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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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USNRC

COMMISSIONERS:

'86 FEB 13 P3:44

- Nunzio J. Palladino, Chairman
- Thomas M. Roberts
- James K. Asselstine
- Frederick M. Bernthal
- Lando W. Zech, Jr.

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In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station)

Docket No. 50-322 OL-3

MEMORANDUM AND ORDER

In a "Motion Concerning Proposed Emergency Planning Exercises," dated January 22, 1986 but not received by the Commission until January 27, 1986, the County of Suffolk, the State of New York, and the Town of Southampton (the Governments or Movants) seek a Commission Order, pursuant to 10 CFR § 2.740(f), compelling the NRC Staff, Long Island Lighting Company (LILCO), and the Federal Emergency Management Agency (FEMA) "to produce requested documents, to provide ... requested information, and to permit the Governments to attend meetings, concerning ... proposed [emergency planning] exercises" for the Shoreham Nuclear Power Station. Motion at 3. The request conflicts with the provisions of 10 CFR § 2.740(b)(1) and is hereby rejected.

Movants assert that the NRC Staff, FEMA, and LILCO have withheld information from them about preparations for a February 13, 1986 emergency planning exercise for Shoreham. Although not specified in the motion, we glean from the requests attached to the motion that the County has sought copies of all documents which pertain to the exercise, advance notice of all meetings concerning the exercise, lists of attendees at and summaries of past meetings,

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and identification of all NRC personnel involved in the preparation or conduct of the exercise.

It is the Commission's policy to be as forthcoming to State and local governments as reasonably possible about information regarding upcoming exercises, and the NRC Staff and licensees are expected to abide by this policy in their informal interchanges with State and local officials. However, this case is unusual. The County's efforts to impose criminal sanctions on exercise participants may have had a natural tendency to chill the informal dialogue that normally occurs between utility, Federal, State and local employees. Were the County to have clearly stated that it did not intend to interfere with the conduct of the scheduled emergency planning exercise by criminal actions under its newly-enacted Local Law 2-86 or otherwise, a possible understandable reluctance to speak informally to County representatives about the exercise would have disappeared. Unfortunately, the County took the opposite course and applied the new Local Law to disapprove of the exercise, and thereby subjected some of the exercise participants to possible criminal sanctions. On February 10, 1986, the U.S. District Court for the Eastern District of New York issued a preliminary injunction prohibiting enforcement of the Local Law to obstruct the exercise.

However, the motion before us seeks formal discovery against various persons, and therefore must be judged according to the Commission's Rules of Practice in 10 CFR Part 2. Under 10 CFR 2.740(b)(1), formal discovery is allowed only on admitted contentions, and "no discovery shall be had after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer for good cause shown." The motion before us does not explain why there is good cause for untimely discovery on the admitted emergency planning contentions. Moreover, we question whether good cause could

exist in light of the statements by LILCO and the Staff that the State and County already have copies of the emergency plan, a description of the exercise, and many other documents related to the exercise, and in light of the failure of the State and County to agree to confidentiality as to documents and meetings concerning development of the exercise scenario.<sup>1</sup> Limited confidentiality was absolutely necessary to preserve the integrity of the exercise process and ensure that applicant's employees did not learn of the exercise scenario. The correspondence attached to the motion suggests that FEMA offered to include the County in the exercise planning process if it agreed to such confidentiality, but the County declined this invitation. Much controversy and delay in providing information could have been avoided had it reconsidered its position on confidentiality.

In sum, Movants do not show good cause for allowing untimely discovery, and offer no reason to believe that later discovery, after completion of the exercise, would be inadequate.

Movants also express concerns regarding ex parte communications. The Commission's ex parte rule in 10 CFR § 2.780 applies to "any substantive matter at issue in a proceeding on the record then pending before the NRC ...." While some issues are pending in the Shoreham adjudication regarding the adequacy of the LILCO emergency plan, the scheduling and planning for the conduct of the exercise itself are not pending adjudicatory issues and hence do not give rise to ex parte concerns.

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<sup>1</sup>Also, while section 2.740 permits discovery on "contested issues," the scheduling of and planning for the exercise -- which appear to be the subject of the bulk of the document requests -- are not adjudicatory issues, in contrast to the adequacy of the plan and its implementability.

Last, we note that while the Governments in their January 22 motion sought relief from the Commission as to activities which were to occur on January 29, Movants filed their motion to the Commission using ordinary mail, thereby virtually assuring that the motion would not be received for several days. In fact, the motion was not formally received by the Secretary until January 27, 1986. For the future, Movants should consider whether all parties would be better served in tight time situations by hand delivery or express mail delivery to the Secretary of the Commission.

Chairman Palladino did not participate in this action. Commissioner Asselstine abstained from this action.

It is so ORDERED.

For the Commission\*

  
SAMUEL J. SHILK  
Secretary of the Commission

Dated at Washington, DC

this <sup>1<sup>st</sup></sup> 3 day of February, 1986

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\* Chairman Palladino was not present to participate in this action. Commissioner Bernthal was not present when this action was voted on. If he had been present, he would have approved it.