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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'88 SEP 21 P5:04

Before the Atomic Safety and Licensing Board

OFFICE OF THE BOARD
DOCKET NO. 50-322-OL-3

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

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

SUFFOLK COUNTY, STATE OF NEW YORK AND TOWN
OF SOUTHAMPTON RESPONSE TO NRC STAFF MOTION FOR
SCHEDULE FOR LITIGATION OF THE JUNE 1988 EXERCISE

In a motion served on September 9, 1988,^{1/} the NRC Staff proposed a schedule to govern litigation of issues arising from LILCO's June 1988 emergency exercise. The Staff's proposed schedule provides specific dates for all phases of the proceeding, with an evidentiary hearing beginning on February 27, 1989.

^{1/} NRC Staff Motion for Schedule for Litigation of the June 1988 Exercise (September 9, 1988) ("Staff Motion"). As the Board is aware, the Governments informed this Board on September 13 that, in the Governments' opinion, the Board lacks jurisdiction to hear issues related to the exercise issues. Accordingly, the Governments moved the Appeal Board to designate an appropriate Licensing Board. This Response should not be construed as a waiver of that argument or concession that the Board has jurisdiction. Nevertheless, this Response is filed in order to inform the Board of the Governments' position in the event that this Board is found to have jurisdiction.

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LILCO's September 16 response to the Staff Motion,^{2/} takes a different approach. While declining to support a specific schedule beyond the admission of contentions, the theme running throughout LILCO's Response is that this proceeding should be rushed through under a host of pre-determined expedited procedures and special rules which LILCO seeks to have this Board impose at the outset. LILCO also proposes an unrealistically abbreviated amount of time for the Governments to digest vast amounts of material concerning LILCO's exercise, much of which the Governments have not yet received, and to file contentions. LILCO's arguments in support of these self-serving proposals are fueled largely by reliance on irrelevant facts and the misrepresentation of other facts.

Neither the Staff's nor LILCO's suggested approaches to the upcoming exercise litigation are appropriate. For the reasons stated below, this Board should establish a realistic schedule for the submission and admission of contentions, with any further schedule to be established after the Board and the parties know the nature and scope of the admitted contentions.

DISCUSSION

While LILCO attempts to deny it, it is apparent to everybody that LILCO's June 1988 exercise is likely to require

^{2/} LILCO's Response to NRC Staff's Motion for Schedule for Litigation of the June 1988 Exercise (September 16, 1988) ("LILCO's Response")

extensive proceedings before whatever Licensing Board is granted jurisdiction over the exercise issues. The need for careful scrutiny of the June 1988 exercise results is particularly crucial in light of the fact that LILCO failed its February 1986 exercise. Thus, it is important to consider both whether the deficiencies found in the earlier exercise have been corrected, as well as to determine whether the June 1988 exercise has exposed additional fundamental flaws in LILCO's planning and preparedness.^{3/} Any consideration of the procedures to be invoked in this proceeding must also take into account that the June 1988 exercise took place over three days and included, to an extent, ingestion pathway and recovery and reentry issues. The February 1986 exercise lasted only one day and did not test ingestion pathway or recovery and reentry planning or preparedness. Accordingly, there are more activities and probably more documents to review for the June 1988 exercise than was true for the February 1986 exercise.

The Staff has generally recognized the need to be realistic about the length of time this proceeding may take. LILCO,

^{3/} LILCO suggests that the upcoming proceeding cannot consider aspects of the exercise which the OL-5 Board found to be adequate. LILCO Response at 3-4. LILCO's suggestion defies reason. The June 1988 was not a remedial exercise, but rather was required to be a new full participation exercise. If LILCO's planning and preparedness has deteriorated since 1986, it is important for the exercise Board to be aware of and consider that fact. LILCO, however, suggests that certain deficiencies arising from the June 1988 exercise be hidden and ignored simply because similar issues may have been heard regarding the February 1986 exercise. The focus of this litigation must be on the results of the June 1988 exercise, regardless of the results of the February 1986 exercise.

however, prefers to ignore the facts, seeking instead to push any proceeding through the exercise Board at breakneck speed.

In the Governments' view, neither the Staffs' nor LILCO's proposals are appropriate. While the Governments generally agree with the Staff that the exercise issues could not possibly be ready for hearing until late February at the earliest, it is simply not possible to set an exact schedule governing the entire proceeding at this time. The Governments have not yet submitted contentions, nor has any Board ruled on them. Until the parties and a Licensing Board are aware of the nature and scope of admitted contentions, it is futile to attempt to set a schedule governing proceedings beyond that point. After contentions have been admitted, a Licensing Board can quickly convene a conference of counsel to consider and decide a schedule for further proceedings.

With respect to LILCO's Response, the Governments' comments are more extensive. In general, it appears that LILCO agrees that it is inappropriate to establish a specific schedule beyond the contention phase of the proceeding. However, the schedule for the contention phase which LILCO proposes is onerous and unrealistic. Furthermore, LILCO has proposed numerous special procedures which are wholly unwarranted and premature at best. These two issues are discussed separately below.

1. Schedule for the Contention Phase

First, LILCO attempts to establish a schedule regarding contentions that is unreasonably restrictive and would deny the

Governments their right to an opportunity to conduct a meaningful review of data and documents related to the exercise prior to filing their contentions. Thus, while the NRC Staff has suggested a date of October 13 to file contentions (Staff Motion at 2), LILCO proposes that all contentions be filed by October 3 -- only two weeks from today.

LILCO buttresses its proposed unrealistic deadline on the basis of several arguments that are either irrelevant or misrepresent the facts. For instance, LILCO argues that the Governments have already had the benefit of reviewing FEMA documents related to the exercise. LILCO's Response at 5, 6. This is only partly true. While FEMA has provided the Governments with pre-exercise documents, the Governments have been denied the right to obtain and review FEMA documents generated on the day of the exercise and thereafter. Plainly, such documents generated by FEMA evaluators, controllers, and other federal government observers are crucial to evaluating the results of the exercise. These documents are particularly important because the FEMA report of the June 1988 exercise is lacking in the kind of detail which was evident in the February 1986 exercise report.

The Governments have made strenuous efforts to obtain day-of-the-exercise and post-exercise documents, but have been thwarted at every turn. For instance, in response to a request by the Governments to obtain "controller messages" as they were issued at the exercise, counsel for the NRC stated in a June 6

letter^{4/} that the Governments would receive such messages "within a reasonable period of time after they are issued." The Governments still have not received those messages.

Furthermore, the Governments have been in contact with FEMA's counsel in an attempt to obtain all relevant exercise and post-exercise documents.^{5/} FEMA's counsel, however, has informed the Governments that FEMA will not agree to produce the documents voluntarily -- despite the fact that such documents were produced and used during and after the February 1986 exercise. Accordingly, the Governments have been forced to file a FOIA request which may take several weeks to be resolved. In short, it is simply inaccurate to state that the proceeding should be expedited because the Governments have received relevant FEMA documents. In fact, most such documents have been denied to date.

Likewise, LILCO states that the Governments should be required to file contentions only two weeks from now because LILCO has already provided the Governments with relevant documents. LILCO Response at 5, 6. While it is true that LILCO has produced many documents, the Governments' review of those documents to date indicates that LILCO's production has been only

^{4/} Letter from Edwin J. Reis, Deputy Assistant General Counsel, NRC, to Herbert H. Brown, dated June 6, 1988.

^{5/} A copy of a recent letter sent to FEMA by counsel for Suffolk County is attached hereto. FEMA's counsel has since informed the Governments by telephone that the requested documents will not be produced, despite his earlier statement that they likely would be produced.

partial. In particular, one of the major issues in the February 1986 exercise was the adequacy of LILCO's training. The OL-5 Licensing Board ruled that LILCO's inadequate training constituted a fundamental flaw in LILCO's preparedness. LBP-88-2, 27 NRC 85, 212-13 (1988). Yet, LILCO has not provided any training documents pertinent to the instant exercise.

LILCO's additional argument that the FEMA report which the Governments received on September 9 is "only" 150 pages long and found no deficiencies in LILCO's performance is also unavailing. LILCO Response at 3-4. The fact is that the FEMA report is extensive and covers a number of issues. The Governments cannot reasonably be expected to analyze it and develop contentions in the short time which LILCO seeks to allot, particularly in light of the fact that the FEMA report is only one source of information concerning the exercise. Other sources must be factored into contentions as well and, as stated above, the Governments have been denied much of the information from those sources.

The Governments submit that any schedule for the filing of contentions and subsequent consideration of those contentions must take account of the foregoing facts, the extensive nature of the issues to be explored, and the Governments' need for adequate time to review and analyze the issues carefully. If FEMA were not delaying on the production of relevant exercise documents, the Governments probably would agree with the Staff that

October 13 would be a reasonable date for the filing of contentions. FEMA, however, is denying the Governments access to relevant information on which such contentions should be based. Assuming that the Governments receive the FEMA documents within the next two weeks, the Governments propose that their exercise contentions be due on October 27, 1988 -- only two weeks later than the Staff's proposal. LILCO and the Staff should file any objections to those contentions 10 days and 15 days later, respectively, with the Governments responding to both filings seven days after the Staff has filed.^{6/} After the Board has ruled on the admissibility of the contentions, it should convene a conference of counsel promptly to consider a schedule for further proceedings.

Thus, the Governments' proposed schedule is as follows:

October 27	Contentions filed
November 7	LILCO files objections, if any
November 11	Staff files objections, if any
November 18	Governments respond to LILCO and Staff filings
Promptly after Board rules on contentions	Conference of counsel

2. LILCO's Proposed Special Procedures

LILCO's Response also proposes a number of expedited and/or restrictive procedures which are insupportable at this early

^{6/} While LILCO has recognized the Governments' right to respond to such objections (LILCO's Response at 5), the Staff has overlooked it. It is consistent NRC practice for intervenors to have the opportunity to respond to objections to contentions.

stage of the proceeding. For instance, LILCO proposes imposing arbitrary restrictions on interrogatories and document requests, expedited responses to such requests, restrictions on depositions and multiple-tracking of such depositions. LILCO's Response at 6. LILCO also proposes truncated summary disposition and testimony-filing procedures, and even goes into such detail as to suggest that service be considered complete only when a document is in the hands of a party at its place of business.^{7/} LILCO's Response at 4, 6-7. In short, LILCO proposes a radical restructuring of the Commission's rules of practice -- the very sort of arbitrary tampering with the Commission's rules that the OL-5 Licensing Board rejected in the earlier exercise proceeding. See Memorandum and Order (Prehearing Conference, July 8, 1986) (July 11, 1986) (OL-5 Docket).^{8/}

^{7/} LILCO fails to explain why next-day service by Federal Express or Express Mail, which has become the custom among the parties for many filings, is now insufficient for the purposes of this litigation.

^{8/} LILCO complains about the time required to litigate the results of the February 1986 exercise and, based on that experience, urges the Board to expedite the upcoming exercise litigation. LILCO's Response at 3, 6 n.1. LILCO misleads the Board with its remarks concerning the pace of the 1986 litigation. First, it must be remembered that the prior exercise was the first exercise ever litigated. Thus, much time was spent by the Commission itself in issuing guidance to the Board and the parties. An unsuccessful interlocutory appeal by FEMA from a Licensing Board prehearing conference order took additional time. In all, the OL-5 Licensing Board handled the exercise litigation about as expeditiously as it could be handled, given the novelty of the litigation. Second, LILCO's suggestion that the deposition discovery process during the prior exercise litigation was "abusive in the aggregate" is equally baseless. LILCO's Response at 6 n.1. Of the 52 persons deposed, nearly one-half (23 persons) were deposed by LILCO. Thus, it is absurd for LILCO
(continued...)

Even if such a radical approach were warranted under some circumstances, and the Governments do not concede that they would ever be warranted, it is plainly premature to impose the draconian steps suggested by LILCO at this time. As stated above, the only reasonable course of action is to proceed with the contention phase of the proceeding before establishing any further schedule or tinkering with the Commissions rules of practice. A Board cannot make reasonable decisions regarding further proceedings until it knows the scope and extent of the contentions which are to be litigated.

CONCLUSION


For the foregoing reasons, at such time that a Licensing Board with jurisdiction over the June 1988 exercise issues is established, a reasonable schedule for the contention phase of the proceeding should be established, with consideration of

8/ (... continued)
to complain that a period of about three months was "chewed up" during discovery, when LILCO itself did as much "chewing" as the other parties. Finally, the time necessary to litigate the February 1986 exercise is a direct result of LILCO's dismal performance, a fact which is well-documented in the OL-5 Licensing Board's findings. See generally, LBP-88-2, 27 NRC 85 (1988). Thus, it ill-behooves LILCO to complain about the time spent to litigate the numerous flaws which the OL-5 Licensing Board found to exist.

further scheduling and procedural issues after the Board has ruled on contentions.

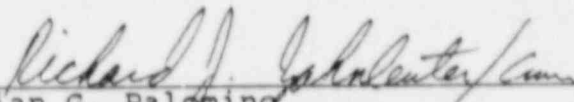
Respectfully submitted,

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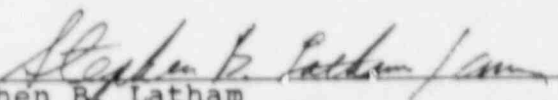
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September 12, 1988

William R. Cumming, Esq.
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Dear Bill:

As you know, Suffolk County has requested on several occasions that FEMA provide the County with FEMA-generated documents from the June 7-9, 1988, Shoreham Exercise. FEMA has to date provided no such documents. Thus, documents such as FEMA controller messages and free-play messages, FEMA control cell documents, and FEMA Exercise evaluation documents, have been withheld.

You advised Mike Miller on August 17, 1988, that all FEMA-generated documents from the June Exercise were being stored in boxes at Argonne. You also stated that we probably would be given copies at the time the Exercise report was officially served, but not before.

FEMA's final Exercise report has now been issued but we have received no FEMA documents. On behalf of Suffolk County, I reiterate the request that FEMA provide copies of all such documents. These documents are essential to the County's ability to formulate contentions. Since the Staff has proposed a contention schedule on Exercise matters (see Staff Motion for Schedule for Litigation of the June 1988 Exercise, June 9, 1988), it is incumbent that FEMA provide these documents immediately.

Sincerely yours,


Lawrence Coe Lanpher

cc: Mitzi Young, Esq.
Donald P. Irwin, Esq.
Richard J. Zahnleuter, Esq.

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USNRC

'88 SEP 21 P5:04
September 19, 1988

OFFICE OF SECRETARY
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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 SUFFOLK COUNTY, STATE OF NEW YORK AND TOWN OF SOUTHAMPTON RESPONSE TO NRC STAFF MOTION FOR SCHEDULE FOR LITIGATION OF THE JUNE 1988 EXERCISE and ATTACHMENT have been served on the following this 19th day of September 1988 by U.S. mail, first-class, except as otherwise noted.

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- * With additional courtesy hand delivery on September 20, 1988.
- ** By Federal Express.
- *** With additional courtesy telecopy delivery on September 20, 1988.