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LILCO, February 22, 1988

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

'88 FEB 24 P3:46

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)	)	(School Bus Drivers)
	)	

LILCO'S MOTION TO COMPEL ANSWERS TO LILCO'S THIRD SET  
OF INTERROGATORIES AND MOTION TO HOLD DECISION IN ABEYANCE

On February 10, 1988, Suffolk County filed its "Answers to LILCO's Third Set of Interrogatories and Requests for Production of Documents Regarding Role Conflict of School Bus Drivers to Suffolk County and New York State" ("Answers"). The County refuses to respond to one of the interrogatories (no. 38) based on an erroneous application of the work product doctrine;<sup>1/</sup> the County's answer to one other (no. 41) is inadequate. Pursuant to 10 C.F.R. § 2.740(f), LILCO moves to compel complete answers to these interrogatories.

LILCO also requests that the Board hold its decision on this motion in abeyance pending further supplementation of the County's answers. LILCO has asked counsel for the County to reconsider its responses to the interrogatories referred to herein and to supplement them as necessary. As recently as February 17, Counsel agreed to "look

<sup>1/</sup> In LILCO's view, Suffolk County also has misapplied the attorney work product doctrine in its response to LILCO Interrogatory No. 39, which requested that the County identify the "causes of role conflict and the factors existing on Long Island which could lead to role conflict" that it referred to in an earlier interrogatory response. Since the County in fact answered this interrogatory, however, and indicated it would supplement its response if "further research analysis and investigation by Professor Cole" leads to the identification of additional "causes" and "factors", LILCO does not now move to compel an additional response.

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into" that request. It is possible that the parties will settle the disputes raised herein without Board intervention; however, LILCO is filing this motion to compel today in order to satisfy the timeliness standard of 10 CFR § 2.740(f) and thereby preserve its rights.

#### DISCUSSION

##### A. LILCO Interrogatory No. 38

LILCO Interrogatory No. 38 reads as follows:

38. In your response to LILCO Interrogatory No. 1, Suffolk County's Answers to LILCO's First Set of Interrogatories and Document Requests Regarding Role Conflict of School Bus Drivers (Jan. 19, 1988), at 3, you refer to Professor Cole's "contacts with other experts on the subject." Please identify all such contacts.<sup>2/</sup>

Suffolk County answered as follows:

Answer. At this time, any contacts between Professor Cole and other experts regarding the nature or causes of role conflict in general, and, more particularly, Suffolk County's contentions that role conflict will substantially reduce the number of available bus drivers in the event of a Shoreham emergency, have been made at the request of counsel. Accordingly, Suffolk County objects to this Interrogatory on the ground that it seeks information privileged at this time from discovery by the work product doctrine.

The work product doctrine lends a qualified privilege to "documents and tangible things otherwise discoverable under [10 C.F.R. § 2.740(b)(1)] and prepared in

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<sup>2/</sup> LILCO's Interrogatory No. 1 asked Suffolk County to identify their witnesses and, for each intended expert witness, to state the expected subject matter of his testimony, the substance of facts and opinions in his testimony, and a summary of the grounds for each opinion. The pertinent part of Suffolk County's response, which LILCO sought to clarify in Interrogatory No. 38, stated as follows:

Apart from the surveys noted above, his [Professor Cole's] testimony will be based upon his general knowledge of literature in the field, and contacts with other experts on the subject.

Suffolk County's Answers to LILCO's First Set of Interrogatories and Document Requests Regarding Role Conflict of School Bus Drivers at 3 (Jan. 19, 1988).

anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent)". 10 C.F.R. § 2.740(b)(2). Work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Id. The purpose of the doctrine is "to shield each attorney's thought processes and preparatory efforts from those of his adversary so as not to disclose trial strategy or legal conclusions." Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-38, 22 NRC 604 at 627 (1985).

The County's use of the work product doctrine in this instance is wholly improper. All Interrogatory No. 1 requested was that Suffolk County identify its witnesses, and state the expected subject matter of their testimony and a summary of the grounds for their opinions. The County identified just one witness — Professor Cole — but then stated that Professor Cole's testimony "will be based upon contacts with other experts on the subject." When LILCO asked the County to identify those contacts, the County refused, saying the contacts "have been made at the request of counsel."

If the County intends to rely on other experts for its case, it should be required to name them so LILCO can depose them and obtain relevant documents through discovery. The County should not be allowed to rely on those other experts second-hand, i.e., through Professor Cole, and thereby shield those experts from discovery because Professor Cole contacted them at the request of the County's lawyers. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 49v, 494 (1983), quoting 8 Wright and Miller, Federal Practice and Procedure, Civil § 2023, at 194 (1970)("the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts").<sup>3/</sup>

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<sup>3/</sup> On February 12, 1988, the County identified nine new witnesses in addition to Professor Cole. On February 16 the County identified another (the 11th) witness. If

B. Interrogatory No. 41

LILCO Interrogatory No. 41 reads as follows:

41. Are you aware of any contacts or communications in which any person or group has attempted to persuade schools or school districts (or representatives or employees of schools or school districts) not to participate in LILCO's auxiliary school bus driver arrangement or otherwise not to cooperate with LILCO with regard to the evacuation of schools during a Shoreham emergency? If so, please identify such contacts and communications. To the extent that such information is available to you or can be obtained, please include, for each contact and communication, the school or school district contacted and the person talked with, the date of each contact, and the substance of each conversation. Please produce any documents related to such contacts.

The County answered that it was generally aware that contacts between members of the public and school officials had taken place over the years, but added that "on information and belief, the specific information concerning particular contacts or communications requested by this Interrogatory is as accessible to LILCO as it is to Suffolk County." Answers at 7. Since the latter statement concerning accessibility of information simply is not true, LILCO moves to compel a more complete response.

Both Suffolk County and New York State have maintained the position that school districts are separate political entities outside the control of the State or County. But in light of the fact that Suffolk County has named eight school officials as witnesses in this case, it cannot seriously be argued that information about contacts between schools and outside persons or groups "is as accessible to LILCO as it is to Suffolk County," at least with regard to the schools represented by the County's

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(footnote continued)

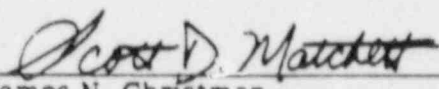
any of these witnesses are among the experts contacted by Professor Cole, the County should be required to say so. If not, the County should be required to identify the experts that Professor Cole has contacted and upon whom Professor Cole will base his testimony.

witnesses. Those witnesses clearly are in a better position to know about such contacts than is LILCO. LILCO asks the Board to compel the County to disclose any such specific information.

CONCLUSION

LILCO requests that the Board order Suffolk County to answer Interrogatories Nos. 38 and 41. However, LILCO respectfully asks that the Board hold its decision on the instant motion to compel in abeyance pending further notification from LILCO that the interrogatories at issue have not been adequately supplemented by the County.

Respectfully submitted,

  
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DATED: February 22, 1988

LILCO, February 22, 1988

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CERTIFICATE OF SERVICE

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I hereby certify that copies of LILCO'S MOTION TO COMPEL ANSWERS TO LILCO'S THIRD SET OF INTERROGATORIES AND MOTION TO HOLD DECISION IN ABEYANCE were served this date upon the following by Federal Express as indicated by one asterisk, or by first-class mail, postage prepaid.

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