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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'88 MAR -2 P2:32

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

NRC STAFF RESPONSE IN OPPOSITION TO
STATE OF NEW YORK'S MOTION FOR AN ORDER
COMPELLING THE NRC STAFF TO RESPOND TO DISCOVERY

INTRODUCTION

On February 12, 1988 the State of New York filed a motion ^{1/} with this Licensing Board for an order directing the NRC Staff to respond to the State's discovery previously served upon the Staff. The NRC Staff's response in opposition to that motion follows.

BACKGROUND

On January 22, 1988 the State of New York served its "First Set Of Interrogatories And Request For Production Of Documents To The NRC Staff And FEMA." On February 2, 1988 the Staff served "NRC Staff Objections To State Of New York's First Set Of Interrogatories And Request For Production Of Documents To The NRC Staff And FEMA."

1/ "State Of New York's Motion For Order Compelling LILCO And The NRC Staff To Respond To The State Of New York's First Set Of Interrogatories And Request For Production Of Documents" February 13, 1988.

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FEMA has no role in New York's motion which is directed only to the Staff and LILCO and is not further addressed here. In its objections, the Staff declined to respond to the State's discovery as in the Staff's opinion the information sought by the State of New York was not relevant to the possible bus driver role conflict issue now before the Licensing Board, was not necessary for this Licensing Board to make a proper decision upon the issue, and, in some instances, available to the State from other sources, i.e., the Commission's Public Document Room or the Applicant.

On February 12, 1988 the State of New York filed a motion with the Licensing Board requesting an order compelling LILCO and the NRC Staff to make responses to discovery. That motion in so far as it relates to LILCO is not addressed here.

On February 22, 1988 the Licensing Board granted LILCO's Motion of January 25, 1988 to exclude as issues in controversy 1) the availability of buses, 2) the identification of reception centers, and 3) evacuation time estimates. Thus the issue now before the Licensing Board is possible role conflicts among bus drivers in the event of an emergency at the Shoreham facility, an issue remanded by the Appeal Board in ALAB-832, 23 NRC 135, 153, 154 (1986).

DISCUSSION

A. Intervenor Has Not Complied With The Regulatory Provisions Governing Discovery From The Staff

Discovery against the NRC Staff is governed by 10 CFR §2.720(h)(2)(ii) for interrogatories and by 10 CFR 2.744 in regard to the production of documents. For interrogatories, the proponent must first

submit them to the presiding officer, here the Administrative Judge, who will authorize their service upon the Staff only after a finding is made that the requested information is necessary to a proper decision in the proceeding and that the information sought is not reasonably obtainable from any other source.

A request for document production may be served upon the Executive Director For Operations (EDO) without first obtaining leave of the presiding officer (2.744(a)). If the EDO determines that the requested documents are not relevant, or exempt from disclosure under 10 CFR §2.790, or not necessary to a proper decision in the proceeding or reasonably obtainable from other sources, he may decline to produce the requested documents and shall so advise the requesting party, §2.744(b).

If the EDO objects to producing a document for the reasons set forth in §2.744(b) the requesting party may apply to the presiding officer for an order compelling production of the document. The applicant for the order must affirmatively demonstrate 1) relevance, 2) that the document is not exempt under §2.790, 3) that disclosure is necessary to a proper decision in the proceeding and, 4) that the document sought is not obtainable from another source, (§2.744(c)). If the presiding officer makes affirmative findings on relevancy, exemption under 2.790, necessary for a proper decision, and not otherwise obtainable, about each document sought, he may then order production of the documents sought (§2.744(d)) subject to conditions to protect safeguards information or other confidential matter. As stated in Pennsylvania Power and Light

Company (Susquehanna Steam Electric Station, Units 1 and 2) ALAB-613,
12 NRC 317, 323 (1980):

Discovery against the staff is on a different footing. With limited exceptions, Commission regulations make staff documents that are relevant to licensing proceedings routinely available in the NRC Public Document Room. 10 CFR 2.790(a). The contemplation is that these "should reasonably disclose the basis for the staff's position," thereby reducing any need for formal discovery. Reflective of that policy, the Rules of Practice limit documentary discovery against the staff to items not reasonably obtainable from other sources, 10 CFR 2.744; require a showing of "exceptional circumstances" to depose staff personnel, 10 CFR 2.720(h) and 2.740a(j); and allow interrogatories addressed to the staff only "where the information is necessary to a proper decision in the case and not obtainable elsewhere." See 10 CFR 2.720(h)(2)(ii). In addition, the licensing board's advance permission is needed to depose staff members or to require the staff to answer written interrogatories. Ibid.

[Footnotes omitted]

The State of New York's Motion acknowledges the two applicable provisions of the NRC regulations, 10 CFR §§2.720(h)(2)(ii) and 2.744, but fails 1) to comply with them and 2) fails in the text of their Motion to address the substantive requirements of the regulations to show that the information should be disclosed. Nor did the State of New York feign to make the required regulatory showings in its original discovery request dated January 22, 1988. As the intervenors have not complied with regulations applicable to discovery from the Staff, the Motion must be denied.

B. Intervenors' Discovery Requests Do Not Fall With The
Ambit Of Matters Subject To Discovery From The Staff

As we have detailed, discovery from the Staff may only be ordered where an intervenor has established that the matters he seeks to discover are (1) relevant to issue in controversy, (2) necessary for the Licensing Board to reach a proper decision, (3) not protected from disclosure by 10

C.F.R. § 2.790 and (4) not available from another source. See 10 C.F.R. §§ 2.720(h)(2)(ii) and 2.744(b). The Intervenor has not even attempted to shoulder this burden or attempted to comply with the regulations. Further an examination of each interrogatory and the Staff's response, shows that the Intervenor could not have sustained this burden and even if Intervenor had proceeded under the Rules, and its requests for information could not have been granted. Each interrogatory is addressed below.

Interrogatory 1:

When bus drivers for nuclear plants other than Shoreham are trained to drive buses during radiological emergencies, what, if anything, are they told, on a plant by plant basis, about calling for their families in emergencies?

NRC Staff Objection:

Communication to bus drivers at nuclear facilities other than Shoreham is not relevant to, or necessary for, this Licensing Board's decision.

The Intervenor states that "The interrogatory does not seek communication to bus drivers at nuclear facilities other than Shoreham." Motion at 13. This is not true. The interrogatory asks, by its terms, "what, if anything, are they told, on a plant by plant basis, about calling for their families in an emergency." [Emphasis added]

Further, the Licensing Board need not know in order to reach a proper decision upon the bus driver role conflict issue, what emergency response bus drivers are told" on a plant by plant basis, about calling for their families in emergencies." Intervenor admits this information is of doubtful relevance, (Motion at 13). The test under 10 C.F.R. §2.720(h)(ii), is not only that this information be relevant, but that it

meet a higher standard of being "necessary to a proper decision in the proceeding." The bus driver role conflict issue in Shoreham can be resolved without this information. The request does not fall within the scope of matters discoverable from the Staff under 10 C.F.R. § 2.720(h)(2)(ii).

New York refers to parts of two sentences, taken out of context, of the "NRC Staff Response To LILCO's Motion For Summary Disposition of Contention 25.C (Role Conflict of School Bus Drivers) dated November 13, 1987. As a part of its Motion For Summary Disposition LILCO asserted that there was historical precedent for the use of utility employees to serve as bus drivers. In the Staff's response the Staff agreed that this factual statement was true - and indeed it is true, see Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-857, 25 NRC 7, 10 (1987). That does not demonstrate that matters told to bus drivers" at all 106 licensed nuclear plants is "necessary for a proper decision on the role conflict issue in this proceeding." ^{2/}

Further, the Intervenor has not established that he cannot obtain this information from other sources, such as the NRC public document rooms or from licensees. No basis exists to determine the information sought could be required to be produced under 10 C.F.R. § 2.720(h)(2)(ii).

^{2/} Intervenor seeks to buttress its request to the Staff with citations to discovery requests to other parties. Those requests are governed by 10 C.F.R. § 2.740(b)(1) which permits discovery to other parties of any matter "which is relevant to the subject matter involved in the proceeding." This section does not apply to discovery from the

Interrogatory 2

Do any radiological emergency response plans for nuclear plants other than Shoreham rely either fully or partially on utility employees to drive buses for school children? If the answer is affirmative, please identify the particular nuclear plants and the relevant pages of the corresponding radiological emergency response plans.

NRC Staff Objection

The provision of emergency plans for facilities other than Shoreham are not relevant to the issue before the Board, and are not necessary for the Board's decision. Further, the emergency plans are public documents available in the Commission's Public Document Room and readily available to the State of New York. See 10 CFR § 2.720(h)(ii).

Emergency Plans for nuclear power facilities are in the Commission's Public Document Room. Therefore the information is available from other sources and the Intervenor cannot compel the Staff to search the emergency plans in the PDR and to winnow out the information Intervenor seeks.

Further, the State of New York has not even attempted in its interrogatories or in its Motion to Compel to show why this requested information is needed by this Licensing Board to arrive at a proper decision upon the bus driver role conflict issue. Information on whether utility employee drive buses for school children at other nuclear plants is not necessary for the Licensing Board's decision. Thus, for this reason alone, Intervenor could not obtain the information sought under 10 C.F.R. § 2.720(h)(2)(ii).

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

Staff (10 C.F.R. § 2.740(f)(3)), which under 10 C.F.R. § 2.720(h)(2)(ii) is limited to "answer to interrogatories which are necessary to a proper decision in the proceeding."

Interrogatory 3

Has the NRC or FEMA ever met (on or about January 14, 1988 or at any other time), or engaged in telephone conversations or discussions, with LILCO regarding in any way LILCO's schools evacuation proposal? If the answer is affirmative:

(a) identify the dates and locations of the meetings or the dates of the telephone conversations or discussions, (b) identify all attendees or participants; (c) specifically describe all statements that were made about LILCO's schools evacuation proposal, (d) attribute all such statements to particular individuals, and (e) provide any documents that concern LILCO's schools evacuation proposal that were produced in preparation for, during, or as a result of the meetings, telephone conversations or discussions.

NRC Staff Objection

Discussions, if any have occurred, among NRC, FEMA and/or LILCO regarding the schools evacuation proposals contained in Revision 9 of the LILCO emergency plan are not relevant to whether there will be an adequate supply of bus drivers for school buses in the event of an emergency at Shoreham (the remanded issue in this proceeding), nor is the disclosure of any such discussions, if they occurred, necessary to a decision by this Licensing Board. See 10 CFR § 2.720(h).

The State has made no effort at all to demonstrate that the requested information, if it exists, is necessary to a proper decision by the Licensing Board upon the bus driver role conflict issue. Discussions between NRC and FEMA could not effect New York's evidentiary case upon the role conflict issue and revealing such discussions is not necessary to a proper decision upon this issue. ^{3/}

^{3/} Intervenor cites as a reason for requesting an order to compel, its discussion at 10-12 of its Motion relating to discussions between counsel for LILCO and counsel for the Staff on January 17, 1988. Discussions among counsel for the parties are, of course, not discoverable.

Moreover, information on any discussions the Staff may have had with LILCO is obtainable from another source, i.e., LILCO, and thus may not be gathered from the Staff under 10 C.F.R. § 2.720(h)(2)(ii).

Interrogatory 4

Provide a copy of all documents used in preparing the answers to these interrogatories.

NRC Staff Objection

Not applicable.

The State complains that "it is difficult to tell what the Staff's response means. . ." The Staff feels that its response is susceptible of full and complete meaning, even though succinctly stated. The Staff answered no interrogatories and therefore it is apodictic that it relies upon no documents in answering.

Interrogatory 5

List, on a numerical interrogatory by interrogatory basis and on a lettered subpart by subpart basis, all people who were asked to provide information or documents in response to: (a) this pleading; (b) the pleading submitted by Suffolk County entitled, "Suffolk County's First Set of Interrogatories and Request for Production of Documents to the NRC Staff and FEMA." dated January 4, 1988.

NRC Staff Objection

This interrogatory seeks disclosure of the scope of a Staff search for information to regard to Interrogatories. First, this is not relevant to the issue before the Board. Secondly, such information is not necessary to a proper decision in this proceeding upon the issue of availability of school bus drivers.

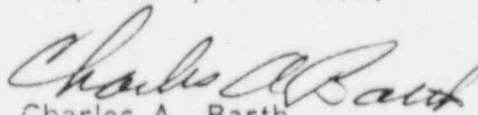
The Staff stands upon its objection to the interrogatory with one further addition. The Staff objected to all of the State of New York's Interrogatories and therefore no one on the NRC Staff or elsewhere was

asked to provide information to assist in preparing a response either to the original Interrogatories or to the State's Motion To Compel as no Staff answering response was made. It was patently evident to the Staff's counsel that the State of New York's Interrogatories and Documents Requests were in violation of 10 C.F.R. §§ 2.720 and 2.744. Thereupon Staff counsel prepared and filed objections to these Interrogatories and Documents Requests.

CONCLUSION

The NRC Regulations prohibit discovery upon the NRC Staff as attempted by the State of New York. The State has not even feigned to make the affirmative showings required by 10 C.F.R. §§ 2.720 and 2.744 to obtain discovery upon the Staff. The Motion by the State of New York for an Order directing the NRC Staff to Respond to the State's discovery should be denied.

Respectfully submitted,



Charles A. Barth
Counsel for NRC Staff

Dated at Rockville, Maryland
this 25th day of February, 1988

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NUCLEAR REGULATORY COMMISSION

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Unit 1))

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(Emergency Planning)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO STATE OF NEW YORK'S MOTION FOR AN ORDER COMPELLING THE NRC STAFF TO RESPOND TO DISCOVERY" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 25th day of February 1988.

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