

June 20, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

LONG ISLAND LIGHTING COMPANY

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

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to discovery requests made in 1982 and 1983. See Tr. 20875, 20886.^{1/}

In furtherance of this retained jurisdiction, the Board authorized LILCO to depose nine past or present Suffolk County officials and seven New York State officials "to plumb the knowledge of the past and present state and local officials concerning the recent production of the so-called County of Suffolk emergency operations plan" (Tr. 20867), and ordered the Governments to respond to LILCO's Third Set of Interrogatories, which deal with past discovery issues.

The Governments move the Board to vacate its June 17 rulings for three reasons. First, Commission precedent makes clear that this Board has no jurisdiction to issue those rulings.

Second, the underlying premises of the Board's rulings are incorrect. The issues identified by the Board -- i.e., Should the County Operations Plan have been produced prior to 1988, and was it produced? -- are either undisputed or not capable of resolution. In any event, they are moot.

^{1/} LILCO's allegations focus on discovery requests filed by LILCO on June 2, 1982, July 21, 1983, and August 8, 1983. The State had no role in the 1982-83 discovery since the State did not enter the case until January 1984. Accordingly, any inquiry directed to State personnel pertaining to that earlier time period would be a pointless exercise.

Third, even if the Board had the jurisdiction it erroneously claims, the procedure the Board has adopted is contrary to law. The Board may not designate LILCO to conduct what amounts to an investigation into the compliance of Suffolk County and New York State with the NRC's discovery processes. Any such inquiry is distinctly the responsibility of the NRC itself. If such an inquiry were appropriate, the Commission would have to mandate the commencement of such an inquiry in a forum and under procedures where the due process rights of the County and State would be secure.

1. THE BOARD'S CLAIM OF RETAINED JURISDICTION VIOLATES THE COMMISSION'S LAW

On June 10 and June 17, the Board ruled that it was disposing of the Governments' Contentions 1-10 (the legal authority or "realism" contentions), thus concluding the CLI-86-13 remand proceeding. The Board reiterated during the June 17 conference call that it "will not proceed further with the realism contentions" (Tr. 20872), and that the substantive matters raised by those contentions are no longer before it. See Tr. 20879.^{2/} The Governments are today filing a Notice of Appeal

^{2/} Furthermore, based on the Board's rulings and explanations of them, the parties stated their understandings that the merits of the realism contentions are no longer before the Board. See, e.g., Tr. 20877 ("LILCO agrees with the [NRC] staff that the realism, best efforts issue is resolved We concur with the staff that [the realism] issue is closed" (Irwin)); Tr. 20879 ("the nature and scope of the Governmental response are not encompassed within the[] issues" remaining before the Board) (Zahnleuter)).

of the June 10 Order, thus protecting their appeal rights within the 10 days specified in 10 CFR § 2.762.

Having disposed of Contentions 1-10, the Board, by definition, no longer has jurisdiction over those Contentions. There is no longer a dispute of fact or law before the Board concerning those Contentions. Nonetheless, on June 10, the Board announced its intention to retain jurisdiction over the discovery issue, and on June 17 it explained its intention as follows:

[W]hether the discovery requirements have been complied with in this proceeding . . . not only involve[s] in my view the integrity of NRC's procedural rules of practice, but it does involve substantive matters concerning the rights and responsibilities of parties in these proceedings. We have a responsibility -- this board has a responsibility to resolve that matter, to the extent that an administrative board can resolve it. If we are unable to resolve it, we may have to refer the matter to other levels of the NRC. But that is the principal reason we are retaining jurisdiction.

Tr. 20875-76.

The Board's retention of jurisdiction is legally unsupportable. It is beyond dispute that Licensing Boards do not possess authority to assert jurisdiction over any issue that may come to their attention. Rather, the Boards possess jurisdiction over only those issues which the Commission specifically commits to them. See, e.g., General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 476

(1987). In a recent decision that is directly on point, the Commission ruled that once a Board disposes of an issue, it relinquishes jurisdiction to address whether the NRC's processes had been compromised in connection with that issue.

In Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501 (1986), the Commission rejected an attempt by the Appeal Board to retain jurisdiction, following disposition of an issue, based on reasoning practically identical to that advanced by the Board here. In Limerick, the Appeal Board found that it had jurisdiction to consider one party's allegation that actions by the other party had compromised the integrity of the NRC's processes, even though the Appeal Board had already ruled on the substantive contention that had been at issue. The Appeal Board stated:

Where a question has been raised about the integrity of the decisionmaking process, the decisionmaker necessarily retains residual power to address such matter when requested, notwithstanding that jurisdiction over the underlying substantive claims now lies elsewhere Hence, to the extent that [one party's allegations'] suggest[] a taint on the process that resulted in the issuance of ALAB-836, we do indeed have jurisdiction to address [the allegations].

24 NRC at 504 (quoting ALAB-840, 24 NRC at 58-59). The Commission rejected the Appeal Board's analysis, ruling instead:

There is no support for it in NRC case law and we are unaware of any federal judicial decision that would support such an approach.

24 NRC at 504.

The Commission's ruling in Limerick is dispositive here. This Board cannot retain jurisdiction to pursue LILCO's claim of non-compliance with the discovery process on realism issues because the Board has already disposed of the realism contentions and relinquished its jurisdiction. Accordingly, the Board must vacate its June 17 Order.^{3/}

2. THE PREMISES OF THE BOARD'S ORDER ARE FALSE, EVEN
ASSUMING, ARGUENDO, JURISDICTION OVER THIS MATTER

The Board has identified the following matters to be examined by LILCO through depositions of past and present County and State personnel.

-- should the County Operations Plan have been produced in discovery prior to its recent production pursuant to the Board's May 10 Order?^{4/}

^{3/} The Board could gain jurisdiction over the present matter only if the Commission were to so order, as recognized in the General Public Utilities case when the Appeal Board certified the issue of expansion of jurisdiction to the Commission. See 26 NRC at 477-78.

^{4/} See Tr. 20867, 20871, 20892.

-- why was the plan not produced by the County in 1982-83?

-- are there other plans that were not produced by the County in 1982-83?^{5/}

The premises which underlie these matters are false.

First, all parties agree that the County Operations Plan was within the scope of LILCO's 1982-83 discovery requests. The dispute, however, is whether it was produced in its entirety at that time. The County believes it was. LILCO believes not, although LILCO admits that portions of the plan were produced in 1982-83. Tr. 20873. These facts are before the Board through representations of counsel for LILCO and for the County. There are no further facts to develop with respect to this dispute.

Moreover, the Board's question -- "why was the County operations plan not produced in 1982?" -- is clearly premised on the Board's supposition that the County did not previously produce the Operations Plan,^{6/} and that additional inquiry would explain

^{5/} The Board also identified as a potential issue "what substantive effect that [i.e. the alleged non-production] had on the positions of the parties" Tr. 20871. That issue cannot be explored in discovery, because it inherently involves speculation that no deponent can answer. Moreover, as explained later in this motion, any such inquiry is moot since the Board has disposed of the legal authority contentions in LILCO's favor.

^{6/} For example, during the June 17 conference call, the Board stated.

(footnote continued)

why not. There is no basis for the Board's presupposition.

In fact, as the Board has been advised several times, the question whether the entire Plan was produced in 1982-83 is a stand-off: LILCO says no; the County says yes; and neither party can actually "prove" the fact one way or the other. It is thus without foundation for the Board to have framed the issue, "Why" wasn't the Plan produced earlier? In doing this, the Board arbitrarily accepted LILCO's unprovable claims and ignored the County's claims to the contrary.^{7/}

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-- "Why [the Operations Plan] was not produced . . . is certainly a relevant matter that this board has got a continuing concern" (Tr. 20871);

-- the Board "will retain jurisdiction over the controversy which has been produced by the late production of these Suffolk County emergency plans" (Tr. 20872);

-- "the issue that is being pursued is the question of the late emergence of this state-county emergency plan" (Tr. 20884).

^{7/} Further, the fact that as a practical matter, this stand-off is unresolvable is underscored by the passage of time, as well as by the representations already made by both sides. These discovery requests and the production at issue date from 5-6 years ago. Thus, the Board's stated "principal reason" for retaining jurisdiction -- that the Board "has a responsibility to resolve th[e] matter, to the extent that an administrative board can resolve it" -- clearly does not justify that action here.

Similarly, the question whether there might be any other plans not produced by the County in 1982-83 is without basis. There are no facts which suggest that any plan or document responsive to 1982-83 document requests, other than portions of the County Operations Plan, might not have actually been produced. In the absence of any facts or foundation, there is no justification for undertaking an inquiry simply on the basis of bald claims by an adversary.

Second, the issue of discovery relating to the "realism" issues has been rendered moot. There is no question that the Operations Plan was produced pursuant to the Board's recent order of May 10, 1988. Thus, the contents of the plan have been fully revealed. Therefore, even assuming for the sake of argument some inadvertent partial non-production in 1982-83, the subsequent production has made the discovery record complete.

Moreover, discovery in this proceeding has been rendered moot by the Board's decision to dispose of Contentions 1-10. Discovery is a pre-hearing tool. There will be no hearing, and therefore, there can be no discovery. Any alleged non-production of a document in 1982-83 simply has no relevance to this proceeding, which has been terminated on the merits. Thus, even assuming arguendo it could be proven that portions of the County Operations Plan were not produced in 1982, the sanctions already imposed have granted LILCO a victory on the merits of the issues in this remand proceeding. No further purpose, or benefit to LILCO, could be served by continuing to pursue an alleged -- but vigorously disputed -- partial non-production of documents five or six years ago. As for the Board's interest, as stated in Section 1 above, the Board lacks jurisdiction to launch an inquiry into this matter.

3. ASSUMING, ARGUENDO, THE BOARD'S JURISDICTION,
THE PROCEDURES ADOPTED BY THE BOARD ARE IMPROPER

The foregoing has demonstrated that the Board's proposed inquiry is beyond its jurisdiction and without basis. Assuming arguendo, however, that a forum were established to inquire into discovery events of 1982-83, such a forum could not lawfully adopt the procedure instituted by the Board on June 17.

First, before any investigation of alleged non-compliance with NRC processes could be commenced, the forum would have to issue an order giving notice of precisely: what would be the subject of inquiry; who would be the subject of inquiry; the basis for inquiry; and why the inquiry was necessary. The County and State would also have to be given full due process rights to respond to these threshold issues and to present their positions under fair and objective procedures.

Second, the Board claims to have authorized LILCO's depositions so the Board can determine whether the integrity of the NRC's processes has been compromised. The Board stated that it has "a responsibility to resolve that matter" Tr. 20876. Yet, the Board has designated LILCO, an adversary of the Governments, to act, in effect, as the Board's prosecutor. The Board has no authority to delegate to LILCO the responsibility of safeguarding the integrity of the NRC's processes, particularly

given LILCO's vested interest in this proceeding.^{8/} If there were a need to develop facts, a Board with lawful jurisdiction would itself have to conduct any inquiry the Commission directed.^{9/}

^{8/} An NRC Board wishing assistance in "taking evidence and preparing a suitable record for review" is constrained by the procedures established in 10 CFR § 2.722 to appoint a member of the Atomic Safety and Licensing Board Panel. A Board has no authority to expand the regulation by designating a party in this proceeding to take charge of eliciting evidence on another party's actions and compiling a record for review.

^{9/} Similarly, it is inappropriate for the Board to have required the Governments to respond to LILCO's Third Set of Interrogatories. Those interrogatories also place LILCO in the role of developing information in effect as prosecutor. At any rate, the salient points raised in those interrogatories have already been addressed.

a) As Suffolk County has stated previously, the County believes that the Operations Plan was produced in its entirety during discovery in 1982. Indeed, LILCO concedes that some portions were so produced. Precise records regarding the date of such production cannot be located. However, it is the memory of Mr. J. Bilello and Mr. F. Jones that the County intended to produce that document.

b) As counsel for the State of New York has stated previously (Tr. 20549, 20822-26), the State of New York provided LILCO with a copy of a successor of an outdated portion of the Suffolk County Emergency Operations Plan (the New York State Disaster Preparedness Plan) under cover of a letter from REPG to Donald P. Irwin, dated February 17, 1984, in response to LILCO's February 8, 1984, discovery request.

c) Member agencies of the New York State Disaster Preparedness Commission have copies of a successor of an outdated portion of the Suffolk County Emergency Operations Plan (the New York State Disaster Preparedness Plan). Upon inquiry from counsel, one copy of the Suffolk County Emergency Operations Plan was located in the files of the State Emergency Management Office on June 6, 1988. That copy was originally received from the County on May 6, 1988.

d) It is impossible for the County to identify every person who was involved in document production in the 1982-83 era. We can state that Messrs. F. Jones, J. Bilello, and

(footnote continued)

Third, if a lawful inquiry were commenced, nothing could justify taking testimony from the large number of persons LILCO has identified. The most that could be justified would be a focused inquiry designed to obtain relevant facts; namely, testimony of the persons with first-hand knowledge of the 1982-83 document production.^{10/}

Respectfully submitted,

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R. Jones were involved, with Mr. F. Jones having lead responsibility. In 1988, the County persons were F. Petrone, R. Jones, and J. Bilello. No State persons were involved in 1982-83; the State did not enter the proceeding until January 1984.

e) Mr. J. Bilello produced the Operations Plan to Mr. F. Petrone in May 1988 who transmitted it to counsel for production to LILCO. The document produced to LILCO is the same as originally obtained from the County, except the County version has xeroxing on both sides and the LILCO version has confidential data redacted.

^{10/} Messrs. Bilello, R. Jones, and F. Jones were the persons primarily involved on the County's behalf in 1982-83, and Messrs. F. Petrone, Bilello and R. Jones in 1988, concerning production of documents in response to LILCO discovery requests. These persons are present or former County employees. They could be expected to testify that the Operations Plan (and many other documents as well) were located and were to be produced to LILCO, that there was no effort to retain any portion of the Operations Plan or any other document, and that to the best of their knowledge these documents were produced.

Mr. DeVito is the Director of the New York State Emergency Management Organization ("SEMO"), which is the State agency that oversees State planning in areas that the County Operations Plan pertains to: i.e. areas other than radiological emergencies at nuclear power plants. Mr. DeVito could be expected to testify that upon inquiry of counsel, a copy of the County Operations Plan was located in SEMO files on June 6, 1988, and that this copy was originally received from Suffolk County on May 6, 1988.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
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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 GOVERNMENTS' MOTION FOR LICENSING BOARD TO VACATE JUNE 17 ORDER have been served on the following this 20th day of June 1988 by U.S. mail, first class, except as otherwise noted.

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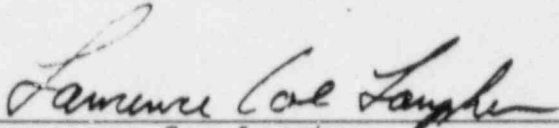
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