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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Morton B. Margulies, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

In the Matter of	Docket No. 50-322-OL-3
LONG ISLAND LIGHTING COMPANY	(Emergency Planning Proceeding)
(Shoreham Nuclear Power Station, Unit 1)	February 12, 1985

MEMORANDUM AND ORDER
(Ruling On Motion For Reconsideration Of
Board's February 5, 1985, Protective Order)

I. Introduction

On February 8, 1985 this Board received a joint motion from the County and State requesting the Board reconsider its protective order of February 5, 1985. The motion further requested that if relief were not forthcoming, the matter be certified to the Appeal Board. The February 5, 1985 order granted LILCO's February 1, 1985 motion for a protective order and authorized Applicant not to respond to the Intervenors' discovery requests made following the Board's reopening of the record on January 25, 1985.

Timely answers in response to the motion were received today from LILCO and Staff. They both request that Intervenors' motion be denied.

II. Development Of The Issues

To place the matter in prospective, it is necessary to point out that the evidentiary record in this proceeding was closed on August 29, 1984, after the litigation of some 70 contentions in a record containing in excess of 15,000 numbered transcript pages and 7,000 pages of prefiled testimony and other documents.

At a conference of counsel on January 4, 1985 the Board ruled that LILCO's failure to identify a relocation center constituted a void in the record, and identifying the Nassau Veterans Memorial Coliseum (Coliseum) as a relocation center was not merely a confirmatory item. Pursuant to a January 11, 1985 motion by LILCO, opposed by Intervenors, the Board reopened the record for the limited purpose of assessing the adequacy of LILCO's proferred evidence concerning the Coliseum as a relocation center to be used in the event of an emergency at Shoreham.

The documents LILCO seeks to have admitted into evidence, which were submitted on January 11, 1985, consist of an affidavit of a person purporting to have participated in negotiating the arrangement for the Coliseum; with 6 attachments stated to be: a letter of agreement between LILCO and the General Manager of the Coliseum; a letter from the Nassau County Executive to the General Manager of the Coliseum approving use of the Coliseum as a reception center: a letter of agreement between LILCO and the American Red Cross providing for use of the Coliseum as a reception center; a map showing the location of the Coliseum; a diagram of the Coliseum; and a letter from the Nassau County Executive to the Chairman of the Long Island Lighting Company.

Before ruling on the proferred evidence the Board asked of the parties the following:

1) Do the parties question the authenticity of LILCO's documents? If so, set forth with particularity the reasons for such a challenge and the evidence such party intends to offer to challenge the authenticity of the documents.

2) If a party asserts a need to cross-examine LILCO's witness on the substance of the designation of the Nassau Veterans Memorial Coliseum as a relocation Center, such party shall state the questions to be asked and the substance of what is expected to be proved by such interrogation.

3) If a party asserts a need to submit direct testimony or other evidence on the merits of LILCO's designation of the Coliseum as a relocation center, such party shall submit copies of all such documents and narrative testimony or an affidavit of any witness whose testimony is said to be necessary.

Upon considering the written submissions it was ordered the Board would review the proferred evidence and material and thereupon elect to admit in the record any or all of the evidence or to schedule a further oral hearing. The January 25, 1985 order reopening the proceeding set February filing dates for submitting the specified information and for a reply.

The County and State immediately moved for discovery from LILCO, Staff, and FEMA. This resulted in LILCO's February 1, 1985 motion for a protective order for itself, which was granted by the Board during a telephone conference call on February 5, 1985.

The Board ruled that the subject matter did not require discovery, it neither being new nor complex. The fact that the Coliseum was the

designated center was announced in October, 1984. The details of LILCO's evidence had been made known previously to the County and State, with the proferring of the affidavit and attached statements. There will be no suprises as to Applicant's offering. The area involved is very limited. The general matter of relocation centers for Shoreham was extensively litigated during the hearings.

A special expedited procedure was invoked setting forth in very specific terms the steps the parties are to follow. It did not call for discovery, for none is required. We are not to hold a full-blown adjudicatory hearing with all of the attendant trappings on the narrow issue to be developed. An abridged procedure is to be followed with prompt responses made on the basis of information parties have available to them. No more is required to reasonably develop the record on this limited issue.

III. The Subject Motion

The thrust of the subject motion, which calls for reconsideration, and in the alternative, certification of the issue to the Appeal Board, is to reargue the merits of the motion for a protective order. Intervenors argue that without discovery they will be unable to conduct adequate cross-examination or to make an adequate record of the facts pertaining to LILCO's proposed use the Coliseum. They argue that denial of discovery constitutes a violation of the County's and State's rights under NRC regulations. Movants assert the Board is sanctioning LILCO's claim that the public is not entitled to know about, or inquire into, the bases for its proposal to use the Coliseum.

In their claim for reconsideration the County and the State present nothing by way of fact or law that would require a result different from the one we reached on February 5, 1985.

A party has no absolute right to discovery as the Intervenors indicate. In fact, at this late stage of the proceeding the regulations provide no discovery shall be had "except upon leave of the presiding officer upon good cause shown." 10 CFR 2.740(b)(1). Good cause has not been established. Discovery was not shown to be warranted under the facts of the matter involved, as previously discussed.

Absent a finding for Intervenors on the request for reconsideration, they request in the alternative that the issue be certified to the Appeal Board. With one exception, the Intervenors correctly cite the Commission's regulatory requirements for bringing an interlocutory appeal. They recognize that the Rules contain a general prohibition against taking interlocutory appeals. 10 CFR 2.740(f). They cite those instances where interlocutory appeals have been permitted. They include: (a) "When in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense ..." Id.; (b) [W]hen a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission or the Appeal Board and when the prompt and final decision of the question is important for the protection of the public interest or to avoid undue delay or serious prejudice to the interests of a party." 10 CFR Part 2, App. A,

V.(f)(4).;[1] (c) 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); and "If it 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).

Interlocutory appeals do not have as their purpose the supervision of the presiding officer in the day-to-day judgments that are made in ruling on the issues of an ongoing proceeding. Even where a ruling is incorrect it does not ipso facto satisfy the requirements for proceeding with an interlocutory appeal. In this motion Intervenors simply reargue the merits of the motion for a protective order rather than adequately addressing the stringent requirements for an interlocutory appeal. Central to satisfying these requirements is a showing that Intervenors would suffer a substantial harm to their interests, which could not be alleviated by an appeal at the conclusion of the proceeding. This they have failed to do. There is nothing in the Board's ruling on the discovery issue that cannot be rectified on appeal, if found to be erroneous. The subject ruling involves but a very minor part of the

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1 Rather than the current standard, Intervenors set forth, "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."

record and in the event corrective action were needed it would not be of any significant cost to the public or parties to remedy it through the normal appeal process. Movants' case to certify the issue to the Appeal Board is without merit under the regulatory standards.

IV. Ultimate Findings and Order

The motion of the County and State for reconsideration of the Board's Order of February 5, 1985, granting Applicant's motion for a protective order, and in the alternative for certifying the matter to the Appeal Board, is unsupported in fact and in law and should be denied.

It is so Ordered.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
ADMINISTRATIVE LAW JUDGE

Dated at Bethesda, Maryland
this 12th day of February, 1985.