

845

RELATED CORRESPONDENCE

LILCO, August 6, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board '84

160-8 A10:17

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 OPPOSITION TO SUFFOLK COUNTY'S DILATORY
PLEADINGS ON STRIKE ISSUES AND MOTION TO DIRECT
THE PARTIES TO PROVIDE TIMELY DISCOVERY ON DIRECT CASE

Barely a week into the five-week period established by this Board to prepare for a narrow, structured hearing on three issues raised by the Board relative to the current LILCO strike, Suffolk County began complaining about its professed ability to meet that schedule.1/ Three days later the County asked the Board both to encumber its own inquiry with written testimony and to delay it by three weeks.2/ Similar letters have been sent by the County to LILCO counsel. For the reasons set forth below, LILCO believes that the Board should reject Suffolk County's complaints, promptly and outright.

1/ "Suffolk County's Motion to Board Regarding Schedule for Hearing the Strike Issues," July 31, 1984.

2/ "Suffolk County's Motion for Reconsideration of Board's July 24 Order Regarding Schedule for Hearing and Prohibiting Written Testimony on the Strike Issues," August 3, 1984.

*add:
J. Gann
FOCA*

DS03

Second, LILCO has been compelled to conclude that Suffolk County has embarked upon a course of conduct which will make timely litigation of this matter impossible without default by Suffolk County, severe prejudice to LILCO, or further direction by this Board.

The seriousness of this possibility is such that LILCO, as a party vitally affected by the pace of this litigation, is compelled to bring the matter to the Board's attention at this early date and to seek appropriate relief.

I. Suffolk County's Request for a Three-Week Delay
and for Encumbered Proceedings Should be Rejected

On July 24, this Board delineated three issues which it felt needed resolution as a result of the current strike by LILCO's two labor unions. The Board's Order permitted three weeks for discovery and, rather than requiring written testimony, permitted the parties to proceed at hearing by live oral testimony.

The Board's Order is capable of being implemented; indeed, within 10 days of its issuance Suffolk County and LILCO had exchanged potential witness lists in preparation for depositions, and New York State had filed a request for production of documents.^{3/} The Board should adhere to the July 24 Order, for the following reasons:

^{3/} The aspects of the discovery process that will, in LILCO's judgment, tend inevitably to frustrate the accomplishment of the Board's schedule unless redressed are set forth in Part II of this pleading.

1. The issues raised by the July 24 Order were raised sua sponte by the Board, after consideration of the parties' views. Presumably the Board had in mind a scope of inquiry proportionate to the time frame and procedures it allotted. The Board is reasonably entitled under its supervisory powers in 10 CFR § 2.718 to control the scope and schedule for the hearing, particularly since it is the Board's own inquiry that must be satisfied.

2. LILCO has both provided the other parties with detailed advance notice of its case and has significantly narrowed -- LILCO believes, totally resolved -- any reasonable basis for dispute on the Board's questions. LILCO accomplished this by the offer of a license condition requiring Shoreham to be put into cold shutdown in the event of a strike, and supporting affidavits, contained in its August 3 Motion for Summary Resolution.^{4/} LILCO has also offered to make its potential witnesses generally available for discovery through August 14 for further discovery on its case. Thus LILCO has expedited preparation for litigation of whatever issues, if any, will need to be tried.

^{4/} In its August 3 Motion for Summary Resolution LILCO (1) stipulated that it could not guarantee that LERO's effectiveness would never be impaired by a strike involving a majority of its members, and (2) offered to put the Shoreham unit into cold shutdown in the event of such a strike. LILCO believes that this commitment, backed up by the affidavits attached to the Motion for Summary Resolution, resolved any material issues of fact on Board Questions 2 and 3. What is certain is that they totally mooted Board Question 1.

3. Suffolk County's complaint about a shortage of resources to fulfill its responsibilities on this issue in a timely manner cannot be credited. At the same time as it asserts that it can commit time for only two lawyers to the Emergency Planning proceeding -- the proceeding which it has endlessly referred to as being "unique" and "centrally important" to the ultimate resolution of the entire Shoreham proceeding -- the County is attempting to secure access for four of its lawyers to Safeguards Information in the low-power license proceeding.^{5/} The fact that Suffolk County is also embroiled in litigation on other issues as well is no excuse, since Suffolk County's participation in each of them is purely voluntary. Suffolk County has entered the appearance of at least 12 lawyers from the firm of Kirkpatrick, Lockhart, et al. in various phases of this case. Within limits, parties' allocation of resources is their own business. When, however, that allocation operates to frustrate completion of legitimate goals, it becomes the business of other parties and the Board. LILCO submits that this issue has now reached these proportions.

4. Written prefiled testimony is not a requirement of NRC regulations, as even Suffolk County's Motion for Reconsideration concedes. It merely aids in focusing a hearing, particularly when

^{5/} One of these, Mr. Miller, is among the two lawyers the County admits to having still available for this proceeding. The other three -- Messrs. Brown and Lanpher and Ms. Letsche -- have all appeared in this proceeding and are presumably conversant with it.

issues are broad-ranging, complex and technical. The so-called "strike" issues are discrete and not excessively technical. Prefiled written testimony is not needed.^{6/} In any event, LILCO's affidavits provide Suffolk County with notice of the outlines and much detail of its direct case, more than three weeks before the hearing. Though LILCO would not object to Suffolk County's prefiling written testimony before August 28, LILCO does not intend to complain about the use of live direct testimony as a means to come to hearing on this discrete set of issues, as long as it has had a chance to obtain discovery of each of Suffolk County's intended witnesses.^{7/}

In short, the so-called "strike" issue consists of three limited questions raised by the Board; their resolution is within the Board's sound discretion. LILCO has attempted to aid this process by filing its Motion for Summary Resolution, intended to narrow the issues and to put the parties on notice of its case, and by offering its witnesses for deposition. Suffolk County's

^{6/} Suffolk County's reference (Motion for Reconsideration at 8) to the Susquahanna case, LBP-79-31, 10 NRC 597, 602 (1979) is totally inapposite. The context of the discussion quoted by Suffolk County was a Licensing Board's consideration of a request by certain intervenors to both (1) refuse to submit to discovery and then (2) submit testimony live, with no advance notice. The Licensing Board totally correctly rejected this no-notice approach, which is a far cry from the focused opportunity for a live hearing, following discovery, contemplated by this Board's July 24 Order.

^{7/} Suffolk County's apparent intent to defy the Board's July 24 Order in this regard is treated in Part II of this motion.

complaints about this schedule involve resource-allocation conflicts entirely of its own making. If the County is directed to concentrate its energy on taking discovery and finding and preparing witnesses rather than on filing dilatory pleadings, or else risk default, this issue can be tried on the reasonable schedule set by the Board. Otherwise, it will not be.

II. This Board's Prompt Intervention is Necessary to Ensure That Suffolk County Does Not Create a Situation Where Delay Is Inevitable

As of this morning, August 6, it became clear to LILCO that Suffolk County was embarked upon a course which, unless promptly corrected, must lead either to barring of direct testimony by Suffolk County witnesses, prejudicial denial of LILCO's right to obtain discovery of Suffolk County witnesses, or delay in the hearing on the "strike" issues. While LILCO knows long since of this Board's distaste for being required to resolve discovery disputes, this matter has ramifications well beyond discovery generally, and go to the integrity of the hearing process. Its elements are twofold: first, refusing to make its witnesses available for discovery as required by the Board's July 24 Order; and second, seeking to delay the hearing rather than obeying the Board's Order and preparing for it.

A. Refusal to Comply with Discovery: On July 26, LILCO asked Suffolk County, by letter, to designate its intended witnesses on the so-called "strike" issues (Attachment 1). On August

2, Suffolk County replied by letter, designating four witnesses (and stating that others might be named in the future) but making only two of them (Lieutenant Fakler, Mr. Minor) available at all for deposition in the Board-ordered discovery period, and then only on August 13 and 14 (Attachment 2). On August 3, LILCO wrote to Suffolk County (Attachment 3), requesting depositions of these witnesses on August 14 and presaging its proposed basis for resolution of the "strike" issues. On August 6, Suffolk County refused by letter (Attachment 4) to make these witnesses available on August 14 despite its earlier representation that they would be, giving as the reason that emergency planning hearings would be in session that day and Suffolk County could not make attorneys available to represent them. LILCO replied by letter later that day (Attachment 5) urging Suffolk County to reconsider and renoticing the depositions for August 13 (Attachment 6); a parallel telephone call, placed by Mr. Irwin to Mr. McMurray at about 11:00 on August 6, has not been returned.^{8/}

The upshot of this is that, with the possible exception of August 13 (as to which LILCO has been unable to gain any information from Suffolk County), Suffolk County will not be making any of its intended witnesses available for discovery within the deadline set by the Board.^{9/}

^{8/} On August 3, LILCO requested New York State to identify any witnesses it intended to sponsor in time to be deposed by August 14; LILCO has not yet received any reply from New York State.

^{9/} LILCO, by contrast, on August 3, identified its witnesses, made them generally available for deposition, and indicated their basic testimony.

This situation is obviously unacceptable, since it could result either in Suffolk County's presenting its entire case through live direct testimony without any notice to LILCO or in an unwarranted delay in the hearing caused by Suffolk County's defiance of the Board's July 24 Order. LILCO requests that this Board specifically, and promptly, direct that any party wishing to sponsor direct testimony make each of the witnesses through whom it intends to present that testimony available for deposition within the ordered discovery period.^{10/}

B. Dilatory Conduct: Contrary to Suffolk County's implicit assumption, the identification of a new issue does not necessarily engender a long delay;^{11/} it all depends on the issue and the conduct of the parties. The Board has taken steps, in its July 24

^{10/} For the reasons stated in Part I, LILCO does not believe that any extension of the discovery period is warranted. LILCO would be willing to extend it by one week, to August 21, as long as the August 28 hearing date was not disturbed; but from Mr. McMurray's August 2 letter, it appears that such an extension would not increase the number of Suffolk County witnesses available.

^{11/} Suffolk County refers to dictum in the recent Indian Point emergency planning case, LBP-83-68, 18 NRC 811 (1983) for the proposition that new issues necessarily mean substantial delays. Motion for Reconsideration at 4-5. Three things may be noted above the County's reference. First, the Indian Point Licensing Board's observation, while interesting commentary on NRC practice, is dictum and too general to be directly applied. Second, it referred to full-blown hearings starting from scratch, whereas here the issue is familiar and narrow, advance information has been provided, and the Board has explicitly crafted procedures to eliminate delay. Finally, one of the current Board members was on the Indian Point Board; presumably, if he thought that an improper schedule were being proposed here, he would not have joined in the Board's July 24 Order.

Order, to avoid unnecessary delay. Rather than comply with that Order, however, Suffolk County has merely stated that each of its four named witnesses will be "unavailable" for unspecified reasons during most or all of the period between now and August 28, and that not one of them would be available on August 23, the day of the hearing. Neither the reasons for these witnesses' ostensible unavailability nor the scope of the County's assertedly fruitless search for other relevant witnesses is specified.

Similarly, the County's entire volume of paper to date on this issue -- two pleadings, at least two letters -- has been directed to forestalling an August 28 hearing rather than accomplishing it.

Suffolk County has not yet taken any steps to request the depositions of LILCO's prospective witnesses. LILCO does not object to this, so long as the County is not allowed to use this default later to delay the August 28 hearing.

It goes without saying that LILCO has a vital stake in the progress as well as the final outcome of this proceeding. Suffolk county's gambit of refusing to accede to the inherent requirements of the Board's schedule, if it succeeds, will both flout this Board's authority and prejudice LILCO in numerous ways, not limited to the \$1.4 million daily cost of debt service for Shoreham. The Board should not permit this type of behavior.

CONCLUSION

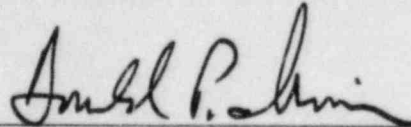
For the reasons stated above, LILCO urges the Board to take two steps:

1. to promptly deny Suffolk County's August 3 "Motion for Reconsideration" both as to its scheduling aspects and live-testimony aspects, with the caveat that nothing in the Board's Order should be understood to prohibit Suffolk County from filing direct testimony in written form (if it chooses so to file) far enough before the August 28 hearing to put the other parties adequately on notice; and

2. to explicitly put all parties on notice that if they wish to present direct testimony, they must have made available each witness for deposition before the close of discovery.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY



Donald P. Irwin

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

DATED: August 6, 1984

HUNTON & WILLIAMS

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FILE NO

DIRECT DIAL NO. 804-788

July 26, 1984

Michael S. Miller, Esq.
Christopher M. McMurray, Esq.
Kirkpatrick, Lockhart, Hill,
Christopher & Phillips
1900 M Street, N.W.
Eighth Floor
Washington, D.C. 20036

BY TELECOPIER

Dear Mike and Chris:

I write to you since, as I understand it, you are now jointly in charge of Suffolk County's emergency planning work.

The Board's July 24 Memorandum and Order concerning the effect of a strike on LERO indicates that it expects the parties to present oral testimony on August 28, and that it expects parties to complete such discovery on this issue as is necessary prior to August 14.

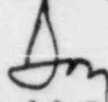
By this letter, I request that the County advise LILCO, either through me or Jim Christman, as to whether it intends to produce any witnesses on the matters addressed in the Board's July 24 Order. If the answer is in the affirmative, please notify us, as soon as possible, of the following:

1. The name of each witness being proffered by the County;
2. His or her professional qualifications, if they are not already in the record;
3. A statement of the areas in which the witness is expected to testify; and
4. Any documents on which the witness intends to rely in his or her testimony.

HUNTON & WILLIAMS

LILCO will want to depose any witnesses being proffered by the County and would like to complete any such depositions prior to August 14.

Sincerely yours,

A handwritten signature in black ink, appearing to read "D. Irwin", written in a cursive style.

Donald P. Irwin

91/730

KIRKPATRICK, LOCKHART, HILL, CHRISTOPHER & PHILLIPS

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August 2, 1984

WIRELESS DIRECT DIAL NUMBER

(202) 452-8391

BY TELECOPIERDonald P. Irwin, Esq.
Hunton & Williams
P.O. Box 1535
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Richmond, Virginia 23212

Dear Don:

This is to identify witnesses the County presently intends to rely upon for testimony on the strike issues raised by the Board in its July 24, 1984 Order. As of this date, the County proposes to offer the testimony of the following four witnesses: Deputy Inspector Peter Cosgrove, Lieutenant John Fakler and Professor David J. Olson and Mr. Gregory C. Minor, all of whom have previously testified before the Board on other matters. Deputy Inspector Cosgrove, Lieutenant Fakler and Professor Olson will address primarily the first issue set out in the Board's July 24 Order. Mr. Minor will address primarily the second and third issues in that Order. The County is continuing its efforts to identify other witnesses and will bring them to your attention as soon as they are known to the County.

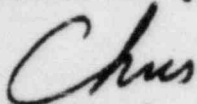
Please be advised that Inspector Cosgrove is unavailable from August 6-20 and August 27-28. Lieutenant Fakler is available for deposition from now through August 13, but is not available to appear during the week of August 28. Professor Olson is not available during the entire month of August, but is available after September 3. Greg Minor is available during the week of August 13 and during the week of September 10.

I assume from your failure to identify witnesses to appear on LILCO's behalf that you are also experiencing difficulty in preparing your case within the time allotted by the Board.

KIRKPATRICK, LOCKHART, HILL, CHRISTOPHER & PHILLIPS
Donald P. Irwin, Esq.
August 2, 1984
Page 2

Nevertheless, please inform me as soon as you are aware of the
witnesses LILCO intends to offer on the strike issues.

Yours truly,



Christopher M. McMurray

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August 3, 1984

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Christopher M. McMurray, Esq.
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BY HAND

Dear Chris:

Your letter of August 2, responding to my letter of July 26, arrived here yesterday evening by telecopier. LILCO includes among its potential witnesses at the August 28 hearing the following names: Matthew C. Cordaro, John A. Weismantle, Charles A. Daverio, John Rigert, John A. Scalice and Elias P. Stergakos. Messrs. Cordaro, Weismantle, Daverio, and Rigert have testified previously. Mr. Scalice is Operations Manager of the Shoreham Nuclear Power Station. Dr. Stergakos is Manager of LILCO's Radiation Protection Division. Dr. Cordaro will testify primarily on Board Question 1. Messrs. Rigert, Scalice and Stergakos will primarily testify on Board Questions 2 and 3. Messrs. Weismantle and Daverio are generally conversant with all issues raised by the Board's July 24 Order. These witnesses will be available generally for deposition during normal business hours between now and August 14 on Long Island. If further witnesses are designated, LILCO will promptly notify Suffolk County then.

With respect to your notice of the availability of the County's four expected witnesses for discovery, please be advised that LILCO wishes to depose both Lieutenant Fakler and Mr. Minor on August 14, preferably on Long Island. I don't consider that you have fairly offered to make Lieutenant Cosgrove available during the discovery period prescribed by the Board, given that during that entire period he is stated to be "available" only today. As I understand you, the County does not propose to make Mr. Olson available at all for discovery within the allotted discovery period.

HUNTON & WILLIAMS

As you can see from the above, LILCO does not share the difficulties which you profess with preparing for the August 28 hearing. Please be advised that LILCO does not intend to consent to any deferral of the hearing. I am sure, given the resourcefulness the County has shown in the past, that the County, if it wishes to present witnesses at the hearing, will do so. All LILCO demands is the realistic opportunity to obtain discovery on anyone whom the County proposes to proffer, on or before the August 14 cutoff. LILCO will object to the appearance of any witnesses on behalf of the County whom it has not had a reasonable opportunity to depose by August 14.

You may find a reasonable resolution of this matter preferable to litigation. LILCO would be willing to accept the following condition on an 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 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

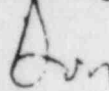
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fact, impair LILCO's ability to implement its offsite emergency preparedness plan.

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 (955-1500) by 4:00 this afternoon if the County wishes to resolve the issue on this basis. Otherwise I shall assume that Suffolk County rejects this proposal.

Sincerely yours,



Donald P. Irwin

91/730

cc: Edwin J. Reis, Esq.
Bernard M. Bordenick, Esq.
Stewart M. Glass, Esq.
Richard J. Zahnleuter, Esq.

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BY TELECOPIER

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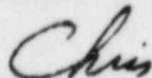
Dear Don:

I received Friday your hand delivered letter of August 3 in which you identify some of the "potential" witnesses LILCO intends to rely upon to provide testimony on the strike issues raised by the Board in its July 24 Order. I also received approximately two hours later LILCO's motion for summary disposition of the strike issues.

Your request to depose Greg Minor and Lieutenant Fakler on August 14 is unacceptable to the County since, as you are aware, the emergency planning hearings resume on that date and counsel will be unavailable to defend the witnesses' depositions.

With respect to LILCO's summary disposition motion, the County will respond in due course.

Yours truly,



Christopher M. McMurray

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BY TELECOPIER

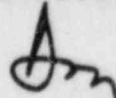
Dear Mike and Chris:

On Saturday I became aware of two pleadings filed by Suffolk County, one dated July 31 and the other dated August 3, concerning the litigation of the so-called "strike" issue. The purpose of this letter is to urge you to schedule forthwith the depositions of LILCO witnesses who were designated in my August 3 letter to Chris McMurray and whom Suffolk County wishes to depose. LILCO also expects that if Suffolk County contemplates presenting any testimony through Lieutenant Cosgrove or Mr. Olson, the County will make them available for deposition on or before August 14.

I look forward to hearing from you imminently. If, for any reason, I am not in the office, I urge you to reach Jim Christman or Lee Zeugin to make the necessary arrangements.

I have also received Chris McMurray's letter this morning, refusing to schedule Mr. Minor and Lieutenant Fakler available for depositions on August 14, despite the fact that both of these witnesses are available in fact that day. This response by the County is in direct defiance of the Board's Order of July 24. I urge you to reconsider your position.

Sincerely yours,



Donald P. Irwin

91/730

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FILE NO. 24566.3
DIRECT DIAL NO. 804 788-8357

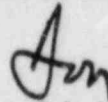
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BY TELECOPIERBoard "Strike Issues" Discovery

Dear Chris:

I'm sorry that you haven't returned my telephone call of this morning. I don't accept the basis stated in your letter of this morning for your refusal to make Mr. Minor and Lieutenant Fakler available for deposition on August 14. However, since according to your letter of August 2 they will be available on August 13 as well, and since there's no hearing that day, this will notify you that LILCO intends to depose them individually on August 13, preferably on Long Island, beginning at 9:30 a.m. Please let me know which of them you prefer to be deposed first.

Sincerely yours,



Donald P. Irwin

91/730

LILCO, August 6, 1984

CERTIFICATE OF SERVICE

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
(Emergency Planning Proceeding) Docket No. 50-322-94-3

DOCKETED
USNRC
AGO -8 A10:17

I hereby certify that copies of LILCO'S OPPOSITION TO SUFFOLK COUNTY'S DILATORY PLEADINGS ON STRIKE ISSUES AND MOTION TO DIRECT THE PARTIES TO PROVIDE TIMELY DISCOVERY ON DIRECT CASE were served this date upon the following by first-class mail, postage prepaid, or by Federal Express (as indicated by an asterisk).

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DATED: August 6, 1984

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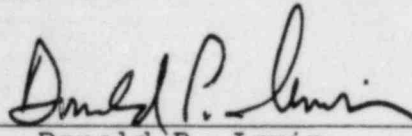
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