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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

SUFFOLK COUNTY AND STATE OF NEW YORK
MOTION FOR RECONSIDERATION OF BOARD'S
FEBRUARY 5 ORDER PROHIBITING DISCOVERY
ON LILCO'S PROPOSED USE OF THE NASSAU COLISEUM

I. Introduction

A significant legal issue has been created by this Board's February 5 ruling barring all discovery on LILCO's proposal to use the Nassau Coliseum as a relocation center in the event of an emergency at Shoreham. That issue is: did this Board violate the Commission's Rules of Practice and deprive Suffolk County and the State of New York their due process rights by agreeing at LILCO's request to reopen the record to consider LILCO's factual proffer designed to fill the "void" which exists on relocation center issues, but denying the County and State any discovery designed to probe the bases for LILCO's factual proffer?

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The County and State submit that the Board's ruling was clearly in error. By this Motion, we ask the Board to reconsider and correct its ruling or, in the alternative, to certify the matter to the Appeal Board so that prompt correction can be made. Set forth below are the bases for this Motion.

II. Background

On January 28, 1985, the Board reopened the record for the purpose of "assessing the adequacy of LILCO's proffered evidence concerning the Nassau Veterans Memorial Coliseum as a relocation center to be used in the event of an emergency at Shoreham."[1/] The Board made clear, however, that before ruling on LILCO's proffered evidence, it would consider the positions of the other parties, including any testimony or other evidence addressing LILCO's proposed use of the Nassau Coliseum. Such testimony or other evidence, together with some indication of what would be the substance of any cross-examination of LILCO's witness, are required to be filed by February 18. Thereafter, the Board will decide whether "to admit in the record any or all of the evidence proffered or to schedule a further oral hearing." Order, at 9-10.

1/ Memorandum and Order Granting LILCO's Motion to Reopen Record (hereinafter, "Order"), at 9.

In order to comply with the Board's February 18 schedule, Suffolk County and New York State promptly pursued limited informal discovery concerning LILCO's proposed use of the Nassau Coliseum with LILCO, the NRC Staff and FEMA. In addition, the County and State noticed the deposition of LILCO's witness on the Nassau Coliseum relocation center issues, and informed the Staff and FEMA that they wished to depose any witness submitting testimony or other evidence on their behalf. While neither the Staff nor FEMA indicated any opposition to the discovery sought by the County and State, LILCO opposed the discovery and petitioned the Board for a protective order.[2/] Over the objection of the County and State,[3/] the Board, during a transcribed telephone conference on February 5, 1985, granted LILCO's motion for a protective order, ruling that LILCO "need not respond to Intervenors' discovery requests made in response to the Board's reopening . . . ." Tr. 15,804. Thus, the County and State were barred from any discovery on the Nassau Coliseum relocation center issues.

The Board has been advised that, in the County's view, the Board committed clear error in precluding any discovery on the

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2/ LILCO's Opposition to Suffolk County Discovery Requests Concerning Use of Nassau Coliseum as a Reception Center, Motion for Protective Order and Request for Expedited Board Ruling, dated February 1, 1985 (hereinafter, "Opposition").

3/ Suffolk County and New York State Response to LILCO's Opposition to Nassau Coliseum Discovery Requests, dated February 4, 1985.

issues raised by LILCO's reopening of the evidentiary record. Tr. 15,806.[4/] Accordingly, the County and State request that the Board reconsider its February 5 ruling and establish a schedule under which discovery can go forward. In the alternative, the Board is requested to certify this issue to the Appeal Board.

III. Argument

In requesting certification, the County and State realize that the Commission's Rules of Practice contain a general prohibition against interlocutory appeals. 10 CFR § 2.730(f); see, e.g., Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258 (1973). Nevertheless, there are exceptions to this prohibition. See, e.g., 10 CFR § 2.718(i).[5/] For example, discretionary interlocutory review is permitted when failure to resolve an issue promptly would cause "detriment to the public interest or unusual delay or expense." See 10 CFR § 2.730(f). See also Public Service Co. of Indiana (Marble Hill),

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4/ New York State agrees with the County that the Board's February 5 ruling is clear error. This view was not expressed to the Board during the February 5 telephone conference only because the attorney for the State was not included in the conference call, apparently due to logistical problems with the telephone company.

5/ The Commission's Rules of Practice appear to contemplate "certification" under 10 CFR § 2.718(i) where a board does not first decide the disputed question, and "referral" under 10 CFR § 2.730(f) where the board first rules and then requests interlocutory review. The distinction, however, appears to be unimportant. See Southern California Edison Company (San Onofre), LBP-81-36, 14 NRC 691, 699, n.7 (1981).

ALAB-405, 5 NRC 1190, 1192 (1977), and cases cited therein. In addition, interlocutory appeals are encouraged "if a significant legal or policy question is presented." Statement of Policy on Conduct of Licensing Proceedings, 46 Fed. Reg. 28533, 28535. Interlocutory review may also be appropriate where the ruling in question affects "the basic structure of the proceeding in a pervasive and unusual manner," Houston Lighting and Power Co. (Allens Creek Station), ALAB-635, 13 NRC 309, 310 (1981), or "threatens the party adversely affected by it with immediate and serious irreparable impact" which, as a practical matter, cannot be alleviated by a later appeal. Houston Lighting and Power Co. (South Texas Project), ALAB-608, 12 NRC 168, 170 (1980).

The issues involved here meet all of the above standards, any one of which is sufficient to justify appellate review of interlocutory rulings. For example, the public interest would be served by prompt resolution of the discovery issues now before the Board. The need for information concerning LILCO's proposed use of the Nassau Coliseum is substantial and compelling. The documents sought underlie and form the basis for LILCO's proposal. Without access to such documents, the County and State will be unable to conduct full and complete cross-examination of LILCO's witness, or any witnesses who may testify on behalf of the NRC Staff or FEMA, to probe, challenge, or impeach the conclusions rendered by such witnesses, or otherwise to present on the record all the relevant facts pertaining to LILCO's proposed use of the

Nassau Coliseum. To deny the County and State an opportunity to conduct discovery, as the Board has done, therefore constitutes a violation of the County and State's rights under NRC regulations (see, e.g., 10 CFR §§ 2.740 and 2.743(a)) and, in effect, affords special preferential treatment to LILCO by shielding its witness from any meaningful inquiry or challenge.6/

The discovery here sought involves LILCO's proposed use of the Nassau Coliseum as a monitoring and decontamination facility in the event of a radiological emergency at Shoreham. Clearly, the public interest would be served by permitting meaningful inquiry to be made of the witness chosen by LILCO to submit evidence regarding the adequacy of LILCO's proposal. Both the Board and the parties must be able to probe such evidence and assess its accuracy. This, however, is not possible without providing the County and State an opportunity to discover relevant documents and depose LILCO's witness on the Nassau Coliseum issues.

The Board's decision to preclude discovery is not only contrary to the public interest, it raises significant legal and policy questions. The Board, when asked to clarify its ruling, made clear that the County and State are expected to

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6/ The fundamental unfairness of the Board's ruling cannot be masked by the Board's implied assertion that there is no need for discovery, since LILCO's proposal is "not new nor complex" given the fact that LILCO first announced its designation of the Nassau Coliseum as a relocation center in October 1984. See Tr. 15,803. During a January 4, 1985 Conference of Counsel, the Board (then chaired by Judge Laurenson) specifically noted

(Footnote continued on next page)

proffer evidence "without the opportunity for any discovery" on the Nassau Coliseum relocation center issues -- issues raised by LILCO after the evidentiary record had closed. See Tr. 15,805-06. By not permitting discovery, the Board is sanctioning LILCO's inexplicable and groundless claim that the public is not entitled to know about, or inquire into, the bases for its proposal to use the Nassau Coliseum as a facility to monitor and, if necessary, decontaminate evacuees from the Shoreham EPZ. Such a ruling defies logic as well as law.

The Board's ruling also affects the basic structure of this proceeding in a pervasive and unusual manner. By granting LILCO's motion to reopen, yet barring the County and State from discovery, the Board has effectively prohibited the County and State from ascertaining the facts underlying LILCO's proposed use of the Nassau Coliseum. Accordingly, any decision rendered by the Board, assuming it decides to admit LILCO's proffered evidence, will be based upon an incomplete factual record, since there are no means other than through the discovery here requested for the

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that, notwithstanding LILCO's October 30, 1984 letter informing the Board and parties of the Nassau Coliseum proposal, "the void in [the] record remains" since "the identification of the Nassau Coliseum as a relocation center is not merely a confirmatory item." Tr. 15,739-40. Thus, LILCO's October 30 letter was simply an extra-record communication, outside the evidentiary record, and therefore entitled to no substantive weight or consideration. It was not until the Board on January 28, over the objection of the County and State, agreed at LILCO's request to reopen the record that it became necessary to pursue discovery on the Nassau County relocation center issues.

County and State to obtain information about the Nassau Coliseum and its proposed use by LILCO.7/

The Board should therefore reconsider its February 5 ruling and prevent the immediate and serious irreparable impact to the County and State's case which has resulted from the decision to preclude discovery, thereby awarding preferential treatment to LILCO. In circumstances such as are present here, where discovery can be permitted and completed without impacting the Board's February 18 schedule, it makes no sense to await an initial decision to remedy this harm. Moreover, in the view of the County and State, there is a substantial likelihood that the Board's decision would ultimately be determined on appeal to be incorrect, and substantial delay and expense will have been unnecessarily incurred. Therefore, the Board should reconsider and reverse its

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7/ It is worth noting that the County and State have attempted to obtain information about the Nassau Coliseum and LILCO's proposal to use that facility as a relocation center from the Hyatt Management Corporation of New York, Inc., the company which leases and manages the Coliseum. Such information was informally requested on behalf of the County and State when counsel for the County telephoned the General Manager of the Coliseum to request information relating to the ordinary business use of the Coliseum and its availability for use by LILCO or as a relocation center, a copy of the agreement or contract form generally used by Hyatt Management Corporation in permitting the use of the Coliseum, and any documents relating to the physical layout of and facilities available in the Coliseum. Counsel for the County was informed during this telephone call that there is no reason for Hyatt Management Corporation or the Coliseum to provide any information to the County or State.

February 5 ruling, or in the alternative, immediately certify its ruling to the Appeal Board.[8/]

8/ In order to expedite consideration of the relief requested by the County and State, copies of this Motion have been filed with the Appeal Board. For purposes of background, the Appeal Board has also been provided copies of the following: LILCO's October 30, 1984 letter regarding the Nassau Coliseum proposal; Objection of Suffolk County and New York State, dated November 7, 1984; Board Order Scheduling Conference of Counsel, dated December 13, 1984; pertinent transcript pages from Conference of Counsel on January 4, 1985; LILCO's proffered evidence accompanying its January 11, 1985 Motion to Reopen Record; Board Memorandum and Order Granting LILCO's Motion to Reopen Record, dated January 28, 1985; Informal discovery requests from Suffolk County and New York State to LILCO, the NRC Staff and FEMA, dated January 31, 1985; LILCO's Opposition to Discovery Requests, dated February 1, 1985; Suffolk County and New York State Response to LILCO's Opposition to Nassau Coliseum Discovery Requests, dated February 4, 1985; and transcript of telephone conference and Board's ruling on discovery requests, dated February 5, 1985.

Respectfully submitted,

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Dated: February 7, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

Certificate of Service

I hereby certify that copies of Suffolk County and State of New York Motion for Reconsideration of Board's February 5 Order Prohibiting Discovery on LILCO's Proposed Use of the Nassau Coliseum have been served to the following this 7th day of February, 1985 by U.S. mail, first class, except as otherwise noted.

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Dated: February 7, 1985