208

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, 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-5 (EP Exercise) (ASLBP No. 86-533-01-OL) August 1, 1986

MEMORANDUM AND ORDER
(Objections to Prehearing Conference Order)

On July 11, 1986, the Licensing Board issued a prehearing conference order reciting the rulings it made at the July 8, 1986 prehearing conference. Suffolk County, the State of New York, and the Town of Hampton (Intervenors or Governments) on July 24, 1986 filed objections to certain of the Licensing Board's rulings. They request the Licensing Board to revise its rulings in consideration of the objections or, in the alternative to certify the matters to the Commission, as authorized by 10 CFR 2.751(a)(d) and 2.718(i). The Licensing Board finds that the objections to the rulings consist of but an overall repeat of what the Governments presented at the prehearing conference and they do not warrant any change in the Licensing Board's

DS02

rulings contained in the July 11, 1986 prehearing conference order or merit certifying the matters to the Commission.

1. Ruling on Nassau Coliseum

The issue presented was whether the action of the Nassau County Board of Supervisors enacting resolutions on June 16, 1986, which bar the use of the Nassau County Veterans Memorial Coliseum as part of LILCO's emergency plan should have been placed on the prehearing conference agenda for discussion. Governments' position was that the Applicants' lack of a reception center constituted a void in the record, the consequences being such "that the LILCO plan itself was devoid of content on its face worthy of going forward" and "means that it has a preclusionary effect on the further evaluations of LILCO's plan due to the shortcoming, [and] one that should have a preclusionary effect on further activities in this litigation" (Tr. 16097). The proposed discussion was to go beyond considering the elimination of the Coliseum as a reception center as the basis for a contention (Tr. 16092).

The Licensing Board denied the placement of the proposed discussion on the agenda of the prehearing conference, without prejudice to Intervenors' rights to submit contentions in the subject, because of the discussion being beyond the scope of the subject hearing.

In instituting the proceeding the Commission in its Memorandum and Order, CLI-86-11, June 6, 1986, narrowly defined the scope of this proceeding to conducting an expedited proceeding to consider evidence which Intervenors might wish to offer, to show based on the emergency

planning exercise, that there is a fundamental flaw in the LILCO emergency plan.

The overall importance of the Coliseum to LILCO's emergency plan is the specific subject of other litigation. The Appeal Board considered the matter in ALAB-832 and there are pending petitions before the Commission for review of that decision. The subject is not a proper one for inclusion in this proceeding.

Governments' claim that the elimination of the Coliseum as a reception center is of such magnitude that there is no point to the exercise and therefore this proceeding should be discontinued, is also not a proper one for inclusion in the proceeding. We are to consider evidence on any fundamental flaws in the LILCO emergency plan that may be disclosed by the emergency planning exercise. It is not within our jurisdiction to determine whether the proceeding should be discontinued based on an allegation that there is no longer a need for the proceeding. That issue can more properly be determined by the body that instituted the proceeding, the Commission. This avenue of approach is already being followed by the Governments. They have asked the Commission to reconsider CLI-86-11, by motion filed July 21, 1986. The foregoing ruling does not preclude Intervenors from filing proposed contentions involving the elimination of the Coliseum as a reception center, to be considered on their merits.

Intervenors have presented nothing in their objections to warrant changing our ruling, not allowing the Coliseum issue on the agenda for discussion at the prehearing conference. The scope of the proceeding

has not changed. The parameters have been fixed by the Commission's Memorandum and Order of June 6, 1986. Nothing presented by Intervenors in their objections causes the discussion proposed for the agenda to come within the ambit of the subject proceeding, i.e., Intervenors' argument that the denial of the use of the Coliseum as a reception center is a new reality and that the emergency planning exercise was fundamentally premised on the existence of a relocation center, and that it involved the Coliseum.

The request made of the Licensing Board to promptly terminate the exercise litigation is not a matter for its determination and therefore the relief sought is denied. No need was shown for staying the previously announced schedule and calling for briefing of the matter. The request is denied.

2. Ruling on Long Island Power Authority.

Intervenors sought to place on the agenda the action taken by the New York State Legislature, several days prior to the conference, of enacting legislation creating the Long Island Power Authority, whose purpose is to take over LILCO and all of its generating and transmission facilities, and further prohibiting it from operating Shoreham. Governments sought to discuss the matter (or set a briefing schedule for its consideration) alleging that the prospective takeover renders LILCO no longer a bona fide applicant for a Shoreham license and that the Licensing Board should so rule. They further assert that there is no reason to continue with the post-exercise litigation to examine the plan

for fundamental flaws because that would be a waste of time and resources.

The Licensing Board denied the request to place the matter on the agenda because it was beyond the limited jurisdiction of the Licensing Board. We also denied a motion to suspend the proceeding to await the placing of the matter before the Commission. Our mandate is to conduct an expedited proceeding. (Intervenors in their motion of July 21 to the Commission to reconsider CLI-86-11, request that the Commission rule that LILCO is no longer a bona fide applicant for a Shoreham license.)

The Board finds no valid basis to change its ruling of July 8, 1986, in which it declined to place the Long Island Power Authority legislation on the prehearing conference agenda. This newly instituted proceeding involves but a small part of the very extensive litigation on the LILCO application, that has gone on over many years at great costs and continues today in various actions before the agency. At hand is a proceeding involving a very limited issue, the matter of establishing fatal flaws in the LILCO emergency plan as disclosed by the emergency planning exercise. It is not a matter for determination in this offshoot of the litigation the question of whether LILCO is a bona fide applicant, because that would be of critical importance to the entire application and ensuing litigation. This is not the proper forum, with its limited jurisdiction, to consider the issue. If it is intended to save time and resources, the matter should be brought before the body that can grant the relief sought. Raising the matter with the Commission is a realistic way to approach the matter. There is no

justifiable reason to delay proceeding with this case, where the Commission has mandated expeditious handling, and where the same request for delay was not made for the other continuing litigations before the agency, based on the allegation that LILCO is no longer a bona fide applicant for a Shoreham license.

Intervenors' request to change the Board's ruling of July 8, 1986 on placing the matter of the Long Island Power Authority on the prehearing conference agenda or for briefing the issue is denied. The request made of the Licensing Board to discontinue the proceeding is not a matter for its determination and therefore the relief sought is denied.

3. Ruling on Burden of Going Forward.

Intervenors sought to place on the agenda their claim that the current posture of this licensing proceeding places on LILCO the burden of going forward in this litigation. The Governments accept the general proposition that when an intervenor chooses to contest a utility's application for a license, the intervenor has the burden of presenting contentions with adequate specificity. They claim the general rule is inapplicable to this case because the emergency plan has been found to be illegal and incapable of implementation resulting in LILCO having been denied an operating license and that Intervenors have prevailed in this proceeding. They go on to argue that the Governments are not in a situation of being confronted with the need to initiate further litigation before the NRC. Further, if LILCO believes the results of the exercise or the FEMA report thereon would provide a basis for

changing the Licensing Board decision which denied a license to LILCO, then LILCO has the burden of identifying the bases, specifying the precise issues which it would seek to litigate, and satisfying the appropriate procedural requirements.

The Licensing Board in its ruling on July 8, 1986, denied placing the matter of the burden of going forward on the prehearing conference agenda on two grounds. First, the issue involved was moot, having been raised before the Commission prior to its instituting the subject proceeding. The Commission's Memorandum and Order instituting the proceeding inherently calls upon Intervenors to assume the burden of going forward. Second, this proceeding is but part of an ongoing operating license case, where the general rule applies that intervenors have the burden of going forward and establishing the issues for litigation.

Nothing presented by Governments in their objections warrants changing the Licensing Board's prior ruling. The objections raised for the third time the issue that Applicant should have the burden of going forward in this proceeding. The matter was raised before the Commission and acknowledged at page 2 of the Memorandum and Order instituting the proceeding. A reading of the decision makes it clear that the Commission did not accept Intervenors' proposal to depart from the general rule on who has the burden of going forward. It is evident from the Commission's statement, "In sum, we direct continued deferral of the ALAB-832 remand, and immediate initiation of the exercise hearing to consider evidence which Intervenors might offer to show that there is a

fundamental flaw in the LICLO emergency plan." It then goes on to discuss pleading and practice standards that Intervenors are to meet in establishing the issues for litigation. The effect of the Commission's action is to render the issue moot and provides sufficient grounds to support the Licensing Board's ruling denying Intervenors' request.

Furthermore, the posture of this proceeding provides no basis for departing from the general rule that the Intervenor has the burden of going forward. Intervenors are incorrect in their assertion that LILCO nas been denied an operating license and that they have prevailed in the proceeding. If that be the case, why was the subject proceeding instituted and why do Intervenors participate in it?

LILCO's operating license application has not been finally determined by the agency. The proceeding is ongoing and not all issues that an intervenor has the right to raise in a hearing required by section 189(a) of the Atomic Energy Act of 1954, as amended, have been heard. The results of an emergency preparedness exercise have been held to be material to the issue of the issuance of an operating license and there is a right to a hearing on the results prior to the initial licensing decision, should intervenors request it. UCS v. NRC, 735 F. 2d 1437 (1984). This proceeding was instituted to afford Governments their right to such hearing. If they want to exercise that right (which they are not required to do) they must abide by the rules of practice that are applicable to such proceedings. In a proceeding such as this, which is part of the hearing in an ongoing operating license case under

section 189(a) of the Act, the burden of going forward is on the Intervenors.

Although it might be helpful for Intervenors to know in advance of submitting any contentions what the grounds are for LILCO's alleged position that the emergency planning exercise provides a basis for a reasonable assurance finding, it provides no grounds to change the burden of proof for this segment of the application proceeding.

The request to reverse the burden of going forward is denied.

4. Ruling on Bases of Litigation.

Intervenors proposed the following for placement on the prehearing conference agenda:

> The Board and parties should discuss and define what document(s) or portion(s) are to form the bases of exercise litigation (e.g. FEMA Post Exercise Assessment), their sponsors, and how they are to be handled for evidentiary purposes.

The Board denied the request as premature considering the stage of the proceeding. In their objections to the ruling, Intervenors assert that the Governments were to submit contentions by August 1 and if they were to comply it is essential that they know as precisely as possible what the focus of the litigation is to be. Intervenors further advise that, since the Licensing Board has stated that the FEMA Post Exercise Assessment is the key pacing document for the filing of contentions, they construe this to mean that contentions properly may and should focus on the FEMA report and the conclusions therein and that they will proceed on that basis.

The objection presents no grounds for the Licensing Board to change its ruling. There can be no meaningful discussion and determination on defining what documents or portions of documents, their sponsors, and how they are to be handled for evidentiary purposes, in advance of identifying the issues to be litigated in the proceeding. No one has the clairvoyant ability to do so. Intervenors have the order of proceeding reversed. It is after the issues have been identified that one can treat with underlying documents, their sponsors and other evidentiary matters.

The matter of the Governments deciding that the contentions should be based on the FEMA report and its conclusions is wholly of their own choice and not binding on the Licensing Board.

The requested relief is denied.

5. Ruling on Need for Documents.

A dispute over Intervenors asserted need to have certain exercise documents as a basis for filing contentions was resolved at the prehearing conference when the Licensing Board found that "the key pacing document for the filing of contentions is based on the FEMA evaluation report which has been out for quite a number of months now." The Licensing Board subsequently ruled that the time for contentions had begun to run June 18. (We had made a similar ruling during a telephone conference call on June 20, 1986.) We therefore deemed it appropriate to set a date at the conference for filing of contentions. (Tr. 16165). The Intervenors continued to press for the documents they wanted and the Licensing Board twice ruled that it was premature to hold discovery

prior to the time of filing contentions (Tr. 16166; 16167). Now Intervenors come again to the Licensing Board pressing the same objections in writing that were made and ruled upon in the prehearing conference. Intervenors object to the Board ruling because "this is not a normal proceeding where the detailed documentation underlying an application--e.g., the FSAR--is available for everyone to review. Rather in this post-exercise litigation, the documents upon which contentions are to be based are being withheld from the parties which are required to come forward at the outset and file contentions--i.e., the Governments." Intervenors seek immediate relief from the date for filing contentions that was set at the conference (August 1, 1986) and revision of that filing schedule until two weeks after the Governments receive the FEMA documents (Objections at 18). (A similar dispute involving LILCO documents has been resolved.) (Objections at 16).

Intervenors' objections tell the Licensing Board nothing that it did not consider at the prehearing conference. Specifically, we were aware that the FEMA exercise report was available to Intervenors; that large volumes of exercise documents had already been voluntarily produced by LILCO; and that Intervenors had numerous observers present when the exercise was conducted. Further, the nature of the additional information being sought appears to be corroborative of information already possessed by Intervenors. (Tr. 16177.)

Upon consideration of these facts at the conference, the Licensing Board found again that the FEMA report was the pacing document, but it acknowledged the possibility of additional contentions being filed at a

later date if new documents come to light. It then set a date of August 1, 1986 for the filing of contentions. (Tr. 16179.)

In an opening statement to the parties the Licensing Board stated: "If anything is to be considered different about this proceeding, aside from the requirement of pleading fundamental flaws, it is this requirement for expeditious handling. There is nothing in using the present rules of practice and procedures that would impede the Board from accomplishing that goal. The existing rules of practice and procedures were designed to afford parties full, fair and expeditious hearing and they should be employed to that end."

The Board continues to adhere to these views and its previous rulings. It rejects Intervenors' argument that these proceedings are somehow so special that we must devise new rules of practice. Intervenors know full well that they are not entitled to discovery for the purpose of framing contentions under the existing rules. Further, they have already acknowledged their present capability for framing contentions. (Tr. 16167; Objections at 17.) The Board finds that Intervenors have sufficient information to frame contentions and that the due date for filing should remain August 1, 1986 as previously established.

Intervenors' objections concerning FEMA's inability to produce documents on the time scale requested by Intervenors is likewise without merit and need not detain us long. Intervenors are not now entitled to these documents for the purpose of framing contentions even though FEMA does not object to producing them. The difficulty in producing

documents is entirely logistical in nature and arises from reductions in FEMA's Staff support in anticipation of the closing of FEMA's regional office. Any objections on that account are now premature. To be sure FEMA will be required to account for such difficulties should it not respond to properly filed discovery requests at a later date but that is not a problem that confronts us now.

Upon reconsideration, the Board affirms its prehearing conference rulings concerning need for documents, finds Intervenors objections meritless, and denies the requested relief.

6. Conclusion.

The Licensing Board concludes that the objections to its rulings of July 8, 1986 are without merit. No error was shown in the rulings nor for a need to seek the Commission's intervention through certifying the matter, as authorized by 10 CFR 2.751(a)(d) and 2.718(i).

ORDER

The request for relief sought in the Governments' objections to the prehearing conference order of July 24, 1986 is denied.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
ADMINISTRATIVE LAW JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 1st day of August, 1986