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RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

DOCKETED
USNRC

'84 AGO -8 A11:16

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

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

JOINT MOTION OF NEW YORK STATE
AND SUFFOLK COUNTY TO COMPEL DISCOVERY

On August 3, 1984, LILCO stated its refusal to respond to sixteen limited discovery requests made jointly by Suffolk County and the State of New York on August 1 pursuant to the Board's July 24, 1984 Memorandum and Order and 10 CFR §2.740. For the reasons set forth below, the State of New York and Suffolk County move this Board pursuant to 10 CFR §2.740(f) to compel LILCO to produce without delay, but in no event later than August 14, the documents and information sought in the State and County's August 1 discovery request. The Board is also requested to give expedited consideration to this matter.

Facts

On July 24, 1984, the Board issued a Memorandum and Order Determining That A Serious Safety Matter Exists (hereinafter "Memorandum and Order"). In essence, the Board concluded that the current strike of LILCO employees, who comprise the bulk of

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the workers LILCO expects to respond to a radiological emergency at Shoreham, raised important questions regarding LILCO's ability to implement its emergency response plan. Accordingly, the Board admitted three issues, sua sponte, for litigation by the parties. Memorandum and Order at 3. The Board further ruled that the parties may engage in limited discovery on the three admitted issues. Id.

Pursuant to the Board's Memorandum and Order, on August 1 the State and the County telecopied an informal discovery request to LILCO seeking information relevant to the issues set forth in the Board's Memorandum and Order. The State's and County's joint request is appended as Attachment 1 to this pleading.

LILCO replied to the State's and County's joint discovery request by letter received late in the afternoon of Friday, August 3. (Attachment 2).^{1/} As an initial matter, LILCO stated its refusal to answer the State's and County's discovery request because it took the form of an "informal letter pleading."

With respect to the State's and County's sixteen specific requests, LILCO informed the State and the County that twelve of those requests (Requests 1-11 and 15), pertaining to the LERO

^{1/} Attached to LILCO's Friday, August 3 letter was another letter addressed to counsel for the County which, for the first time since the Board's July 24 Memorandum and Order, identified individuals, all LILCO employees, whom LILCO characterized as "among its potential witnesses" on the strike issues.

work force, the union affiliations of the LERO workers, and the extent of resignations from LERO as a result of the strike, were "moot" because of LILCO's intent to bring the Shoreham reactor to cold shutdown upon notice of a strike. Thus, LILCO stated it did "not propose to answer" those requests.

LILCO's August 3 letter also refused to respond to the remaining four requests for a variety of reasons. Request 12 sought information regarding the number and identity, by job title, of the non-union workers LILCO intends to rely on to place the plant in cold shutdown. LILCO rejected this request on grounds that it was burdensome and unnecessarily intrusive, and on the mistaken assumption that the request sought "names or other personal information about [LILCO's] employees." LILCO further stated that the information sought in Requests 14 and 16, regarding its procedures for cold shutdown, could be found in the FSAR and plant procedures. LILCO did not, however, identify the specific FSAR provisions or plant procedures in which the information was available. Finally, Request 13 sought all documents pertaining to or discussing any commitment either to place the plant in cold shutdown or to keep the plant operating. LILCO replied that, in its view, the proposed licensing condition included in the letter "adequately" addressed the matter.

Discussion

The Board's July 24 Memorandum and Order established three important safety issues on which it wished to hear evidence and granted the parties the opportunity to conduct discovery to develop their respective cases. Pursuant to the NRC's discovery rules, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the party or to the claim or defense of any other party. . . ." 10 CFR §2.740(b)(1). Furthermore, discovery requests are not objectionable "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 10 CFR §2.740(b)(1).

In the instant case, the State and the County have filed a limited number of discovery requests, all of which are pertinent to, and likely to lead to the discovery of admissible evidence on, the important strike issues raised by the Board. Nevertheless, LILCO, in defiance of the Board's Memorandum and Order, has refused to respond to the State and County's joint requests for reasons which have no support in law or fact. LILCO's attempt to hide facts pertinent to the very questions put into issue by the Board is inexcusable and must not be condoned by this Board.

Furthermore, LILCO's efforts to obstruct the progress of discovery is wasting the already limited time afforded to the parties for discovery under the Board's current schedule.^{2/}

LILCO's first reason for refusing to respond to the State and County's joint request -- that the request constitutes "an informal letter pleading" -- strains credibility and is totally at odds with established practice in this case. To say that LILCO's objection raises form above substance is to state the obvious. Furthermore, it has been the rule, rather than the exception, for the parties to make discovery requests through "informal letter pleadings." Indeed, the County's and the State's files are filled with such informal discovery requests from LILCO. The State and the County have even responded to discovery requests from LILCO made by telephone. Thus, LILCO cannot, in good, faith, raise this weak objection.

LILCO's single objection to twelve of the joint discovery requests (Requests 1-11 and 15) has nothing to do with the standard for the scope of discovery set forth in 10 CFR §2.740(b)(1). Nor, for that matter, is it based on any known NRC regulation or caselaw. Rather, LILCO has taken it upon itself to determine

^{2/} Indeed, LILCO's actions provide further support for Suffolk County's Motion for Reconsideration of the Board's July 24 Order Regarding Schedule For Hearing and Prohibiting Written Testimony on the Strike Issues (August 3, 1984); see also, Suffolk County Notice To Board Regarding Schedule For Hearing The Strike Issues (July 31, 1984).

that its proposed licensing condition renders "moot" the issue of a strike's impact on LILCO's ability to implement its plan and therefore obviates the need for discovery. LILCO's "mootness" objection, however, is without basis.

The Board itself has raised particular issues for the parties to address and has ruled that the parties may conduct limited discovery on those issues. This is what the State and County have endeavored to do by asking specific and limited questions about the LERO work force, union affiliations, union contracts and the extent of the workers' withdrawal from LERO. LILCO cannot seek to short circuit legitimate discovery by stating that, in LILCO's opinion, it has found the solution to its strike problem and on that basis deny further discovery. LILCO's "mootness" objection is simply not a proper objection to a legitimate discovery request and must be rejected. In light of LILCO's failure to raise any objection to Requests 1-11 and 15, other than its unsupportable "mootness" objection, the Board should compel LILCO to answer those requests without delay.

Furthermore, the County and the State disagree with LILCO's bald assertion that its proposed licensing condition makes any of the Board's issues moot, for reasons which the County and State intend to address when the strike issues are heard. Suffice it

to say, however, that LILCO's licensing condition is vague, ambiguous and incomplete, particularly subpart (2) which would permit LILCO:

to conduct such other operations as the Staff shall approve if it is shown that the strike does not, in fact, impair LILCO's ability to implement its offsite emergency preparedness plan. (Emphasis added).

As is evident from this subpart, the question of whether a strike would impair LILCO's ability to implement its plan is still an issue. Indeed, this subpart emphasizes the importance of the issue. Therefore, the State and County are entitled to discovery on the matter.

In addition, LILCO's proposed licensing condition assumes that in the future there will be a LERO of similar size and nature as that which existed prior to the strike. At the July 19 discussion of the strike issues, counsel for LILCO stated that "[t]he appropriate course is to presume, unless evidence emerges to the contrary, that LERO, as it is constituted, in the plan and in the evidence taken, will, in fact, be so constituted again by the time it is needed." Tr. 13,839. This assumption, however, may not be valid. The State and County have a right to obtain information regarding the validity of LILCO's assumption and to seek evidence that may, in fact, "emerge[] to the contrary."

Request 12 seeks the identity, by job title, of non-union workers who could be relied upon to place the plant in cold shutdown, or run the plant, in the face of a strike. LILCO has refused to respond to Request 12 because it is "burdensome," "unnecessarily intrusive," and would require LILCO to reveal names and personal information about its employees. LILCO's objection has no merit.

Request 12 is obviously relevant to the Board's determination of the Board (particularly the second and third issues in the cold shutdown) because LILCO may be required to achieve cold shutdown using only non-union personnel. Request 12 (as well as Requests 13, 14 and 16) is likely to lead the State and the County in discovery whether there is any basis for LILCO counsel's bald assertion, made on July 19 in response to questioning from the Board that "there are enough non-union personnel to shut the plant down safely even if union personnel did walk off the job without any notice." Tr. 13,851; see also, Tr. 13,848-849. Furthermore, LILCO's own licensing condition says that the plant may still operate during a strike, if the NRC approves. Request 12 thus seeks information about how the licensing condition, particularly subpart (2), would be implemented.

In addition, LILCO has given no specifics as to why it believes Request 12 to be "burdensome," casting serious doubt on the validity of its concern. Finally, LILCO's objection that

Request 12 is "intrusive" and would require the identification of the names of personnel is unfounded in light of the specific direction that personnel need be identified only by job title. Therefore, for the reasons stated above, the Board should compel LILCO to respond to Request 12.

Request 13 seeks all documents pertaining to or discussing any commitment by LILCO to shut down the plant, or to keep it operating, in the face of a strike. LILCO's August 3 letter stated that LILCO's licensing condition address the request "adequately." LILCO's response, however, is inadequate.

The second and third issues raised by the Board in its Memorandum and Order clearly raise the issue of the efficacy and safety of placing the plant in cold shutdown during an actual or threatened strike. LILCO's proposed licensing condition also purports to make a commitment to go to cold shutdown under such conditions, and also to "conduct other operations" if the NRC approves. The State and the County are entitled to discovery on the issue raised by the Board, including discovery of what information LILCO has about the feasibility and safety of going to cold shutdown, and any information which explains how LILCO's decision to go to cold shutdown (or to conduct "other operations") will be triggered. Therefore, the Board should compel LILCO to supply all documents responsive to Request 13.

Finally, LILCO has stated that the answers to Requests 14 and 16, also on the issue of cold shutdown, can be found in the Shoreham FSAR and plant procedures. LILCO, however, did not specify which parts of the FSAR, or which plant procedures, are relevant. Furthermore, LILCO did not specify whether other documents are responsive to the State's and County's joint request. LILCO should be compelled to provide such information and/or copies of the relevant documents immediately.

The State and County request this Board to give expeditious consideration to this matter.

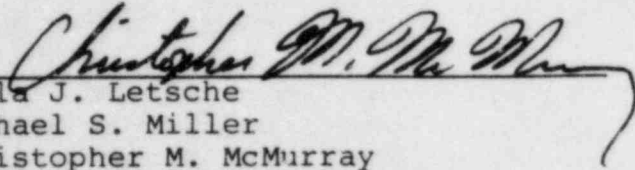
Respectfully submitted,

MARIO CUOMO,
Governor of the State of New York

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Special Counsel to the Governor
of the State of New York

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Attorneys for Suffolk County

Dated: August 7, 1984



STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

FABIAN PALOMINO
Special Counsel to the Governor

August 1, 1984

BY TELECOPIER

Donald P. Irwin, Esq.
Hunton & Williams
P.O. Box 1535
707 East Main Street
Richmond, Virginia 23212

Dear Don:

Pursuant to the Board's Memorandum and Order of July 24, 1984, I request that LILCO furnish the following information pertaining to the three issues raised by the Board in that Memorandum and Order as soon as possible, but in any event, no later than August 14, 1984:

1. The identity of any and all labor unions which represent any LILCO employee affiliated with LERO.
2. A copy of any and all labor contracts between LILCO and any of the labor unions, or members of such unions, identified in response to request 1 above. In the event that any such union or union member currently has no contract with LILCO in effect, please provide a copy of the contract which was in effect most recently.
3. The latest computer printout of LILCO employees who are members of LERO, effective immediately prior to the strike, in the same format as the printout provided to the County on June 21, 1984, and indicating which such workers are union members and the union affiliation of each such LERO workers.
4. A listing of all members of LERO who have resigned or withdrawn from LERO as a result of the current strike. This may be done by job title to protect the identities of the workers.

5. All letters of resignation from LERO received by LILCO since July 1, 1984 and all other documents received since July 1, 1984 stating the intention of LERO workers to resign or withdraw from LILCO.
6. All documents received from labor unions listed in response to request 1 above, or officials of such unions, regarding their support or lack of support of LERO and/or LILCO's radiological emergency response plan.
7. All documents indicating the withdrawal of support for LERO by any union listed in response to request 1, or officials of such unions, for LERO and/or the LILCO radiological emergency response plan.
8. All documents pertaining to or discussing the impact of the documents identified in response to request 5, 6 and 7 on the ability of LILCO to implement its radiological emergency response plan.
9. The identity of any and all labor unions which represent employees who may be expected to respond to a radiological emergency and who are employed by organizations other than LILCO, including, but not limited to, ambulance companies, bus companies, radio stations, Radiofone Corporation and all support organizations (private and public/nonprofit) identified in Appendix B of the LILCO Transition Plan.
10. A copy of any and all labor contracts between non-LILCO organizations and the personnel described in request 9 above.
11. A listing, by job title, of the employees who are employed by non-LILCO organizations and who would be expected to respond to a radiological emergency at Shoreham, identifying which employees are union members and the union affiliation of each such employees.
12. The number and identity, by LILCO job title, of all of the non-union LILCO employees (including, but not limited to, reactor operators) upon whom LILCO would rely to place the reactor at the Shoreham Nuclear Power Station in cold shutdown in the face of a threatened or actual strike by union employees.
13. All documents which pertain to or discuss a commitment by LILCO to keep the Shoreham reactor operating during a strike by union employees, or which pertain to or discuss a commitment by LILCO to place the Shoreham reactor in cold shutdown in the face of a threatened or actual strike by union employees.

August 1, 1984

14. All documents which pertain to or discuss the ability of LILCO's non-union employees to place the Shoreham reactor in cold shutdown in the face of a threatened or actual strike by union employees, or which pertain to or discuss the ability of LILCO's non-union employees to keep the Shoreham reactor operating during a strike by union employees.
15. All documents which pertain to or discuss LILCO's or LERO's ability to implement its offsite radiological emergency preparedness plan during a strike by union employees.
16. All documents which pertain to or discuss in any way the measures to be taken to place the Shoreham reactor in cold shutdown in the face of a threatened or actual strike by LILCO's union employees.

Please construe the term "document" as used in this request to include, but not be limited to, all draft or final memoranda, correspondence, questions, comments, reports, evaluations, ratings, summaries, notes, transcripts, minutes, summaries or notes of meetings, discussions or conferences (including telephone conferences). Please also construe the term "document" to include, but not be limited to, documents in the possession or control of LILCO, LERO, LERIO, any non-LILCO organization which employs persons who may be expected to respond to a radiological emergency at Shoreham, or any consultant or contractor to such organizations.

Counsel for the County has authorized me to inform you that the County endorses this request and that copies of all information provided to the State should also be furnished to counsel for the County at their offices in Washington, D. C.

If you have any questions, please contact me at (518) 474-1238 or Mr. McMurray at (202) 452-8391.

Sincerely,



Richard J. Zahnleuter, Esq.
Assistant Special Counsel
to the Governor

cc: Mr. McMurray ←

HUNTON & WILLIAMS

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August 3, 1984

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FILE NO.
 DIRECT DIAL NO. 202-955

Richard J. Zahnleuter, Esq.
 Assistant Special Counsel
 to the Governor
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 Albany, New York 12224

BY TELECOPIER

Dear Rick:

Thank you for your letter dated August 1, which arrived after the close of business that evening. As you can see from the attached letter to Chris McMurray, LILCO's potential witnesses -- Drs. Cordaro and Stergakos and Messrs. Weismantle, Daverio, Rigert and Scalice -- will be generally available for deposition between now and August 14, the cutoff of discovery set by the Board. I suggest that you and Chris coordinate your desired discovery schedules so that depositions of as many of these persons as you desire can be accomplished by the August 14 discovery cutoff date ordered by the Board.

With respect to the questions contained in your letter generally, they are not proper interrogatories or requests for production and LILCO does not intend to answer an informal letter pleading as such. With respect specifically to the questions 1-11, and 15, all of them have relevance only if LILCO intends to operate the Shoreham reactor during a strike in a fashion which presumes the unimpaired ability of LERC to perform its functions. LILCO stipulates that it cannot guarantee that there are no circumstances under which LERC's ability to function would be impaired during a strike by LILCO employees. Therefore, LILCO intends to take the reactor to cold shutdown in the manner outlined below in the event of a strike against LILCO. Thus, questions 1-11 and 15 are moot and LILCO does not propose to answer them. Question 12 is burdensome, unnecessarily intrusive, and deals with personnel records; as you know, LILCO will not voluntarily provide names or other personal information about its employees. However, you may

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obtain relevant information on this matter in your deposition of Mr. Scalice, the plant Operations Manager. Question 13 is addressed adequately by the stipulation above and the proposed license condition below. Questions 14 and 16 address the same subject and, generally speaking, involve numerous parts of the FSAR and plant procedures. The FSAR is available; LILCO will endeavor to make available to you any specific pertinent plant procedures. You may wish to depose the LILCO witnesses, particularly Mr. Scalice, on these questions.

If New York State intends to present any witnesses, please advise me promptly of their names, qualifications, expected areas of testimony, documents to be relied on, and those dates between now and August 14 when they will be available for discovery. LILCO will oppose New York State's proffering any witness whom it has not had a reasonable opportunity to depose on or before August 14.

New York State may prefer a reasonable resolution of this matter to litigation. LILCO would be willing to accept the following condition on the operating license at Shoreham:

PROPOSED LICENSE CONDITION

So long as LILCO shall rely on an offsite emergency response organization consisting entirely or primarily of LILCO employees, then in anticipation of the commencement of a strike by a union representing LILCO employees, LILCO shall bring the Shoreham Nuclear Power Station (SNPS) to cold shutdown condition using normal operating procedures. LILCO shall commence bringing SNPS to cold shutdown condition 24 hours prior to the commencement of such strike, or immediately upon receipt of less than 24 hours' notice of the impending commencement of a strike, with the goal of having the plant in cold shutdown condition by the time the strike commences. LILCO shall maintain SNPS in cold shutdown condition until the end of the strike except that, with the prior approval of the NRC Staff upon review of written application by LILCO, LILCO shall be permitted:

- (1) to take the reactor to a refueling mode to conduct refueling or other operations requiring access to the

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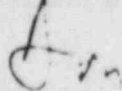
reactor core if it is shown that such operations cannot result in the occurrence of any events requiring offsite emergency response capability; and

- (2) to conduct such other operations as the Staff shall approve if it is shown that the strike does not, in fact, impair LILCO's ability to implement its offsite emergency preparedness plan.

This condition shall terminate at such time as any or any combination of agencies of the Federal, New York State, or Suffolk County governments shall provide to the NRC written notice of its or their agreement, under terms and conditions approved by FEMA, to assume legal responsibility for effectuation of offsite emergency response for Shoreham Nuclear Power Station.

Please telephone me in our Washington office (202/955-1500) by 4:00 this afternoon if you are agreeable to resolving this issue on this basis. If you fail to call, I will infer that New York State is not so willing.

Sincerely yours,



Donald P. Irwin

91/730

cc: Christopher M. McMurray, Esq.
Edwin J. Reis, Esq.
Bernard M. Bordenick, Esq.
Stewart M. Glass, Esq.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
)

LONG ISLAND LIGHTING COMPANY)

(Shoreham Nuclear Power Station,)
Unit 1))
_____)

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

CERTIFICATE OF SERVICE

I hereby certify that copies of JOINT MOTION OF NEW YORK STATE AND SUFFOLK COUNTY TO COMPEL DISCOVERY dated August 7, 1984, have been served to the following this 7th day of August 1984 by U.S. mail, first class, except as otherwise noted.

James A. Laurenson, Chairman *
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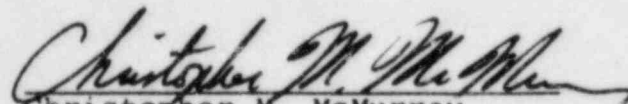
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Dated: August 7, 1984

* By Hand
By Telecopier