

DOCKETED  
USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'88 MAY 18 P4:58

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

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

}  
} Docket No. 50-322-CL-3  
} (Emergency Planning)

NRC STAFF RESPONSE TO LILCO'S SUPPLEMENTAL RESPONSE  
AND MOTION IN THE ALTERNATIVE TO COMPEL DISCOVERY

On April 22, 1988, Applicant filed "LILCO's Response to Governments' Objection to Portions of February 29 and April 8 Orders in the Realism Remand and Offer of Proof" ("LILCO Response to Objection"). Therein LILCO requested that the Board dismiss Intervenors' contentions because Intervenors had failed to offer any evidence which would rebut the presumption in 10 C.F.R. § 50.47(c)(1) that any best-efforts response of non-participating governments will be based upon an approved utility plan. Subsequently, on May 2, 1988, LILCO supplemented its response to Intervenors' Objections and offer of proof and renewed its request that the Board dismiss Intervenors' realism contentions and, alternatively, requested that that the Board issue an order compelling further discovery. Supplement to LILCO's Response to Governments' April 13 Objection and Motion in the alternative to Compel Discovery, May 2, 1988 ("Supplement") at 1-2.

As grounds for its discovery and renewed dismissal motions, LILCO states that Intervenors' interrogatory responses and conduct during recent depositions of Intervenors' witnesses show they seek to obstruct LILCO's

BB05260027 880513  
PDR ADOCK 05000322  
G PDR

DS07

attempts to discover the nature of their best-efforts response pursuant to the Board's rulings of February 29 and April 8, 1988. <sup>1/</sup> Supplement at 2, 33-37. LILCO states that Intervenors: (1) unilaterally ended the depositions of two key witnesses (Halpin and Axelrod) on State and County best-efforts response; <sup>2/</sup> (2) obstructed LILCO questioning of Halpin and Axelrod with repeated objections by counsel and unresponsive answers by the two witnesses; (3) preëmptorily ended the depositions of Messrs. Petione, Roberts, Papile, Czech, and Baranski without LILCO's consent; (4) defied the Board Order compelling the deposition of the Suffolk County Commissioner of Health Services and Director of Emergency Preparedness; and (5) objected to virtually all of LILCO's written interrogatories. Id. at 3-4, 6-33. For the reasons set forth below, the Staff supports LILCO's motion. <sup>3/</sup>

- 
- <sup>1/</sup> 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 28, 1988 (February 29 Order); Memorandum (Extension of Board's Ruling and Opinion on LILCO Summary Disposition Motions of Legal Authority (Realism) Contentions and Guidance to Parties on New Rule 10 C.F.R. § 50.47(c)(1)), LBP-88-9, 27 NPC \_\_\_\_ (April 8, 1988) ("April 8 Memorandum").
- <sup>2/</sup> During the Prehearing Conference held May 10, 1988, the Board granted LILCO's motion to compel further depositions of these two witnesses and ruled that the information concerning civil defense plans and emergency plans for nuclear facilities other than Shoreham were relevant. Tr. 19380-82.
- <sup>3/</sup> The Staff often does not take a position in discovery disputes between Applicant and Intervenors, however, the discovery LILCO seeks to compel is consistent with the Board's guidelines for litigation concerning the nature and timeliness of the nonparticipating governments best efforts response under the realism rule, 10 C.F.R. 50.47(c)(1). See February 29 Order at 4; April 8 Memorandum at 15 - 24.

## II. DISCUSSION

Because the Staff has already filed its response in support of LILCO's request for dismissal of Intervenor's contentions, the Staff limits this response to the new matters raised by LILCO's Supplement, namely whether the interrogatory responses and deposition events further support LILCO's request for dismissal, or alternatively, provide a basis for a motion to compel against Intervenor's.

Under 10 C.F.R. § 2.707, an intervenor may be dismissed from a proceeding for its failure to comply with discovery orders. E.g., Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298 (1977); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975). Similarly, the refusal of a party to make its witnesses available for prehearing examinations is an abandonment of the right to present such witnesses' testimony at hearing. Shoreham, LBP-82-115, 16 NRC 1023, 1935 (1982).

The Commission's guidance regarding sanctions in NRC proceedings is found in its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981), which states in relevant part:

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 . . . When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. For example, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one or more of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, boards should consider the relative importance of the unmet obligation, its

potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance. At an early stage in the proceeding, a board should make all parties aware of the Commission's policies in this regard.

The Appeal Board has urged that the sanction of dismissal be reserved for the most severe instances of where a party has failed to meet its obligations. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1416 (1982). The Appeal Board has further explained that pursuant to the principles in CLI-81-8, boards should evaluate an offending party's conduct in terms of three questions: (1) what obligations were imposed by board orders; (2) did the offending party fail to meet any of its obligations; and (3) if so, what sanction is appropriate. Id. at 1411.

Intervenors' refusal to reveal the nature of the State and County's projected response to a radiological emergency at Shoreham, or even the resources available for, and the timing of, such response, warrants dismissal under the tests outlined in CLI-81-8 and Byron. The nature of Intervenors' best-efforts response is the central issue in the upcoming realism hearing and Intervenors were specifically directed to make an affirmative showing as to their projected emergency response efforts. February 29 Order at 2-4. The withholding of such information is contrary to the obligations of a party under the Commission's realism rule and threatens the orderly conduct of the proceeding since Intervenors' failure to disclose the nature and timing of their best-efforts response stifles

the Board's inquiry under the realism rule. Intervenors' repeated assertions that they are legally barred from pursuing emergency planning for Shoreham and that operation of Shoreham is "speculative," or a County or State emergency response is "speculative" since no Shoreham-specific plan exists, are all part of a pattern of behavior to withhold facts pertinent to the inquiry under the realism rule. <sup>4/</sup> It can hardly be doubted that the State and County know the resources they would apply in the event of a radiological emergency, and the nature other emergency plans for nonradiological events.

While Intervenors' activities may be prompted by aggressive attempts to promote their contentions and general concerns regarding the feasibility and adequacy of emergency planning for Shoreham, the circumstances of this proceeding warrant the severe sanction of dismissal. Intervenors' obstructionist discovery tactics, their failure to offer an affirmative showing regarding State and County responses to an radiological emergency at Shoreham, their disregard of Board discovery and evidentiary rulings, combined with the default provisions contained in the Board's February 29 Order (at 4), taken together, warrant dismissal of Intervenors' contentions.

Should the Board determine that Intervenors' actions do not warrant dismissal, the Staff supports LILCO's motion to compel discovery.

---

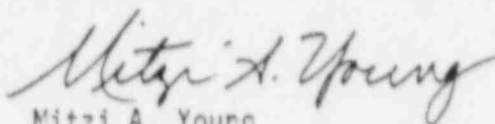
<sup>4/</sup> For example, despite the pendency of this realism proceeding since the issuance of CLI-86-13 in July 1986, Intervenors once urged this Board to extend the discovery period because "the Governments had not yet decided upon or designated any witnesses on the realism issues, or decided whether witnesses will be designated." Governments' Motion for Extension of Time to Respond to Realism Discovery Requests, and To Extend Discovery Schedule, April 6, 1988, at 5.

Pursuant to 10 C.F.R. § 2.740(f), motions to compel discovery must set forth the nature of the request or questions contained in interrogatories, the responses or objections of the party upon whom the request was served, and provide arguments in support of the motion. Under this regulation, a presiding officer is to treat evasive or incomplete answers or responses as a failure to answer or respond. E.g., Houston Light & Power Co. (South Texas Project, Units 1 and 2), LBP-79-5, 9 NRC 193, 194-95 (1979). LILCO's motion to compel comports with the requirements of section 2.740(f) and is amply supported by excerpts from depositions and interrogatory responses. Thus, the requested motion to compel depositions and interrogatory responses should be granted.

### III. CONCLUSION

For the reasons stated above, the Staff supports Applicant's renewed motion for dismissal and Applicant's alternative motion to compel discovery.

Respectfully submitted,



Mitzi A. Young  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 13th day of May, 1988

DOCKETED  
USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

MAY 18 P4:59

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF GENERAL COUNSEL  
NUCLEAR REGULATORY COMMISSION

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

)  
)  
)

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO LILCO'S SUPPLEMENTAL RESPONSE AND MOTION IN THE ALTERNATIVE TO COMPEL DISCOVERY" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 13th day of May 1988.

James P. Gleason, Chairman\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Jerry R. Kline\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Frederick J. Shon\*  
Administrative Judge  
Atomic Safety and Licensing  
Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Jonathan D. Feinberg, Esq.  
New York State Department of  
Public Service  
Three Empire State Plaza  
Albany, NY 12223

Joel Plau, Esq.  
Director, Utility Intervention  
Suite 1020  
99 Washington Avenue  
Albany, NY 12210

Fabian G. Palomino, Esq.  
Special Counsel to the Governor  
Executive Chamber  
State Capitol  
Albany, NY 12224

Philip McIntire  
Federal Emergency Management  
Agency  
26 Federal Plaza  
Room 1349  
New York, NY 10278

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.  
New York State Department of Law  
120 Broadway  
Room 3-118  
New York, NY 10271

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

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

W. Taylor Reveley III, Esq.  
Donald P. Irwin, Esq.  
Hunton & Williams  
707 East Main Street  
P.O. Box 1535  
Richmond, VA 23212

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

Alfred L. Nardelli, Esq.  
General Counsel  
Long Island Light Company  
175 East Old Country Road  
Hicksville, NY 11801

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

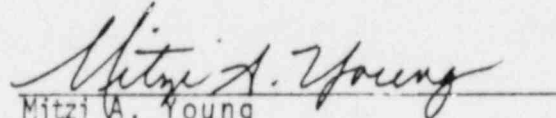
Barbara Newman  
Director, Environmental Health  
Coalition for Safe Living  
Box 944  
Huntington, New York 11743



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

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

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

  
Mitzi A. Young  
Counsel for NRC Staff