

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Appeal Board

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

LILCO'S MEMORANDUM ON THE APPROPRIATENESS
OF DIRECTED CERTIFICATION OF THE LATEST
FEMA DISCOVERY DISPUTE

The Appeal Board's August 2, 1984 Order requested parties to address the question of whether the criteria for granting directed certification had been met by Suffolk County in its Memorandum to Show Cause, dated August 1, 1984.^{1/} For the reasons detailed below, LILCO believes that Suffolk County has failed to demonstrate any of the compelling reasons necessary for the Appeal Board to exercise its discretion and review what is, at this point, merely a dispute about the sufficiency of the record.

^{1/} Since the Appeal Board's Order raises only the narrow question of whether Suffolk County has shown cause for review of the Licensing Board's interlocutory discovery order, this memorandum will not address the merits of Suffolk County's Notice of Appeal and Brief in Support, dated July 26, 1984. Should the Appeal Board decide that a review of the Licensing Board's order is appropriate, LILCO requests that all parties be given the opportunity to respond to the merits of Suffolk County's appeal.

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1. Background and Applicable Legal Standards

Suffolk County's pending appeal brings before the Appeal Board, for the second time, issues relating to Suffolk County's discovery of the internal deliberations of the Federal Emergency Management Agency's (FEMA) Regional Assistance Committee (RAC). In the first appeal, FEMA sought to protect documents relating to the preliminary, internal observations of individual RAC members on the Shoreham radiological emergency response plan. On June 13, 1984, the Appeal Board issued an order which upheld FEMA's claim of executive privilege with regard to these documents and denied Suffolk County access to them based on a finding that Suffolk County had failed to demonstrate a compelling need for them, particularly given discovery avenues still open to Suffolk County. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, ___ NRC ___ (June 13, 1984). Fully a week after the deposition of the last FEMA witness and only one day prior to the resumption of hearings, Suffolk County filed a motion with the Licensing Board seeking the production of all FEMA documents and the issuance of subpoenas to the remaining RAC members. On July 10, the Licensing Board, in an oral ruling, denied Suffolk County's request on the grounds that Suffolk County had failed to make the requisite showings of need pursuant to ALAB-773. Hearing Transcript at 12,127-30.^{2/} The Licensing Board found that Suffolk

^{2/} For the Board's convenience the relevant pages of this hearing transcript have been included as Attachment 1 to this response.

County had been provided with some notes prepared by FEMA witnesses Keller and Baldwin prior to their depositions which reflected "the number of comments which disagreed at least initially with the final RAC findings for each NUREG 0654 element of the LILCO plan," id. at 12,128, and that Suffolk County had failed to establish that the FEMA witnesses were unable to explain or defend the FEMA findings, id. at 12,129. Following the Licensing Board's ruling, Suffolk County cross-examined the FEMA witnesses before the Licensing Board from July 10 to 13. Suffolk County now seeks review of the Licensing Board's July 10 interlocutory ruling.

As the Appeal Board has noted, and Suffolk County has agreed, Memorandum to Show Cause at 2, the Commission's Rules of Practice generally prohibit interlocutory appeals. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258 (1973). Accordingly, the Appeal Board has exercised sparingly its discretionary authority to conduct interlocutory reviews of licensing board rulings. See, e.g., Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693, 695 n.5 (1979). In determining whether to grant interlocutory review, the Appeal Board has typically applied a standard first articulated in Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977):

Almost without exception in recent times, we have undertaken discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be

alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner.

See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 171 (1983); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309, 310 (1981); Puget Sound, supra, 10 NRC at 694.3/ When the Marble Hill standard has been applied to discovery disputes, the Appeal Board has only rarely found that such disputes warrant review. See, e.g., Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 99 (1981); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-608, 12 NRC 168, 170 (1980); Puget Sound, supra, 10 NRC at 696. As in those earlier discovery disputes, Suffolk County has failed to demonstrate that its appeal meets the Marble Hill standard.

3/ Suffolk County's Memorandum to Show Cause suggests that the Commission's Statement of Policy on Conduct of Licensing Proceedings establishes a separate, and perhaps different, test for granting interlocutory review. See Memorandum to Show Cause at 2-3. In Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371 (1983), the Appeal Board examined the effect of the Commission's Statement of Policy on the Marble Hill standard. The Board concluded:

As we read it, the Policy Statement does not, either explicitly or by necessary implication, call for a marked relaxation of the Marble Hill standard. Rather, in terms, it simply exhorts the licensing boards to put before us legal or policy questions that, in their judgment, are "significant" and require prompt appellate resolution.

Id. at 375.

2. Deficiencies in Suffolk County's Attempt to Show Cause

At the outset, it must be noted that Suffolk County's Memorandum to Show Cause proceeds from a single, erroneous premise, namely, that Suffolk County is legally entitled to have access to all FEMA documents related to the RAC review including the notes of individual RAC members as well as the right to subpoena all RAC members. See Memorandum to Show Cause at 4-5. Suffolk County's presumption blithely ignores the Appeal Board's earlier ruling that FEMA had properly invoked a claim of executive privilege with regard to the documents in question, and that parties seeking release of these documents would have the burden of showing an overriding need for their release. ALAB-773, slip op. at 10-11. In addition, this underlying presumption also ignores the Licensing Board's July 10 ruling, which specifically found that Suffolk County had failed to demonstrate a compelling need for the documents since Suffolk County had neither established that there were "significant differences of opinion among members of the RAC on important issues effecting the adequacy of LILCO's plan," nor that the FEMA witnesses were unable to defend and explain adequately the FEMA findings. Hearing Transcript at 12,128-29. Thus, Suffolk County has attempted in its Memorandum to Show Cause to characterize this pending appeal as something it is not. The question presented in this proceeding is whether Suffolk County has factually demonstrated a compelling need for the FEMA documents. The Licensing Board concluded that it has not. Such a factual dispute does not warrant interlocutory review.

While advanced under numerous rubrics, Suffolk County presents essentially three basic grounds for the granting of directed certification:

- (1) the public interest would be served by such review since significant legal and policy questions are presented by Suffolk County's motion, see Memorandum to Show Cause at 3, 5-6, 8;
- (2) Suffolk County has a substantial and compelling need for the documents and requested subpoenas and failure to provide this information would result in immediate and serious irreparable impact to Suffolk County's case, see Memorandum to Show Cause at 3, 7-8; and
- (3) the failure to provide this information to Suffolk County will affect the basic structure of the proceeding below, see Memorandum to Show Cause at 6-7.

First, in asserting that the public interest would be served by the granting of review, Suffolk County argues that its pending appeal raises "significant legal issues of first impression." Memorandum to Show Cause at 6. As was discussed above, Suffolk County implicitly assumes that the public is entitled unqualifiedly to "know about, or inquire into, the workings or conclusions of the RAC." See id. Suffolk County asserts, without examples, that resolution of this issue may affect the rights of parties in other cases. Id. at 8. The facts of this proceeding do not support Suffolk County's assertions. The question of the public's right to inquire into the internal workings of federal agencies was already addressed in great detail by the Appeal Board in ALAB-773. That decision recognized that FEMA could, upon proper demonstration, invoke the doctrine of executive privilege

in NRC proceedings. ALAB-773, slip op. at 10. Accordingly, the Appeal Board recognized that the public did not have an unbridled right to inquire into the internal, preliminary deliberations of federal agencies, but rather that such inquiry was permitted only after the party seeking discovery had demonstrated a need that outweighed the agency's need to protect frank communications among its staff members during the agency's deliberative process. See id. at 10-11, 21-22. Thus, contrary to Suffolk County's assertion, the pending appeal does not raise issues of first impression about the scope and interpretation of FEMA's claim of executive privilege that are potentially of generic importance in other NRC proceedings: those were clearly raised and decided in ALAB-773. Instead, the pending appeal raises questions only about whether Suffolk County has made the requisite showings pursuant to the strict tests of ALAB-773 with respect to the sufficiency of the record on an issue which has already been tried. The Licensing Board has found that Suffolk County has not, and further interlocutory review by the Appeal Board would merely entangle it in a routine discovery dispute.^{4/}

^{4/} Suffolk County's suggestion on page 6 of its Memorandum to Show Cause that denial of its appeal would be inconsistent with the Appeal Board's prior decision to grant review of FEMA's appeal from the ASLB's May 18 Order rests solely on Suffolk County's idiosyncratic views of equity and fairness. Suffolk County's suggestion has no legal support. Indeed, as is demonstrated above, the two appeals raise significantly different legal issues and decisions which granted review in the first case but denied it in the second would be entirely consistent.

Second, Suffolk County asserts it has a substantial and compelling need for the FEMA documents since it alleges that the documents sought "underlie and form the basis for the RAC findings." Memorandum to Show Cause at 3. Suffolk County argues it will suffer "immediate and serious irreparable impact" if it is not provided these documents. Id. at 7-8. Simply stated, this assertion of irreparable impact is based solely on speculation that a later review of the Licensing Board's initial decision may result in a reversal of that Board's July 10 ruling. See Memorandum to Show Cause at 8. Such speculation about future appeals was expressly precluded from use as a basis for granting interlocutory review in the first part of the Marble Hill standard. That portion clearly requires a showing of ". . . irreparable impact which, as a practical matter, could not be alleviated by a later appeal." Marble Hill, supra, 10 NRC at 1192 (emphasis supplied). Indeed, the Appeal Board has uniformly held that assertions of future delay and additional expenses do not warrant interlocutory review. See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 176 (1983); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982); Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 552 (1981). Thus, Suffolk County's Memorandum has failed to demonstrate an "immediate and serious irreparable impact."

In fact, if any party were to suffer prejudice or serious impact from a future reversal of the Licensing Board's July 10 ruling, it would be LILCO and not Suffolk County. Such reversal would undoubtedly involve a remand of the proceeding to the Licensing Board and an attendant delay in the time at which LILCO would be permitted to bring the Shoreham plant on-line. Despite this possible outcome, LILCO does not believe that interlocutory review of Suffolk County's pending appeal is appropriate.

Finally, Suffolk County argues that the Licensing Board's July 10 ruling will affect "the basic structure of the proceedings below in a pervasive and unusual manner." Memorandum to Show Cause at 6-7. Suffolk County bases this argument on its assertion that FEMA's testimony is based largely on the RAC review process and that failure to permit inquiries into that process would prevent the development of a true and complete record. Id. at 7. As the Appeal Board recognized in ALAB-773, the significant FEMA findings are the ultimate determinations of the RAC; the predecisional opinions of individual RAC members are not demonstrably of central importance in judging the adequacy of the LILCO emergency response plan. ALAB-773, slip op. at 20. Yet it is the disclosure of those predecisional opinions that Suffolk County now argues will have an effect on the basic structure of the proceeding. There is simply no basis for this argument. As the Appeal Board also recognized in ALAB-773, it is the applicant that bears the ultimate burden of proof. ALAB-773, slip op. at 20-21. If the FEMA witnesses are found to have failed to explain the bases

for their testimony, then their testimony will be entitled to little weight and any presumptive effect it may have had will have been diluted or removed. But the net result is that the basic structure of the proceeding will not have been affected. Suffolk County has already been given ample opportunity to disprove the credibility of the FEMA witnesses. It has questioned them for one week from July 10 to July 13 and will be permitted to question them for another from August 14 to August 17. Thus, Suffolk County has not been deprived of its right to develop a complete record, and accordingly, the basic structure of the proceedings will not be affected by a decision to deny this request for interlocutory review.

Thus, Suffolk County has failed to meet the review standards of Marble Hill.

3. Timeliness of Suffolk County's Appeal

In the Appeal Board's Order of July 27, 1984, Suffolk County was also required to address the issue of whether its appeal should be dismissed because it was not filed within ten days of the entry of the Licensing Board's ruling. Suffolk County proffered a showing of good cause for its belated filing in its Memorandum to Show Cause. Memorandum to Show Cause at 9-10. While it is unclear from the Appeal Board's August 2 Order whether other parties were requested to comment on this showing, LILCO offers the following brief observations on this issue.

As the Appeal Board noted in its July 27 Order, the two provisions of the Commission's Rules of Practice which authorize appeals from Licensing Board actions each provide a ten-day period for filing an appeal. See 10 CFR §§ 2.714a, 2.762(a). These provisions relate, respectively, to appeals from rulings on petitions for intervention and from a licensing board's initial decision. Discovery disputes, such as the pending appeal, are, by nature, more time sensitive than either of these two rulings. Accordingly, imposition of a ten-day filing deadline for an interlocutory appeal from a discovery decision would be entirely appropriate.

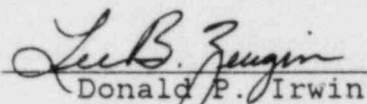
In any case, Suffolk County's delay in filing this appeal gives a hollow ring to many of its claims about the immediate irreparable injury it is allegedly suffering or about the importance of its appeal. See Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309, 310 (1981). Indeed, Suffolk County's claims are further undermined when one considers that the Licensing Board also found that Suffolk County's initial request to it for further access to the FEMA documents was "inexcusably late" having been filed a full week after the completion of the last FEMA deposition and one business day prior to the start of oral testimony by the FEMA witnesses. Hearing Transcript at 12,129.

4. Conclusion

For the above reasons, LILCO believes that Suffolk County has failed to demonstrate good cause for the granting of directed certification of the Licensing Board's July 10 interlocutory order. Accordingly, Suffolk County's request should be denied.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY



Donald P. Irwin
Lee B. Zeugin

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

DATED: August 10, 1984

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATTACHMENT 1

2

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of: :

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LONG ISLAND LIGHTING COMPANY : Docket No. 50-322-OL-3

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(Shoreham Nuclear Power Station, : (Emergency Planning)
Unit 1) :

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Court of Claims

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State of New York

12

State Office Building

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Room 3B46

14

Veterans Memorial Highway

Hauppauge, New York 11787

Tuesday, July 10, 1984

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The hearing in the above-entitled matter convened

16

at 10: a.m., pursuant to notice.

17

BEFORE:

18

JAMES A. LAURENSEN, ESQ., Chairman

19

Atomic Safety and Licensing Board

U. S. Nuclear Regulatory Commission

20

Washington, D. C. 20555

21

DR. JERRY KLINE, Member

22

Atomic Safety and Licensing Board

U. S. Nuclear Regulatory Commission

23

Washington, D. C. 20555

24

DR. FREDERICK SHON, Member

25

Atomic Safety and Licensing Board

U. S. Nuclear Regulatory Commission

Washington, D. C. 20555

1 First, the county needs to review the
2 contentions and prefiled testimony to determine whether
3 and how they should be revised. Secondly, it is
4 senseless to cross-examine the FEMA witnesses concerning
5 their opinions on revision 3 of the LILCO plan. Third,
6 the county needs more discovery from FEMA and, therefore,
7 cross-examination of the FEMA witnesses can not go
8 forward today.

9 First, we agree with LILCO that the four
10 examples selected by Suffolk County to demonstrate the
11 substantial impact of rev 4 on the issues in this proceeding
12 miss the mark of establishing that it would be unproductive
13 to go forward at this time. Insofar as rev 4 may have an
14 impact on the FEMA testimony on the 33 contentions
15 scheduled for this week, the county may inquire in the
16 areas which have been revised as to the effect, if any,
17 upon the FEMA findings or conclusion.

18 Until it is established that FEMA is withdrawing
19 or substantially modifying its findings as relevant to the
20 33 contentions scheduled for this week, we shall go forward.
21 As in the past, we express no opinion at this juncture
22 concerning the county's suggestion that testimony or
23 contentions may need to be revised.

24 The county's motion for stay is denied.

25 Secondly, we come to the county's motion to

1 compel the production of documents by FEMA, to postpone
2 the cross-examination of the FEMA witnesses, and to issue
3 subpoenas for members of the RAC. We received LILCO's
4 reply to this motion yesterday. At this time we will
5 again offer New York and the NRC Staff or FEMA an
6 opportunity to present their arguments concerning this
7 motion.

8 Mr. Zahnleuter?

9 MR. ZAHNLEUTER: Again, the state has not
10 received the responsive pleading from LILCO, and without
11 belaboring the point, I will assume that my request for
12 a recess to read the pleading has been denied.

13 Judge Laurenson, Judge Shon, and Judge Kline,
14 the State of New York hereby moves that you stay the
15 presentation of the FEMA testimony until the courts decide
16 whether LILCO lacks the legal authority to implement
17 the LILCO plan.

18 As you know, the state's position is that
19 LILCO's plan unlawfully obstructs and usurps the
20 state's governmental powers and functions set forth in
21 specific New York State laws.

22 Also, the state's complaint seeking such
23 a declaratory judgment has been remanded to the New York
24 State courts and is currently pending in the Supreme
25 Court of Suffolk County.

1 Under Federal regulations, FEMA is only
2 empowered to conduct reviews and make findings based on
3 legitimate, legal emergency response plans. FEMA is
4 not empowered to conduct reviews and make findings when
5 the underlying plan is illegal and defective.

6 The RAC review and the FEMA testimony recognizes
7 that there are serious concerns and inadequacies
8 pertaining to LERO's legal authority to implement the
9 LILCO plan. All of attachment two of the RAC review is
10 devoted to this theme. And indeed, the theme pervades
11 the entire RAC review.

12 Accordingly, the RAC review and the FEMA
13 testimony are based on an emergency response plan which
14 is defective and inadequate because the LILCO plan has not
15 been proved to be a legal plan.

16 Until the lawsuit currently pending in the
17 New York State courts is resolved, the state submits that
18 the RAC review and the FEMA testimony is premature without
19 a sound basis and should not be entertained by this
20 Board at this time.

21 Consequently, the state respectfully urges
22 that the presentation of the FEMA testimony be stayed.

23 END 3
24
25

1 JUDGE LAURENSEN: Why was this Motion not filed
2 before?

3 MR. ZAHNLEUTER: Part of the consideration was
4 that the -- LILCO's Motion to have New York State declaratory
5 judgment heard in Federal District Court was not resolved
6 until recently, and it has now been remanded to the State
7 Court.

8 So, it is currently pending in the State Court.

9 JUDGE LAURENSEN: The matter has been in the
10 State and Federal courts for several months now, as I recall,
11 and yet New York took no action until today on an oral Motion
12 to request a stay.

13 I don't understand why you believe this is a
14 timely Motion at this time.

15 MR. ZAHNLEUTER: I think that we initially raised
16 the legal argument back in the courtroom in Riverhead, and
17 at that time I think the Board dispensed with all Motions of
18 hearing legal contentions until the end of the court proceedings.

19 So, at this time I am more in the nature of making
20 a renewal of the State's Motion to stay the proceedings, and
21 it is -- it directly pertains to the FEMA testimony because
22 of the FEMA's testimony and the RAC review's comments of the
23 inadequacies of the Plan based on the concerns about the
24 legal authority of LILCO to implement the Plan.

25 JUDGE LAURENSEN: We will hear from both LILCO

1 and the County on the State's Motion.

2 Mr. Irwin?

3 MR. ZAHNLEUTER: Excuse me. In addition, the
4 State does support the County's Motion for the reasons stated
5 by the County, which are different than the State's Motion.

6 MR. IRWIN: I think I can respond very briefly.
7 I don't think any material fact has changed since January
8 of this year, when this Board said they were going to proceed
9 with hearings on emergency planning issues, unless or until
10 somebody brought in a dispositive judgment from either Federal
11 or State court clarifying issues relative to legal authority.

12 The circumstances haven't changed at all. The
13 State filed and Suffolk County filed a lawsuit in New York
14 State court. It was transferred to Federal District Court,
15 and remanded approximately three weeks ago to State court.

16 It is right back where it was four months ago.
17 Nothing has happened that would change that in the meantime.
18 As for the effect of uncertainty as to legal issues in the
19 RAC Review, the RAC Review is a very carefully articulated
20 document that is full of all sort of contingent outcomes as
21 denoted by a complex asterisk system, dealing with those
22 issues.

23 I just don't see anything that has changed at
24 all in the past several months that would warrant raising this
25 Motion now.

1 JUDGE LAURENSEN: Does the County wish to be
2 heard on this.

3 MR. MILLER: Yes, Judge Laurenson. I will be
4 brief also. The County fully supports New York State's Motion
5 to stay. As the Board is well aware, it has always been the
6 County's position that LILCO lacks the legal authority to
7 implement its offsite emergency response plan. We have
8 stated that position to this Board before. We have asked
9 this Board to terminate these proceedings for that reason.

10 In addition, Judge Laurenson, if there is a
11 difference between now and a few months ago when the Motions
12 by the County and New York State were first made, it was
13 revealed during the week of June 29th, during the deposition
14 of the FEMA witnesses.

15 During those depositions, the FEMA witnesses
16 made very clear that they made assumptions during the course
17 of the RAC Review that LILCO has the legal authority to
18 carry out and implement its plan, and that if those assumptions
19 proved to be unfounded, FEMA would not be able to find the
20 LILCO Plan to be an adequate plan.

21 Judge Laurenson, in light of the importance of
22 the legal authority issues to the RAC Review, to FEMA's
23 findings, and to the issues before this Board, the County
24 fully supports New York State's position that these hearings
25 be stayed until the issues of LILCO's legal authority are

1 resolved.

2 JUDGE LAURENSEN: Does FEMA or the Staff have
3 a position on both of these Motions?

4 MR. GLASS: I just want to make one note for the
5 record. The RAC Review, which is attached to the FEMA
6 testimony, was very carefully drawn, in one way, to assist
7 this particular Board. The legal concerns were set out as
8 a separate attachment, so that if that issue did become a
9 major part of this hearing, or if there was a change in the
10 status, or a definition of the status of the legal concerns,
11 that the Board would be able to utilize that document to
12 assist it in its findings. That is the only comment I have
13 to make at this time.

14 JUDGE LAURENSEN: That goes to the State's Motion,
15 but what about the County's Motion to compel production of
16 documents by FEMA, to postpone the cross examination, and
17 to issue subpoenas for the RAC?

18 MR. GLASS: I did not realize we were going to get
19 to that one this quickly. We seem to be dealing with a number
20 of Motions at the same time.

21 I will state again, for the record, my objection
22 to the fact that we have to comply on such short notice.

23 Basically, the County is asking for three things.
24 They are asking for additional time to depose Mr. Kowieski.
25 They are asking to acquire the thirty documents that were held

1 to be privileged, and they were asking to depose the RAC
2 members, all of which would result, according to Suffolk
3 County, or would require, according to Suffolk County, the
4 postponement of the testimony of FEMA's witnesses.

5 I must admit having read the Suffolk County's
6 Motion, I am quite concerned about the number of mis-
7 characterizations that are contained therein, and that is the
8 reason that I am hesitant to argue at this point, because I
9 think it is necessary for a full record to indicate line
10 and page citation to overcome it.

11 But considering where we are today, I will proceed.
12 They raise three points. Referring back to the Appeal Board's
13 decision. They raise the issue of whether there were
14 significant differences of opinion of the RAC members on
15 important issues affecting the adequacy of the LILCO Plan.
16 Whether the members would be unable to defend or explain
17 the underlying basis of FEMA's determination, or number three,
18 whether they relied in an inordinate degree, on the views
19 of the others.

20 None of these three tests are met.

21 It is very obvious by a reading of the transcripts,
22 and my own attendance there, and I think the other members
23 also in attendance, that they did not establish a compelling
24 need. The witnesses consistently, even though deposed
25 separately, stated clearly for the record that there was no

1 disagreement by the individual RAC members with the final
2 RAC Report.

3 Not only did they reach consensus at that
4 particular January 20th meeting, which is referenced in the
5 various Motions, but in addition, in discussions that took
6 place after the fact, all three witnesses that were asked
7 on this particular area, stated for the record that all the
8 RAC members were happy with the findings.

9 There was nobody beaten down into subjugation
10 to admit or accept a conclusion that they were not satisfied
11 with. FEMA witnesses produced information as to what they
12 relied on. They fully discuss the basis of the RAC meeting.
13 The testimony itself and the RAC attachment contains not only
14 the ratings, but the reasons therefor.

15 The RAC Report does not provide a naked review
16 of adequacy or inadequacy, but comments do give the basis for
17 the rating. The instant Motion of Suffolk County states that
18 FEMA's witnesses provided information, including the number
19 of comments received from RAC members on each NUREG 0654
20 element, prior to the meeting, with all RAC members in
21 attendance. The notes that were provided by Mr. Keller and
22 Mr. Baldwin also reveal the number of comments which were
23 disagreed, at least initially, with the final RAC findings
24 for each NUREG element to the LILCO Plan.

25 Neither Mr. Keller nor Mr. Baldwin's notes

1 reveal, however, the identities of the dissenting RAC
2 members, and that seems to be what the Suffolk County attorneys
3 are inquiring.

4 The statement that the reasons for the dissenting
5 views were not given, and I disagree with the characterization
6 of dissenting views, they were preliminary comments, is a
7 mischaracterization of the strongest type.

8 I understand by the filings provided by Long
9 Island Lighting Company, that you did receive copies of the
10 two sets of notes that were provided by Mr. Keller and Mr.
11 Baldwin.

12 Those notes were gone into in great detail by
13 Mr. Miller at the deposition. He inquired into the underlying
14 basis and the reasoning and what the notations meant.

15 In addition, FEMA provided and identified for
16 the record the preliminary comments of Mr. Keller and Mr.
17 Baldwin. The reason we did this is we understood the chilling
18 effect, but we felt that since these individuals were witnesses
19 appearing before this Board, that we would provide that
20 information.

21 We were under no obligation to create those
22 notes. They were created by the individuals, and I had not
23 seen them prior to the depositions, to assist those individuals
24 in answering the questions that may be posed by the County,
25 and they utilized those notes. Mr. Keller utilized his, and

1 we provided them to Suffolk County's attorney; Mr. Baldwin
2 utilized his, and we provided them to Suffolk County.

3 Suffolk County complains that they did not get
4 Mr. Kowieski's notes. It was not necessary for Mr. Kowieski
5 to utilize those notes at the hearing, since we provided him
6 Mr. Keller's and Mr. Baldwin's notes, and he was able to answer
7 the questions from them.

8 I repeatedly gave Suffolk County the opportunity
9 to inquire. I indicated to him that they had not laid any
10 groundwork or any basis for the production. He did not
11 sursue it. He did not inquire. He asked questions, and those
12 questions were answered by utilization of these other notes.

13 The County claims that they attempted to ascertain
14 the reasons for and the substance of the RAC members dissenting
15 opinions. They were given that information. The only thing
16 that we refused, and the witnesses were directed not to provide
17 were the identities of the individual RAC members who held
18 those preliminary reviews. It is a bold assertion that is
19 important for the County to determine which RAC members
20 dissented from the various RAC findings.

21 This issue has been discussed before the Appeal
22 Board. It is clear from the record there was no dissent from
23 the final RAC Report. There is no reason given why it is
24 necessary to know which member disagreed at any time with
25 the findings in the final RAC Report, and it is a misstatement

1 of fact, because they didn't dissent from the final RAC
2 Report.

3 The individual ratings submitted a number of weeks
4 before may not have been the same as contained in the RAC
5 Report, but they did not have the benefits of the RAC
6 meeting when those comments were submitted.

7 In addition, Mr. Miller was able to ascertain
8 from the witnesses, and he repeatedly did from all four
9 witnesses, the process that took place and was able to
10 ascertain how the final decisions were arrived at, how
11 consensus was reached.

12 They also indicate -- there is a statement
13 on page 13 of Suffolk County's Motion, that my opportunities
14 to question Mr. Kowieski and Mr. Keller and Mr. Baldwin went
15 to their involvement in the RAC. Not true. No -- there
16 was no such limitation. The information provided in the
17 notes indicated the number the oadequate and the number of
18 inadequate ratings submitted for each element in the
19 individual RAC comments, and the reasons for those comments
20 were either provided in the RAC Report and differences between
21 the collegial RAC ratings and the individual RAC comments were
22 contained in the material provided by Mr. Keller and Mr.
23 Baldwin.

24 We also have the question of the time period
25 that Suffolk County indicates that they were cut off in their

1 ability to conduct their cross examination.

2 When we originally determined how the depositions
3 would take place, it was a negotiated process. FEMA agreed
4 to allow Suffolk County to depose the individuals as
5 individuals, and not as a panel, and in exchange it was
6 agreed that the depositions would take place in New York
7 for two business working days.

8 Later on it was determined that we would prefer
9 to have Mr. Baldwin go first, and Suffolk County indicated
10 they would appreciate having some additional time, because
11 they felt they needed more time with Mr. Kowieski. The
12 original agreement, as I remember it, was that we had
13 agreed until six o'clock. There was no attempt to try to
14 cut off, but there has to be some sort of reasonable agreement,
15 especially when you had mutual consent on the original
16 agreement.

17 On the first day of depositions, there had been
18 no agreement as to an extension of time, and FEMA voluntarily
19 kept the witness there an additional hour. A review of the
20 transcript will indicate that no more than ten or fifteen
21 pages were taken up by any other parties in their cross
22 examination, during the deposition of Mr. Kowieski. The
23 original agreement dealt with two business days, and included
24 time for all the other parties. So, there certainly was no
25 inordinate amount taken at that time.

1 In addition, what raises some questions as to
2 whether Suffolk County was under the impression that there
3 was additional time needed or agreed to, was the fact that
4 none of the other parties were aware of any additional time,
5 nor was the court reporter, who had to reschedule his flight,
6 aware of such changes.

7 In addition, we went, instead of six o'clock,
8 we went until seven twenty-two, and it is only because the
9 Suffolk County elected to spend so much time with Mr. Baldwin,
10 which was supposed to be a short deposition, that we did not
11 start until a little bit before four o'clock. In either case,
12 the County had almost three and a half hours to depose Mr.
13 Kowieski.

14 We tried to again rearrange Mr. Kowieski's time,
15 and we offered the County an additional ten to fifteen
16 minutes, and they indicated they could not complete it in that
17 time, and they refused that offer.

18 There has been no showing in the filing by
19 Suffolk County that; a, there is need to have additional time
20 by Mr. Kowieski; that, b, that they have a need for the
21 thirty documents, or a right or need to depose the RAC
22 members. This Board has addressed before the issue of
23 the identification by FEMA of who its witnesses shall be,
24 and who shall be deposed.

25 If it would assist the Board, at least on

1 Mr. Kowieski's deposition transcript, I can give you line and
2 page, for where Mr. Kowieski discussed the basis of his
3 testimony, discussed the personal notes and the reason we
4 withheld them, and the fact that no foundation was laid for
5 Mr. Kowieski's notes. That it was not pursued. That the
6 process was explained. That there was no disagreement by
7 the members of the RAC and that they reached consensus, that
8 -- about the assumptions utilized by the RAC. About the
9 format of the final RAC Report. His involvement. His
10 comments. The RAC meeting. The fact that Mr. Kowieski states
11 on page 86, lines 3 through 7, that I can recall the
12 substance, the substance of the discussion when it was inquired
13 if he could provide information as to the RAC meetings, the
14 changes that took place to reflect the RAC concerns, and the
15 handling of the differences in ratings.

16 For all the above reasons, I respectfully submit
17 that the Motion of Suffolk County should be denied.

18 JUDGE LAURENSEN: All right. We will take a
19 brief recess and consider both of these Motions, and we will
20 be back with our decision.

21 MR. McMURRAY: Excuse me, Judge Laurenson, the
22 County has been accused of mischaracterizing the record, and
23 I think the County ought to have an opportunity to respond
24 to the comments made by Mr. Glass.

25 MR. BORDENICK: Judge Laurenson, I would also

1 like an opportunity to make a brief statement.

2 JUDGE LAURENSEN: Let me ask Mr. Bordenick first.

3 Is your position different from FEMA's on this matter?

4 MR. BORDENICK: No. Fully supportive. If you
5 want to take that as the comment or the statement, that is
6 fine.

7 (Laughter)

8 JUDGE LAURENSEN: I was just trying to find the
9 appropriate place for this, because we have treated FEMA and
10 the NRC Staff as sort of one, and we might get some complaints
11 that we are doubling up if we allow both of you to argue on
12 a particular side of a question if your views are the same.

13 MR. BORDENICK: They are the same, and actually
14 I would only be elaborating on several points that Mr. Glass
15 made. I don't have anything significantly different to add.

16 JUDGE LAURENSEN: Let me ask if there is any
17 objection to the Staff stating its position?

18 MR. McMURRAY: There is no objection.

19 JUDGE LAURENSEN: Please proceed.

20 MR. BORDENICK: Actually, I also first wanted
21 to briefly address Mr. Zahnleuter's Motion, just in summary,
22 and state that if it is in the nature of a Motion for
23 Reconsideration of the Board's previous ruling, then it is,
24 of course, substantially late. And in any event, I agree
25 with Mr. Irwin's comment that there is nothing essentially

1 different between the situation that obtains at present and
2 the situation as it obtains at the time that the Board first
3 denied the County and State's Motions.

4 It seems strange to me that the State has sat
5 in here for five or six, or whatever number of months it is,
6 and then has renewed this type of Motion at this late stage.

7 On the question of the County's Motion to compel
8 production of documents by FEMA and postpone the cross
9 examination of FEMA's witnesses and for issuance of
10 subpoenas to the members of the RAC, I simply wanted to
11 indicate first of all that the Staff has set out its legal
12 position in this matter.

13 This Board does have the guidance set forth by
14 the Appeal Board in ALAB 773. What we are now involved with,
15 or what the Board is faced with, is essentially a factual
16 situation.

17 We fully support the analysis and the argument
18 that Mr. Glass has just given the Board. We find it
19 somewhat strange that the County chose to only attach selective
20 portions of the transcript to their Motion. I think if the
21 Board hasn't read the transcripts in toto, it should.

22 On the time situation, there is no question that
23 the time was tight, vis-a-vis the County completing the
24 depositions of the four FEMA witnesses, and that was due
25 to circumstances beyond their control, as well as anyone else's
control.

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1 However, there were certain agreements reached
2 between the County and FEMA. The County used its time as
3 it sees fit. It agreed to two days. If it decided to spend
4 substantially all of Friday with Mr. Baldwin and leave very
5 little time for Mr. Kowieski, that's their choice, and that
6 is a decision they will have to live with.

7 In summary, the Staff fully agrees with FEMA
8 that the County's motion should be denied in all respects.

9 JUDGE LAURENSEN: We will get to Mr. McMurray's
10 request in just a moment.

11 (The Board is conferring.)

12 We have considered the County's request to re-
13 spond, but we decided that we will not allow a response
14 here. So, at this time we will consider the positions of
15 the parties and we will be back with a ruling on these two
16 motions.

17 (Short recess.)

18 JUDGE LAURENSEN: The thrust of the County's
19 motion is that the County believes that it has established
20 the necessary facts to be entitled to an Order that FEMA
21 should be required to turn over the thirty predecisional
22 documents which the Appeal Board held were privileged and
23 not discoverable.

24 The County reviews the history of this dispute
25 and then cites and attaches portions of the depositions of

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1 the four FEMA witnesses taken June 27th and June 29th.
2 During those depositions, FEMA voluntarily produced some
3 notes prepared by witnesses Keller and Baldwin prior to
4 their depositions. These notes reflect the number of com-
5 ments which disagreed at least initially with the final
6 RAC findings for each NUREG 0654 element of the LILCO plan.

7 However, the County complains that these notes
8 do not identify the dissenting RAC members or the reasons
9 for their dissenting views. The County believes that it is
10 important for it to determine which RAC members dissented
11 from various RAC findings. This is a complete about-face
12 from the County's position before the Appeal Board where at
13 Page 17 of the Appeal Board decision, ALAB 773, it is
14 stated, "Counsel for the County disavows any particular
15 interest in the names of individuals putting forth specific
16 views. She seeks only the basis of the RAC conclusions."

17 Moreover, the County does not attempt to explain
18 why it has now become important to have this information.
19 While the County speaks in terms of its right to probe the
20 basis of the RAC review, the County has failed to show that
21 it has established the compelling need for these documents
22 which the Appeal Board found absent last month.

23 We agree with LILCO that the County has failed
24 to meet any of the preconditions to further discovery set
25 by the Appeal Board. At this time, Suffolk County has not

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1 established "significant differences of opinion among
2 members of the RAC on important issues effecting the
3 adequacy of LILCO's plan."

4 Moreover, the County has not established that
5 these FEMA witnesses are unable to defend and explain
6 adequately the FEMA findings or that the witnesses view
7 were inordinately derivative of other views. Unless the
8 County makes such a showing, the executive privilege pre-
9 cludes probing the individual views of individual RAC
10 members.

11 While we prefer to dispose of this motion on
12 the merits so that all parties will understand the test
13 we will apply to the cross-examination of the FEMA witnesses,
14 we also deny this motion for the reason cited by LILCO
15 that it is inexcusably late. Although these depositions
16 were taken a week earlier and presumably the County knew
17 it would have to file the instant motion, it waited a full
18 week after completion of the last deposition before filing
19 this motion. That left only one business day to consider
20 this request before the hearing was to resume.

21 We find that under these circumstances the un-
22 timeliness of the motion would be a sufficient cause to deny
23 it.

24 In conclusion, all three requests of the County
25 are denied at this time. We will carefully monitor the

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1 FEMA testimony during the course of this hearing to deter-
2 mine whether a different result should obtain.

3 MR. MCMURRAY: Judge Laurenson, I think in
4 light of the fact that the Board has focused on a quote
5 taken from the Appeal Board decision, and the County's view
6 at this time that that quote was taken out of context, I
7 think it would be appropriate for the County to be given an
8 opportunity to respond both to Mr. Glass' statements, LILCO's
9 response to the County's motion, and to the Board's ruling
10 and ask for reconsideration.

11 JUDGE LAURENSEN: Well, let's move on first of
12 all, and then we will take up your motion for reconsidera-
13 tion.

14 New York presented an oral motion here to stay
15 the cross-examination of the FEMA witnesses. That motion
16 is untimely and could be denied for that reason alone. How-
17 ever, we further note that New York cites no legal authority
18 or precedent to support its assertion that the mere pendency
19 of legal issues in the State courts precludes going forward
20 with FEMA testimony. We know of no such precedent.

21 Good case management requires that we deny the
22 New York motion and proceed with the testimony.

23 Now, getting back to the County's motion for
24 reconsideration, I think the point of our comment about the
25 statement made by your counsel, your co-counsel, before the

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1 Appeal Board was that it was different than the position
2 you are taking here, and that in any event the County has
3 given no reasons to explain why it now believes that it was
4 important to receive the individual views of the RAC members.
5 And that's the basis on which we ruled, not on the basis of
6 any quote from your counsel at the Appeal Board hearing.

7 MR. MC MURRAY: Well, the point I wish to make,
8 Judge Laurenson, is that the position of the County before
9 the Appeal Board is perfectly consistent with its position
10 now. What Ms. Letsche was saying in that quote that you
11 lifted from the Appeal Board opinion was based on a request
12 for FEMA documents. What Ms. Letsche was saying at that
13 time was that we were not asking for the identification of
14 the individual RAC members at that time, because we didn't
15 know whether there was unanimity or lack of unanimity; and,
16 therefore, it was not considered important at that time to
17 determine what their individual opinions were, if in fact
18 there was unanimity.

19 But, as everybody recognized, the Appeal Board
20 and all parties present, was that if there was a significant
21 lack of unanimity then the identities of the individual RAC
22 members and their individual opinions would, of course, be
23 relevant. And that is why we are now asking for the
24 identity of the individual FEMA members and their opinions,
25 because as it turns out at the depositions it was revealed

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1 that before the January 20th meeting there was substantial
2 lack of unanimity. And then out of this meeting came some
3 sort of consensus. And we were not able to determine how
4 this consensus was arrived at.

5 That's the thrust of the County's motion.

6 JUDGE LAURENSEN: The thrust of our decision was
7 that you have not established significant differences of
8 opinion among members of the RAC on important issues affecting
9 the adequacy of LILCO's plan. And so there is nothing in
10 that argument that you made that affects our decision here.

11 MR. MC MURRAY: We were barred from doing so,
12 Judge Laurenson. That's our entire point.

13 If you look at the Baldwin and the Keller notes,
14 it shows that people went into that RAC meeting with sub-
15 stantial differences of opinion. If you look at LILCO's
16 motion, I think they attached the relevant notes, and it
17 shows that for many, many of the issues there was a lack of
18 unanimity. And then apparently out of this all came some
19 sort of consensus. And we were barred from finding out
20 how this lack of unanimity somehow became a consensus,
21 whether people were -- whether they took a vote, or whether
22 or not expert opinions were overridden by certain members of
23 the RAC Committee, those types of questions.

24 We were not able to find that out. So we don't
25 know whether or not in the end there was a substantial

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1 disagreement.

2 JUDGE LAURENSEN: The County's motion for re-
3 consideration is denied.

4 We turn next to the LILCO motion to admit LILCO's
5 supplemental testimony on Contention 24.R, the letter of
6 agreement with Connecticut. On June 20, 1984 LILCO filed a
7 motion to admit supplemental testimony on Contention 24.R,
8 along with the supplemental testimony of Dr. Cordaro and
9 William F. Renz. And a letter dated May 22, 1984 from Mr.
10 Renz to Frank Mancuso, Director of the Connecticut Office of
11 Civil Preparedness, and the response from Mr. Mancuso to
12 Mr. Renz, dated June 1, 1984.

13 New York and Suffolk County oppose the motion
14 to admit the supplemental testimony and attachments, whereas
15 the NRC Staff supports LILCO's motion.

16 In LILCO's prefiled written direct testimony in
17 chief on Contention 24.R, which was filed March 2, 1984,
18 LILCO attached and relied upon a letter dated December 15,
19 1983 from Frank Mancuso, Director of the Office of Civil
20 Preparedness for Connecticut, to Donald A. Devito, Director
21 of the Office of Disaster Preparedness for New York, to
22 establish that Connecticut had agreed to assume responsibility
23 for implementing protective actions for the portion of the
24 Shoreham fifty mile ingestion exposure pathway within
25 Connecticut.

LILCO, August 10, 1984

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO'S MEMORANDUM ON THE APPROPRIATENESS OF DIRECTED CERTIFICATION OF THE LATEST FEMA DISCOVERY DISPUTE were served this date upon the following by first-class mail, postage prepaid, or by hand (one asterisk), or by Federal Express (two asterisks).

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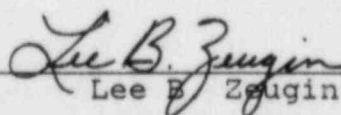
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