April 27, 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-3 (Emergency Planning)
(Shoreham Nuclear Power Station, Unit 1)	

SUFFOLK COUNTY AND STATE OF NEW YORK'S REPLY TO LILCO'S ANSWER OPPOSING MOTION TO COMPEL

On April 13, 1987, Suffolk County and the State of New York (the "Governments") filed a motion with this Board seeking an Order compelling LILCO to provide certain information regarding data relied upon in its direct testimony.[1] On April 23, 1987, LILCO answered[2] the Governments' Motion. LILCO's Answer advances certain arguments which are so unsupported by law or fact that (1) the Governments could not have anticipated those arguments when preparing their Motion To Compel and (2) the Board must be advised of LILCO's fast-and-loose approach to the circumstances surrounding this matter.

1/ Suffolk County and State of New York Motion To Compel LILCO To Provide Sources of Data Relied Upon In Testimony (April 13, 1987) (the "Motion").

2/ LILCO's Answer Opposing Intervenors Motion To Compel of April 13, 1987 (April 23, 1987) (the "Answer").

There are four LILCO arguments which the Governments address here.

DISCUSSION

I. LILCO Argument No. 1: "The Governments' Motion Is Untimely"

LILCO first argues that the Governments' Motion is untimely and therefore must be denied under the NRC's regulations. See 10 C.F.R. §2.740(f)(1). LILCO's argument runs as follows:

1. In a response filed in February to certain interrogatories and document requests propounded by the Governments, LILCO identified two documents concerning the data at issue here which LILCO declared it was withholding on grounds of the work product privilege;

2. The Governments did not seek to contest LILCO's assertion of the work product privilege with respect to those two documents;

3. LILCO decided to produce the documents in April after its witnesses offered testimony based on the documents and data which LILCO had previously informed the Governments were protected by the work product privilege;

4. Therefore, the Governments' request for information pertinent to the reliability of the data, which are the bases for part of LILCO's direct testimony, are untimely because the Governments should have contested LILCO's assertion of the work product privilege within ten days after LILCO refused to produce the documents in February.

See LILCO Answer at 3-4.

This argument abuses both logic and the NRC's regulations. In essence, LILCO argues that it may withhold information on work product grounds and, after the assertion of the privilege is accepted in good faith by the opposing party, it may wait 10 days (the time limit for filing a motion to compel under 10 C.F.R. §2.740(f)(1)), then use the "privileged" information in its testimony and claim that any subsequent attempts to scrutinize the validity of the newly-released information are "untimely." Such unfairness is supported by no NRC regulation and must be rejected.

Section 2.740(f)(1) indeed imposed a 10-day limitation on the Governments' right to contest LILCO's assertion of the work product doctrine over the withheld documents. LILCO's claim served, in essence, to keep the documents and data out of this litigation. However, once LILCO unilaterally changed the circumstances under which all of the parties were operating by

injecting the documents and data into this litigation through its direct testimony, the work product protection which LILCO claimed was lifted. See Section III, infra. There is nothing in Section 2.740(f)(1) which provides that a party may not inquire into the validity of such newly-released information.

The Governments have a right to explore the bases for any "facts" offered by LILCO's witnesses. LILCO has attempted to circumvent these rights by first withholding information on grounds of privilege and then springing that information on the Governments in testimony while at the same time claiming that the Governments have no right to explore the validity of that testimony. In short, the Governments have been denied proper discovery by LILCO's inappropriate actions. The approach to litigation advocated by LILCO in its Answer is unfair and prejudicial and cannot be condoned by the Board. Indeed, if LILCO refuses to allow its testimony to be appropriately investigated, it should be stricken. See Suffolk County, State of New York and Town of Southampton Motion to Strike Portions of LILCO's Testimony on the Suitability of Reception Centers (April 20, 1987) ("Motion to Strike").

II. LILCO Argument No. 2: "LILCO Has Provided Pertinent Documentation"

LILCO argues that it has produced two documents reflecting the "privileged" information advanced by its witnesses in their testimony and that the validity of that information can be (1) explored at trial under cross-examination or (2) should have been explored in depositions during the discovery phase of this proceeding. Answer at 2-3. The former argument flies in the face of the purpose of discovery, the latter argument is disingenuous.

LILCO's suggestion that the Governments explore the validity of the newly-released "privileged" information at trial, without proper discovery, is directly contrary to the purpose of discovery -- that is, to permit advance preparation for cross-examination and to avoid protracted cross-examination conducted for discovery purposes. In any event, it must be remembered that LILCO's testimony consists of multiple levels of hearsay. If it is to be admitted (which the Governments' Motion to Strike urges should not be permitted) the validity of the data cannot be fully explored at trial without the opportunity to explore the source of those data.

LILCO also argues that the Governments should have explored the validity of the data and documents at issue during the deposition of Messrs. Watt and Daverio which were taken in March:

(1) four weeks before LILCO released the documents and (2) without any notice from LILCO that it intended to use the withheld documents and "privileged" data in its direct case. This argument is so absurd as to require no further treatment here. Obviously no inquiry was possible on LILCO documents and data not provided to the Governments until weeks after the depositions at issue.3/

III. LILCO Argument No. 3: "The Documents and Data At Issue, Although Relied Upon By LILCO's Experts, Are Nevertheless Work Product and Are Therefore Still Protected Absent a Showing of Substantial Need"

LILCO next claims that despite its witnesses' reliance on the "privileged" data in their direct testimony, there has been no waiver of the work product privilege as it applies to those data, nor have the Governments demonstrated "substantial need". Thus, LILCO argues that it can advance through its witnesses certain "facts", yet keep the source of those "facts" secret by claiming they are protected "work product". This argument is directly contrary to the argument advanced by LILCO before this Board in its motion to compel the production of a document from the State of New York.4/

3/ It should be noted also that LILCO has still left unclear whether it has provided all documents reflecting its contacts with the unnamed sources providing the data. Note especially the ambiguity of footnote 2 of the LILCO Answer. It appears that certain notes have not been produced.

4/ LILCO Motion to Compel State of New York to Produce Document (April 3, 1987) ("LILCO Motion to Compel").

LILCO claimed in its Motion to Compel that because a State witness, Mr. Langdon Marsh, would rely in his testimony on a particular document (a fact not conceded by the Governments), LILCO had a compelling need for production of that document. LILCO Motion to Compel at 8-9. LILCO now argues the opposite -- that although its witness relies on "privileged" information in direct testimony, which the Governments have not been given the opportunity to explore, the Governments have not demonstrated a "substantial need" for the information they request. LILCO cannot have it both ways.

LILCO is simply wrong when it argues that the County has not demonstrated a substantial need for the information regarding the sources of its data. As stated in the Governments' Motion, the Governments have a need to explore the validity of LILCO's data which were previously withheld from the Governments during discovery and which are inherently unreliable, as they are based on multiple levels of hearsay. Even if the Governments advance different data, compiled by their own sources, the Board will still be left with conflicting data. The only way to determine which data are correct is to permit inquiry into the reliability of LILCO's data. The alternative is to strike the LILCO testimony, which the Governments have also asked this Board to do in their Motion to Strike.

In any event, the law on the subject, which LILCO ignores, is that reliance by witnesses on "ordinary" work product, (which the information sought is) waives the work product privilege. United States v. Nobles 422 U.S. 225, 239-40, 95 S.Ct. 2160, 2170-71 (1975) ("Respondent can no more advance the work product doctrine to sustain a unilateral use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination"); see generally, M. Larkin, Federal Testimonial Privilege, § 11.05 (1984). Thus, even accepting LILCO's work product claim, that claim has been waived by LILCO's use of the privileged data in its testimony.

IV. LILCO Argument No. 4: "There Is A Real Potential For Harassment of LILCO's Secret Sources"

LILCO next argues that if its secret sources are revealed, the Governments are likely to harass, intimidate or pressure them. The Governments will not respond to LILCO's groundless ad hominem accusations, which are unbecoming of LILCO and its counsel. Suffice it to say that LILCO's attacks are unfounded, and supported by no reliable evidence. LILCO's argument is in effect no more than a smoke screen designed to allow LILCO to proffer "facts" but keep the sources of those "facts" secret.

The conclusion one must draw is that LILCO's secret sources are so tenuous and unreliable that they would not stand up to legitimate scrutiny.

In any event, LILCO's alleged fears of harassment, intimidation, or pressure can be readily allayed by an appropriate protective order which, for instance, (1) restricts contacts with LILCO's secret sources to specific Government counsel, paralegals, or employees and (2) limits the use of the information from and about those sources to this hearing. LILCO cannot, however, attempt to proffer facts and yet prevent the Governments from exploring the validity of those facts.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the SUFFOLK COUNTY AND STATE OF NEW YORK MOTION FOR LEAVE TO REPLY and the SUFFOLK COUNTY AND STATE OF NEW YORK'S REPLY TO LILCO'S ANSWER OPPOSING MOTION TO COMPEL have been served on the following this 27th day of April, 1987 by United States mail, first class, except as otherwise noted.

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