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Energy Department Is Making an Effort To Save Shoreham

By MATTHEW L. WALD
Special to The New York Times

WASHINGTON, April 21 — The Federal Department of Energy is involved in intense negotiations aimed at saving the Shoreham nuclear plant on Long Island, according to documents obtained by a House subcommittee.

The department, according to these documents, is seeking a way for the Federal Government to lend its legal authority to the Long Island Lighting Company's plan for the company to evacuate the area around the plant in the event of an accident.

The Lilco emergency plan recently failed an evaluation by the Federal Government because of technical problems and questions about the legal authority of Lilco employees to take steps in an emergency that would usually be taken by public-safety officials.

Seeking Solution by Friday

The documents indicate that the Energy Department, which favors the operation of Shoreham, is seeking to develop some solution by Friday, when Lilco faces a major financial hurdle.

The department has been engaged in intensive consultations with the Federal Emergency Management Agency, the White House and Lilco since the beginning of this month, the documents show. It is not clear from the documents which party initiated the discussion.

Access to the documents was provided by the Department of Energy to the staff of House Interior Committee's Subcommittee on Oversight and Investigations. Representative Edward J. Markey, Democrat of Massachusetts, is chairman of the subcommittee, which has jurisdiction over the Nuclear Regulatory Commission.

The papers include handwritten notes on interagency meetings, internal memorandums and letters between the parties.

They discuss the possibility that either the Department of Energy or the Emergency Management Agency — which is charged with coordinating the Federal response to radiation emergencies — could "deputize" utility workers, or confer authority on the utility to take such steps as activating emergency sirens, directing traffic, towing stalled cars and ordering messages to be sent on the Emergency Broadcast System.

Without an emergency plan, Shoreham cannot receive a full operating license from the N.R.C. The development of an emergency plan is a requirement for licensing.

The government of Suffolk County, where the plant is situated, has refused to participate in the creation of such a plan, and called for the abandonment of the reactor, which is now estimated to cost $4.2 billion. Governor Cuomo has pledged that the state, which does have the legal authority to implement a plan, will not impose one plan on the county, casting doubt on the future of the 809-megawatt reactor.

The Eventual Responsibility

The Nuclear Regulatory Commission, the agency that licenses nuclear plants and instituted the requirement for emergency planning after the Three-Mile Island accident in March 1979, is the body that will eventually have to decide whether the steps taken at Shoreham are adequate to protect public safety. The commission has already decided that emergency planning is not needed for a low-power testing license.

Suffolk County, which is a party in the licensing hearing, maintains that it would not be legal for the Federal Government to supply police authority to the utility.

Mr. Markey, whose subcommittee has been investigating the issue of emergency planning for more than a year, said only the local and state governments had the police powers necessary to manage a nuclear emergency plan. "The Federal Government does not have the legal authority to implement Lilco's plan," he said.

Mr. Markey said the Department of Energy and other agencies were looking for a solution that they could announce before Friday to make operation of the plant seem more likely and induce investors to resume lending money to Lilco. He called the effort "all smoke and no substance."

Memo From the Secretary

The Secretary of Energy, Donald Paul Hodel, wrote a memo to his staff in April 1983 favoring resolution of the emergency planning dispute at Shoreham and a similar dispute then in progress over the Indian Point reactors in Westchester. He said the dispute should be resolved because not operating the plants would mean "economically penalizing their respective utility service areas." He also cited "the potential threat to the viability of the nuclear power industry."

The effort by the Department of Energy comes as the N.R.C. is about to begin accelerated hearings on the reactor's remaining technical problem: the failure of its diesel generators, and the resulting lack of an emergency power source on the site in case of a simultaneous reactor shutdown and blackout in the area of Shoreham, which is 55 miles east of Manhattan on the North Shore of Long Island.

The company has brought in alternative equipment to provide emergency power. But that did not prevent a transmission line failure from causing a blackout at the site last weekend.

The accelerated hearings, to determine whether Shoreham should be allowed a low-power license for testing, are scheduled to begin on Tuesday. On Friday, however, Suffolk County filed a petition with the Nuclear Regulatory Commission asking for a delay, saying the hearings had been scheduled so abruptly that it had not had time to prepare its case.

One staff member of the Department of Energy, in his notes on an April 4 meeting with officials from the Federal Emergency Management Agency, noted that a meeting was due soon between the heads of those two agencies, and wrote: "Important for Lilco to know this so they don't throw in the towel. April 27 line of credit due."

Special Type of Loan

The "line of credit" referred to is a special type of loan that Lilco obtained to pay for its share of another reactor, Nine Mile Point 2, in Scriba, N.Y., on the south shore of Lake Ontario, that Lilco is building with four other New York State utilities. That loan, called a "construction finance trust," is coming due prematurely, because Lilco violated its conditions.

A construction finance trust is a vehicle that utilities with poor credit ratings sometimes use to borrow money, according to financial experts. Companies with low ratings can borrow only at high rates, so they seek instead to have a bank guarantee the loan, and have the interest rate set according to the bank's credit rating, not the utility's. In exchange, the utility pays a fee to the bank.

In Lilco's case, a consortium of about 18 banks — the company refused to give details — was formed to guarantee loans totaling $500 million, which Lilco used to pay its 18 percent share of Nine Mile Point 2. But in January, Lilco defaulted on its partnership agreement with the other utilities, and stopped making construction payments for Nine Mile. Under the terms of the trust, that default allows the banks to demand full repayment on April 27.

A spokesman for Lilco, Kenneth J. Simons, said in a telephone interview Friday that the company would have no comment on the trust or on its ability to pay the bill. Analysts believe that it could not pay, largely because investors have recently refused to lend it money because of the uncertainty about Shoreham.

Whether an extension of the trust will be worked out is not clear. When asked about the prospects, Chase Manhattan, the lead bank in the trust, issued a one-sentence statement: "We are working on an extension of the April 27 date, and we are hopeful of getting it." The bank declined to comment further.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

APR 25 1984

JAMES F. DAVEY, Clerk

MARIO M. CUOMO, Governor of the State of New York, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 84-1264
UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.,	:	
Defendants.	:	

MEMORANDUM OPINION

Plaintiffs, the Governor of the State of New York and the County of Suffolk, bring this action to enjoin the commencement of hearings before an Atomic Safety and Licensing Board (Licensing Board) of defendant, the U.S. Nuclear Regulatory Commission (NRC or the Commission), concerning the proposed low power operation of the Shoreham Nuclear Power Station. The owner of the Shoreham facility, the Long Island Lighting Company (LILCO), intervened as a defendant. The hearing, scheduled to begin on April 24, 1984, is to evaluate LILCO's proposal to operate Shoreham without an onsite emergency electric power system.

On March 20, 1984, LILCO submitted to the NRC its proposal to operate the Shoreham plant at low power without

an onsite electric power system. The NRC's Chief Administrative Law Judge created a new Licensing Board on March 30, 1984, to hear and decide LILCO's request. After oral argument, the Licensing Board established on April 6, 1984, an expedited procedural schedule for the low power license hearings. The schedule provided for discovery from April 6 to April 16, 1984; issuance of an evaluation of the proposal by NRC staff on April 19, 1984; filing of plaintiffs' testimony on April 20, 1984; and the hearing on April 24, 1984. Further, the Licensing Board mandated that the hearing be concluded by May 5, 1984. In response to plaintiffs' request for reconsideration of its expedited hearing schedule, the Licensing Board, on April 20, 1984, refused to alter or vacate its order. Plaintiffs then appealed to the Commission to overturn the expedited schedule, but the Commission, on April 23, 1984, refused to alter the scheduling order. On the same day, plaintiffs filed this action, and the Court heard argument from all parties on plaintiffs' application for temporary relief.

Plaintiffs maintain that the Licensing Board and the Commission have violated procedural due process by establishing an expedited schedule under which it is impossible for plaintiffs to prepare their case. Specifically, plaintiffs assert that seventeen days is insufficient time in which to complete discovery, retain experts, and prepare expert testimony with respect to a

proposal that has neither been suggested by a license applicant nor evaluated in a licensing proceeding in the history of civilian nuclear power generation. Further, plaintiffs argue that the expedited hearing would not have been scheduled but for improper actions of the Chairman of the Commission and the financial condition of LILCO.

Defendants assert that the Court does not have jurisdiction to issue temporary equitable relief in this case because the agency action is not final and plaintiffs' objections can be reviewed following the decision of the Licensing Board. In the alternative, defendants maintain that if a court has jurisdiction, this action would properly be before the Court of Appeals pursuant to 42 U.S.C. § 2239(a) (1976). In addition, defendants assert that the schedule does not deprive plaintiffs of due process, and irreparable harm would not result from a denial of the requested relief.

It is well established that "judicial intervention in uncompleted administrative proceedings, as distinguished from judicial checking by statutorily-established method of review, must remain very much the exception rather than the rule." Nader v. Volpe, 466 F.2d 261, 268 (D.C. Cir. 1972). See Gulf Oil Corp, v. U.S. Department of Energy, 663 F.2d 296, 312 (D.C. Cir. 1981); Association of National Advertisers, Inc. v. Federal Trade Commission, 617 F.2d 611, 621-22 (D.C. Cir. 1979). The narrow exception to that rule

is that "a party may bypass established avenues for review within the agency only where the issue in question cannot be raised from a later order of the agency, . . . or where the agency has very clearly violated an important constitutional or statutory right." Sterling Drug Inc. v. Federal Trade Commission, 450 F.2d 698, 710 (D.C. Cir. 1971) (citations omitted). See Fitzgerald v. Hampton, 467 F.2d 755, 768 (D.C. Cir. 1972); Amos Treat & Co. v. Securities and Exchange Commission, 306 F.2d 260, 267 (D.C. Cir. 1962). Contrary to defendants' principal argument that Federal Trade Commission v. Standard Oil Co., 449 U.S. 232 (1980), deprives this Court of jurisdiction, that case does not preclude a finding of jurisdiction if a constitutional right has been violated. In contrast to the instant case, plaintiff in Standard Oil did not allege any constitutional violations but only statutory violations. 449 U.S. at 235. Standard Oil can also be distinguished from this case on the same grounds that it was distinguished in Gulf Oil, 663 F.2d at 311. As in Gulf Oil, plaintiffs herein do not seek an order requiring withdrawal of LILCO's proposal or challenging the necessity of a hearing on the proposal, but they seek judicial assistance "in getting the proceeding tried fairly." Id.

To come within the purview of Amos Treat, plaintiffs must demonstrate something more than a mere procedural irregularity, subject to review upon the whole record at the conclusion of the proceeding; the asserted infirmity must be

fundamental. 306 F.2d at 265; Fitzgerald, 467 F.2d at 769. Although the exact boundaries of due process are fluid and defy a bright-line test, procedural due process at the very least requires that quasi-judicial proceedings provide a fair hearing. Amos Treat, 306 F.2d at 263. With respect to agency adjudiciations, due process could be said to mandate "fair play." Id. at 264.

The expedited hearing schedule threatens to make plaintiffs' participation in the administrative proceeding meaningless because of the lack of time for effective preparation. Plaintiffs have presented serious allegations of constitutional violations and have sufficiently demonstrated that their allegations may support the Court's jurisdiction under the Amos Treat exception. It appears that the discovery period permitted by the Board has precluded plaintiffs from preparing for the hearing on LILCO's unique and technically complex issue. When parties to an action are not permitted to prepare their case, the fundamental fairness of the administrative process is called into question. As did the Court in Amos Treat, the Court in this case finds that

> [e]nough has been said to demonstrate the basis for our conclusion that an administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirements of due process.

306 F.2d at 267.

For relief to issue, the Court must determine that plaintiffs have satisfied the four-fold test for injunctive relief articulated in Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958). See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) [hereinafter cited as WMATC]. The Court must find either that plaintiffs demonstrated probable success on the merits or presented a "serious legal question" and the balance of the equities favors granting relief. National Association of Farmworkers Organizations v. Marshal, 628 F.2d 604, 616 (D.C. Cir. 1980); WMATC, 559 F.2d at 843-44. The Court in WMATC emphasized that the preventive nature of the requested relief permitted the court some discretion in finding that plaintiff would succeed on the merits:

> An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

559 F.2d at 844. In this case, plaintiffs have raised serious questions concerning the propriety of the decision to expedite the hearing on LILCO's proposal to such an extent

that interested parties cannot be fairly heard. The underlying reasoning of the Licensing Board has been sufficiently called into question by plaintiffs to sustain temporary relief if warranted by the other criteria.

As previously discussed, meaningful participation in the administrative proceeding by plaintiffs has been precluded by the limited discovery period. From the evidence available at this early stage of the case, it appears that the procedural due process rights of plaintiffs have been compromised by the expedited schedule. If so, such a denial of due process constitutes irreparable harm. Amos Treat, 306 F.2d at 267; Heublein, Inc. v. Federal Trade Commission, 539 F. Supp. 123, 128 (D. Conn. 1982). Granting relief in this case will not harm defendants or any other interested party. No party to this action alleged that any harm would result from staying the commencement of the hearing pending a hearing on the motion of plaintiffs for preliminary injunction.

The public interest is furthered by a careful and full adjudication of LILCO's proposal for a low power license; no benefit can result from an unfair hearing on this proposal. With the potential consequences of the administrative decision being so great, the public will be served if defendants are permitted to adequately prepare their positions concerning LILCO's proposal. Further, the public

interest will benefit if the administrative proceeding is conducted fairly.

Since plaintiffs have raised a substantial legal question regarding the propriety of the hearing schedule, and have demonstrated irreparable injury, and since the balance of the equities favors preserving the status quo pending a determination on the preliminary injunction, the Court will grant the motion of plaintiffs for a temporary restraining order.

An Order consistent with this Memorandum Opinion will issue.

Norma Holloway Johnson

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

DATED: April 25, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

APR 25 1984

JAMES F. DAVEY, Clerk

MARIO M. CUOMO, Governor of the State of New York, et al.,

Plaintiffs,

v. : Civil Action No. 84-1264

UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.,

Defendants.

ORDER

Upon consideration of the Application of plaintiffs for a temporary restraining order, and upon consideration of all matters in support and opposition thereto, including oral argument before the Court, it is this 25th day of April, 1984,

ORDERED that defendant the United States Nuclear Regulatory Commission and defendants Nunzio J. Palladino, Marshall E. Miller, Glenn O. Davis, and Elizabeth B. Johnson be, and they hereby are, jointly and severally restrained and enjoined from further convening, participating in, proceeding with, or authorizing any hearings before the Atomic Safety and Licensing Board pertaining to the supplemental motion of Long Island Lighting Company for a Low Power Operating

License in the proceeding styled In the Matter of Long Island Lighting Company, Docket No. 50-322-)L-4 (Low Power), or otherwise for a period of ten (10) days from the date of this Order or pending the hearing on the motion of plaintiff for a preliminary injunction, whichever first occurs.

Entered this 25th day of April, 1984, at 10:30 a.m.

Norma Holloway Johnson

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE