

A-17

Case No. Official Exhibit No. 17

50-322-OL-3

(GC, Board, Party)

Disposition: Identified

Rejected Received

IN THE MATTER OF:

LILCO

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

No. Pages:

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

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

GOVERNMENTS' RESPONSE TO BOARD ORDER OF JUNE 24, 1988

During the June 24, 1988 telephone conference call, the Board asked the parties to submit responses to the following proposal: rather than permitting LILCO to depose 17 former and present State and County officials, the Board would itself conduct a focused hearing on the "integrity of the proceeding" issue raised by LILCO's allegations that the Governments have withheld the Suffolk County Operations Plan and other documents during discovery in 1982-83 and 1988. See Tr. 20923-25. This is the Governments' Response, filed on behalf of the State of New York and Suffolk County.^{1/}

^{1/} The Governments do not repeat here the reasons they believe the LILCO deposition procedure originally proposed by the Board would be unlawful and inappropriate. The Governments' position is set forth in their June 20 Motion to Vacate and their June 23 Motion for a Stay. See Governments' Motion for Licensing Board to Vacate June 17 Order (June 20, 1988); Governments' Motion for Stay of June 17 Order (June 23, 1988).

As demonstrated below, the premise of the Board's inquiry and of LILCO's accusations -- that LILCO had never seen or obtained a copy of the County's Operations Plan until May, 1988 -- is false. The Governments submit, therefore, that the Board should terminate this "inquiry."

I. The Necessary Scope of the Board's Inquiry, Assuming that One is Conducted

The requested responses are to identify the individuals the parties believe should be witnesses available for Board questioning on "the basic issue . . . whether state and county emergency plans may have been withheld during the proceeding . . . [a]nd if such plans were withheld what were the circumstances surrounding the withholding?" Tr. 20924. The Board stated:

Witnesses ought to be knowledgeable about . . . the plans themselves, and who had access to them and knowledge of them

Id.

In previous filings, the Governments identified the State and County officials who are knowledgeable about the production of documents during discovery, both in the 1982-83 time frame (during which only the County was a party) and in 1988. Those five individuals are listed in Section II below with a description of their respective positions, knowledge, and anticipated testimony. The Governments continue to believe that these individuals are the appropriate persons to respond to Board questions about the knowledge and access of the State and County

to the County Operations Plan and other documents produced during discovery.^{2/}

In order to fully address the issue presented by the Board's "integrity of the proceeding" inquiry, however, this Board must not limit itself to the facts concerning the Governments' knowledge of and access to the County Operations Plan. LILCO's allegations also require the Board to ascertain the state of LILCO's access to and knowledge of that Plan in light of LILCO's repeated assertions that it was ignorant of the existence of that Plan until May, 1988, that earlier LILCO access to the Plan would have altered LILCO's presentation of its "realism" case, and that the Governments have attempted to conceal the existence of the Plan.

Accordingly, the Board must also question at least one additional witness in order to determine the complete facts concerning knowledge of and access to the County Operations Plan. That witness is Mr. Norman Kelly, who since 1985 has been employed by LILCO in its emergency planning division. From 1968 to 1980, Mr. Kelly was the Director of the Suffolk County Division of Emergency Preparedness. See Section II.C below.

Mr. Kelly is a central figure because, notwithstanding LILCO's reported claim of "astonishment" upon the "discovery" of the County Operations Plan for the "first time" in late May 1988,

^{2/} As stated during the June 24 conference call, the County would also be willing to submit an affidavit of counsel, in response to LILCO's affidavit of counsel, concerning document production in 1982-83, should the Board believe that is necessary.

the Governments learned subsequent to the June 24 conference call that no later than late 1985 or early 1986, LILCO had actual possession of the County Operations Plan. At that time the Plan was provided by the County to Mr. Kelly, at Mr. Kelly's request, wholly apart from the County's formal production of the plan during discovery in this NRC proceeding.

LILCO has made sweeping assertions about the supposed prejudice to LILCO resulting from LILCO's alleged ignorance about the existence of the County Operations Plan prior to May 1988. LILCO has charged the Governments with concealing or attempting to conceal the existence of the County's Operations Plan. And, LILCO has alleged that pre-1988 revelation of the existence of the Operations Plan would have greatly enhanced LILCO's ability to present its "realism" position. Indeed, such allegations have animated virtually every LILCO filing and statement of counsel made in this realism remand since the County's most recent production of the County's Operations Plan in May 1988. For example, LILCO has stated:

No copy of [the County Operations Plan] was in LILCO's possession when Suffolk County counsel produced it on or about May 26, 1988^{3/}

LILCO did not hold the Suffolk County Plan when it was produced in May 1988. There is no evidence in LILCO's comprehensive records that it was ever produced. . . .^{4/}

3/ LILCO's Response to Intervenor's Motion to Vacate (June 23, 1988) at 5.

4/ Id. at 20.

LILCO has been gravely, if not mortally, prejudiced by the unavailability of ^{5/} [the County Operations Plan] for years.

I can assure the Board as we are all sitting here today that had we been able to point to offices, names, phone numbers, resource lists instead of having to shoot dark into a void . . . we could have demonstrated realism three years ago, perhaps four. There is no question about that. ^{6/}

[T]he effect of the absence of this document, and perhaps other related documents during this previous four years, I can't say more clearly than to state that it would have made a difference between shooting in the dark and shooting fish in a barrel to LILCO. ^{7/}

The Board may still wish to inquire into the details of document production in 1982-83, and the Governments would provide the appropriate witnesses for that inquiry. The Governments continue to believe, however, that such an inquiry could only result in the conclusion that the parties' honest recollections about events of 5-6 years ago and available documentation create an impasse which cannot be definitively resolved.

Of overriding significance, however, is the need to inquire into LILCO's actual knowledge and possession of the County

^{5/} LILCO's Response to "Suffolk County Response to Licensing Board Discovery Inquiries," (June 1, 1988) at 17 (appearing ff. Tr. 20832).

^{6/} Tr. 20829-30 (Irwin) (June 3, 1988).

^{7/} Tr. 20873 (Irwin) (June 17, 1988).

Operations Plan -- assuming an inquiry is conducted at all. LILCO has concealed from the Board its own material knowledge concerning the existence and complete contents of that Plan, all the while asserting that the Governments' alleged withholding of documents has caused extreme prejudice to LILCO.

No such prejudice to LILCO has occurred, because LILCO has been in possession of the supposedly "withheld" document, which it obtained from the County, since approximately 1985 (if not before). In fact, if that document actually could have enhanced LILCO's "realism" defense, LILCO had more than two years to use it for that purpose.

II. The Necessary Witnesses

The Board should call the following witnesses to determine the facts about production of the County Operations Plan in 1982-83 and in 1988, and to ascertain the status of LILCO's actual knowledge and possession of the County Operations Plan. ^{g/}

A. Suffolk County

The following individuals are knowledgeable about production of the County Operations Plan and who had access to it, during the 1982-83 and/or 1988 time period.

1. Frank Jones, then Deputy Suffolk County Executive, was in charge of gathering documents to be produced to LILCO in response to discovery requests in 1982 and 1983. Mr. Jones would

g/ As noted during the conference call, should the Board's interrogation of these witnesses reveal a need to question additional witnesses, that matter can be addressed at that time.

testify as to how the document gathering and production process was conducted. He would also testify that the County intended to and believes it did produce to LILCO all non-privileged documents responsive to LILCO's discovery requests, including the County's Operations Plan.^{9/}

2. John Bilello has been the Deputy Director of the Suffolk County Emergency Preparedness Division since February 1980. He is currently the Acting Director of that Division. Mr. Bilello was directly involved in the 1982 and 1983 document production, and he is knowledgeable about the County's plans and procedures and who has access to them.^{10/} Mr. Bilello would testify that in 1982-83 the Emergency Preparedness Division produced to Mr. F. Jones all documents responsive to LILCO's 1982-83 discovery requests, including the County's Operations Plan.

Mr. Bilello is also generally knowledgeable about Mr. Norman Kelly's knowledge concerning the County's emergency plans and procedures, including the County's Operations Plan, while Mr. Kelly was the Director of the County's Emergency Preparedness Division. Mr. Bilello would testify that during Mr. Kelly's employment by LILCO, Mr. Kelly has occasionally visited the

^{9/} Although Mr. Jones is no longer a County employee, he has indicated to the County that he is willing to appear at a hearing to be questioned by the Board. Mr. Jones is presently the Supervisor of the Town of Islip, New York.

^{10/} According to standard County procedure, copies of all County emergency plans and procedures are forwarded to the Emergency Preparedness Division.

County's Emergency Preparedness Division. Mr. Bilello also would testify that during a recent social lunch with Mr. Kelly, Mr. Kelly acknowledged that subsequent to commencement of his employment by LILCO, he had obtained a copy of the County's Operations Plan.

Mr. Bilello also assisted Mr. Frank Petrone (see below) in the document production which occurred in 1988. He would testify that the County diligently searched for and identified responsive documents, and that the County's Operations Plan was again produced to LILCO in May, 1988.

3. Richard Jones has been the Radiological Officer in the Suffolk County Emergency Preparedness Division since September 1982. He was involved, with Mr. Bilello, in the document productions which took place in 1983 and 1988. He would testify that in 1983 and again in 1988, the Emergency Preparedness Division diligently searched for, and produced, all documents responsive to LILCO's discovery requests, including the County's Operations Plan.

Mr. R. Jones is also generally knowledgeable about Norman Kelly's familiarity with the County's emergency plans and procedures, including the Operations Plan. Mr. Jones would testify that Norman Kelly was employed by LILCO in late 1984 or early 1985, in a position related to emergency preparedness, and that he occasionally visited with some of the personnel in the County's Emergency Preparedness Division. Mr. Jones would also testify that in late 1985 or early 1986, Mr. Kelly asked the

County's Emergency Preparedness Division for an updated copy of the County's Operations Plan and that Mr. Jones personally gave Mr. Kelly a current copy at that time. Mr. Jones understood that Mr. Kelly sought the copy of the Plan for use in connection with LILCO's emergency preparedness work.

4. Frank Petrone was an assistant to the Suffolk County Executive in May, 1988.^{11/} He was in charge of the County's document production in 1988, assisted by Messrs. Bilello and R. Jones. Mr. Petrone would testify about how the County's document gathering and production took place, and he would testify that the County produced responsive documents to LILCO, including the County Operations Plan.

B. The State of New York

Since the State did not enter this proceeding as an active party until 1984, it has no information concerning document production by the County prior to that time. In addition, there has been no evidence to suggest that the State failed to respond appropriately to discovery requests and Board orders in 1988. Nevertheless, the State would produce for questioning by the Board the following witness who is knowledgeable about the State's receipt of, and knowledge about, the Suffolk County Operations Plan.

^{11/} Mr. Petrone has recently become Acting Director of the County's Department of Fire, Rescue and Emergency Services. In this position, he supervises the work of the Emergency Preparedness Division.

Donald DeVito is the Director of the New York State Emergency Management Office ("SEMO"). SEMO has authority to review State and local government emergency plans for non-nuclear emergencies. Mr. DeVito would testify that SEMO personnel have known for many years that Suffolk County, like other counties in New York, had a plan for dealing generally with emergencies. He would also testify that a copy of the County Operations Plan was located in SEMO files on June 6, 1988, and that this copy was received from Suffolk County on May 6, 1988. He would testify that the State obtained that copy in connection with a SEMO review of non-nuclear emergency plans in early May, 1988, and not in connection with any Shoreham-related matters.

C. LILCO

There is at least one LILCO employee whom the Governments can now identify as necessary to the Board's inquiry. Questioning by the Board may reveal the need to call additional LILCO witnesses in order to determine the full extent of LILCO's actual knowledge or possession of the County Operations Plan.

Norman Kelly is currently employed by LILCO in an emergency preparedness position. The Governments do not know his precise title, but believe he is a member of LILCO's emergency planning staff. Based on discussions with Messrs. Bilello and R. Jones, the Governments believe that Mr. Kelly would testify that:

-- Between 1968-1980, Mr. Kelly was the Director of Suffolk County's Emergency Preparedness Division. While in that

position, he was knowledgeable concerning the County's emergency plans and procedures,^{12/} and was intimately familiar with the County's Operations Plan.

-- Beginning in late 1984 or early 1985, Mr. Kelly was employed by LILCO in an emergency preparedness capacity.

-- In late 1985 or early 1986, Mr. Kelly asked the County's Emergency Preparedness Division for a copy of the County's Operations Plan. Mr. R. Jones gave Mr. Kelly a copy.

-- During a recent luncheon with Mr. Bilello, Mr. Kelly acknowledged that he had received a copy of the County's Operations Plan several years ago.

III. Conclusion

The Governments submit that the Board's questioning of the witnesses identified herein will result in the following conclusions:

1. The County produced the Operations Plan in its entirety in 1982-83, or, any partial non-production was inadvertent;
2. Any partial non-production which may have occurred in 1982-83 was of no consequence, and certainly caused no harm or prejudice to LILCO, because by 1985 LILCO had actual knowledge and possession of the County Operations Plan and could have used it in preparing its case; and,

^{12/} For example, Mr. Kelly was the author of the Suffolk County Emergency Plan for Major Radiation Incidents, dated August 1979.

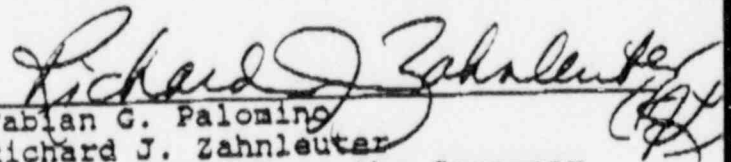
3. Any allegations by LILCO of failure by the Governments to comply with discovery procedures must be rejected in light of LILCO's failure to disclose to the Board that in 1985 LILCO had actually obtained the County Operations Plan from the County.

Respectfully submitted,

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