UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD



Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles
Howard A. Wilber

August 15, 1984
(ALAB-780)



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

Lawrence Coe Lanpher, Karla J. Letsche, Michael S. Miller, and Christopher M. McMurray, Washington, D.C., and Martin Bradley Ashare, Hauppauge, New York, for the intervenor, Suffolk County, New York.

Richard J. Zahnleuter, Albany, New York, for the intervenor, State of New York.

Donald P. Irwin and Lee B. Zeugin, Richmond, Virginia, for the applicant, Long Island Lighting Company.

Stewart M. Glass, New York, New York, for the Federal Emergency Management Agency.

Bernard M. Bordenick for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

On July 26, 1984, intervenor Suffolk County filed a notice of appeal (together with a supporting brief) from a July 10, 1984 oral order of the Licensing Board in the emergency planning phase of this operating license proceeding. That order denied the County's motion seeking, inter alia, to compel the Federal Emergency Management Agency (FEMA) to produce certain documents.



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In an unpublished July 27 order, we directed the County to show cause why the appeal should not be summarily dismissed in light of the general prohibition in 10 CFR 2.730(f) against interlocutory appeals.[1] By way of response, the County conceded that the Licensing Board's oral order was interlocutory in character but nonetheless maintained that we should review it in the exercise of our discretion.[2] In this circumstance, we elected to treat the appeal as, in effect, a motion for directed certification of the oral order[3] and, accordingly, called for the views of the other parties to the controversy respecting whether the criteria for granting such relief were met.[4]

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[1] The single exception to that prohibition is found in 10 CFR 2.714a, which allows an appeal from certain orders entered on petitions for leave to intervene in an adjudicatory proceeding.

[2] Memorandum to Show Cause Why Suffolk County's July 26 Appeal Should Not be Dismissed (August 1, 1984) at 2-8.

[3] See 10 CFR 2.718(i); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482-83 (1975).

[4] August 2, 1984 order (unpublished). In memoranda filed on August 10, 1984, (1) the State of New York supported Suffolk County; and (2) FEMA, the applicant Long Island Lighting Company and the NRC staff each took the position that interlocutory appellate review of the Licensing Board discovery order was not warranted.

For the reasons that follow, we dismiss the appeal and deny directed certification.[5]

A. In our Zion decision more than a decade ago, we took note of the distinction, insofar as appealability is concerned, between an order "granting discovery against a non-party to the proceeding" and an order that "denies discovery by quashing a subpoena addressed to the non-party."[6] The former, we observed, "has all of the attributes of finality insofar as that non-party is concerned" and, thus, is appealable as a matter of right.[7] On the other hand, an order denying discovery "is wholly interlocutory in character" and, accordingly, is not so appealable given the provisions of 10 CFR 2.730(f).[8]

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[5] Our unpublished August 2 order did not either (1) specifically dismiss the appeal; or (2) detail the basis for our conclusion that the appeal would not lie and thus the County's papers should be treated as seeking discretionary appellate review. We therefore deal with these matters in this opinion.

[6] Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258, 258 (1973) (emphasis in original).

[7] Ibid. As noted in Zion (at n.3), that consideration was at the root of our acceptance of an appeal from a Licensing Board order directing non-parties to comply with subpoenas issued at the behest of one of the parties to an antitrust proceeding. See Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-122, 6 AEC 322 (1973).

[8] Zion, supra, 6 AEC at 258.

Precisely the same distinction is drawn in federal judicial practice.[9] And it explains why, in ALAB-773,[10] we recently entertained the appeal of FEMA from a Licensing Board order directing it to produce documents sought by the County. Because FEMA is a non-party in this proceeding, that production order had "all of the attributes of finality." In contrast, the Licensing Board order now challenged by the County -- denying a discovery request directed to FEMA -- has none of the attributes of finality but, rather, "is wholly interlocutory in character."[11]

B. A Licensing Board ruling normally will qualify for discretionary interlocutory review only if it "either (1) threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a

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[9] Compare EEOC v. Neches Butane Products Co., 704 F.2d 144, 148 (5th Cir. 1983) (discovery orders generally not appealable apart from a final decision in the case) with Branch v. Phillips Petroleum Co., 638 F.2d 873 (5th Cir. 1981) (non-party government entity claiming privilege may appeal immediately from an order granting discovery against it).

[10] 19 NRC ___ (June 13, 1984).

[11] In these circumstances, we need not decide whether, had the July 10 oral ruling been an appealable order, the appeal nonetheless would have been subject to dismissal as untimely. Inasmuch as the notice of appeal was not filed until July 26, the answer to this question would have hinged in turn upon whether the ten-day appeal period prescribed in 10 CFR 2.762(a) was applicable and, if not, what other provision of the Rules of Practice might be taken as setting a time limit.

practical matter, could not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner."[12] We have observed that "discovery rulings rarely meet those tests."[13] Indeed, insofar as our research has disclosed, no prior endeavor to obtain directed certification of the denial of a discovery request has been successful.

We see no reason to reach a different result here. Plainly, should it turn out that the discovery ruling in question contributes materially to an unfavorable outcome on the emergency planning issues, Suffolk County will be free to mount its challenge to the ruling on an appeal from that outcome. Equally plainly, there is no room for a serious claim that the ruling has affected the basic structure of the proceeding at all -- let alone in a pervasive or unusual manner. To the contrary, the situation at bar cannot be differentiated from that in any other case in which a party endeavored unsuccessfully to acquire certain information to

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[12] Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

[13] Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 99 (1981). See also Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-608, 12 NRC 168, 170 (1980) ("As a general matter, discovery rulings of licensing boards are not promising candidates for the exercise of our discretionary authority to review interlocutory orders.").

assist its preparation for trial. Even if the party might have been entitled to obtain the sought information by way of discovery, it scarcely follows that the proceeding was significantly altered in structure simply because the request was not enforced by the trial tribunal.

We need add only that the County's cause is not advanced by its reliance[14] on the following direction in the Commission's 1981 Statement of Policy on Conduct of Licensing Proceedings:

> If a significant legal or policy question is presented on which Commission guidance is needed, a board should promptly refer or certify the matter to the Atomic Safety and Licensing Appeal Board or the Commission.[15]

We have previously determined that "the Policy Statement does not, either explicitly or by necessary implication, call for a marked relaxation of the [existing interlocutory review] 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."[16] In this instance, the Licensing Board apparently did not regard its July 10 oral

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[14] Suffolk County's August 1 Memorandum, note 2 supra, at 2.

[15] CLI-81-8, 13 NRC 452, 456.

[16] Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 (1983).

order as involving questions of that stripe. Nor do we. The legal issue at the root of this controversy was considered and decided in ALAB-773, supra. All that is currently in question is whether the Licensing Board correctly applied the standard established in that decision to the particular factual situation before it. That hardly is the kind of inquiry that the Commission's Policy Statement had in mind.

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Appeal dismissed; directed certification denied.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board