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LILCO, April 7, 1988

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION 88 APR 12 P5:33

OFFICE OF SECRETARY  
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Before the Atomic Safety and Licensing Board

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

LILCO'S RESPONSE TO "GOVERNMENTS' MOTION FOR EXTENSION OF TIME TO RESPOND TO REALISM DISCOVERY REQUESTS, AND TO EXTEND DISCOVERY SCHEDULE" AND REQUEST FOR ADDITIONAL RELIEF

Introduction

The Intervenors have asked for a substantial increase allowed by the Board for discovery on the "best efforts" (realism) issues, Contentions EP 1-2, 4-8, and 10. Governments' Motion for Extension of Time to Respond to Realism Discovery Requests, and to Extend Discovery Schedule (Apr. 6, 1988) (hereinafter "Motion"). This Motion was telecopied to LILCO at 4:51 p.m. on April 6.

LILCO opposes the Motion. A full 30 days have passed since the Board established the discovery period for the realism proceeding. In that time the Intervenors have made no serious attempt to proceed with discovery: they have designated no witnesses on the "best efforts" issue,<sup>1/</sup> and they have failed to respond to LILCO's offer to arrange the depositions of LILCO's witnesses.<sup>2/</sup> The Intervenors provide no acceptable

<sup>1/</sup> Suffolk County telecopied LILCO counsel a letter with its motion for extension of time designating two witnesses whom they will not make available until after the discovery period ends. Likewise the State has this afternoon named a single "immateriality" witness who, the State says, will be available for deposition the week of April 18, 1988.

<sup>2/</sup> LILCO designated four of its five witnesses on March 30 in response to Suffolk County's first set of interrogatories. On that same date, by letter, LILCO provided the

(footnote continued)

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reason why they should now be allowed additional time when they have neglected to use the time already given them by the Board.

LILCO therefore asks for the following relief:

1. That the Board deny the Intervenors' Motion and adhere to the existing schedule
2. That the Board issue an Order to Show Cause requiring the Intervenors to show why sanctions (up to and including dismissal of their contentions with prejudice) should not be imposed for their failure to respond timely to LILCO's interrogatories
3. That the Board issue an Order Compelling Discovery requiring the Intervenors to respond to LILCO's Second Set of Interrogatories on the following schedule:
  - a. By Monday, April 11, 1988 (in hand) -- file objections, if any, to the interrogatories
  - b. By Thursday, April 14, 1988 (in hand) -- answer the interrogatories not objected to on April 11
4. That the Board compel the Intervenors to make available the persons named in LILCO's notices of deposition on the dates noticed
5. That the Board convene a conference phone call on Friday, April 8 to resolve
  - a. The above four requests and
  - b. LILCO's Motion to Impose Witness Designation Cut-off (April 5, 1988)

#### Summary of this Response

The Intervenors have requested a three-week extension of a six-week discovery period. They have done so only seven business days before discovery ends. LILCO opposes any such extension, for reasons set out below in Part I.

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(footnote continued)

availability dates of those witnesses. On March 31 LILCO supplemented its response with the designation of its fifth witness. LILCO also provided the County with the dates that that witness would be available for depositions.

Closely related to the Intervenor's request for more time is their treatment of LILCO's two sets of interrogatories, the first set asking the names of Intervenor witnesses and the second set asking about the substance of their case.

Neither of these sets of interrogatories has been answered.<sup>3/</sup> Suffolk County and the State have still named no witnesses on what they would do in an emergency; they have answered none of the substantive questions in the second set of interrogatories and claim, as of yesterday afternoon, they are unable to do so by today, when the answers are due.

Below in Part I LILCO argues why the Intervenor's request for extra time is unjustified and should be denied. Even if the Board agrees with LILCO and adheres to the existing schedule, however, the Intervenor's tactic of waiting until the last minute leaves LILCO prejudiced. The Intervenor has failed to answer LILCO's Second Set of Interrogatories in the time set by the rules; accordingly, a mere denial of the Intervenor's motion, without more, would leave LILCO with no answers to its interrogatories and no clue to the Intervenor's substantive case. Therefore, more than a mere denial of the Intervenor's Motion is required. LILCO addresses what more should be done in Part II below.

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<sup>3/</sup> As they recite in their Motion, the Intervenor did file answers to LILCO's First Set of Interrogatories. See Suffolk County's Response to LILCO's First Set of Interrogatories Regarding contentions 1-2, 4-8, and 10, dated March 23, 1988; Response of the State of New York to LILCO's First Set of Interrogatories and Requests for Production of Documents Regarding Realism, dated March 23, 1988. But they provided literally no information. Later, on March 25, 1988, Suffolk County named two witnesses, but only on the "immateriality" issue. The State, only this afternoon, named one witness on "immateriality."

I. The Intervenors' Reasons For An Extension of Time Are Baseless

The Intervenors give four reasons why they desire an extension of time: First, the nature of outstanding interrogatories to them; second, other Shoreham-related obligations; third, the nature of LILCO's record designation and prima facie case; and fourth, the "failure of this Board to yet provide its written opinion(s), rationale or reasons" for its ruling on the realism summary disposition motions. See Motion at 5-6. None of the Intervenors' reasons provides a basis for an extension of the discovery period.

A. Outstanding Interrogatories

LILCO served its second set of interrogatories on the Intervenors by telecopy on March 24, 1988. The Intervenors' first response is due today. The Intervenors informed LILCO at 4:51 p.m. yesterday, however, that they would not respond to LILCO's interrogatories in the time provided in the NRC regulations. The Intervenors claim that both LILCO's and the Staff's interrogatories are burdensome and require additional time to answer.

LILCO's interrogatories are of two types.<sup>4/</sup> The first type asks what the State's and County's "best efforts" response would be during a Shoreham emergency. The second type probes the basis for the positions the State and County took in their responses to LILCO's realism summary disposition motions and in the supporting affidavits.

Neither type of question should be difficult for the Intervenors to answer. The questions do not raise new issues. As to the first type, the Intervenors have been aware at least since the Board's September 17, 1987 Decision that they must be forthcoming

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<sup>4/</sup> The Intervenors at page 6 of their Motion claim that LILCO's interrogatories "ask about not just the substance of the Governments' case, but also each and every aspect of how the Government might respond to an emergency at Shoreham." It is difficult to understand the distinction the Intervenors are trying to make. The "best efforts" principle makes these one and the same.

with their case so that the facts may be developed. LBP-87-26, 26 NRC 201, 216 (1987). They have also known since the new emergency planning rule was published on November 3, 1987 that their "best efforts" in response to a Shoreham emergency would be in issue. If the Intervenors have neglected to begin preparing their case, LILCO should not have to suffer further delays to accommodate the Intervenors' shortsightedness.

The second type of questions directly confronts facts presented and positions taken by the Intervenors in pleadings and affidavits filed almost two months ago. Presumably those statements were made after the factual bases for them had already been developed. Thus, it should not be overly difficult for the Intervenors to reassemble those facts. The Intervenors have many State and County personnel at their disposal who have access to this information. With effort, they could have marshaled those persons to obtain the requested information within the time allotted by NRC regulations.

Little needs to be said about the Staff's interrogatories. They are short: two and a half pages with six questions. Like LILCO's interrogatories, they go to the heart of this litigation: the substance of the Intervenors' case.

Finally, the Intervenors attempt to seek an extension of time to respond to LILCO's discovery requests one day before their response is due is inappropriate. The Intervenors have had these interrogatory requests for 13 days. They should have known within 24 hours of their receipt whether they needed more time to respond and should have requested an extension then. The Intervenors give no explanation why they waited so long. Timing their request as they have is nothing more than an attempt to force a de facto extension. This behavior should not be tolerated.

B. Other Shoreham-related Obligations

The Intervenors' argument that they do not have enough resources rings hollow six years into a proceeding that they themselves have made so long and and arduous.

NRC policy is that "the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 73 NRC 452, 454 (1981). This is particularly true of intervenors with the resources of Suffolk County and New York State.

Back in 1983 Suffolk County by resolution directed the County Executive to "take all actions necessary to assure that actions taken by any other governmental agency, be it State or Federal, are consistent with" the County's decision not to adopt or implement an emergency plan for a Shoreham accident. Suffolk County Resolution No. 111-1983, discussed at LBP-83-22, 17 NRC 608, 612 (1983). Evidently the County seeks to carry out that mandate without undue burden to itself and asks this Board to approve that approach. To do so would violate NRC rules and policy. If the extent of the workload were new to the Intervenors, then possibly one could accept their argument as having some minor validity. The Intervenors have known, however, for a long time that the Shoreham case is a demanding one. If they decided not to staff their case adequately they, not LILCO, should be responsible for the consequences.

Specifically, the Intervenors argue that the Board's discovery and hearing schedule for the remaining remand issues has precluded them from beginning their preparation of this proceeding until after March 25. Intervenors' Motion at 4. The Intervenors ignore the fact that discovery on the school bus driver remand issue was completed February 29 (a date that had been extended over three extra weeks because of the Intervenors' late designation of witnesses), that the EBS and hospital ETE issues involve only four to six witnesses for each proceeding, and that the EBS and hospital issues are both minor and discrete. These facts do not support an extension of time.

Furthermore, the Board's schedule for all issues was established some time ago, and the realism discovery period is almost over. The alleged overload of the Intervenor's capabilities is not new. Thus, it is hard to understand why the Intervenor's have waited until the last minute to seek relief. All facts point to an attempt by the Intervenor's to force an extension through their own delay in seeking an extension. Such tactics should not be tolerated.

C. LILCO's Record Designation  
and Prima Facie Case

The Intervenor's argue that they could not proceed with discovery until they had in hand LILCO's prima facie case. Motion at 5. They then imply that they could not decide on their witnesses until they saw LILCO's prima facie case. Id.

This claim is both extraordinary and wrong. The contentions being litigated are the Intervenor's own, though they have been refocused by the enactment of a new regulation, as the Board has recognized. LILCO's prima facie case on those contentions has been laid out for the Intervenor's many times over several years. LILCO's "realism" case was outlined at pages 42-78 of LILCO's Motion for Summary Disposition of Contentions 1-10 (the "Legal Authority" Issues) (Aug. 6, 1984). It was briefed again on pages 41-66 of LILCO's Brief on Contentions 1-10 (Nov. 19, 1984). It was set out again, in greater detail, in LILCO's Second Renewed Motion for Summary Disposition of the "Legal Authority" Issues (Contentions EP 1-10) (Mar. 20, 1987). It was briefed again, in light of the new emergency planning rule, in LILCO's Supplemental Brief on the New Emergency Planning Rule (Nov. 17, 1987). It was explained again, in still greater detail, in LILCO's Motions for Summary Disposition of Contentions 1-2 and 4-10 (Dec. 18, 1987). And it was explained again last Friday in LILCO's Designation of Record and Prima Facie Case on the Legal Authority Issues (Contentions 1-2, 4-8, and 10) (Apr. 1, 1988). The suggestion that this latest pleading, which is not even called for by the rules but is an "extra" required by the Board at the suggestion of the Intervenor's, starts the period in which discovery may be conducted is frivolous.

The Board did not provide the Intervenors an opportunity to respond to LILCO's April 1 filing in its schedule, nor did the Intervenors seek such an opportunity. Any response to LILCO's prima facie case should be in the Intervenors' prefiled testimony.

The short of the matter is that here the Intervenors have been given an unusual amount of advance notice of LILCO's case -- to Intervenors' advantage. The fact that LILCO has provided the Intervenors more than usual is no reason to grant them an extension of time.

D. The Board's Written Opinion  
On the Realism Motions

The Intervenors claim that it is unfair of the Board to require them "to proceed with a major proceeding without even knowing the Board's views and rationale on material aspects on the realism case." Motion for Extension of Time at 5. This is an extraordinary claim. LILCO is aware of nothing that requires the Board to state its views before a hearing. If LILCO had not filed a summary disposition motion, there would certainly be no statement of the Board's views to guide the Intervenors. There can be no basis for claiming that LILCO's motion and the Board's denial of it entitles the Intervenors to guidance. The hearing that is being afforded the Intervenors, after all, is for the purpose of allowing them to litigate contentions that they themselves have created.

Nonetheless, the Board in its February 29 Confirmatory Memorandum and Order has provided the parties guidance about how to proceed in this proceeding. See Confirmatory Memorandum and Order (Ruling on LILCO's Motions for Summary Disposition of Contentions 1, 2, 4, 5, 6, 7, 8 and 10, and Board Guidance on Issues for Litigation) (February 29, 1988) ("February 29 Order"). The Board discussed the presumptions that should be applied and explained how each contention should be rewritten. Id. at 2-3. Further, the Board stated what questions should be answered and what the Intervenors needed to demonstrate to prove their case. Id. at 3-4. In addition, the Board indicated that the Commission had also provided "considerable guidance." Id. at 1.

In short, the Intervenor's request for more time is unjustified.

**II. Additional Relief  
Requested by LILCO**

In addition to asking the Board to deny the Intervenor's Motion, LILCO asks for additional relief designed to restore equity to the proceeding, as follows.

A. The Board Should Issue  
a Show Cause Order

First, LILCO asks the Board to issue an Order to Show Cause why sanctions should not be imposed against the Intervenor for their conduct of this case, principally their refusal to advance the resolution of the best efforts issue. Depending on the facts developed in response to such an Order, the Board should impose sanctions, up to and including the dismissal with prejudice of Contentions 1-2, 4-8, and 10.

The specific circumstances justifying such an Order to Show Cause are the following:

1. The Intervenor's waiting until the afternoon before their answers to interrogatories are due (and a week and a half before the end of the discovery period) before asking for more time;
2. The Intervenor's refusal to name any witnesses on the "best efforts" issue until, at the earliest, approximately a week before the end of the discovery period;
3. The Intervenor's refusal to make any witnesses available for deposition before the end of the discovery period;
4. The pattern of using such tactics that the Intervenor has established in the past; and
5. The disingenuous use of mutually inconsistent arguments. In particular, in resisting LILCO's request to the Appeal Board for speedier oral argument on the exercise (-05) proceeding, the Intervenor cited their discovery responsibilities in this proceeding<sup>5/</sup>; in asking for relief from their discovery responsibilities now they cite their need to conduct oral

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<sup>5/</sup> Governments' Response to LILCO's Motion for Expedited Decision and Possible Advancement of Argument on LILCO's Appeal of LBP-87-3 (Mar. 25, 1988).

argument on the exercise.<sup>6/</sup>

As the Board is aware, this is not the first time that Intervenors have sought an extension of time using as an excuse the press of their "many other Shoreham-related obligations." Motion at 7-8. Indeed, Intervenors' complaints in this regard have recurred with chronic consistency.<sup>7/</sup> Intervenors' claim that they would suffer severe "prejudice" if their request for an extension is not granted should be disregarded, however, in light of clear Commission policy which states:

Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. While a Board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have pursued other obligations or possess fewer resources than others to the proceeding does not relieve that party of its hearing obligations.

Statement of Policy on Conduct of Licensing Proceedings, CLI-81-6, 13 NRC 452, 454 (1981). The Statement of Policy has been consistently applied. See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-18, 15 NRC 598 (1982).

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<sup>6/</sup> Other such inconsistencies can readily be identified. For example, in one paragraph on page 9 of their Motion the Intervenors argue that LILCO's designation of its prima facie case is a mere "outline." Motion at 9. In the next paragraph they argue that it is so extensive that it will require "substantial time to review and analyze." Id.

<sup>7/</sup> See, e.g., Governments' Motion for Postponement of Briefing and Consideration of LILCO's Latest "Realism" Summary Disposition Motions Pending Issuance of Board Guidance (Dec. 21, 1987); Suffolk County, State of New York, and Town of Southampton Motion for Additional Time to Respond to LILCO's Seven "Realism" Summary Disposition Motions (Dec. 23, 1987); Governments' Motion for Extension of Discovery in the Remanded Proceeding Regarding Role Conflict of School Bus Drivers, (Jan. 27, 1988); Governments' Motion for Immediate Conference Call to Discuss Postponement of February 10 Filing Deadline Pending Consideration of Impact of LBP-88-2 on Matters Pending in this Proceeding (Feb. 4, 1988).

Moreover, by deliberately waiting until the end of the reply period to ask for more time, Intervenors have effectively forced a de facto extension. Intervenors recently used a similar tactic in the school bus driver remand proceeding, naming 10 new witnesses just days before the end of the (already extended) discovery period. Since Intervenors made only half of those new witnesses available for deposition by the end of the period, LILCO was itself forced to seek an extension of the discovery period. See Memorandum and Order (February 19, 1988). Intervenors' have now once again attempted to present LILCO -- and this Board -- with a fait accompli.

It appears to LILCO at this point that the appropriate sanction would be to dismiss the contentions with prejudice. The Intervenors have in essence refused to go forward with the case and in essence are in default. It may develop, however, that lesser penalties are in order. The Board should issue a Show Cause Order to find out.

B. The Board Should Compel the  
Intervenors to Answer LILCO's  
Second Set of Interrogatories

The Intervenors have not answered LILCO's Second Set of Interrogatories (unless they plan to do so tonight), have not sought timely relief, and therefore are in default of their responsibilities under 10 C.F.R. § 2.740b(b).

Accordingly, LILCO moves the Board, pursuant to 10 C.F.R. § 2.740(f), to compel the Intervenors to answer LILCO's Second Set of Interrogatories on the following schedule:

- (1) Objections to the interrogatories should be in the Board's and parties' hands by Monday, April 11, 1988; and
- (2) Substantive answers to the interrogatories not objected to should be filed, again in hand, by Thursday, April 14, 1988.

This proposed schedule gives the Intervenors a full extra week over what is provided by the regulation (10 C.F.R. § 2.740b) to provide the substantive answers. It provides for

an earlier statement of legal objections so as to give some time for the parties to address, and the Board to resolve, such legal matters.

LILCO does not believe any additional time is warranted, and LILCO does not believe there can be any legitimate objections to its interrogatories. But the above-proposed schedule is an attempt to cope with the situation the Intervenors have created by waiting until the last minute to move for more time.

C. The Board Should Compel the  
Intervenors to Produce People  
for Depositions Next Week

As noted in its Motion to Impose Witness Designation Cut-off of April 5, 1988, LILCO has sent notices of deposition for a number of State and County officials and employees.

In a letter sent to LILCO today by Suffolk County's counsel, the County claims, disingenuously, that "it is not clear to us why LILCO believes the depositions are appropriate." Letter of April 7, 1988, from Lawrence Coe Lanpher to K. Dennis Sisk. It is, of course, obvious why the noticed depositions are "appropriate." The NRC regulation, 10 C.F.R. § 2.740a, permits depositions of "any party or other person," not just designated witnesses. 10 C.F.R. § 2.740a(a) (1987). Of the people LILCO has noticed for deposition, four (Messrs. Papile, Czech, Baranski, and Roberts) signed affidavits opposing LILCO's motions for summary disposition of the "best efforts" issue and have appeared as witnesses against LILCO in this proceeding. Messrs. Papile, Czech, and Baranski are responsible for radiological emergency planning in New York State.

Likewise, the other people LILCO proposes to depose have, or should have, information about how the State and County would respond to a Shoreham emergency. Mr. DeVito is Director of the State Emergency Management Office. Dr. Harris, a frequent witness in these proceedings, is Commissioner of Health Services for Suffolk County. Mr. Guido is Commissioner of Police for the County. Mr. Regan is the County's Director of the Division of Emergency Preparedness.

All the proposed deponents are employed by the State or County. All are likely to know material facts about a "best efforts" governmental response to a Shoreham emergency. LILCO therefore asks the Board to issue an order compelling the Intervenor to produce the named persons for depositions next week, as noticed.

D. The Board Should Convene  
a Conference Call Tomorrow

Given the six business days left in the discovery period, the only timely way to resolve the issues raised by the Intervenor's Motion and other tactics is to have a conference call. LILCO asks the Board to convene such a call tomorrow, April 8, 1988, to hear argument and, if possible, resolve the issues.<sup>8/</sup>

LILCO asks that the Board include among the issues resolved the issues of requiring the Intervenor to designate their witnesses by tomorrow, an issue presented by LILCO's Motion to Impose Witness Designation Cut-off (April 5, 1988). Clearly that Motion is part and parcel of the present dispute over the Intervenor's request for more time and LILCO's claim that the Intervenor's tactics are improper.

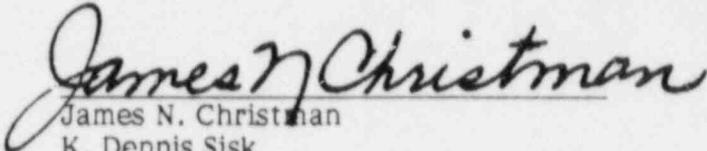
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<sup>8/</sup> LILCO phoned the NRC Staff, the County, and the State this afternoon to ask their opinion of the need for a conference call. The State and County will not say whether they agree a conference should be held until they see this pleading. The Staff is available for a call but does not join in LILCO's request for one.

Conclusion

For the reasons cited above, LILCO opposes the Intervenor's April 6 Motion for Extension of Time and seeks the additional relief requested herein, including a conference call to resolve the issues tomorrow, April 8.

Respectfully submitted,



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DATED: April 7, 1988

LILCO, April 7, 1988

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CERTIFICATE OF SERVICE

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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 RESPONSE TO "GOVERNMENTS' MOTION FOR EXTENSION OF TIME TO RESPOND TO REALISM DISCOVERY REQUESTS, AND TO EXTEND DISCOVERY SCHEDULE" AND REQUEST FOR ADDITIONAL RELIEF were served this date upon the following by telecopier as indicated by one asterisk, by Federal Express as indicated by two asterisks, or by first-class mail, postage prepaid.

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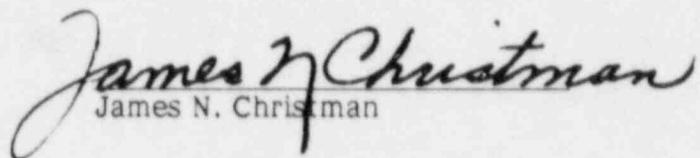
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DATED: April 7, 1988