

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'87 FEB -5 A11:44

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
LONG ISLAND LIGHTING COMPANY)	Docket No. 50-322-OL-3
)	(Emergency Planning)
(Shoreham Nuclear Power Station,)	
Unit 1))	

NRC STAFF RESPONSE TO BOTH LILCO'S
MOTION FOR RECONSIDERATION
OF THE BOARD'S JANUARY 14, 1987 ORDER
(SETTING DISCOVERY AND HEARING SCHEDULE) AND
INTERVENORS' JOINT MOTION FOR RECONSIDERATION OF THAT ORDER

INTRODUCTION

On January 22, 1987, applicant LILCO moved for reconsideration of this Licensing Board's "Order (Setting Discovery and Hearing Schedule)," issued January 14, 1987. Intervenors also separately moved on that same day for reconsideration of that Order. The NRC Staff hereby responds to both motions.

The Licensing Board has set the following schedule for hearing the reopened reception center issue:

1. The time for discovery will commence immediately (January 14, 1987) and conclude on March 6, 1987.
2. LILCO's prefiled testimony is due on March 23, 1987; Intervenors' on April 6, 1987 and Staff's on April 13, 1987.
3. Motions to strike testimony are due April 20, 1987 and responses by April 27, 1987.
4. The due dates are the dates the documents are required to be in the hands of the Board and the parties.
5. The hearing will commence on May 4, 1987.

8702090028 870203
PDR ADOCK 05000322
G PDR

DS07

LILCO has asked the Board to reconsider and change its Order in the following respects:

1. All prefiled testimony should be filed simultaneously. March 23, 1987, is a suitable date for this purpose.
2. Assuming a March 23 filing date for all testimony, motions to strike testimony should be due March 30 (instead of April 20 as in the Board's order); responses should be due April 6.
3. The hearing should commence on or about April 13, instead of May 4.
4. A minor modification as to the requirements for service on the Town of Southampton should be made, as detailed below.
5. Guidance is needed on summary disposition. In particular, the parties need to know whether filing motions for summary disposition will delay the beginning of the hearing.

Intervenors, in their motion, asked the Board to hold this proceeding in abeyance pending:

- (1) a statement from LILCO as to whether it intends to revise its Plan or procedures (a) to remove the deficiency identified by the Licensing Board and Appeal Board orders (i.e., the Plan fails to include an estimate of, and planning for, the number of evacuees expected to require monitoring), and/or (b) to address other deficiencies identified by the FEMA RAC and town zoning boards;
- (2) depending upon the LILCO statement referenced in (1), (a) the filing and ruling on summary disposition motions, or (b) the issuance of Plan revisions; and
- (3) an order by this Board barring LILCO from further revising its reception center proposals or facilities and directing that LILCO will be finally bound by the Board's decision in this litigation on whatever version of LILCO's Plan is identified as the subject of this proceeding.

Intervenors' Motion at 2. ^{1/}

^{1/} Additionally, Intervenors sought expedited consideration of the motion since, by virtue of the Board's January 14 Order, discovery

The Staff position with respect to the various requests of the Applicant and the Intervenors is set out below.

DISCUSSION

I. The Hearing Schedule, Prehearing Preparation and FEMA Resources

An important consideration in the efficient and expeditious conduct of the Shoreham proceedings is the participation of the Federal Energy Management Agency (FEMA) witnesses on various contentions before both this Board and the OL-5 Board. As stated in the Staff's January 27, 1987 letter to the OL-3 and OL-5 Licensing Boards, the Staff is aware of the "resource constraints" on FEMA (see Letter of FEMA Counsel Cumming to OL-5 Board, dated January 13, 198[7]) and, thus, supports FEMA requests to conserve FEMA's limited resources. Since there are many overlapping events before the two Boards which may severely tax FEMA's limited resources, the Staff has suggested that the OL-3 and OL-5 Boards hold a joint conference of counsel to determine, among other matters, whether evidence on certain contentions can be heard jointly by both Boards. While keeping in mind the expedition urged by the Commission in the Shoreham proceeding, the Boards might consider means of preventing duplicative discovery and other means to accommodate FEMA's resource limitations. As the Staff has previously suggested, a joint

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

has already begun in this proceeding. The Licensing Board, in an Order dated January 23, 1987, has requested expedited responses by LILCO and Staff. Thus, this portion of Intervenors' motion is now moot.

prehearing conference of the Shoreham Licensing Boards should be held to assure that the projected May 5, 1987 hearing of the OL-3 Licensing Board and the preparations for that hearing, do not adversely impact on the scheduled March 9, 1987 hearings of the OL-5 Licensing Board. ^{2/} Reconsideration and resolution of scheduling matters, such as those presented in the instant motions, should await the outcome of such a joint conference.

II. LILCO's Motion

In the event the Boards reject the Staff's suggestion for a joint prehearing conference be held to resolve the scheduling problems arising in the Shoreham proceedings, the Staff takes the following positions with respect to the various matters in LILCO's motion:

A. Simultaneous Filing of Testimony - Applicant is correct in stating that the general past practice in the Shoreham proceeding has been the simultaneous filing of testimony by all parties. LILCO Motion at 2-3. LILCO states that FEMA has authorized LILCO to say that FEMA would not object to having its testimony filed on March 23, at the same time as LILCO and the Intervenors. Since the Staff presently does not contemplate calling witnesses to testify in this proceeding, the Staff defers to FEMA's and LILCO's views on the matter of due dates and the simultaneous filing of testimony.

^{2/} Such a joint prehearing conference might be held in lieu of the presently scheduled February 10, 1987 conference of counsel of the "OL-5" Licensing Board.

B. Start of the Hearings - In the event the Licensing Board modifies the schedule for the filing of testimony to provide for the simultaneous filing by all parties on March 23, then it appears to the Staff that motions to strike testimony could be due by March 30 and responses thereto on April 6. Likewise, it appears to the Staff that hearings could commence on April 13.

C. Service on the Town of Southampton - As noted by LILCO, Motion at 4, Counsel for the Town of Southampton does not have a telecopier. Accordingly, the Staff believes that "in hand" service dates, as to the Town of Southampton, should be deemed adequate if the document being served is delivered to an express service (such as Federal Express or Express Mail) on the due date for delivery the following business day.

D. Summary Disposition - The Staff agrees that the Board should inform the parties whether or not the filing of motions for summary disposition would delay the start of hearings in this proceeding.

For the foregoing reasons, if the Licensing Boards do not reconsolidate the two proceedings, the Staff does not oppose LILCO's Motion for Reconsideration of the Board's Order.

III. Intervenors' Motion

A. The Motion is Untimely - The events set out in the "Background" portion of Intervenors' motion, at 3-7, which are not rehearsed here, were known prior to issuance of the Board's scheduling order of January 14, 1987; thus, these matters are raised out of time and on this basis alone the motion for reconsideration should be denied.

Intervenors urge, at fn. 8 page 10 of the motion, that they assumed based upon LILCO's (unspecified) past practices that LILCO would attempt to revise its Plan before the schedule imposed by the Board in its January 14th Order commenced, or that the Board would not commence the instant proceeding before LILCO did in fact make such an attempt. Thus, say Intervenors, they did not raise the matters set out in their motion when they submitted their proposed schedules of December 23 and 24, 1986. ^{3/} Given that the events noted in Intervenors' motion for reconsideration were known both to the Intervenors, and the Board, at the time Intervenors set forth their proposed schedules, it is clear that the motion does not raise any new matters which could not have been raised prior to December 23-24, 1986. No authority is offered to support the proposition that Intervenors can assume other parties, or the Board, will take certain action to hold a proceeding in abeyance where actions are simultaneously being taken to set discovery and hearing schedules. ^{4/} The Intervenors' motion for reconsideration should be denied as untimely.

^{3/} See "Suffolk County's Response to Board Memorandum and Order Regarding Schedule for Reception Center Proceeding (December 23, 1986"; and "State of New York's Response to Memorandum and Order (December 24, 1986)". The town of Southampton did not file a separate response.

^{4/} LILCO on January 22, 1987 also filed a motion for reconsideration of the Board's January 14, 1987 Order. See "LILCO's Motion for Reconsideration of the Board's January 14, 1987 Order (Setting Discovery and Hearing Schedule)". The Staff in a filing also dated February 3, 1987, determined not to oppose LILCO's motion. However, since the Board has not yet ruled on LILCO's motion, the schedule set out in the Board's January 14 Order is still operative. In any event, the Staff urges denial of Intervenors' motion for reconsideration.

B. Deficiency of the Plan With Regard to Monitoring Does Not Preclude Litigation of Other Issues

Assuming, arguendo, that the motion for reconsideration raises new matters, Intervenor's argue, at 8-11 of their motion, that it makes no sense to proceed with litigation of the Contention 24.0 issues presently before this Board. ^{5/} According to Intervenor's, this is because the Board has held (LBP-85-31, 22 NRC at 417, 430-31), and the Appeal Board (ALAB-855) has affirmed, that LILCO's plan is presently deficient in that it fails to estimate and plan for the number of evacuees expected to seek monitoring but not relocation facilities at LILCO's reception centers. ^{6/} According to Intervenor's, the state of the record compels one of two choices. Motion at 11. Either (1) the parties should go forward with litigation, or summary disposition of the existing Plan (through Revision 8) and no further revision by LILCO should be permitted or (2) the schedule should be put on hold until LILCO attempts to revise its Plan to correct the identified deficiency and includes a planning basis as to monitoring which complies with the Board's ruling, supra. In addition, Intervenor's urge that this proceeding should be put on hold until after the Commission rules on LILCO's Petition for Review of ALAB-855.

^{5/} See Memorandum and Order of December 19, 1986, reopening the record on Contention 24.0.

^{6/} LILCO has sought Commission review of ALAB-855. While Intervenor's concede that LILCO is not barred from seeking Commission review of ALAB-855, they urge that further litigation should not go forward until LILCO moves to correct the plan

The Staff does not agree with Intervenors. ^{7/} The fact that LILCO's plan, as to the reception centers (Contention 24.0) has been amended five times is irrelevant to the issues presently set for litigation by the Board. It is well known that the amendments are apparently the result of events beyond LILCO's control. Intervenors have failed to state in their motion why litigation of the discrete matters already set for hearing by this Board cannot proceed at this time. They have simply argued that instead of litigating all reception center issues at one time, they may be required to litigate discrete issues at different times. However, there is no showing in the motion that Intervenors would be prejudiced by proceeding in such a manner.

With respect to the argument that LILCO should now be compelled to file a plan amendment in order to move this proceeding forward, the Staff is unaware of LILCO's intentions regarding future revisions of the LILCO Plan. As has been the case on several previous occasions involving LILCO's offsite emergency plan, the Board may proceed with litigation of presently disputed matters based on the most current revision (now

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

deficiency or until the Commission rules on LILCO's Petition for Review or until the Commission rules on LILCO's Petition for Review. Motion at 10.

^{7/} As noted, infra, the County has suggested that the filing of motions for summary disposition is one option that could be pursued. The question of whether summary disposition will delay the start of hearings is one of the matters raised in LILCO's motion for reconsideration. In any event, the County has not been precluded by the Board from filing a motion for summary disposition of any or all the matters set for litigation by the Board's December 19, 1986 Order Reopening the Record.

Revision 8) before the Board. ^{8/} What may or may not occur in the future is, of course, speculative and in any event irrelevant to the matter already set for hearing by this Board. If the matters already set by the Board proceed to hearing, the Intervenors can attempt to make a showing that the plan, as currently revised, is deficient.

In sum, this proceeding should now go forward based on Revision 8 of the LILCO Plan. Based on this Revision, and the Board's December 19, 1986, Order regarding reopened Contention 24.0, the parties are fully on notice as to what will be litigated.

C. Whether LILCO Operational Facilities Will Be Available

As noted by Intervenors, motion at 13, LILCO's current (Revision 8) reception centers are located at its Bellmore, Hicksville and Roslyn operational facilities. Intervenors argue, Motion at 14-15, that there is evidence that these facilities may not be available to LILCO ostensibly because of local zoning laws. For this reason, Intervenors further assert that it makes no sense to commence litigation premised on facilities which, they claim, are not available for use as proposed by LILCO in Revision 8. Thus, say Intervenors, if LILCO intends to substitute new facilities at some time in the future such substitutions should be made before the Board and parties litigate proposals that Intervenors say will become

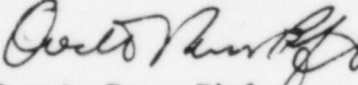
^{8/} See, for example earlier Board orders concerning scheduling of testimony in emergency planning proceeding with regard to future plan revisions; specifically emergency planning transcript of December 1, 1983 at Tr. 634; transcript of conference call of October 24-25, 1983 concerning scheduling, and Board orders of October 26, 1983 and December 2, 1983 (unpublished).

inoperative. The Staff does not dispute that facilities presently proposed by LILCO as reception centers may not ultimately be available to LILCO. However, the question of the availability or unavailability of the facilities in question has not been factually established on the record before this Board. Consequently, the Board would be speculating on future events, without record support, if it were to accede to Intervenor's arguments in this regard. The Board should proceed to litigate the proposal before it (Revision 8) in accordance with its Order of December 19, 1986. Intervenor can attempt to make a showing, through an evidentiary record, that the facilities in question are not available to LILCO. For the reasons set out above, Intervenor's Motion for Reconsideration of the Board's Order of January 14, 1987, setting discovery and hearing schedules should be denied.

CONCLUSION

For the reasons set out above, the Staff urges that a joint prehearing conference be held with Licensing Boards "OL-3" and "OL-5" in the Shoreham proceeding in order to minimize the impact of those proceedings on FEMA's resources. In the alternative, the Staff does not object to granting LILCO's motion for reconsideration of the January 14, 1987 prehearing conference order. The Board should deny the Intervenor's motion to reconsider that order.

Respectfully submitted,


Oreste Russ Pirfo
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 3rd day of February, 1987

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC
'87 FEB -5 A11:44

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
LICENSING & SERVICE
BRANCH

In the Matter of)
)
LONG ISLAND LIGHTING COMPANY) Docket No. 50-322-OL-3
) (Emergency Planning)
(Shoreham Nuclear Power Station,)
Unit 1))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO BOTH LILCO'S MOTION FOR RECONSIDERATION OF THE BOARD'S JANUARY 14, 1987 ORDER (SETTING DISCOVERY AND HEARING SCHEDULE) AND INTERVENORS' JOINT MOTION FOR RECONSIDERATION OF THAT ORDER" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system or, as indicated by double asterisks, by hand, this 3rd day of February, 1987.

Morton B. Margulies, Chairman**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Joel Plau, Esq.
Director, Utility Intervention
Suite 1020
99 Washington Avenue
Albany, NY 12210

Jerry R. Kline**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Fabian G. Palomino, Esq.
Special Counsel to the Governor
Executive Chamber
State Capitol
Albany, NY 12224

Frederick J. Shon**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jonathan D. Feinberg, Esq.
New York State Department of
Public Service
Three Empire State Plaza
Albany, NY 12223

Philip McIntire
Federal Emergency Management
Agency
26 Federal Plaza
Room 1349
New York, NY 10278

W. Taylor Reveley III, Esq.
Donald P. Irwin, Esq.
Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, VA 23212

Stephen B. Latham, Esq.
Twomey, Latham & Shea
Attorneys at Law
33 West Second Street
Riverhead, NY 11901

Atomic Safety and Licensing
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veteran's Memorial Highway
Hauppauge, NY 11788

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

Ms. Nora Bredes
Shoreham Opponents Coalition
195 East Main Street
Smithtown, NY 11787

Anthony F. Earley, Jr.
General Counsel
Long Island Lighting Company
175 East Old Country Road
Hicksville, NY 11801

Dr. Robert Hoffman
Long Island Coalition for Safe
Living
P.O. Box 1355
Massapequa, NY 11758

Mary M. Gundrum, Esq.
New York State Department of Law
120 Broadway
3rd Floor, Room 3-116
New York, NY 10271

Herbert H. Brown, Esq.
Lawrence Coc Lanpher, Esq.
Karla J. Letsche, Esq.
Kirkpatrick & Lockhart
South Lobby - 9th Floor
1800 M Street, NW
Washington, DC 20036-5891

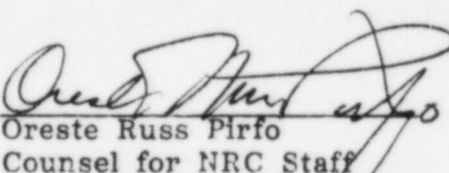
Jay Dunkleberger
New York State Energy
Office
Agency Building 2
Empire State Plaza
Albany, NY 12223

Spence W. Perry, Esq.
General Counsel
Federal Emergency Management
Agency
500 C Street, SW
Washington, DC 20472

Robert Abrams, Esq.
Attorney General of the State
of New York
Attn: Peter Bienstock, Esq.
Department of Law
State of New York
Two World Trade Center
Room 46-14
New York, NY 10047

William R. Cumming, Esq.
Office of General Counsel
Federal Emergency Management
Agency
500 C Street, SW
Washington, DC 20472

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555


Oreste Russ Pirfo
Counsel for NRC Staff