

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission



In the Matter of)

LONG ISLAND LIGHTING COMPANY)

(Shoreham Nuclear Power Station,)
Unit 1))

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

MOTION OF SUFFOLK COUNTY, THE STATE OF NEW YORK,
AND THE TOWN OF SOUTHAMPTON FOR RULING
CONCERNING PROCEEDINGS RELATED TO THE SHOREHAM EXERCISE

I. Introduction

On February 13, 1986, LILCO conducted an exercise of its emergency plan. FEMA is in the process of evaluating that exercise, and its report of the exercise evaluation is expected to be completed by early to mid-April.

On February 24, 1986, Suffolk County, the State of New York, and the Town of Southampton ("Governments") moved the Appeal Board to issue the following two rulings concerning post-exercise proceedings:

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1. There is no basis for any party to seek to proceed with litigation of the results of the Shoreham exercise until after the FEMA report has been issued.

2. In view of the ASLB's denial of an operating license and FEMA's preliminary statement that the plan cannot be implemented and the exercise does not permit a reasonable assurance finding, the initial burden will be on LILCO to articulate whether and how it wishes to rely on the results of the exercise in the Shoreham proceeding; should LILCO do so, the other parties would have the right to respond to LILCO's showing before the Board determines whether a hearing shall be held.

Motion at 5.¹

On February 24, 1986, the Appeal Board summarily denied the Government's Motion. The Appeal Board ruled:

At this juncture, each of the parties will have to make its own determination respecting (1) what procedural rights arise from the exercise and (2) when those rights must be pursued. As a general matter, we are disinclined to issue advisory opinions of the stripe requested by the intervenors and we perceive no special circumstances calling for such action in this instance.

ALAB Order at 1-2.

Both before and after the Appeal Board's ruling, the Governments have attempted to determine the procedural rights and duties which arise from the February 13 exercise and the time that those rights and duties should properly be pursued. There is no precedent, however, for the instant situation in which a license has been denied, but an exercise has nonetheless

¹A copy of the Governments' Appeal Board Motion is Attachment 1 hereto.

subsequently been conducted. Therefore, despite the diligent efforts of the Governments to make their own determinations as to the rights and duties of the parties to this proceeding, there is no basis, without further guidance of the Commission, to show a common predicate for actions they may wish to take in pursuit of their interests.

In this situation, the Governments submit that it is not appropriate for each party to be left to proceed at its peril.² Rather, this is an instance where declaratory relief is both necessary and appropriate. The Appeal Board had authority to provide such declaratory relief,³ but for reasons not articulated, it chose not to do so.⁴ The Governments now respectfully move the Commission to address the issues set forth below or, in the alternative, to direct the Appeal Board to do so.

²The public safety issues before the Commission in this proceeding should turn on substance, and not on the basis of procedural guesswork or game-playing. The Commission should use its authority to facilitate the identification and establishment of procedures to enable the NRC to make full and fair judgments on the merits of the issues presented.

³See Kansas Gas & Elec. Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1, 3-5 (1977).

⁴The Appeal Board characterized the Governments' Motion as one requesting an "advisory opinion." Since the Appeal Board did not explain its reasoning, the Governments do not know what the Board meant. The Governments submit, however, that the February 24 Motion presented issues for declaratory relief which the Board should have addressed. At a minimum, the Board was required to explain why it would not address the merits of the Governments' Motion. See Public Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 40-42 (1977).

II. Discussion

A. No Proceedings on the Results of the Shoreham Exercise Should Commence until after the FEMA Evaluation Report is Issued.

Under UCS v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 815 (1985), the parties to the Shoreham proceeding have the right to litigate material issues raised by the "results" and "evaluation" of LILCO's February 13 exercise. These results and evaluation will not exist, and thus their context will not be known to anyone except FEMA and those in whom FEMA confides, until FEMA's report evaluating the exercise is available to the NRC and the parties.⁵ Until that time, the NRC will have no basis to reach any conclusions concerning the pertinence or results of the exercise. The Governments are in the same position. Thus, if FEMA's report supports the Governments' position, the Governments will presumably have no reason to contest those "results," because FEMA's views will for purposes of any NRC litigation be a rebuttable presumption in

⁵FEMA conducted an informal post-exercise meeting with LILCO on February 14 that the Governments were permitted to witness. FEMA's ground rules permitted LILCO to engage in discussions with FEMA and to make statements and respond as LILCO wished. The Governments were not permitted to question FEMA or otherwise "interject" themselves into this meeting. The following day, February 15, FEMA held a press conference. At both the February 14 and 15 sessions, FEMA emphasized that the views it was expressing concerning the exercise were skeletal, preliminary, and subject to change.

favor of the Governments' position. If, on the other hand, FEMA makes findings favorable to LILCO, the Governments will contest those results.⁶

The foregoing conclusions are supported by the D.C. Circuit's decision in UCS v. NRC, which provides that it is the exercise results and particularly FEMA's evaluation of the exercise, which are to be the subject of the NRC's post-exercise proceedings. Indeed, the Court stated that its ruling "only requires that emergency exercise evaluations be subject to public hearings because they are material to the NRC's licensing decision" ⁷ The FEMA report constitutes the key pacing

⁶Even if the Governments were to seek to raise issues concerning the exercise at this time, they do not have the factual data concerning the exercise that are essential. For example, the Governments still do not even have a copy of the exercise scenario, despite repeated attempts since the exercise to obtain that basic document (and others) from FEMA, the NRC Staff, and LILCO. See Attachments 2, 3, and 4. The Governments had monitors at various locations during the exercise. Those monitors were restricted in their numbers and in what they could see or hear. The data requested in Attachments 2, 3, and 4, in addition to the FEMA report, are essential to provide the Governments with the most basic information from which they can proceed toward evaluating the results of the exercise.

⁷735 F.2d at 1445, n.14 (emphasis added). See also id. at 1442-43, 1445, 1450 (NRC relies on the post-exercise FEMA evaluation in reaching its licensing decision; since the exercise evaluation constitutes material evidence relevant to the licensing decision, parties must have an opportunity to contest the evaluation and data upon which the NRC proposes to rely); id. at 1446 (court indicates that post-exercise proceedings must provide for meaningful public participation; the Governments submit that there can be no meaningful public participation until the parties themselves have the opportunity to review the substance of the evaluation upon which the NRC will rely); id. at 1449 (requirement that NRC provide opportunity to dispute issues raised by exercise; until the FEMA evaluation is available, the Governments submit that issues raised by the exercise are matters

(footnote continued)

item in the evaluation of the exercise. That report, as well as the exercise scenario and the responses executed pursuant to the scenario, must therefore be included in the required post-exercise litigation. Until the FEMA report is available to the NRC and parties, therefore, there is no basis to proceed. We respectfully request the NRC to so rule.

B. If Post-Exercise Proceedings Commence, LILCO Has the Burden of Initiating Those Proceedings.

As the Commission is aware, LILCO has been denied an operating license for Shoreham based, among other reasons, on the ASLB's ruling that because the proposed LILCO emergency plan cannot lawfully be implemented, there can be no finding of reasonable assurance that adequate protective actions can and will be taken in the event of an accident at Shoreham. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 22 NRC 644 (1985). See also, Cuomo v. LILCO, Consol. Index No. 84-4615, New York State Supreme Court, February 20, 1985; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-31, 22 NRC 410 (1985); Long Island Lighting Co.

(footnote continued from previous page)
of speculation); id. at 1450 ("Where, as with preparedness exercises, the decision involves a central decisionmaker's consideration and weighing of many other persons' observations and firsthand experiences, questions of credibility, conflicts, and sufficiency surface and the ordinary reasons for requiring a hearing come into the picture."); id. at 1450 (evaluations of emergency preparedness exercises may not be exempted from Section 189(a) hearing requirements).

(Shoreham Nuclear Power Station, Unit 1), ALAB-818, 22 NRC 651 (1985). In addition, in its preliminary statement following the February 13 exercise, FEMA stated:

Since this plan cannot be implemented without state and local government participation, we cannot give reasonable assurance under NUREG-0654 that the public health and safety can be protected.⁸

It thus appears that the FEMA report and evaluation of the exercise will support the ASLB's finding and the position of the Governments -- i.e., that the LILCO Plan cannot be implemented by LILCO and no reasonable assurance finding justifying issuance of an operating license can be made.

Since the result sought by the Governments in the Shoreham proceeding -- the denial of the operating license -- has already been achieved, the Governments are not in the situation of being confronted with the need to initiate further litigation before the NRC. Indeed, it is not clear procedurally how or whether the Governments could go about requesting additional litigation in the licensing proceeding, particularly since the Governments have prevailed in this proceeding. See South Carolina Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Unit A), ALAB-694, 16 NRC 958 (1982) and cases cited therein. Rather, it appears to the Governments that if any other party believes the results of the exercise or the FEMA report thereon

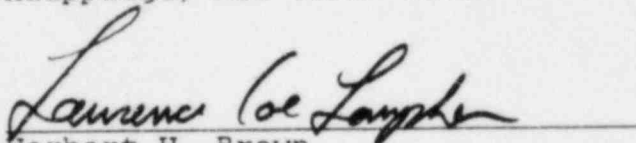
⁸Frank Petrone, FEMA Region 2 Director, FEMA press conference, February 15, 1986.

could or would provide a basis for changing the ASLB decision which denied a license to LILCO, that party has the burden of identifying the bases for that belief, specifying the precise issues which that party would seek to litigate, and satisfying the appropriate procedural requirements.

The Appeal Board declined to address the foregoing issue. However, there are no precedents which squarely control this situation. Again, therefore, this is an instance where declaratory relief is essential so that the Shoreham issues can be addressed on the merits, rather than being overshadowed by procedural disputes.

Respectfully submitted,

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event of a Shoreham accident. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 22 NRC 644 (1985). See also, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-31, 22 NRC 410 (1985); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-818, 22 NRC 651 (1985). In addition, in its preliminary statement following the February 13 exercise, FEMA stated:

Since this plan cannot be implemented without state and local government participation, we cannot give reasonable assurance under NUREG-0654 that the public health and safety can be protected.¹

It thus appears that the FEMA report on the results of the exercise² will support the ASLB's finding and the position of the Governments -- i.e., that the proposed LILCO Plan cannot be implemented by LILCO and no reasonable assurance finding justifying issuance of an operating license can be made.

Since the result sought by the Governments in the Shoreham proceeding -- the denial of the operating license -- has already been achieved, the Governments are not in the situation of being confronted with the need to initiate further litigation

¹ Frank Petrone, FEMA Region 2 Director, FEMA press conference, February 15, 1986.

² FEMA expects to issue this report within 6 - 8 weeks after February 13.

before the NRC. Indeed, particularly in light of the discussion during the oral argument before this Board on February 12, it is not clear procedurally how or whether the Governments could go about requesting additional litigation in the licensing proceeding. See South Carolina Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-694, 16 NRC 958 (1982) and cases cited therein. Rather, it appears to the Governments that if any other party believes the results of the exercise or the FEMA report thereon could or would provide a basis for changing the ASLB decision which denied a license to LILCO, that party has the burden of identifying the bases for that belief, specifying the precise issues which that party would seek to litigate, and satisfying the appropriate procedural requirements. However, the Governments submit that as a practical matter, no party could be in a position to attempt to carry such a burden until after the FEMA report on the exercise results has been issued.

Accordingly, the Governments submit that other than the possible desirability of appointing an ASLB to deal with the views of other parties on this or related preliminary matters, no further action or proceedings should be considered concerning the results of the February 13 exercise until after the issuance of the FEMA report. The Governments also believe that at that

future date and before any further action is taken, it would be helpful to schedule a conference of counsel to obtain the parties' views.

II. The Governments' Motion

The Shoreham litigation has often involved uncertain procedural circumstances. In some instances, a party's good faith reliance on a particular interpretation of procedural rules has later been ruled to have been incorrect. For example, the ASLB ruled in Summer 1984 that the Governments' strike-related emergency planning contention was untimely. On the other hand, LILCO was permitted to reopen the diesel litigation record and the relocation center litigation under circumstances where its delay was found to have been justified.

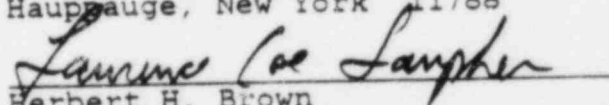
The Governments want to ensure that their procedural rights to litigate the results of the Shoreham exercise, should such a need arise, are not impaired due to their good faith reliance on what they perceive to be the present procedural posture of this case and the respective obligations of the parties in light of that posture. Thus, the Governments move the Appeal Board to rule that:

1. There is no basis for any party to seek to proceed with litigation of the results of the Shoreham exercise until after the FEMA report has been issued.

2. In view of the ASLB's denial of an operating license and FEMA's preliminary statement that the plan cannot be implemented and the exercise does not permit a reasonable assurance finding, the initial burden will be on LILCO to articulate whether and how it wishes to rely on the results of the exercise in the Shoreham proceeding; should LILCO do so, the other parties would have the right to respond to LILCO's showing before the Board determines whether a hearing shall be held.

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February 24, 1986

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Certificate of Service

I hereby certify that copies of MOTION OF SUFFOLK COUNTY, THE STATE OF NEW YORK AND THE TOWN OF SOUTHAMPTON FOR RULING CONCERNING PROCEEDINGS RELATED TO THE SHOREHAM EXERCISE have been served on the following this 24th day of February, 1986 by U.S. mail, first class, except as otherwise noted.

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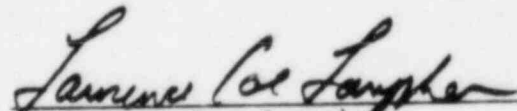
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