

68.18

07/26/88

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'88 JUL 28 A9:40

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE
CLERK

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station,
Unit 1)

)
)
)
)
)

Docket No. 50-322-OL-3
(Emergency Planning)

FURTHER NRC STAFF COMMENTS
ON IMPOSITION OF SANCTIONS

I. INTRODUCTION

On July 11, 12, 14 and 19, 1988, the Board conducted a hearing to determine whether the discovery process had been complied with and to assist the Board in its determination of the appropriate sanction to impose with respect to the realism contentions. Tr. 20947; Notice of Hearing, July 1, 1988. At the conclusion of the hearing, the Board asked the parties to submit by July 26, any additions to their June 15, 1988 filings on proposed sanctions, ^{1/} based solely on the record of the hearing. Tr. 22074. In accordance with that request, the Staff provides its additional views below.

1/ The Staff recommended in its filing that Intervenors' refusal to proceed with Board-ordered discovery or to permit any inquiry into Intervenors' best efforts responses in the event of a radiological emergency at Shoreham and the resources and plans under which such response might be made warranted dismissal of the realism contentions (Contentions 1-2, 4-8 and 10), with prejudice, on procedural grounds. See NRC Staff Comments on the Proposed Imposition of Sanctions on Intervenors for Failure To Comply with Discovery Orders, June 15, 1988.

D507

II. DISCUSSION

The basic question at issue during the hearing was whether State and County emergency plans were withheld from discovery during this proceeding. Tr. 20924, 20885-86. ^{2/} The Board heard testimony from twelve witnesses -- five from the State, six from the County and a LILCO employee -- concerning discovery which took place in 1982, 1983 and 1988 and whether LILCO had received the planning documents apart from discovery. ^{3/}

As discussed in more detail below, the testimony, while less than determinative, indicates that LILCO did receive through discovery part of

^{2/} Judge Gleason explained during a June 29, 1988 conference call with the parties that the hearing would "relate to the production of emergency plans and whether they should have been produced earlier and if they have not been produced, what the circumstances were for their nonproduction." Tr. 20932.

^{3/} The State witnesses were: Dr. David Axelrod, Chairman of the New York State Disaster Preparedness Commission and Commissioner of the State Department of Health (Tr. 21603); Donald Davidoff, Director of the Field Operations Management Group in the New York State Department of Health since 1985 (Tr. 21984); Donald DeVito, Director of the State Emergency Management Office (SEMO) since 1982 (Tr. 21096-97); Anthony Germano, Chief of Staff for SEMO since 1985 (Tr. 21729); and James Papile, Director of the State Radiological Preparedness Group (REPG) since 1986 (Tr. 20962-63). The County witnesses were: John B. Billello, Acting Director of Suffolk County's Division of Emergency Preparedness (DEP) since May 1988 and Deputy Director of that Division since 1980 (Tr. 21443-44); Frank Jones, Deputy and Chief Deputy County Executive from July 1978 to March 1987 (Tr. 21836); Richard Jones, Radiological Defense Officer in the Department of Fire, Rescue and Emergency Services (FRES), and employed with the County DEP since September 1982 (Tr. 21315); Frank P. Petrone, Acting Commissioner for FRES and a County employee from 1980-81 and from January 15, 1987 to present (Tr. 21503-05); William E. Regan, Director of the County DEP from February 1980 to May 1988 (Tr. 21878); and Robert Sheppard, a 30-year county employee and currently an Associate Public Health Hearing Officer, a liaison between the Department of Health Services (DHS) and FRES, and the DHS Radiation Emergency Officer (Tr. 21916-18).

what was later produced as the Suffolk County Emergency Operations Plan ("SCEOP") on May 24, 1988 (LILCO Discovery Exhibit 9, Tr. 21144) and was aware of the existence of a general County emergency plan as early as 1982 during cooperative efforts between the County and LILCO to draft an emergency plan for Shoreham. LILCO's digest of discovery materials shows that LILCO had received portions, or earlier versions of the "basic emergency plan" for the County. County Disc. Exh. 1 at 1, 5. ^{4/} The record is less clear as to whether the copy of the integrated SCEOP with then-existing annexes, was provided in 1985 or 1986 to Norman Kelly of LILCO, or ever actually received by LILCO because Mr. Kelly had only asked for the basic plan and gave it to one of his superiors (Tr. 21548-49). The record is clear, however, that Intervenors, particularly the County, did not undertake assiduous efforts to update their discovery responses concerning County plans once later revisions were made to the SCEOP. In addition, document production in response to 1988 discovery requests by LILCO or Board Orders concerning LILCO's requests were sometimes tardy or incomplete.

A. 1982 and 1983 Discovery ^{5/}

During Phase I (onsite emergency planning) of this proceeding, LILCO served two sets of document production requests dated June 2 and 22, 1982.

^{4/} Richard Jones, the County employee responsible for maintaining and updating the SCEOP since 1984, identified LILCO Disc. Exh. 10, Annex A, Appendix 9, as the basic plan which is accompanied by annexes which set forth the duties of various County departments during an emergency. Tr. 21313-17.

^{5/} Since the State did not intervene in the proceeding until 1984, the activities of the State during this time period are not at issue.

Those requests concerned all documents pertaining to the County's organization for nuclear and nonnuclear emergencies, procedures for nonnuclear emergencies, and documents concerning plans or planning for emergencies at Brookhaven National Laboratory ("BNL") and at the nearby Millstone Nuclear Power Plant. E.g., LILCO's First Request to Suffolk County for Production of Emergency Planning Documents, June 2, 1982, at 5-6. In accordance with a June 27, 1982 Board Order compelling production of nonnuclear documents, Frank Jones, then Deputy County Executive for Suffolk County, issued a memo to all County department heads asking that they produce all planning documents, both nuclear and nonnuclear, including emergency procedures. LILCO Disc. Exh. 43, Tr. 21899. The County conducted a search to locate all emergency planning documents referring to plans for all types of emergencies and the documents collected, which the witnesses believed included the SCEOP, were placed in boxes and delivered to Frank Jones' office. Billello, Tr. 21448-50; F. Jones, Tr. 21837-38, 21841. ^{6/}

During Phase II (offsite emergency planning) LILCO made two informal discovery requests dated June 29 and July 21, 1983 (LILCO Disc. Exhs. 27 and 28, Tr. 22074) which again asked for documents concerning the County's organization and procedures for nonnuclear emergencies. Frank Jones issued another memo to County department heads and attached pertinent

^{6/} The three individuals that actually conducted the search for the County's Emergency Preparedness Division did not testify. See Tr. 21449.

pages from LILCO's requests. F. Jones, Tr. 21861. ^{7/} A search commenced again for all emergency planning documents for all types of emergencies, both natural and manmade. R. Jones, Tr. 21318-19; Billello, Tr. 21450; Regan, Tr. 21886. The documents collected were placed in several boxes and forwarded to Frank Jones. R. Jones, Tr. 21319; Billello, Tr. 21451. Present and former County employees testified that they believed that the SCEOP was provided (e.g., Billello, Tr. 21451-52; F. Jones, Tr. 21850-51), but no listing of the document provided could be located (F. Jones, Tr. 21867-68) and the County DEP does not have a copy of the SCEOP as it existed in 1982 or 1983 (R. Jones, Tr. 21319-20).

The evidence concerning the 1982-83 discovery did not establish that the County willfully concealed documents responsive to either request. Frank Jones's memo transmitting pages from LILCO's requests required each department head to respond with due diligence. F. Jones, Tr. 21842, 21861. Frank Jones did not direct that any documents be withheld in 1982 and 1983. Tr. 21839, 21843-44. In addition, the 1983 search was treated as a new request that required a new search. F. Jones, Tr. 21866; Billello, Tr. 21450-51. While it appears that some County employees involved in the search never saw LILCO's written discovery requests (R. Jones, Tr. 21363), there was no evidence that any documents were inten-

^{7/} Frank Jones also testified that he believed the 1983 request was similar, but asked specifically about contaminated food products. Tr. 21842. Mr. Jones may have recalled LILCO's August 8 and September 27, 1983 request for ingestion pathway documents. It appears that the County was somewhat mindful of its obligation to update its responses because the County response to these two requests provided documents it had "just discovered" and believed to be responsive to Phase I or II discovery. Letter to D. Irwin from K. Letsche, dated October 6, 1983.

tionally withheld. Moreover, LILCO's digest shows that it received the January 1, 1981 basic County plan in 1982 and 1983. County Disc. Exh. 1 at 1, 5.

B. 1988 Discovery

The issues relevant to the realism contentions were set forth in CLI-86-13, 24 NRC 22 (1986). ^{8/} In order to determine the nature of Intervenor's best-efforts responses, LILCO conducted depositions, and served its Second Set of Interrogatories and Document Requests, dated March 24, 1988 (LILCO Disc. Exh. 29, Tr. 22074). That request sought copies of all plans and procedures for responding to radiological and nonradiological emergencies affecting the County, including accidents at BNL and medical and industrial facilities. LILCO Disc. Exh. 29 at 39. LILCO's Request also asked for plans and procedures for responding to radiological emergencies at Millstone. Id. at 38.

Intervenors were ordered to produce all emergency plans during a May 10, 1988 prehearing conference. Tr. 19382. By letter dated May 24, 1988, the County provided LILCO a copy of the SCEOP (LILCO Disc. Exh. 9) which was served on the Board and the parties by counsel for LILCO on May 25, 1988. Letter to Gleason from Irwin. The Board also ordered Intervenor to produce all emergency plans on May 24, 1988 and, on June 29 (Tr. 20934), ordered Intervenor to answer LILCO's Third Set of

^{8/} The Commission's statements in CLI-86-13 were amplified in the new rule on emergency planning and establish that parties wishing to litigate issues concerning the failure of local governments to carry out a utility plan must assume the burden of going forward and show the plan it would follow in such an emergency. 52 Fed. Reg. 42078, 42085 (November 3, 1987).

Interrogatories, dated June 7, 1988 (LILCO Disc. Exh. 30, Tr. 22074) concerning the production of the SCEOP (LILCO Disc. Exh. 9). ^{9/}

1. County Responses

Present and former County employees testified that they tried to locate all documents related to planning for natural or manmade disasters. R. Jones, Tr. 21321; Petrone, Tr. 21511; Billello, Tr. 21453. Two searches were conducted beginning in May and concluding on July 6, 1988. R. Jones, Tr. 21396-97; Petrone, Tr. 21522. The version of the SCEOP provided to LILCO on May 24, 1988 (LILCO Disc. Exh. 9) was the last of the copies made in 1985 by R. Jones. Tr. 21322-23. The documents collected were placed in boxes and held at the County's Emergency Operation Center for review by the County's attorneys. Billello, Tr. 21452.

The County did not produce the most current or master version of the SCEOP (LILCO Disc. Exh. 10) until R. Jones was assisted by counsel, in part, because Mr. Jones believed that it was too burdensome to reproduce the updated plan. Tr. 21408-10. Petrone also stated that he did not know until the week before the hearing the most recent version of the plan had not been provided. Tr. 21519. The County's lack of thoroughness during the recent search is also apparent in its apparent failure to contact all County employees that might have relevant documents in their possession. For example, Sheppard testified that he had a library of emergency documents, including a listing of State personnel to be contacted in an

^{9/} Intervenors were also directed to provide Annex K of the SCEOP. Tr. 20934-35.

emergency, but stated that he was not asked to search for documents in 1988. Tr. 21960-61, 21968. ^{10/}

The County did not produce until shortly before the hearing the Radiological Intelligence Annex K, dated August 1976 (LILCO Disc. Exh. 25) until June 1, 1988. Tr. 21259. R. Jones explained that the Annex was being revised in accordance with federal guidelines to make it applicable to both war and peacetime. Tr. 21412.

The County's actions with respect to 1988 discovery requests indicate that some of its search strategy may have been incomplete and the searches were not undertaken until after repeated Board orders that granted LILCO discovery requests. The County also failed to acknowledge the existence of a general disaster plan with applicability to Shoreham in response to questioning during depositions. The County's discovery performance in 1988, while recalcitrant, piecemeal and occasioned by delay, cannot be said to constitute willful withholding of documents.

2. State Responses

The testimony provided by New York state witnesses during the hearing suggests that a thorough search for documents responsive to LILCO's discovery requests was not initiated until at least May 1988. For example, although Mr. Papile recalled that REPG began searching for pertinent documents in March or April 1988 (Tr. 20968), he also stated that he had no knowledge of whether his office had a copy of the New York State

^{10/} Sheppard was contacted regarding a 1982 or 1983 discovery request, but he did not have any responsive documents. Tr. 21919-20.

Disaster Preparedness Plan when he was deposed by LILCO on April 29 of that year (Tr. 20992).

Similarly, Mr. DeVito stated that he was unaware of the existence of a Suffolk County disaster plan when he was deposed in April 1988 (Tr. 21230-32) even though he had known as early as 1987 that a member of his staff would be going to Suffolk County in order to assist in the preparation of such a plan (Tr. 21235). Mr. DeVito recalled that he had been specifically asked for the Suffolk County Emergency Operations Plan by counsel during a telephone conversation on June 6, at which time he ascertained that a copy had been received by a member of his staff who had visited the County during the previous month. Tr. 21102-03. His chief of staff and the person responsible for coordinating the document search (Tr. 21729-30), Mr. Germano, stated that he was asked to search for documents that would affect Suffolk County. Tr. 21730, 21769. Germano initially had been asked to provide documents responsive to LILCO's requests during June or July 1988. Tr. 21811. Mr. DeVito also testified that the State never retained a copy of the SCEOP until it was obtained by Mr. Horton in May 1988 in connection with the State review of the County's disaster plans to support Federal Emergency Management Assistance funding. DeVito, Tr. 21101-07. 21133-34, 21148. ^{11/}

^{11/} Just as the County did not produce to LILCO the master plan (Exh. 10), the County also gave the State one of the out-of-date copies of the SCEOP that was identical to Exh. 9. R. Jones, Tr. 21325.

As for the information provided by the State, the evidence indicates that some relevant documents may not have been produced. ^{12/} For example, the State did not provide LILCO with the Emergency Directory (Tr. 21154), even though Mr. DeVito stated that the document was maintained by his office (Tr. 21206-07). However, none of the testimony elicited during the hearing indicates that the State's failure to produce documents was the result of a deliberate attempt to withhold or conceal information from LILCO.

The testimony of Mr. Davidoff, however, indicates that LILCO had access to at least a generic emergency plan for Suffolk County for many years. According to Mr. Davidoff, both Suffolk County and the State of New York were involved in the development of a LILCO emergency plan for Shoreham from 1980 to 1982. Throughout that time, he was aware that LILCO had access to a generic emergency preparedness plan for the County. Tr. 21983, 21991-02, 22004-06.

Documents not produced but obtained by LILCO independently were the BNL Plan, revised July 1987 (Exh. 43), and a Memorandum from Germano to County Managers, dated August 27, 1987 (LILCO Disc. Exh. 5). Papile believed that the guidance in the memo could be used by any New York County (Tr. 21028), but Germano insisted that the information was specific to the thirteen counties surrounding the Ginna facility (Tr. 21731,

^{12/} The State was also slow to respond to discovery requests. For example, it was not until after the Board order of June 29, 1988 (Tr. 20934-35) that Intervenors provided authentication of the New York State Radiological Emergency Plan (LILCO Disc. Exh. 6) and the New York State Disaster Preparedness Plan, dated September 1982 (LILCO Disc. Exh. 1, 20990).

21815-17). The State Health Department's radiological procedure, RAD 320 (LILCO Disc. Exh. 7, Tr. 21063), was not produced until July 5, 1988, but was relevant to LILCO's March 1988 discovery request (LILCO Disc. Exh. 29). Similarly, the SEMO operating procedures were not provided. Germano, Tr. 21819-21. ^{13/}

C. 1985 or 1986 Distribution to Norman Kelly of LILCO

Intervenors argued at the hearing that, contrary to LILCO's assertion, LILCO was not ignorant of the existence of an integrated County operations plan because Norman Kelly of LILCO had been provided with a copy of the SCEOP in 1985 or 1986. Kelly was the director of the County's DEP from 1968 to 1980. Kelly, Tr. 21545; R. Jones, Tr. 21326-27.

Richard Jones testified that he gave Kelly one of the 10 copies of the SCEOP that he had made in 1985. Tr. 21329, 21322. ^{14/} Kelly also testified that pursuant to the request of one of his supervisors, had asked R. Jones to give him a copy of the basic plan, only in late 1985 or early 1986. Tr. 21547-48. While he did not examine the document, he recalls it was entitled "Basic Emergency Operations Plan" and was provided to one of his supervisors. Tr. 21540. He also stated that at least one year ago, he had obtained an unredacted copy of the Emergency Services Directory (LILCO Disc. Exh. 11) for Mr. Adikoff, a LILCO consultant. Tr. 21550-01. Kelly was not provided a copy of the Emergency

^{13/} A partial listing of documents collected by the State in 1988 was received as Exhibit 31. Tr. 21424.

^{14/} County witnesses also asserted that the SCEOP was discussed in detail (R. Jones, Tr. 21329-30) or just referred to (Billello, Tr. 21454-55) at yearly hurricane conferences held by the County DEP.

Service Directory in 1985 or 1986, although it was part of the plan (an annex maintained separately in 1985 or 1986. R. Jones, Tr. 21416-17.

In sum, the Staff concludes that evidence at the hearing provides further support for the dismissal of the realism contentions since Intervenors' discovery compliance record was spotty or piecemeal and it was not until the eve of the Board's sanction hearing that the most up-to-date version of the SCEOP (LILCO Disc. Exh. 10) was produced. ^{15/} The record showed that Intervenors failed to exercise due diligence during document searches conducted in response to LILCO's discovery requests and Intervenors resisted, to the bitter end, any attempts by LILCO (whether by deposition, document production or interrogatories) and Board Orders concerning emergency plans and non-nuclear planning information which could be relied on during a Shoreham emergency. However, the evidence does not support the imposition of sanctions beyond those previously proposed by the Board. ^{16/}

LILCO had the basic County emergency plan, dated January 1, 1981, that was derived from a generic State disaster plan. LILCO also probably worked with the basic County plan during the drafting of the Shoreham emergency plan as early as 1982. Thus, it cannot be said that LILCO did

^{15/} Many State planning documents requested during 1988 discovery were similarly not produced until the week before the hearing. See Letter from R. Zanleuter to D. Irwin, July 5, 1988.

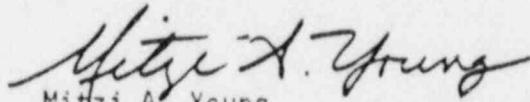
^{16/} Further, the State and County, earlier this year, endeavored to prevent LILCO's attempts to discover the nature of their best-efforts responses during depositions of various State and County witnesses, including County Executive Halpin and Dr. Axelrod, by repeated objections by counsel, unresponsive witness answers and preemptorily ending depositions.

not know of the existence of, or have the benefit of, the County emergency plan for general disasters at the time it structured the Shoreham plan or that the course of this proceeding was substantially affected by County and State failures to completely reveal their general emergency plans since the early 1980's. It is indisputable that the failure to produce all the attachments or annexes to the plan and to deny the existence of any plan which could be applied to Shoreham, hindered LILCO's efforts to determine fully the nature of County and State resources for their best-efforts responses. Consequently, dismissal of the realism contentions is an appropriate sanction.

III. CONCLUSION

In conclusion, the record of the sanction hearing provides further support for the dismissal of the realism contentions because of Intervenors' failure to comply with discovery.

Respectfully submitted,


Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 26th day of July, 1988

Stephen B. Latham, Esq.
Twomey, Latham & Shea
Attorneys at Law
33 West Second Street
Riverhead, NY 11901

Atomic Safety and Licensing
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing
Appeal Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veteran's Memorial Highway
Hauppauge, NY 11788

Anthony F. Earley, Jr.
General Counsel
Long Island Lighting Company
175 East Old County Road
Hicksville, NY 11801

Dr. Robert Hoffman
Long Island Coalition for Safe
Living
P.O. Box 1355
Massapequa, NY 11758

Alfred L. Nardelli, Esq.
New York State Department of Law
120 Broadway
Room 3-118

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. W. Reed Johnson
115 Falcon Drive, Colthurst
Charlottesville, VA 22901

Herbert H. Brown, Esq.
Lawrence Coe Lanpher, Esq.**
Karla J. Letsche, Esq.
Kirkpatrick & Lockhart
South Lobby - 9th Floor
1800 M Street, NW
Washington, DC 20036-5891

Jay Dunkleberger
New York State Energy
Office
Agency Building 2
Empire State Plaza
Albany, NY 12223

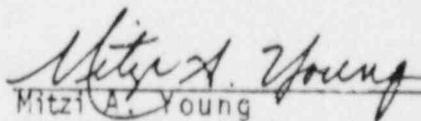
Spence W. Perry, Esq.
General Counsel
Federal Emergency Management
Agency
500 C Street, SW
Washington, DC 20472

Dr. Monroe Schneider
North Shore Committee
P.O. Box 231
Wading River, NY 11792

Ms. Nora Bredes
Shoreham Opponents Coalition
195 East Main Street
Smithtown, NY 11787

William R. Cumming, Esq.
Office of General Counsel
Federal Emergency Management
Agency
500 C Street, SW
Washington, DC 20472

Barbara Newman
Director, Environmental Health
Coalition for Safe Living
Box 944
Huntington, New York 11743


Mitzi A. Young
Counsel for NRC Staff