

ORIGINAL

UNITED STATES NUCLEAR REGULATORY COMMISSION

In the Matter of:

LONG ISLAND LIGHTING COMPANY)	
(Shoreham Nuclear Power Station,)	Docket No.
Unit 1))	50-322-OL-3
)	Remand/Emergency Planning

TELEPHONE CONFERENCE

Pages: 20845 through 20862

Place: Washington, D.C.

Date: June 10, 1988

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1 UNITED STATES NUCLEAR REGULATORY COMMISSION
 2 ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of:)

LONG ISLAND LIGHTING COMPANY)
 (Shoreham Nuclear Power)
 Station Unit 1))

Docket Nos.
 50-322-OL-3
 Remand/Emergency
 Planning
 PLANNING

TELECONFERENCE

Friday,
 June 10, 1988

Room 447
 4350 East-West Towers,
 Bethesda, Maryland

The above-entitled matter came on for hearing,
 pursuant to notice, at 11:30 a.m.

BEFORE: HONORABLE JAMES P. GLEASON, Chairman
 Atomic Safety and Licensing Board
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

JUDGE FREDERICK SHON, MEMBER
 Atomic Safety and Licensing Board
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

JUDGE DR. JERRY KLINE, MEMBER
 Atomic Safety and Licensing Board
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

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APPEARANCES:

On behalf of the NRC Staff:

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Washington, D.C. 20036

On behalf of New York State:

RICHARD ZAHNLEUTER, ESQ.
Deputy Special Counsel to the Governor
Executive Chambers
Capital, Room 229

On behalf of FEMA:

GEORGE WATSON, ESQ.
Federal Emergency Management Agency
Washington, D.C. 20972

P R O C E E D I N G S

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JUDGE GLEASON: All right. This is Judge Gleason. We have a telephone conference which has been requested by LILCO to be called in connection with a discovery dispute. And we also have filed with us this morning a -- filed a pleading by the Intervenors which is titled "Government's notice that the Board has precluded continuation of the CLI-86-13 remand."

I have Judge Shon and Judge Kline with me. The conference, as I indicated, is being recorded and please make your appearances noted for the record, starting with LILCO, then the staff, then FEMA, and then Suffolk County and then the State of New York, please.

MR. IRWIN: Judge Gleason and members of the Board, this is Don Irwin. With me also are James Christman and Dennis Sisk.

MR. REIS: This is Mr. Reis, NRC staff with me are Mitzi Young, Richard Bachmann, and Lisa Clark.

MR. WATSON: This is George Watson, I'm representing FEMA, and I am here by myself.

MR. LANPHER: Lawrence Lanpher representing Suffolk County, Herbert H. Brown and Christopher McMurray are present also.

MR. ZAHNLEUTER: This is Richard Zahnleuter representing Governor Cumono and the State of New York.

JUDGE GLEASON: All right, gentlemen, I think, as I

1 view the filing by the governments, by the Intervenors that
2 that filing takes kind of precedence over the matters of
3 discovery, because in effect as we interpret it, it's a motion
4 which consists of their indication of a refusal to proceed with
5 the Board's orders on discovery of the realism issues.

6 Does that interpretation meet with your intent, Mr.
7 Lanpher?

8 MR. LANPHER: This is Larry Lanpher, Judge Gleason.
9 Your interpretation does not meet with our staff, let me
10 clarify two things. The filing does speak for itself in a
11 large part. It is our view that the Board has structured the
12 proceeding in a manner so that the proceeding itself cannot go
13 forward. We would like to clarify that it is our view that
14 none of the depositions on the so-called best effort matter
15 should proceed.

16 There might be some ambiguity with respect to
17 Executive Halpin and State Health Director Axelrad. We believe
18 that insofar as relevant to this proceeding they have been
19 fully deposed, Judge Gleason.

20 They could be produced for further deposition, if
21 necessary, but we believe that --

22 JUDGE GLEASON: Excuse me a minute. Do we have
23 another voice coming in here?

24 MR. LANPHER: Not from our phone, Judge Gleason.

25 JUDGE GLEASON: Well, is somebody else attempting to

1 speak at this point?

2 (No response)

3 JUDGE GLEASON: All right, proceed, Mr. Lanpher.

4 MR. LANPHER: I'm sorry, Judge Gleason.

5 So we do not agree with your characterization. I
6 would like to clarify one other matter, that in our view that
7 the so-called emergency broadcast system issue and the best
8 effort issue are separable matters, and at the appropriate time
9 I will address that EDS discovery matter unless you would
10 prefer me to go forward on that at this time as well.

11 MR. ZAHNLEUTER: This is Richard Zahnleuter. I agree
12 with the things that Mr. Lanpher has stated and reiterate that
13 Dr. Axelrad be produced for further deposition.

14 But I would like to state that it would not be
15 productive that the position on the LILCO, that is that the
16 state does not interface with LILCO --

17 JUDGE GLEASON: We can't hear you, Mr. Zahnleuter.

18 MR. ZAHNLEUTER: This is Richard Zahnleuter, and I
19 will try to speak up again. I stated that I am in agreement
20 with the things that Mr. Lanpher has stated. And I would also
21 like to reiterate that Dr. Axelrad could be produced for
22 further deposition, although depositions would not be
23 productive because, as stated -- as the Governor has stated
24 that the State of New York will not interface with LILCO.

25 But that Dr. Axelrad would be available for further

1 depositions.

2 JUDGE GLEASON: Well, Mr. Lanpher, I really don't
3 understand your comments. It seems to me, and it seems to the
4 members of the Board that you're really rearguing or attempting
5 to reargue the interpretation of the new rule which was given
6 guidance to you by the Board on February 28th and April the
7 6th, I believe, or April the 8th.

8 But it clearly seems to us that this is a motion that
9 says you do not intend to proceed with discovery. And you say
10 that that's not your intent and I just don't understand that.
11 So maybe you could elucidate a bit more for me.

12 MR. LANPHER: Judge Gleason, I have attempted to be
13 as clear as I can be. I think you are right in one of the
14 things you say in that, this impasse this meeting is in at this
15 time does result from the Board's application of the new rule.
16 It does result from the Board's seeming willingness to proceed
17 with discovery in other matter regarding what this so-called
18 LILCO interface procedure. And the testimony of Mr. Halpin and
19 affidavits going back several years make absolutely clear that
20 there will be no interface, Judge Gleason.

21 And it would be inconsistent with the sovereign
22 decision of the government for this proceeding to go forward in
23 the context of the Board's structuring it to ignore the
24 decision of the government.

25 JUDGE GLEASON: Well, let me hear from you, Mr.

1 Irwin, please.

2 MR. IRWIN: Judge Gleason, LILCO understands the
3 paper filed this morning by Intervenors in much the same way
4 the Board does. I should note parenthetically that about 20
5 minutes ago we sent a very brief letter to the Board from the
6 parties by telecopier which may not have arrived. It simply is
7 an agenda, item one of which was that, we understand the county
8 and state pleading as apparently indicating that they do not
9 intend with respect to Messrs. Halpin and Axelrad to proceed
10 with the discovery ordered by the Board.

11 We believe that the county and state have exactly two
12 choices in this proceeding. One is to proceed under rules and
13 orders which are ordered by the presiding tribunal or to
14 dismiss their own contentions with prejudice. We don't think
15 they can have it both ways. We frankly think they're trying to
16 and trying to put the onus on the Board for enforcing the
17 orders that is issued and the rules of the Commission.

18 We don't think that the position outlined in their
19 paper this morning has anything new. We agree that it is an
20 attempt to reargue arguments they have made and lost twice
21 before since the issuance of the new rule.

22 So we're prepared, if the county wish to proceed,
23 with taking the depositions which we have requested and which
24 the Board has ordered and to do it promptly. If they don't, we
25 think that there is -- different consequences will follow which

1 we should explore, as the county illuminates the case.

2 JUDGE GLEASON: Well, if I understand Mr. Lanpher he
3 refuses to proceed with those depositions. Isn't that correct,
4 Mr. Lanpher?

5 MR. LANPHER: What I stated, Judge Gleason, is we do
6 not believe any of the depositions can go forward at this time.
7 However, with respect to Mr. Halpin and Mr. Axelrad, since they
8 have sponsored testimony in the proceeding, and we believe that
9 they have been thoroughly questioned on the issues that are
10 pertinent, those depositions could be scheduled.

11 MR. ZAHNLEUTER: This is Richard Zahnleuter. And I
12 agree with Mr. Lanpher's statement.

13 JUDGE GLEASON: All right.

14 MR. IRWIN: This is Mr. Irwin. Obviously, we do not
15 agree with county and state. There's a production of the
16 Suffolk County emergency operations plan, among other things,
17 made undoubtedly clear that there is a county plan which is
18 very much like a directory of services, which our plan can be
19 plugged in.

20 And I would like Mr. Sisk to address for the record
21 the nature of the effort we have undertaken which led to this
22 impasse, just so they're clear on the record this morning.

23 JUDGE GLEASON: Mr. Sisk?

24 MR. SISX: Yes, Judge Gleason, I just wanted to
25 indicate very briefly, I don't think there's any point in

1 rehashing all of the correspondence that we have sent to the
2 Board. But it is LILCO's position, as Mr. Irwin stated, that
3 the Intervenors' choices are two. They may either withdraw
4 their contentions with prejudice which they decline to do in
5 the pleading this morning or they must comply with the Board's
6 orders.

7 The Board's orders date back to the beginning of the
8 realism remand, and the orders ordering many of the depositions
9 we have noted date back to April 11. They were reconfirmed on
10 April 13. Partially reconfirmed of the Halpin and Axelrad on
11 May 10. Reordered again, in the Board's order of I believe May
12 24 or 26.

13 And it is our view that the onus is on the county to
14 say either they will comply with those Board's orders or they
15 refuse to comply with those Board's orders. We need a straight
16 answer to that question. And we don't believe that the county
17 and the state could shift that on the Board to provide that
18 answer.

19 JUDGE GLEASON: All right. Could we hear from you,
20 Mr. Reis, please.

21 MR. REIS: Yes. I think we have already heard from
22 the county and they have said what they would do. We before
23 said that the action in cutting off the depositions of Halpin
24 and Axelrad were contrary to the rules of this agency and its
25 Licensing Board.

1 We have also said what relief should be given to
2 that. They have now offered to make them available again, but
3 refuse to go forward with other discovery which has been asked
4 for, which this Board indicated was proper.

5 I think in these circumstances the Board is faced
6 with a situation of applying the Commission's guidance, 13 NRC
7 with a statement of policy on the conduct of Licensing
8 hearings. And at this point it is incumbent upon the Board to
9 take action under that guidance of the Commission.

10 Thank you.

11 JUDGE GLEASON: All right.

12 Mr. Watson, do you care to get into this record?

13 MR. WATSON: No, sir, I have no comment at this time,
14 Your Honor.

15 MR. BROWN: Judge Gleason, this is Herbert Brown, I
16 would like to respond and actually to make clear our position
17 in the face of what I've just heard.

18 JUDGE GLEASON: All right.

19 MR. BROWN: The word "refusal" is not an appropriate
20 one, Judge Gleason, nor is it a matter of our speaking to shift
21 burdens and the whole conversation about who's trying to blame
22 whom; it's not appropriate at this point.

23 Our position is simply this, the position of the
24 government of Suffolk County, and I believe that New York shares
25 the same one, it's categorically that there will not be an

1 interface with the Long Island Lighting Company. That there
2 categorically, absolutely will not be an interface which has
3 been expressed repeatedly in legally sustained documents upheld
4 by NRC, the federal courts, Second Circuit Court of Appeals,
5 the highest court of the State of New York. We cannot. We are
6 categorically and inherently precluded from having witnesses
7 sit on -- in a deposition or on a witness stand explaining how
8 there will be such an interface and providing substance to the
9 interface which categorically will not be.

10 It's just an application of logic, that it is
11 absolutely impossible and we are precluded from going forward.
12 So we're not speaking to blame the Board for anything. We're
13 not speaking to blame LILCO or anybody else. We're speaking to
14 bring just a simplicity of reason to bear and to put before the
15 Board the fact that we cannot put our people to discuss how
16 they will do that which they categorically will not do.

17 And the effort and suggestions of LILCO, that this is
18 some matter of simplicity and forcing some rule or sanction
19 against us is completely out of place. There's an
20 impossibility that we're all confronting at this point.

21 MR. SISK: Judge Gleason, if I may, this is Mr. Sisk
22 again, respond very briefly. I have been involved in and in
23 fact have been the lead litigator on virtually all of the cases
24 that we, Mr. Brown is referring to in the state and federal
25 court.

1 I categorically disagree with his suggestion that the
2 county and state are legally precluded from implementing the
3 LILCO plan or interfacing with LILCO in responding to an
4 emergency.

5 I will not, unless the Board requests it, elaborate
6 on my reasons for that, but I believe that is categorically
7 incorrect.

8 MR. BROWN: Well, I simply want to respond to say
9 that the Second Circuit Court of Appeals found that the
10 resolutions to the county in which we determine not to follow
11 including the LILCO's plan would fall in that category, were
12 constitutional within our belief and power.

13 And since that was the finding of the government, and
14 those governments control what they do for themselves, they are
15 bound by their own law. And the employees of the government
16 are bound by that law.

17 And accordingly, when I say the employees of this
18 government of Suffolk County, and in the case of the state, the
19 state government cannot do this. I'm speaking correctly.

20 JUDGE GLEASON: Well, Mr. Brown, let me ask you, are
21 they bound by the emergency plan that surfaced last week in
22 these proceedings which is titled "The Suffolk County Emergency
23 Plan?"

24 MR. BROWN: Oh, Judge Gleason, the resolution of
25 Suffolk County is that there is no emergency plan whatsoever

1 for the Shoreham Nuclear Powerplant. The Suffolk County
2 decided after its census analyses, which I won't restate here
3 because they have been before the Board for some time, that
4 they would neither adopt nor implement our plans for Shoreham
5 because they found that it would not be possible.

6 JUDGE GLEASON: Mr. Brown, you're answering a
7 question I didn't ask. I asked you a simple question, are the
8 Suffolk County employees bound to comply with that Suffolk
9 County emergency plan that surfaced in these proceedings last
10 week.

11 MR. BROWN: The answer with respect to Shoreham is
12 no.

13 MR. REIS: Mr. Chairman.

14 JUDGE GLEASON: Who is this? Who just indicated Mr.
15 Chairman.

16 MR. REIS: Mr. Reis.

17 JUDGE GLEASON: All right. You have to identify
18 yourself. Proceed, Mr. Reis.

19 MR. REIS: I want to say that I just heard the county
20 say we will categorically not do this and it is an
21 impossibility. When I look at discovery and the discovery that
22 they had refused to allow us to go forward, a testing of
23 whether those statements are so.

24 Currently the statements and the background for it of
25 what can be done and what can't be done borders that should be

1 examined in discovery. And it is that which they are refusing
2 to do.

3 Therefore, whether ultimately -- categorically cannot
4 do it or whether there is an impossibility is a question we're
5 not faced with right now. We're faced with a question of
6 whether discovery should go forward and their refusal to have
7 discovery go forward. You don't have to get to the merits of
8 this, it's strictly a procedural matter.

9 JUDGE GLEASON: All right. Just hang with us a
10 minute, I'm going to discuss with members of the Board.

11 MR. ZAHNLEUTER: Excuse me, Judge Gleason.

12 JUDGE GLEASON: Yes.

13 MR. ZAHNLEUTER: This is Richard Zahnleuter, and I
14 feel compelled to state for the record that the State of New
15 York takes the same position as stated by Mr. Brown.

16 JUDGE GLEASON: Mr. Zahnleuter.

17 MR. ZAHNLEUTER: Yes.

18 JUDGE GLEASON: May I suggest in the future, because,
19 you know, I really view you parties as having identity of
20 interest, unless there's something you want to add that is
21 different than what Suffolk County attorneys represent, you
22 really don't have to add in your concurrence to it, it is just
23 assumed.

24 MR. ZAHNLEUTER: I feel compelled to do that because
25 if all we have, an identity of interest, we do not have an

1 examined in discovery. And it is that which they are refusing
2 to do.

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4 do it or whether there is an impossibility is a question we're
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19 you know, I really view you parties as having identity of
20 interest, unless there's something you want to add that is
21 different than what Suffolk County attorneys represent, you
22 really don't have to add in your concurrence to it, it is just
23 assumed.

24 MR. ZAHNLEUTER: I feel compelled to do that because
25 if all we have, an identity of interest, we do not have an

1 identity of counsel; and Mr. Brown is not permitted to speak on
2 behalf of the State of New York unless I so authorize. And in
3 this case I have not done that.

4 But I would also like to add that the people who
5 LILCO seek to depose who are state employees are indeed bound
6 by the policy established by the governor, and the governor
7 through Dr. Axelrad is the only person who is lawfully
8 authorized to formulate that kind of a policy.

9 JUDGE GLEASON: All right. Proceed as you will. I
10 tried to advise you, but you proceed as you want to.

11 Just stay with us a minute and we'll be back.

12 MR. SISK: Judge Gleason.

13 JUDGE GLEASON: Yes.

14 MR. SISK: I'm sorry, this is Dennis Sisk. I wish to
15 make just one further note, if I might, in response to Mr.
16 Brown and specifically to the decision of the Second Circuit
17 that he referred to. That decision was in the form of a case
18 called Orderly Energy Policy versus Suffolk County. The
19 holding of the case was that the County was not compelled by
20 federal law to adopt a specific emergency plan for Shoreham.
21 That's the limitation of the holding.

22 There was nothing in that holding that precludes the
23 county from doing anything in response to an emergency when it
24 actually occurs. And there is nothing in that opinion that
25 addresses state law.

1 In fact, state law under Article 2(b), section 25
2 specifically requires the county executive to use all resources
3 and capabilities of the county at his disposal to respond to
4 any emergency in the county including radiological --

5 JUDGE GLEASON: Mr. Sisk, the Board has read those
6 cases. It's familiar with the state law. And please, can the
7 Board push the mute button here so it can talk to each other.

8 Thank you.

9 (Board conferring.)

10 JUDGE GLEASON: Mr. Lanpher or Mr. Brown, we're back;
11 are you all there.

12 MR. BROWN: Yes, sir.

13 JUDGE GLEASON: The Board really would like an answer
14 to a very simple question. You know, we're reaffirming,
15 although there's no necessity for us to do so, our previous
16 order with respect to discovery. And the question is, are you
17 or are you not going to comply with that discovery order of the
18 Board; that is the question and it's either a, yes a no.

19 MR. BROWN: That you will get a, yes or no, Judge
20 Gleason, with all due respect the characterization of the
21 question is one that doesn't reflect the reality of the fact
22 for this reason.

23 JUDGE GLEASON: Well, that is the reality of my
24 question, though. The Board has an order.

25 MR. BROWN: You will get an answer, but I have to

1 frame the situation. It is not one of the -- an issue of the
2 Board issuing an order and our standing before the Board and
3 saying, we don't like the order of the Board and thus we won't
4 respond. It's that the order is asking us to do that which is
5 impossible to do. We cannot, given the legal foundation --

6 JUDGE GLEASON: Mr. Brown -- this is Mr. Brown, isn't
7 it, that's just been talking?

8 MR. BROWN: That's correct.

9 JUDGE GLEASON: Well, you know, we interpret that as
10 saying you're not going to comply with our order, so let us go
11 off the record here for another minute and we'll be back.

12 Thank you.

13 (Board conferring.)

14 JUDGE GLEASON: All right, this is Judge Gleason back
15 again. Is everybody in attendance?

16 MR. REIS: NRC here.

17 MR. IRWIN: Long Island here.

18 MR. LANPHER: Suffolk County.

19 MR. ZAHNLEUTER: State is here.

20 MR. WATSON: FEMA here.

21 JUDGE GLEASON: All right. Did I hear from Mr.
22 Zahnleuter?

23 MR. ZAHNLEUTER: Yes, I should have spoken up later,
24 I think. The State is present.

25 JUDGE GLEASON: Just teasing.

1 The Board interprets the Intervenors' motion as a
2 refusal to proceed with the Board's orders on discovery of the
3 realism issues. Discovery goes much beyond interface.

4 It will issue an order as soon as possible to deal
5 with this situation. Under the Commission's policies for the
6 conduct of License proceedings, the Board will have no
7 alternative except to impose appropriate sanctions against the
8 Intervenors. That sanction will consist of either dismissing
9 the realism contentions from the proceeding with or without
10 prejudice or find the Intervenors in default and rule on the
11 contentions in LILCO's favor.

12 In either of that, the Board intends to retain
13 jurisdiction over the discovery issues concerning the recent
14 availability of the so-called Suffolk County Emergency Plan.

15 However, prior to issuing its orders on this matter,
16 the Board will receive from the parties responses to its
17 proposed action by the close of business on June 15th.

18 And that's the Board's finding, gentlemen. And we
19 can't say anything further, so we will conclude the conference
20 at this point.

21 Thank you.

22 (Whereupon, at 12:05 p.m. the telephone conference
23 was concluded.)

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CERTIFICATE

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This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name: LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)

Docket Number: 50-322-OL-3

Place: Washington, D.C.

Date: June 10, 1988

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken stenographically by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

/s/ Joan Rose

(Signature typed): Joan Rose

Official Reporter

Heritage Reporting Corporation