of a need to accommodate Mr. Rasbury's busy schedule -- indeed, it refused to identify him prior to filing LILCO's revised testimony on July 30. The County would have been willing to accommodate Mr. Rasbury's schedule, but LILCO has made no such offer to attempt to come to an agreement. Rather, LILCO has stated flatly that it will not make Mr. Rasbury available. Thus, the problem does not seem to be Mr. Rasbury's busy schedule, but instead LILCO's outright and unreasonable refusal to make him available.

The County also understands that Mr. Rasbury will be on vacation for the next two weeks, which will last until the week he is scheduled to testify (at this time, the LILCO panel on relocation centers is scheduled to be the first panel heard on Tuesday, August 21). This problem, though, is of LILCO's own making. As stated above, LILCO knew well in advance of filing Mr. Rasbury's testimony that he would be a witness and that he might be asked to be deposed. (See Attachment 1). LILCO also knew, or should have known, Mr. Rasbury's vacation plans. With this knowledge, LILCO could have come to the County and offered to make Mr. Rasbury available while he was not on vacation -- for instance, during the time between the filing of Mr. Rasbury's testimony on July 30 and his vacation commencing August 6. Indeed, the County requested to depose Mr. Rasbury on August 3 (see Attachment 3), a time when Mr. Rasbury was not yet on vacation. LILCO, however, preferred to keep Mr. Rasbury's identity secret for as long as possible (see Attachment 2) rather than to accommodate both the County's need for discovery and Mr. Rasbury's vacation plans. No reason has been offered by LILCO why both factors could not be accommodated. Instead, the County's proffered deposition date of August 3 was flatly rejected, with the explanation that Mr. Rasbury was not being

made available and that, in any event, he would be too busy on August 3 because that was his last day in the office before his vacation.

It appears from these facts that LILCO's failure to identify Mr. Rasbury earlier and its last-minute notification to the County of Mr. Rasbury's vacation plans are a contrivance to keep the County from obtaining discovery. The Board should not countenance this sort of game-playing.

Clearly, LILCO's position in this matter has been unreasonable and prejudicial to the County. The County has a right to the discovery it is seeking. Without the opportunity to depose Mr. Rasbury, the County will be unable to discover the facts underlying Mr. Rasbury's testimony and LILCO's revised relocation scheme. The County therefore requests that Mr. Rasbury be made available next week (during August 6-8 and 10). This is necessary because counsel for the County will be in hearings before this Board during the following two weeks, during which the remaining testimony on the Intervenors' contentions will be heard. In the alternative, if LILCO is unable or unwilling to make Mr. Rasbury available, the County requests that the Board strike Mr. Rasbury as a witness and that all testimony sponsored by him be similarly stricken.

In light of the limited time now available for arranging Mr. Rasbury's deposition, the County also requests that the Board give this matter expedited consideration. The County is available at any time for a conference call with the Board and other parties.

Conclusion

For the reasons stated above, the County's Motion to Compel LILCO to Produce Frank M. Rasbury, a LILCO Witness, For Deposition should be granted.

Respectfully submitted,

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



Karla J. Letsche
Michael S. Miller
Christopher M. McMurray
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
1900 M Street, NW
Washington, DC 20036

Attorneys for Suffolk County

Dated: August 3, 1984

KIRKPATRICK, LOCKHART, HILL, CHRISTOPHER & PHILLIPS

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

1900 M STREET, N. W.

WASHINGTON, D. C. 20036

TELEPHONE: (202) 452-7000

TELEX: 440909 HPH UI

July 26, 1984

1426 BRICKELL AVENUE
MIAMI, FLORIDA 33131
(305) 874-8818

1500 OLIVER BUILDING
PITTSBURGH, PENNSYLVANIA 15222
(412) 265-8500

WRITER'S DIRECT DIAL NUMBER

(202) 452-8391

BY TELECOPIER

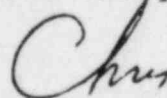
Kathy E.B. McCleskey, Esq.
Hunton & Williams
707 East Main Street
Richmond, Virginia 23212

Dear Kathy:

During one of our telephone conversations earlier this week, you indicated to Mike Miller and me that you intend to add someone from the Nassau County chapter of the Red Cross to LILCO's witness panel on the relocation center issue. At that time, you could not identify the witness, and we have yet to receive that information from you. We expect that you will inform us of the witness's identity as soon as you know who he or she is.

Please be on notice that we intend to conduct all necessary discovery regarding the opinions of your new witness and the facts on which those opinions are based, and that we well may request that you make the witness available to be deposed prior to the recommencement of trial on August 14.

Yours truly,



Christopher M. McMurray

HUNTON & WILLIAMS

707 EAST MAIN STREET P.O. Box 1535

RICHMOND, VIRGINIA 23212

TELEPHONE 804-788-8200

TWX-710-956-0061

2000 PENNSYLVANIA AVENUE, N.W.
P. O. BOX 19230
WASHINGTON, D. C. 20036
TELEPHONE 202-955-1500

333 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA 90071
TELEPHONE 213-617-3052
TELEX 754709

FIRST VIRGINIA BANK TOWER
P. O. BOX 3889
NORFOLK, VIRGINIA 23514
TELEPHONE 804-620-5501
TELEX 755626

288 PARK AVENUE
NEW YORK, NEW YORK 10171
TELEPHONE 212-660-8200
TELEX 754708

B & T BUILDING P. O. BOX 109
RALEIGH, NORTH CAROLINA 27602
TELEPHONE 919-828-9371

FIRST TENNESSEE BANK BUILDING
P. O. BOX 951
KNOXVILLE, TENNESSEE 37901
TELEPHONE 615-637-4311

FILE NO. 24566.000003

DIRECT DIAL NO. 804 788 8701

July 27, 1984

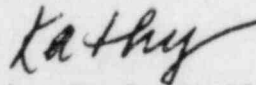
BY TELECOPIER

Christopher M. McMurray, Esq.
Kirkpatrick, Lockhart, Hill,
Christopher & Phillips
8th Floor
1900 M Street, N.W.
Washington, D.C. 20036

Dear Chris:

I received this morning your letter of July 26 regarding the Red Cross witness on relocation centers. LILCO's revised testimony on relocation centers will be filed today or Monday, so the identity of the additional witness will be known to you shortly, as I have previously stated during our phone conversations. I do not intend to identify the witness prior to filing the testimony.

Yours very truly,



Kathy E. B. McCleskey

301/869

KIRKPATRICK, LOCKHART, HILL, CHRISTOPHER & PHILLIPS

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

1900 M STREET, N. W.
WASHINGTON, D. C. 20036

1400 BRICKELL AVENUE
MIAMI, FLORIDA 33131
(305) 574-8812

TELEPHONE: (800) 452-7000
TELEX: 440209 RHPH UI

1500 OLIVER BUILDING
PITTSBURGH, PENNSYLVANIA 15222
(412) 808-6600

July 31, 1984

WRITER'S DIRECT DIAL NUMBER
(202) 452-8391

BY TELECOPIER

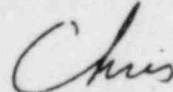
Kathy E.B. McCleskey, Esq.
Hunton & Williams
707 East Main Street
Richmond, Virginia 23212

Dear Kathy:

I received yesterday LILCO's revised testimony on the relocation center issues and note that you have added a new witness, Mr. Rasbury, who has never before appeared as a witness in these proceedings. In light of the fact that the County has not previously been informed of Mr. Rasbury's identity, his qualifications, or the facts underlying the opinions expressed in his testimony, I request that you make him available to be deposed on Friday, August 3, 1984, at our office in Washington, D.C. In addition, please send me Mr. Rasbury's resume prior to the date of his deposition.

Please inform me whether this request presents you or your witness with any problems so that we may resolve them quickly or go to the Board for an expeditious resolution of the matter.

Yours truly,



Christopher M. McMurray

KIRKPATRICK, LOCKHART, HILL, CHRISTOPHER & PHILLIPS

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

1900 M STREET, N. W.

WASHINGTON, D. C. 20036

TELEPHONE: (202) 452-7000

TELEX: 440209 M/PH UI

August 1, 1984

1426 BRICKELL AVENUE
MIAMI, FLORIDA 33131
(305) 874-8112

1800 OLIVER BUILDING
PITTSBURGH, PENNSYLVANIA 15222
(412) 275-8600

WRITER'S DIRECT DIAL NUMBER

(202) 452-8391

BY TELECOPIER

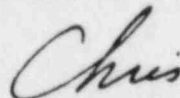
Kathy E.B. McCleskey, Esq.
Hunton & Williams
707 East Main Street
Richmond, Virginia 23212

Dear Kathy:

Mike Miller has informed me that during a telephone conversation held today, you stated that LILCO was refusing to voluntarily produce your new witness on the relocation center issues, Mr. Rasbury, for deposition. Frankly, I do not understand your position on this matter since it has been common practice in these proceedings to make available for deposition all witnesses who have sponsored written testimony on behalf of one of the parties to this litigation.

It appears that the County will have to seek recourse with the Board in this matter; however, if I have misunderstood your position, or if your position changes, please inform me immediately.

Yours truly,



Christopher M. McMurray

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board:17

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

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH
Docket No. 50-322-OL-3
(Emergency Planning)

CERTIFICATE OF SERVICE

I hereby certify that copies of MOTION TO COMPEL LILCO TO PRODUCE FRANK M. RASBURY, A LILCO WITNESS, FOR DEPOSITION dated August 3, 1984, have been served to the following this 3rd day of August 1984 by U.S. mail, first class, except as otherwise noted.

James A. Laurenson, Chairman *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Dr. Jerry R. Kline *
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Mr. Frederick J. Shon *
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

W. Taylor Reveley, III, Esq.#
Hunton & Williams
P.O. Box 1535
707 East Main Street
Richmond, Virginia 23212

Edward M. Barrett, Esq.
General Counsel
Long Island Lighting Company
250 Old Country Road
Mineola, New York 11501

Spence Perry, Esq.
Associate General Counsel
Federal Emergency Management
Agency
Washington, D.C. 20472

Mr. Brian McCaffrey
Long Island Lighting Company
Shoreham Nuclear Power Station
P.O. Box 618
North Country Road
Wading River, New York 11792

Marc W. Goldsmith
Energy Research Group, Inc.
400-1 Totten Pond Road
Waltham, Massachusetts 02154

Joel Blau, Esq.
New York Public Service Commission
The Governor Nelson A. Rockefeller
Building
Empire State Plaza
Albany, New York 12223

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

Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Bernard M. Bordenick, Esq. *
David A. Repka, Esq.
Edwin J. Reis, Esq.
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Stephen B. Latham, Esq.
Twomey, Latham & Shea
P.O. Box 398
33 West Second Street
Riverhead, New York 11901

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

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, California 95125

Hon. Peter F. Cohalan
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

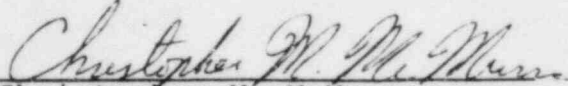
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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

Stuart Diamond
Business/Financial
New York Times
229 W. 43rd Street
New York, New York 10036

Eleanor L. Frucci, Esq. *
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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


Christopher M. McMurray
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
1900 M Street, NW, Suite 800
Washington, D.C. 20036

Dated: August 3, 1984

* By Hand
By Telecopier
By Federal Express