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LILCO, February 12, 1985

RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

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

LILCO'S OPPOSITION TO
INTERVENORS' MOTION FOR RECONSIDERATION
OF BOARD'S FEBRUARY 5 ORDER DENYING DISCOVERY

On February 7, 1985, Suffolk County and New York State filed a "Motion for Reconsideration of Board's February 5 Order Prohibiting Discovery on LILCO's Proposed Use of the Nassau Coliseum," requesting (1) reconsideration of the Board's February 5 Order relieving LILCO from responding to discovery requests made by the Intervenors or (2) certification of the issue to the Appeal Board pursuant to 10 C.F.R. §§ 2.730(f) and 2.718(i). For the reasons stated below, both requests should be denied.

I. Background

On January 28, 1985, the Board granted LILCO's motion to reopen the record to consider LILCO's affidavit and six related documents identifying the Nassau Veterans Memorial Coliseum as a reception center to be used in the event of an emergency at

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Shoreham. In its January 28 Order, the Board invited the parties "to state specifically their positions concerning LILCO's evidence" by (1) setting forth with particularity any evidence a party intends to offer challenging the authenticity of the documents submitted by LILCO, (2) stating the questions to be asked and the information expected to be received if a party asserts a need for cross-examination, and (3) submitting the direct testimony or other evidence any party asserts it is necessary to submit to challenge the merits of LILCO's designation of the Coliseum as a relocation center. The Board stated that it would review all the evidence and determine whether further proceedings, including the possibility of an oral hearing, were necessary on this issue. The Order did not mention discovery.

Following the January 28 Order, Suffolk County sent LILCO on January 31 sixteen separately-numbered discovery requests and attached a notice of deposition for Elaine Robinson, LILCO's affiant in its January 11 motion to reopen the record on the use of the Nassau Coliseum as a reception center. Discovery requests were also sent to the NRC Staff and to FEMA. LILCO requested a protective order on February 1 relieving it from responding to the discovery requests made by Suffolk County. The Board granted LILCO's motion in a February 5 Order. Suffolk County and New York State now ask the Board to reverse its decision.

II. Discovery Is Not Warranted

The Intervenor's request for discovery should be denied. The "void" in the record that was identified by the Licensing Board, and filled by LILCO's submission on January 11 of an affidavit and six documents regarding the Nassau Veterans Memorial Coliseum, is the identity of a reception center. Numerous other issues regarding relocation centers for Shoreham were fully litigated during the emergency planning hearings, including the issues surrounding sheltering people 40-50 miles from their homes, see Tr. 14,816-17; monitoring and decontamination, see Tr. 14,825-30, 14,854 (Weismantle), Tr. 14,878-82, 14,888 (Harris); see also LILCO Plan OPIP 3.9.2; the location of Red Cross relocation centers and the manner in which they are run, see LILCO's Testimony on Phase II Emergency Planning Contentions 24.0, 74, and 75 (Relocation Centers), ff. Tr. 14,707; Tr. 14,801 (Rasbury), Tr. 14,747 (Rasbury); written agreements for relocation centers, see Tr. 14,805 (Rasbury), Tr. 14,719-20 (Robinson), Tr. 14,818-20 (Rasbury, Robinson); the basis of relocation center capacity used in planning, see Tr. 14,744-46 (Rasbury), Tr. 14,886-87 (Harris); the adequacy of the relocation centers facilities, see Tr. 14,775-78 (Rasbury); and the distance of relocation and reception centers from the EPZ, see Tr. 14,616-18, 14,620 (Keller); Tr. 14,625 (McIntire).

The remaining issue raised by the Board regarding Contention 24.0 is the identity of the reception center to be used for Shoreham. Under the Board's January 28 order, it is the Intervenor's responsibility to examine the papers submitted by LILCO on January 11 and to set forth with specificity the facts they wish to bring to light, if any, regarding the use of the Nassau Veterans Memorial Coliseum as a reception center. The broad-ranging discovery requests and depositions sought by the Intervenor will not further the identification of issues specific to the use of the Coliseum, if any issues exist.

The planning basis surrounding the use of Nassau Veterans Memorial Coliseum as part of the response to an emergency at Shoreham has been thoroughly litigated. LILCO's January 11 submission provides the identification of the reception center, letters of agreement for use of the reception center, a map showing its location, a diagram of the building, and a letter from the Nassau County Executive ensuring its availability. This information, coupled with the fully-developed record on the remaining issues regarding relocation centers, should provide ample opportunity for the Intervenor to identify what, if any, deficiencies of the Nassau Veterans Memorial Coliseum make it unsuitable for use as a reception center pursuant to the LILCO Plan. Discovery at this juncture, much less the broad discovery sought by Intervenor, is unnecessary.

III. The Request for Certification Should Be Denied

The Intervenor request that the Board certify this issue to the Appeal Board, on the grounds that (1) "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 C.F.R. §2.730(f)"; (2) "interlocutory appeals are encouraged 'if a significant legal or policy question is presented'"; (3) "the ruling in question affects 'the basic structure of the proceeding in a pervasive and unusual manner'" or (4) the ruling "'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." Intervenor Motion at 4-5. The Intervenor contend that they meet all of these standards. In fact, they meet none.

The Commission's rules of practice contain a general prohibition against interlocutory appeals. 10 C.F.R. §2.730(f); see, e.g., Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258 (1973). The County has previously sought an interlocutory appeal from a discovery order of this Licensing Board, when the Board denied the County's motion seeking to compel the Federal Emergency Management Agency (FEMA) to produce certain documents. In denying certification, the Appeal Board stated:

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." 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. On the other hand, an order denying discovery "is wholly interlocutory in character" and, accordingly, is not so appealable given the provisions of 10 C.F.R. 2.730(f).

. . . .

B. A Licensing Board ruling normally will qualify for discretionary interlocutory review only if it "either threaten[s] 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) affect[s] the basic structure of the proceeding in a pervasive or unusual manner." We have observed that "discovery rulings rarely meet those tests." Indeed, insofar as our research has disclosed, no prior endeavor to obtain directed certification of the denial of a discovery request has been successful.

Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1) ALAB-780, 20 NRC 378, 380-81 (1984) (emphasis in original; footnotes omitted).

While the Appeal Board's decision in Shoreham involved denial of discovery from FEMA, a non-party, the rule is the same for discovery involving parties to the proceeding, and therefore the same result should obtain in this case. See Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1

and 2), ALAB-318, 3 NRC 186 (1976); Toledo Edison Co.

(Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98 (1976). No significant legal or policy question is presented by the Intervenors' motion for reconsideration; the basic structure of the proceeding has not been shown to be affected; the procedure suggested by the Board has not been shown to be detrimental to the public interest. The Coliseum has been identified to the parties since October 30, 1984 as the site of the reception center for Shoreham. Any defects regarding its use as a reception center would be readily ascertainable by an inspection of the building, or of public documents regarding the building, or of the documents attached to LILCO's January 11 filing.

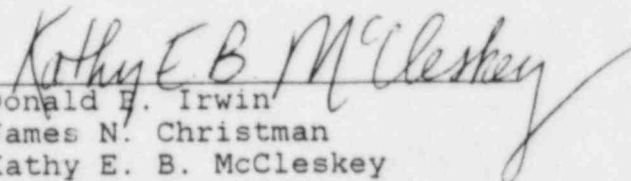
The Board's January 28 order permits any party to produce its own response, in accordance with the Board's guidance, to LILCO's prima facie case by February 19 -- not to do so only after obtaining extensive discovery. The Board's Order is consistent with other Commission summary procedure, e.g., 10 C.F.R. §2.749 (no discovery as of right in connection with summary disposition motions) and with other recent usages in this proceeding (e.g., use of summary procedure in remand from ALAB-788). The denial of a discovery request pursuant to the Board's Order is an interlocutory matter that does not warrant certification to the Appeal Board.

IV. Conclusion

For the reasons stated above, the Intervenor's request for discovery or for certification should be rejected.

Respectfully submitted,

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DATED: February 12, 1985

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO'S OPPOSITION TO INTERVENORS' MOTION FOR RECONSIDERATION OF BOARD'S FEBRUARY 5 ORDER DENYING DISCOVERY were served this date upon the following by first-class mail, postage prepaid or, as indicated by an asterisk, by Federal Express, or, as indicated by two asterisks, by hand:

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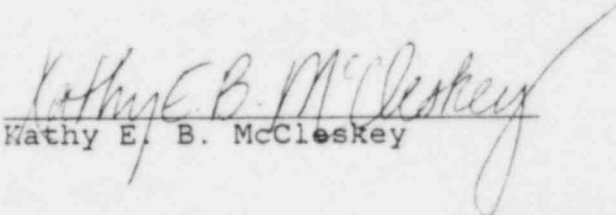
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