2406

LILCO, January 30, 1987

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-5
	)	(EP Exercise)
(Shoreham Nuclear Power Station, Unit 1)	)	
	)	

LILCO'S RESPONSE TO INTERVENORS' MOTION FOR ORDER COMPELLING RESPONSE TO PORTIONS OF INTERVENORS' SECOND SET OF INTERROGATORIES

On January 20, 1987, Intervenors filed a motion requesting that this Board compel LILCO to respond to portions of Intervenors' Second Set of Interrogatories.[1/] "Suffolk County, State of New York and Town of Southampton Motion for Order Compelling LILCO to Respond to Portions of the Governments' Second Set of Interrogatories to LILCO," January 20, 1987 (hereinafter "Intervenors' Motion"). As will be discussed below, Intervenors' motion misrepresents the discovery responses that LILCO has provided to date, contains little or no legal support for the motion's request to compel, and offers no showing of need for the Board to override LILCO's legitimate claim of the attorney work product doctrine. Accordingly, Intervenors' Motion to Compel should be denied.

Background

Intervenors' Motion to Compel is premised on carefully selected extracts from LILCO's response to Intervenor's Second Set of Interrogatories that inaccurately depict

---

1/ Intervenors have labeled two different sets of interrogatories as their "Second Set of Interrogatories" to LILCO. The first was filed on November 5, 1986; the second on December 19, 1986. In this response, LILCO will use the phrase "Second Set of Interrogatories" to refer to Intervenors' December 19 interrogatories.

D503

LILCO's discovery responses. The Motion ignores a significant amount of information that LILCO has provided to Intervenors -- both in its response to Intervenors' Second Set of Interrogatories and in depositions of LILCO witnesses -- and instead mischaracterizes LILCO's response as a "refus[al] to disclose facts and documents which it has already determined that it intends to rely upon in its testimony." Intervenors' Motion at 4.

The interrogatory at issue posed a series of requests about each non-Shoreham exercise upon which LILCO may rely in support of its position on various admitted contentions. In particular, Intervenors asked LILCO to identify (1) the date of each exercise upon which LILCO intends to rely, (2) the facility involved in the exercise, (3) the location of that facility, (4) the participants in the exercise, (5) the contentions for which LILCO intends to rely on the exercise to support its position, (6) all facts or data about the exercise on which LILCO intends to rely, (7) all documents concerning the exercise on which LILCO intends to rely, and (8) any other documents concerning the exercise known to LILCO whether or not LILCO intends to rely on them. In its response, LILCO specifically identified 27 facilities for which it was examining exercises. LILCO also provided Intervenors with the locations of those facilities, identification of the exercises that were being examined for each facility, and the contentions on which LILCO intended to use information from non-Shoreham exercises. Finally, LILCO informed Intervenors that it intended to rely on FEMA post-exercise reports as the source of information about other exercises.[2/]

Intervenors also inquired about LILCO's examination of the results of other exercises at the depositions of LILCO witnesses. For example, during the deposition of Dennis Behr, Intervenors asked Mr. Behr to identify the specific exercises being

---

2/ For the Board's convenience, the exact text of Intervenors' Interrogatory and LILCO's response is attached to this pleading as Attachment 1.

examined by LILCO. Mr. Behr provided Intervenors with a lengthy list of both facilities and exercise dates. See Deposition of Dennis Behr, January 13, 1987, at 12-16, 29-45.[3/] Mr. Behr also described some of the general factual matters that LILCO was reviewing in connection with other exercise reports. Behr Dep. at 17-18.

In short, LILCO has been forthcoming in responding to Intervenors' discovery requests. The only area in which LILCO has refused to respond to Intervenors' requests is with regard to the specific facts from other exercises on which LILCO intends to rely. As to that area, LILCO properly invoked the attorney work product doctrine and refused to respond, since LILCO believes that the production of this information would reveal the mental impressions and opinions of its attorneys.

Discussion

A. LILCO Properly Invoked the Work Product Doctrine

In support of their motion to compel, Intervenors recite only the most general principles of discovery law, namely, that discovery is liberally granted to enable parties to refine the issues and ascertain relevant facts. Intervenors' Motion at 5-6.[4/] In so doing, Intervenors ignore the substantial body of case law that recognizes that liberal

---

3/ Contrary to Intervenors' suggestions, see Intervenors' Motion at 6, 8, LILCO has not even completed its review of other exercises. Thus, Intervenors seek information that is still in preliminary form.

4/ Intervenors also cite an earlier Brenner Board decision for the proposition that "the work product doctrine cannot be used to hide discoverable facts." Intervenors' Motion at 7, citing LBP-82-82, 16 NRC 1144, 1158 (1982). However, a quick review of the cited passage reveals that the Brenner Board was talking about the attorney-client privilege, not the work product doctrine. Viewed in that light, the Brenner Board was absolutely correct since it is settled law that the attorney-client privilege protects attorney-client communications and not the facts of the underlying dispute. See, e.g., Upjohn v. U.S., 449 U.S. 383 (1981) and 8 J. Wigmore, Evidence § 2292 at 554 (McNaughton 1961). The work product doctrine, on the other hand, "is distinct from and broader than the attorney-client privilege." Id. at 1159. The work product doctrine protects the adversary system by forcing counsel to independently sift the important from the unimportant facts and formulate their respective strategies without the aid or interference of opposing counsel.

discovery is permitted only in areas that are not protected by a properly asserted privilege. Instead, they attempt to nullify LILCO's legitimate claim of the attorney work product doctrine with sweeping and unsubstantiated claims that LILCO's invocation of the work product doctrine is "bizarre," Intervenors' Motion at 4, and that if the Board were to uphold LILCO's claim of privilege, "the consequences . . . would be staggering to future litigation" and "discovery would come to a grinding halt." Id. at 6.[5/]

Hyperbole aside, existing case law does not support Intervenors' claims. The work product doctrine, first enunciated by the Supreme Court in Hickman v. Taylor, 326 U.S. 495 (1947), carved out a zone of privacy for attorney work product, because otherwise:

> Much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id., 329 U.S. at 511. Now firmly established, the work product doctrine "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." U.S. v. Nobles, 422 U.S. 225, 238-39 (1975).

The work product doctrine of Hickman has been partially codified in Federal Rule of Civil Procedure 26(b)(3). That rule, and its NRC counterpart (10 C.F.R.

5/ In LILCO's view, it is Intervenors who have applied the work product doctrine (and the attorney-client privilege) in a "bizarre" fashion. For example, Intervenors have invoked both privileges in preventing disclosure of the substance of talks between Intervenors' counsel and persons not yet represented by counsel (i.e. non-clients). See, e.g., Deposition of Frank Petrone, December 15, 1986, at 174-178. Moreover, it is evident from the depositions of most of Intervenors' witnesses that those witnesses possess no knowledge relevant to the admitted contentions other than that which has been bestowed upon them by counsel; yet LILCO has been prevented from tapping that knowledge by counsel's continual invocation of the attorney-client privilege and work product doctrine. Thus, Intervenors have used the two privileges to "grind to a halt" LILCO's discovery efforts.

§ 2.740(b)(2)), require the court or presiding officer to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party" concerning the proceeding. Accordingly, most courts have interpreted FRCP 26 (b)(3) as distinguishing between "ordinary" and "opinion" work product, and have accorded "opinion" work product almost absolute protection from discovery on the ground that any factual content of such material is generally outweighed by the adversary system's interest in maintaining the privacy of an attorney's thought processes and in ensuring that each side relies on its own wit in preparing its case. Sporck v. Peil, 759 F. 2d 312 (3d. Cir.), cert. denied, __ U.S. __, 106 S. Ct. 232 (1985), citing Upjohn Co. v. U.S., 449 U.S. 383, 401 (1981).

In Sporck, the plaintiff sought production of a group of documents that had been selected by the defendant's counsel from a larger group of previously-produced documents in order to prepare the defendant for his deposition. The Third Circuit refused to order production, finding that the select group of documents constituted protected opinion work product, even though the individual documents were not work product, because the selection process itself represented defense counsel's mental impressions and legal opinions as to how the documents related to issues and defenses being litigated. Sporck v. Peil, 759 F.2d at 315.

Likewise, in Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986), the court held that the work product doctrine shielded from discovery counsel's selection and compilation of documents for later litigation. There, the court declined to order the defendant's counsel to answer plaintiff's questions about the existence or non-existence of certain documents because

> [counsel's] acknowledgment of the existence of documents referred to by plaintiff's counsel would reflect her judgment as an attorney in identifying, examining, and selecting from AMC's voluminous files those documents on which she will rely in preparing her client's defense in this case.

Id. at 1328. The court noted that

> In cases that involve reams of documents and extensive document discovery, the selection and compilation of documents is often more crucial than legal research.

Id., at 1329, citing James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144 (D.Del. 1982).[6/]

The issue presented by Intervenors' motion is similar to the issues that confronted the courts in Sporck and Shelton. To prepare for litigation on Contentions EX 15, 16, 21, and 50, LILCO has reviewed the FEMA post-exercise reports of numerous exercises that have been conducted in the United States. LILCO has provided Intervenors with a list of facilities whose exercises it has examined as well as an identification of the specific exercises. LILCO has also identified the FEMA Reports as the documents upon which it intends to rely. Now Intervenors want LILCO to point out the specific facts from within those reports that it considers relevant and important to its position.

Intervenors assert that they do not seek to obtain "legitimate work product," but instead seek "only to obtain the facts with which they will be confronted at the hearing." Intervenors' Motion at 6. But despite such "innocent" intentions, Intervenors clearly seek protected information. LILCO has already told Intervenors that it intends to rely on FEMA Reports as the source of its information on other exercises. What Intervenors now seek -- identification of the specific elements of those reports upon which LILCO will rely -- is nothing but a description of LILCO's strategy and legal theory about how the identified body of facts supports its case.[7/]

6/ See also Omaha Public Power Dist. v. Foster Wheeler Corp., 109 F.R.D. 615 (D. Neb. 1986)(counsel's selection and segregation of particular documents out of larger, previously-produced group is protected work product); Eoppolo v. National R.R. Passenger Corp., 108 F.R.D. 292 (E.D. Pa. 1985)(defendant not required to answer interrogatory to the extent it seeks counsel's view of the case or identification of those facts which counsel considers significant).

7/ That the requested information is work product is all the more clear from the fact that LILCO believes those other exercises are relevant while Intervenors do not.

(footnote continued)

LILCO believes it has fully satisfied its discovery responsibilities. Intervenors are just as capable as LILCO of reviewing the identified FEMA reports and culling out relevant information. If granted, Intervenors' attempts to have this Board order LILCO to reveal the results of its work would invade LILCO's ability to prepare effectively for litigation and reward Intervenors with the fruits of LILCO's labors. Accordingly, Intervenors' motion should be denied.

In any case, both the Federal Rule and NRC regulation provide that work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." But Intervenors have made no significant attempt to provide such a showing. Instead, Intervenors sole "showing of need" is contained in footnote 5 of their motion where they state that "the Governments submit that their need to know what facts and documents, from a huge number of (what the Governments believe are all irrelevant) exercises, will be used against them at trial, would far outweigh any qualified work product interest." Intervenors' Motion at 7 n.5. In this statement, Intervenors in effect concede that they do not have a "substantial need" for the requested material since by their own admission they believe that all such information is irrelevant. Moreover, Intervenors fail to explain why they would face undue hardship to go to the NRC's Public Document Room to review the FEMA reports for themselves.[8/] Thus, Intervenors have failed to present the Board with a reason to override LILCO's legitimate claim of the work product doctrine.

(footnote continued)

Intervenors' Motion at 7 n.5. Obviously there is a difference of legal opinion among the parties' counsel; Intervenors' interrogatory seeks to explore LILCO's legal opinions.

8/ Indeed, the State of New York already has all the FEMA post-exercise reports for exercises conducted in New York, and should be intimately familiar with those exercises since New York State personnel were involved in their formulation and conduct.

B. Intervenors' Requests Are Overly Broad, Unduly Burdensome, and Vague

Intervenors assert that "interrogatories which request the specific facts to be relied upon by a party at trial on a specific issue . . . can hardly be considered overly broad or burdensome." Intervenors' Motion at 8. That may be so; but the interrogatories at issue here do not meet that description. Subpart (f) asked LILCO to identify "all facts about, or data relating to, the exercise upon which LILCO intends to rely." That request neither specifies a particular issue nor asks for specific facts. Instead, it seems to request the universe of facts, data, evaluations, qualities, and characterizations about such exercises that LILCO believes may support its position. Such a general request is vague, overly broad, and unduly burdensome. Similarly, subpart (g), which asks LILCO to identify all documents (concerning all of the exercises at the 27 facilities named by LILCO) upon which LILCO may rely, is also overly broad and unduly burdensome. Nevertheless, LILCO has already told Intervenors that it intends to rely on the FEMA Reports as its source of information on the identified exercises. Accordingly, Intervenors' Motion to Compel should be denied.

Conclusion

For the reasons set forth in this response, LILCO respectfully requests that the Board deny Intervenors' Motion to Compel.

Respectfully submitted,

Scott D. Matchett

Lee B. Zeugin
Jessine A. Monaghan
Scott D. Matchett

Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

DATED: January 30, 1987

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-5
	)	(EP Exercise)
(Shoreham Nuclear Power Station, Unit 1)	)	
	)	

LILCO'S RESPONSE TO SUFFOLK COUNTY, STATE OF NEW YORK AND TOWN OF SOUTHAMPTON SECOND SET OF INTERROGATORIES TO LILCO

Pursuant to §§ 2.740, 2.740b, and 2.741 of the NRC Rules of Practice, LILCO responds to Suffolk County's Second Set of Interrogatories dated and served upon LILCO on December 19, 1986.[1/]

Suffolk County Interrogatory No. 1

Identify each non-Shoreham exercise upon which LILCO intends to rely in support of its position on admitted Exercise contentions, and with respect to each such exercise identify the following:

a. Date of the exercise;

b. Plant(s) or facility(ies) to which the exercise related;

c. Location(s) of facilities identified in response to (b);

d. Participants in the exercise;

e. Contentions as to which LILCO intends to rely upon the exercise to support its position;

f. All facts about, or data relating to, the exercise upon which LILCO intends to rely;

1/ On November 5, 1986 Suffolk County, the State of New York and the Town of Southampton filed a pleading entitled "First Request for Admissions and Second Set of Interrogatories Directed to LILCO." In this response, LILCO will distinguish between the two sets of interrogatories by the dates on which they were filed.

g. Documents, concerning the exercise, upon which LILCO intends to rely;

h. Any other documents concerning the exercise known to LILCO, whether LILCO intends to rely upon them or not.

Response:

In general, LILCO objects to this interrogatory as seeking information protected by the work product doctrine. In addition, other subparts of the interrogatory are unduly burdensome since they seek information that is readily available in the public domain and is, accordingly, as available to Intervenors as it is to LILCO. Without waiving these objections, LILCO responds as follows.

(a). For each facility listed in response to subsections (b) and (c) below, LILCO has examined the exercise which served as the initial "full participation" exercise required under 10 CFR Part 50, App. E to continue full power operation or, in the case of new plants, to allow operation above 5% power. In addition, for plants located in FEMA Region 2, LILCO has examined all "full participation" exercises.

(b) and (c). The facilities whose exercises LILCO has presently examined, and the states in which they are located, are as follows:

Beaver Valley (Pennsylvania)
Calvert Cliffs (Maryland)
Fitzpatrick (New York)
Ginna (New York)
Haddam Neck (Connecticut)
Indian Point #2 (New York)
Indian Point #3 (New York)
Limerick (Pennsylvania)
Maine Yankee (Maine)
Millstone (Connecticut)
Nine Mile Point (New York)
Oyster Creek (New Jersey)
Pilgrim (Massachusetts)
Seabrook (New Hampshire)
Vermont Yankee (Vermont)
Shearon Harris (North Carolina)
Braidwood (Illinois)
Zion (Illinois)
Byron (Illinois)
Calloway (Missouri)
Fermi #2 (Michigan)
Perry (Ohio)

Quad Cities (Illinois)
Wolf Creek (Kansas)
Diablo Canyon (California)
Hope Creek (New Jersey)
Peach Bottom (Pennsylvania)

LILCO may examine additional exercises from other facilities in preparing its testimony.

(d). Participants in any given exercise are plainly identified in the FEMA post-exercise reports which are publicly available in the NRC Public Document Room. This information is as readily available to Intervenors as it is to LILCO.

(e). At present, LILCO intends to rely on information from other exercises in its testimony on Contentions EX 15, 16, 21 and 50.

(f). LILCO objects to this subpart as overly broad, unduly burdensome and vague. In addition, disclosure of the facts and data on which LILCO intends to rely and by implication, the facts from other exercises which it does not intend to use, would reveal attorney thought processes. Accordingly, LILCO's choice of facts it will use is protected by the attorney work product doctrine.

(g) and (h). As just noted, the selection or rejection of documents reveals attorney thought processes and is protected by the work product doctrine. In addition, LILCO objects to subpart (h) as overly broad and unduly burdensome. Without waiving these objections, LILCO states that at the present time it intends to rely on FEMA post-exercise reports as the source of information about other exercises.

Suffolk County Interrogatory No. 2

Identify the times at which each of the following LERO News Releases were made available to the press during the February 13 Exercise and for each state how it was made available and by whom:

a. LERO News Release #1;
b. LERO News Release #2;
c. LERO News Release #3;
d. LERO News Release #4;
e. LERO News Release #5;
f. LERO News Release #6;

CERTIFICATE OF SERVICE

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL-5

I hereby certify that copies of LILCO's Response to Intervenors' Motion for Order Compelling Response to Portions of Intervenors' Second Set of Interrogatories were served this date upon the following by telecopier as indicated by an asterisk, by Federal Express as indicated by two asterisks, or by first-class mail, postage prepaid.

John H. Frye, III, Chairman *
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
East-West Towers
4350 East-West Hwy.
Bethesda, MD 20814

Dr. Oscar H. Paris *
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
East-West Towers
4350 East-West Hwy.
Bethesda, MD 20814

Mr. Frederick J. Shon *
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
East-West Towers, Rm. 430
4350 East-West Hwy.
Bethesda, MD 20814

Secretary of the Commission
Attention Docketing and Service
Section
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Bernard M. Bordenick, Esq. *
Oreste Russ Pirfo, Esq.
Edwin J. Reis, Esq.
U.S. Nuclear Regulatory Commission
7735 Old Georgetown Road
(to mailroom)
Bethesda, MD 20814

Herbert H. Brown, Esq. *
Lawrence Coe Lanpher, Esq.
Karla J. Letsche, Esq.
Kirkpatrick & Lockhart
South Lobby - 9th Floor
1800 M Street, N.W.
Washington, D.C. 20036-5891

Fabian G. Palomino, Esq. *
Richard J. Zahnleuter, Esq.
Special Counsel to the Governor
Executive Chamber
Room 229
State Capitol
Albany, New York 12224

Mary Gundrum, Esq.
Assistant Attorney General
120 Broadway
Third Floor, Room 3-116
New York, New York 10271

Spence W. Perry, Esq. *
William R. Cumming, Esq.
Federal Emergency Management Agency
500 C Street, S.W., Room 840
Washington, D.C. 20472

Mr. Jay Dunkleberger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Stephen B. Latham, Esq. **
Twomey, Latham & Shea
33 West Second Street
P.O. Box 298
Riverhead, New York 11901

Mr. Philip McIntire
Federal Emergency Management Agency
26 Federal Plaza
New York, New York 10278

Jonathan D. Feinberg, Esq.
New York State Department of Public Service, Staff Counsel
Three Rockefeller Plaza
Albany, New York 12223

Ms. Nora Bredes
Executive Coordinator
Shoreham Opponents' Coalition
195 East Main Street
Smithtown, New York 11787

Gerald C. Crotty, Esq.
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Martin Bradley Ashare, Esq.
Eugene R. Kelly, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11787

Dr. Monroe Schneider
North Shore Committee
P.O. Box 231
Wading River, NY 11792

Scott D. Matchett

Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

DATED: January 30, 1987