6594

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL-3 (Emergency Planning) (ASLBP No. 86-535-04-OLR) June 21, 1988

MEMORANDUM AND ORDER
(On Board Ruling of Various Motions Relating to Pending Realism Issues)

The Board received a number of pleadings on the reali. (best efforts) controversy remanded in CLI-86-13, and issued a Bench ruling on May 26, 1987. Tr. 20432 et seq. This Memorandum is in support of that Order.[1]

1. The Intervenors on April 13, 1988 filed "Governments' Objection . . ." to Board Orders dated February 29 and April 8 and

---

1 As a result of a subsequent filing by Intervenors, although the nature of sanctions has yet to be determined, the Board has advised the parties that the realism contentions will be dismissed. Board Teleconference Order (June 10, 1988). This Memorandum and the issues it relates to may therefore be considered moot. It is being issued, nevertheless, to assure a complete record of the proceeding.

D502

proffered the testimony of two witnesses (Halpin and Axelrod), pursuant to 10 C.F.R. § 2.743(e), for the then pending hearing on realism issues. The arguments propounded by Intervenors basically support a Board reconsideration of the Orders.

2. The Applicant and Staff on April 22 and April 28, respectively, filed responses to Intervenors' "Objection" pleading calling for dismissal of the realism contentions on grounds that Intervenors should be held to be in default. By not filing an affirmative response to reflect the probable efforts of the State and Suffolk County to respond in the event of an emergency at Shoreham, even though urged to provide such evidence by the Licensing Board and the Commission, Applicant and Staff contend that Intervenors' proffered testimony fails to carry their burden of going forward with the evidence. Intervenors' testimony is repetitive of previously stated positions that the State and County did not know how they would respond but would not follow LILCO's emergency plan nor authorize utility personnel to act in an emergency. Accordingly, the Applicant's and Staff's view is that the presumption of the new rule (10 C.F.R. § 50.47(1(iii)) is applicable--State and/or local officials will follow the utilities emergency plan--and, consequently, no litigable issue on realism remains in the proceeding. Both parties contend that the only possible issue remaining, one concerning LILCO's emergency plan interfacing with the State and County best efforts responses, could be left to the Staff and FEMA to review. And, Intervenors alleged refusal

to cooperate in the proceeding, they assert, justified dismissal of this issue.

3. Intervenors replied to the Applicant's filing on May 2 and the Staff's on May 5. The replies allege that Intervenors have submitted the truth in its response, that neither the State nor the County have a plan to respond with in the event of an emergency at Shoreham, that they would not rely on LILCO's plan, nor give it authority to act, and, finally, they could not speculate as to what they might do in an emergency in the event that Shoreham were licensed and such an event occurred. Further, Intervenors allege that any ruling by the Board holding them in default and denying the right to cross-examine the prima facie case submitted by LILCO--as suggested by the other parties--would constitute a denial of due process and its right to a hearing on the issues.

4. The Applicant, (based on results of pending discovery efforts), supplemented its April 22 response on May 2. Its response referenced and submitted depositions of Suffolk County Executive Halpin and Dr. Axelrod, head of New York's Department of Health, in an effort to demonstrate an obstruction by Intervenors of the discovery process. In citing numerous examples of interruptions to questioning of both deponents and non-responsive replies to interrogatories, the Applicant renewed a request to have Intervenors' contentions dismissed or, alternatively, to compel answers to interrogatories and make nine individuals, including Halpin and Axelrod, available for depositions.

5. The Staff supported Applicant's request on May 13, 1988, and contend that Intervenors' response was part of a pattern of behavior to withhold facts pertinent to the Board's inquiry under the realism rule of 10 C.F.R. § 50.47(c)(1).

6. Intervenors' responsive pleading, filed on May 13, denies the existence of any basis for dismissing the contentions, that even if the proffered testimony of Halpin and Axelrod was not admitted, Intervenors' still had a right to cross-examine LILCO's prima facie case, and that no additional discovery was needed since LILCO had already submitted its prima facie case on April 1, 1988. The Intervenors allege further that LILCO's deposition efforts had wasted valuable time by irrelevant questioning, and submitted excerpts from depositions of potential witnesses in support thereof.

Board Ruling

In memoranda issued on February 29 and April 8, 1988, the Board provided guidance to the parties on 10 C.F.R. § 50.47(c)(1), the Commission's new rule applicable to situations where, like here, a utility-prepared emergency plan resulting from non-participation by state and/or local governmental entities was being evaluated. We stated therein, that after the Applicant submitted a prima facie case in this proceeding and provided an evidentiary foundation for parts of the case not previously litigated or adjudicated, the burden of going forward with the evidence would shift to Intervenors. We pointed out that one effect of the new rule was to place a responsibility on state and/or

local governments to produce some emergency response plan that they would rely on in an emergency or it would be assumed that the government utilities would follow the plan produced by LILCO. See LBP-88-9, 27 NRC ____ (April 8, 1988) (slip op. at 21-15).

LILCO submitted its prima facie case on April 1, as directed by the Board, and the pleadings indicated above were subsequently filed with the Board.

It is clear in this proceeding that Intervenors intend to maintain a position that not only will they not rely on LILCO's emergency plan but will not submit any other emergency response plan that they would or might rely on in the event that Shoreham were licensed and an emergency occurred. The proffered testimony of Halpin and Axelrod substantiates that position again and, in Intervenors' phraseology, represents its "best effort" response. See Intervenors' April 13 "Objection" at 17.

In their April 13 pleading, the Intervenors object to parts of the Board's Order which "appear to preclude the filing of the Halpin and Axelrod testimony" and they proffer that testimony "to give the Board the opportunity to correct errors . . . manifest in its previous Orders." See Intervenors' "Objection" at 14-15.

Since Intervenors' offer no new grounds for reversal, the Board has no basis to reconsider its previous decisions and guidance. All of the Intervenors' arguments--improper interpretation of the new rule, issues of res judicata, lack of legal authority, prior State and Federal decisions and government police powers have been raised and considered previously and the judicial forum for any further consideration of these

contentions is at an appellate level. We consider the testimony of Halpin and Axelrod as prefiled testimony and it is not the Board's function, at this time, to accept or reject such a proffer under the Commission's Rules of Procedure. Motions to strike such testimony are the proper vehicle for testing the relevancy and admissibility of the proffered evidence.

Responding to recommendations urged by Applicant and the Staff in their pleadings, the Board sees no basis for dismissing the remaining "realism" contentions due to the failure of Intervenors to produce some evidence of an emergency response plan. In our evaluation of 10 C.F.R. § 50.47(c), the Commission does not--and indeed cannot--compel the Intervenors' to produce a particular response plan for Shoreham or an emergency plan for any other particular crisis. The regulations do, however, provide for the application of a presumption if, in fact, no plan is produced and a decision based on the record on whether the utility plan in relationship to such presumption is adequate to meet the agency's regulatory standards and criteria. In such a circumstance, in evaluating a utility emergency plan, there must be an evidentiary foundation for the plan and the Governments' assumed response to it. Additionally, since both the Board and Commission have previously raised questions concerning the operation of a utility emergency plan, these issues also require adequate answers in the record.

Both the Applicant and Staff have urged the Board to impose a sanction of default against Intervenors, as the Board indicated might be forthcoming if no positive case for analysis and evaluation were

presented. See Board Order, February 29, 1988, at 4. The Board, however, considered any such action as premature at that time.

There was some disagreement raised by the pleadings considered here as to whether Intervenors alleged "non-responsiveness" concerning the governments' emergency plans should result in a loss of Intervenors' cross-examination rights. The Board did not intend to issue any such sanctions, but it intended to curtail the controversy on realism to issues not previously litigated and adjudicated. This is in keeping with the Commission's policy on the control of licensing proceedings and its remand in CLI-86-13. In the posture of the case then existing, cross-examination would clearly be allowed with respect to those activities in LILCO's emergency plan which are intended, in the contentions at issue, to interface with a best efforts assumption and could also be exercised on questions previously raised by the Board and Commission.

In the supplemental response of May 2, Applicant alleged obstructions to the discovery process on the part of Intervenors consisting of frequent interruptions to questioning during depositions as well as a substantial number of non-responsive answers to interrogatories. The Board scheduled a prehearing conference with counsel on May 10 during which it issued a ruling that, based on its review of the complete depositions of Halpin and Axelrod, continuation of depositions for further discovery was authorized. Further, we stated that all emergency plans involving the State of New York and Suffolk County were relevant to this proceeding and should be produced by

Intervenors. A review of the deposition, for example (Halpin) pps. 8, 9, 10, 11, 12, 17, 18, 22, 23 and (Axelrod) pps. 25, 29, 37, 45, 40, 47, 48, 54, 55, 69, lead to no other conclusion than that Intervenors' objections and interruptions were not only improper but project a pattern of obstruction designed to impede the discovery process.

The Board also fails to understand Intervenors' claim that plans involving other nuclear plants in New York State or other emergency plans are not relevant to this proceeding. A central issue in the realism controversy relates to how New York York State and Suffolk County will respond in an emergency at Shoreham assuming the facility were licensed to operate. No one can logically contend that the procedure and manner of responding to general emergencies or emergencies at other nuclear facilities may not have some relevant relationship to that issue.

The Board, at the time of the prehearing conference with counsel, indicated that pending a review of Intervenors' responses on the latter, it would not rule on LILCO's May 2 Supplement requesting a continuation of discovery of other State and Suffolk County officials nor would it rule then on LILCO's request to compel complete answers to its interrogatories. The Board completed this review, and concluded that officials should be furnished for additional depositions and that relevant responses to interrogatories should be forthcoming.

In their response to LILCO's Supplement (May 13), Intervenors argue that the submission of the Applicant's prima facie case demonstrates that no additional discovery is required, that LILCO's argument that

more time is needed to depose other officials is specious since it utilized its time on irrelevant questions and questions previously covered and that time limits had to be imposed due to the large numbers of witnesses that had to be deposed in a brief period of time. Intervenors supplied excerpts from depositions of several State and County officials in support of its contention.

In the Board's view, some of the excerpts supplied by Intervenors provide further evidence of counsel imposing unnecessary objection and interruptions to the discovery process. See Attachment I, pp. 39-42, pp. 62-63. Additionally, in the excerpts where relevance or the repetitive nature of questions may be raised as an issue, the Board is unable to conclude based on the information submitted that no valid purpose was being pursued by such inquiries. Accordingly, the Board can find no abuse of discovery procedures in the matter of LILCO's questions and determines it was improper for Intervenors' to curtail the time required for such questioning. It therefore ordered Intervenors to make its officials available for additional depositions as well as to respond to Applicant's unanswered interrogatories.

ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 21st day of June, 1988.