LILCO, June 9, 1983

RELATED CORRESPONDENCE

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)
	)	
(Shoreham Nuclear Power Station, Unit 1)	)	

LILCO'S REPLY TO SUFFOLK COUNTY'S
"RESPONSE" ON PROPOSED DIESEL GENERATOR CONTENTION

Suffolk County's May 31 "Response" is not a response to the specific points and authorities set forth in LILCO's and the Staff's Oppositions to the County's May 2 Motion and May 10 "Addendum" thereto concerning diesel generators. It does not demonstrate the invalidity of any of the arguments advanced by LILCO or the Staff in opposition to the County's proposed contention. Rather, it implicitly concedes their validity by trying to reclamor a month later, at much greater length1/ and shrillness than before2/ matters the County failed to "get right" on the first or second tries.

1/ Even excluding Mr. Goldsmith's attached affidavit, it is over twice the combined length of the County's previous filings.

2/ Without alleging a single violation of any legal obligation by either LILCO or the Staff, it contains some of the most fanciful prosecutorial rhetoric heard since the Watergate reruns closed.

The County's basic arguments have been responded to in LILCO's and the Staff's Oppositions of May 16 and 18 and need not be repeated. This Reply will therefore address only new material contained in the County's "Response."

1. There Is No Cover-Up by LILCO or the Staff

The County devotes twelve full pages, plus later revisitations, to the proposition that LILCO has engaged in some kind of heinous "cover-up" of matters involving the diesel generators. This allegation presumes two things: first, that there are substantive matters that are not being dealt with adequately on the merits; and second, that a duty of disclosure to some party (namely, the County) has been violated. Neither presumption has any basis. The problems which have been experienced with the diesel generators have been of the types normally associated with installation and testing of equipment. Furthermore, as Mr. Youngling's affidavit amply demonstrates, those problems are being systematically dealt with, as both specific evaluations and trend analyses show. Second, the appropriate body -- the I&E Branch of the Staff -- has been kept fully and promptly informed of the progress of work on the diesels. There has been, in short, no "cover-up" on the emergency diesels.

Suffolk County is neither the Staff nor a roving ombudsman. It has all the rights of a party to this proceeding: no more, no fewer. The County's complaint is

grounded in the fact that it has not been made an equal partner with the I&E Branch in the evaluation of diesel generator problems, with unlimited discovery, including one particularly intrusive kind, namely, witnessing of tests on the Shoreham site. The answer to the County's complaint is elementary: rights of discovery under the Commission's regulations are premised on having an issue in contest, i.e., a contention filed and accepted by the Board. 10 CFR § 2.740(b)(1); Allied-General Nuclear Services, et al. (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489, 492 (1977). No contention respecting the diesel generators has been admitted by the Board; therefore, under present circumstances, the County is simply not entitled to discovery on this issue as a matter of right. No amount of railing can change this.3/

As to the County's lament that LILCO has not voluntarily provided the County with discovery, it simply defies credulity, given the history of this proceeding, the closure of the record, and the length of time the County has been on notice of information concerning the diesel generators and of LILCO's position on voluntary discovery, for the County to assert that

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3/ The County apparently does not disagree with this proposition; although other parts of its "Response" are rife with citations to legal authority, none whatever is cited in support of its demand for precontention discovery, nor does the County assert that LILCO has violated any Commission regulation or requirement by declining the County's discovery demands.

LILCO should accept its motives in filing a contention at this time as being pure. Given this background, LILCO categorically rejects the County's branding as "cynical" its evaluation of the County's motivation; indeed, if the County's characterization were accurate, it would merely reflect LILCO's experiential reaction to exposure to the County's course of conduct over the past many months.

The County's further allegation that the Staff has "aided and abetted" the fantasy "LILCO cover-up" is as baseless as its allegation of the "cover-up" itself. In the absence of an admitted contention, the Staff, operating through the I&E Branch, has the duty of establishing that regulatory requirements on all issues not before the Board are satisfied. Theirs is a duty under the Commission's regulations relating to the safety of the plant. That duty does not contemplate the participation by third parties on issues not in controversy before a Board.4/ Nevertheless, the County has been kept regularly informed by the Staff, through a variety of channels, of the progress of the diesel generator matter. Staff Opposition at 11; SC Response, passim. Just as there has been no "cover-up" by LILCO, there has been no "aiding or abetting" by the Staff.5/ In short, the County's assertion of a

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4/ It should be noted that once again, despite the County's incendiary language, there is no citation by the County to any legal duty asserted to have been breached by the Staff.

5/ The County's suggestion that the Staff should have conditioned performance of its regulatory duties on all

(Footnote continued)

"cover-up" by LILCO in collusion with the Staff seems far better adapted to divert attention from, if not to cover up, the deficiencies in the County's own arguments than to shed light on the issues at hand.

2. The Reopening Standard Applies and the County Has Not Met It.

A. The Reopening Standard Applies.

The County's twofold assertion that the reopening standard is inapplicable ("Response" at 13-14) is without merit. Remarkably, the County argues, first, that "the record has [not] in fact been closed." Id. at 14. The County admits that the record on all health and safety contentions was closed on April 8, 1983, yet apparently maintains that because the record is open on Phase II of Emergency Planning, the reopening standard does not apply. The County cites no authority to support its position, and no such authority exists. The fallacy of the County's position is underscored by the fact

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(Footnote continued)

parties' pretending that a given issue had been put into controversy by the filing and acceptance of a nonexistent contention -- e.g., that it should have refused to witness testing or inspection of diesels at Shoreham without the presence of Suffolk County consultants despite the absence of an admitted contention -- invites the Staff to substitute arbitrary ad hoc judgments for the framework of the Commission's regulations. Accession by the Staff to this request would have been without support in the regulations and the County's having urged this course on the Staff was highly improper.

that emergency planning issues have long been considered distinct from health and safety issues. In fact, licensing boards, when satisfied that health and safety issues have been satisfactorily resolved, can and have issued low-power testing licenses prior to litigation of off-site emergency planning issues. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 232-233 (1981).6/

In an effort to avoid application of the reopening standard to its motion to admit a new contention, the County denies it is seeking "further litigation of issues already pursued in this licensing proceeding." Yet the County's own words contradict this and make unmistakably clear that it indeed hopes to litigate "issues already pursued in this licensing proceeding." Significantly, the County admits that its proposed contention "is not limited to inadequacies in LILCO's quality assurance program," clearly implying that alleged QA inadequacies are within the scope of its proposed contention. Similarly, the County admits that its new contention is "not limited" to inadequacies in LILCO's

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6/ This Board has already ruled, at least implicitly, on this very question. After the record on Contention 7B had closed, but while the record remained open on other health and safety issues, this Board applied the reopening standard in refusing LILCO's request to admit a portion of the Budnitz deposition into the record on Contention 7B. A fortiori, the reopening standard would apply where, as here, the entire health-and-safety area has presumptively closed.

preoperational test program," again implying inclusion of alleged test program inadequacies. Thus, the County's response leaves little doubt that any reopened proceeding would result in additional litigation of issues already exhaustively pursued in this licensing proceeding.

Suffolk County also claims that it need not satisfy the reopening standard because "neither the participational rights afforded to the County under Section 2.715(c), nor the 'lateness' factors under Section 2.714(a), are conditioned upon a showing that the evidentiary record should be reopened." "Response" at 13. The County's position is groundless. As the Commission has explained in Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364-65 (1981), all parties to a Licensing Board proceeding, including a Section 2.715(c) party, must satisfy the specificity and lateness requirements of 10 CFR § 2.714, where applicable, as well as the standards for reopening the record, where applicable. See also Pacific Gas and Electric Co. (Diablo Canyon Power Plant, Unit 1 and 2), CLI-82-39, ___ NRC ___, Slip op. at 4 (Dec. 23, 1982), where the Commission held that "the moving party [Governor Brown] must satisfy both the standards for admitting late-filed contentions, 10 CFR 2.714(a), and the criteria established by the case-law for reopening the record." This Board has also required that once admitted as a party to the proceeding, Suffolk County, even as a Section 2.715(c) "interested county," must observe all the

procedural requirements applicable to other parties. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982); see also Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768 (1977).

B. The Reopening Standard Requires Consideration of Whether the Reopened Issue Will Affect the Outcome.

The reopening standard requires: (1) that the motion to reopen be timely; (2) that the issue be one of major significance; and (3) that the newly discovered evidence will have a bearing on the outcome of the proceeding. See Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 465 (1982); Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1978). As to the third test, however, the "different result" criterion is not limited, as the County's Opposition incorrectly asserts at 14-15, to proceedings in which a decision has already been rendered.7/

7/ The County erroneously relies on Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), LBP-72-2, 7 NRC 83, 85 (1978). Shearon Harris, in which the Board reopened the record sua sponte for the admission of

(Footnote continued)

As both LILCO and the Staff demonstrated in their Oppositions to the County's Motion, the Appeal Board in Black Fox, supra, and the Licensing Board in Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), No. 50-382-OL, Slip op. at 6-7 (ASLB Oct. 18, 1982) considered the "different result" criterion where motions to reopen preceded the issuance of an initial decision. Both Boards rested their decision, in part, on the facts that the issue raised by the contention had been fully litigated and that the new evidence would not affect the outcome of the proceeding. The County's glib disregard of these decisions indicates a failure to seriously engage the case law. Clearly the "different result" criterion, as well as the timeliness of the motion and the significance of the issue, is a significant consideration in any decision on a motion to reopen the record.8/

(Footnote continued)

certain documents but not for general litigation of an issue, is inapposite. The Board specifically stated that none of the reopening tests fit neatly in a sua sponte situation.

8/ Even Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973), cited by the County as establishing only two criteria for reopening, recognized that even if the two listed factors are resolved in a movant's favor, the Board must still consider whether there is an "unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue . . . will have no effect upon the outcome of the licensing proceeding."

C. The Proposed Contention Is Untimely Under Either a Reopening Test or a § 2.714(a) Test.

The County's proposed contention is untimely. Both the reopening standard and the separate test for late-filed contentions require that a new issue be timely raised. This issue has not been. LILCO has already discussed at length, LILCO Opposition at 10-15, facts which demonstrate that the County's contention is untimely. Repetition of that discussion is needless. However, there are significant facts raised in LILCO's Opposition which the County's Response simply ignores.

In numbered paragraphs 1 through 7 on pages 16-21, the County sets forth "the facts" it contends relate to timeliness of the County's motion. This listing contains significant omissions and invites inappropriate inferences. For example, paragraphs 1 and 2 assert that the County did not learn any of the details concerning the diesel testing violation until "several weeks after February 24, 1983, the date I&E Report 82-35 was issued by the Staff."9/ The County contends that this was when it "first learned some details of the problems

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9/ The County further contends that Mr. Goldsmith did not receive I&E Report 82-35 until March 8, 1983. The pertinent date, however, is not when Mr. Goldsmith received it, but when the County, through its counsel, first received the report. Even this date, however, is not the crucial date; it is January 26 that counts, for it is on this date that the County's representative attended a meeting at which the essential details of the diesel generator violation were thoroughly discussed.

with LILCO's testing of the diesel generators." SC Response at 16. This is simply not true. As noted in LILCO's Opposition to the County's contention, County counsel was well aware of the details of the alleged diesel generator violation on January 27, 1983. LILCO Opposition at 11-12. The transcript removes all doubt on this point. See Tr. 19,422-23 (Miller). This is not surprising given that the County's representative attended a meeting at which the details of the alleged diesel generator violation were discussed at length in a presentation by Mr. Youngling. It is therefore inaccurate and disingenuous for the County to assert that it first learned "some details" of problems with LILCO's testing of the diesel generators several weeks after February 24, 1983.

Nor can the County escape this conclusion by arguing further in paragraph 2 that I&E Report 82-35 was uninformative because it contained only "conditional statements concerning the seriousness of the problem." These conditional statements were in the cover letter, not the report, and in no way detract from the fact that the report apprised the County of the details of the alleged violation. As noted, however, these details were already known to the County as a result of the attendance of its consultant at the January 26, 1983 meeting. Nor is it significant that the County claims it did not learn until later I&E's opinion of the seriousness of the violation. The County knew the essential facts long before and it is at least ironic if not contradictory that the County seeks to rely

on the Staff's opinion as to the seriousness of the violation in this context and yet refuses to accept the Staff's assessment that the diesel generator problems do not merit reopening the record.10/

Significantly, with respect to other facts relied on by the County, there is a studied failure to indicate when the County first had actual knowledge of those facts. For example, the County recites that LILCO made a 10 CFR § 50.55(e) report concerning cracking of the diesel cylinder heads on March 8 and that a written report of this matter was not available until April 15, 1983. Thus, the County invites the inference that it could not have filed a contention on this issue until mid-April. To the contrary, however, the County was aware of the alleged cracking of the cylinder heads (and other "continuing problems with emergency diesel generators") at least as early as March 23. LILCO Opposition at 13.

The County's "Response" also fails to explain the six week delay between the time it asked for and was refused voluntary discovery of the diesel generators at Shoreham (March 23) and the time it made its initial contention filing (May 2). This unexplained delay occurred despite the fact that the County was aware the record would and did close on April 8, 1983.

10/ The County also chooses to ignore the Staff's conclusion that the diesel generator violation relied upon by the County has no impact on their previous testimony in this case. See Board Notification No. 83-53, April 25, 1983.

Inexplicably, the County delayed an additional month after the close of the record and after receiving I&E Reports 82-35 and 83-07, upon which it bases its contention, before initially filing its diesel generator contention. Under these circumstances, the County had a duty to act expeditiously and attempt to present the issues it now raises prior to the close of the record, yet the County did not do so and now disingenuously claims that it "promptly" prepared its contention and that its contention is timely filed. The County's subsequent receipt of additional information related to the proposed contention cannot excuse the untimeliness of its action. The County's proposed contention is plainly untimely and the record should not be reopened to allow its admission.

D. The County Has Not Shown That the Proposed Contention Raises Significant New Facts and Circumstances.

The County has failed to meet its burden under the reopening standard of raising significant new facts and circumstances. The County relies entirely on the Staff's routine inspections and inspection reports as demonstrating the significance of the diesel generator matter. Yet the Staff itself has taken the position that the County's diesel generator contention does not rise to a level meriting litigation. The County's unsubstantiated claim that significant new evidence is available is not legally sufficient

to reopen the record; case law requires that a movant seeking reopening must itself make the initial case that significant new evidence exists. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981). The County cannot carry this burden by attempting to shift it, as it has attempted to do here. The County has not presented any substantial evidence that the diesel generators at Shoreham are unsafe or unreliable, and has simply failed to meet its heavy burden.

E. The County Has Not Shown That the Proposed Contention Would Affect the Result of This Proceeding.

Suffolk County's "Response" fails to present any support for the proposition that the County's "new evidence" concerning the diesel generators would affect the result of the proceeding. However, a movant seeking reopening of a closed record must make this showing to demonstrate that there is a material unresolved issue of fact. See Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). On its face the County's speculative assertion that its "contention and evidence demonstrate that the diesels at Shoreham could be unreliable and may not meet applicable regulatory requirements" fails to make the requisite showing that, in fact, there is an unresolved issue. "Response" at 28 (emphasis supplied). In addition to being speculative, the County's assertion is

incorrect. There is no substantial evidence that the diesel generators fail to meet regulatory requirements or that they are unreliable. To the contrary, Mr. Youngling's affidavits of May 16 and June 3 as well as NRC Resident Inspector Higgins' affidavit of June 8 demonstrate that LILCO has consistently kept the NRC informed of any matters involving the diesel generators and that LILCO has taken care to insure that its diesel generators are reliable.

3. The Proposed Contention Fails To Meet the Five-Factor Balancing Test of § 2.714(a).

Totally apart from the requirements for reopening a closed record, the County must meet, on balance, the five requirements for late-filed contentions under 10 CFR § 2.714(a). Not one of the five factors of 2.714(a) weighs in favor of admitting the County's contention. The untimeliness of the County's filing, discussed in Section 2.C above, must weigh against the County.

As to the second test, the availability of other means to protect its interest, the County attempts to refute the suggestion that its interest would be adequately protected by a show cause proceeding under 10 CFR § 2.206(a), by misciting Consolidated Edison Company (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 40-41 (1982). Contrary to the County's argument, the holding in Indian Point does not embrace § 2.206 show-cause proceedings: it is limited to the concept that rulemaking or other adjudicatory proceedings are not as

efficacious as a prior hearing. In addition, the facts surrounding Indian Point were markedly different from the instant circumstances. The Indian Point petitioners were seeking intervention on an issue to which they had not been parties and for which there had been no prior hearing; therefore, the Indian Point board weighed the Section 2.714 factor slightly in the petitioners' favor. In contrast, Suffolk County has been a party to a prior hearing in which Shoreham quality assurance program was extensively litigated. The extensive quality assurance record militates against a repetitive proceeding on the emergency diesel generators. The County's interests, if legitimate, can be adequately protected through access to show cause proceedings.

The County has also failed the third test since it has not affirmatively demonstrated how its expert, Mr. Goldsmith, can be expected to supplement or improve the record on the issues raised in the proposed diesel generator contention. The County relies on Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, ___ NRC ___, Slip op. at 9-10 (Dec. 21, 1981), to support its apparent position that the mere offering of Mr. Goldsmith as an expert tips the balance of this factor in the County's favor. The contention in the Detroit Edison case is strikingly different from the technical safety issue raised by the proposed diesel generator contention. In Detroit Edison, an intervening county sought to raise questions about its own ability to implement its own county emergency

plan. Thus, despite the fact that the county had not identified its prospective witnesses, the intrinsic nature of the subject matter provided reason to believe that the county could present witnesses whose testimony would be useful. In contrast, the proposed diesel generator contention involves technical expertise -- an expertise which is already adequately represented by the NRC and by LILCO.

The County also neglects the substantial weight of authority on the fourth test by asserting, basically as a blanket proposition, that its interest cannot be adequately protected by other parties. Contrary to the County's assertion, the question of whether an intervenor can be adequately represented by another party must be determined on a case-by-case basis. The Staff has an affirmative duty to see that the public interest in the enforcement of NRC regulatory requirements is met. NRC regulations prevent the issuance of an operating license until the NRC Staff makes the findings specified in 10 CFR § 50.57, including the ultimate finding that the issuance of an operating license will not be inimical to the health and safety of the public. Other licensing boards have recognized that, in the pursuit of its duty to protect the health and safety of the public, the Staff may adequately represent the interest of a petitioner. See Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP-80-24, 12 NRC 231, 238 (1980); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-46, 15 NRC

1531, 1535-36 (1982); South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981). There is ample evidence that the Staff has been following LILCO's progress on diesel generator matters very closely, and the County does not allege otherwise.

Further, the other attributes of a late-filed contention may bear on the issue of representation by other parties. As the licensing board recently stated in Consolidated Edison Company (Indian Point Station, Unit 2), LBP-82-1, 15 NRC 37, 41 (1982),

> in the circumstance of an unjustifiably late request which does not indicate what benefits to the public will result from its allowance, we believe it appropriate to assume that the Petitioners' interest will be adequately represented by the Staff.

The County's proposed diesel generator contention is likewise unjustifiably late and does not indicate what additional benefit to the public, beyond the benefit already gained from the NRC program, would be gained by admission of the contention. Thus a circumstantial case exists favoring representation of the County's interest by the Staff on this issue.

Finally, it is virtually certain that admission of the County's proposed contention would cause substantial broadening of and delay in the proceeding. The hearings in this licensing proceeding on the quality assurance issues unequivocally suggest the likelihood that substantial delay would attend the admission of the County's proposed contention.

The County would mislead this Board about the importance of the delay factor by its quotation, out of context, of a passage from Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 365 (1973). "Response" at 34. First, the passage from Vermont Yankee deals with the reopening standard, not the § 2.714 standard. Second, contrary to the County's suggestion, the Vermont Yankee case stands for the proposition that the reopening standard requires a balancing of the relative significance of the safety matters raised against the possible delay in the hearing process. In fact, cases construing § 2.714 have held that the delay factor should be given substantial weight. See, e.g., South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 424-25 (1981).

As all parties are aware, this Board has indicated its desire to issue a Partial Initial Decision by July; and LILCO has reaffirmed as recently as this week[11]/ its estimate that the plant will be physically ready to load fuel by the end of August. Good cause must be demonstrated to justify delaying these dates (which can be accomplished either by the literal pendency of hearings or by sufficiently diverting Mr. Youngling and other members of the LILCO startup team as to render timely completion of their duties impossible); at this late time, that

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11/ Letter, W. Taylor Reveley, III to the Atomic Safety and Licensing Board, June 8, 1983.

requires a high showing. Cf. South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887-88 (1981), where the Appeal Board gave considerable weight, in reversing the Licensing Board's grant of an untimely petition to intervene, to the prejudice to the licensee and the Staff from entry of a new party two months before the scheduled start of operating license hearings. Certainly, the present circumstances of this case, with the imminent readiness of the plant for fuel load, demonstrate far greater potential for prejudice to LILCO than was present in Summer.

4. On The Merits, The Proposed Contention Is Factually Deficient.

Though the County asserts ("Response" at 35) that the proposed contention possessed adequate basis and specificity when filed May 2, it has voluntarily added, a month later, a twenty-page affidavit by Marc W. Goldsmith to attempt to substantiate it. The County then argues ("Response" at 35-39) that, as a result, LILCO and the Staff are on notice of the basis and nature of each of the five items listed in the proposed contention. The County's attempt to give some content to its contention by an after-the-fact affidavit does not cure the defects in the contention.

There is little to Mr. Goldsmith's affidavit to alter LILCO's earlier-expressed view that the proposed contention is

merely a pastiche of excerpts from I&E documents, connected only by the spurious nexus of a five-item listing.

Further, Mr. Goldsmith's affidavit fails to provide the relevant and probative factual information necessary to meet the heavy burden the County bears in its attempt to reopen the record. In large measure, the Goldsmith affidavit does not, and indeed cannot, dispute the facts asserted in Mr. Youngling's affidavit. Rather, Mr. Goldsmith (a) speculates about potential concerns, (b) emphasizes previously identified problems falling far short of the significance requirements for reopening the record, (c) fails to allege specific inadequacies in corrective actions taken by LILCO, and (d) does not take account of important facts asserted in Mr. Youngling's affidavit.

Examples of the speculative nature of Mr. Goldsmith's affidavit abound. In his discussion of the alleged excessive vibration of the diesels, he theorizes that "several apparently unrelated failures could have vibration as a common cause," and that "bolt cracking in a cyclic fatigue mode as indicated by SNRC 873 [sic] could have a vibration component." Goldsmith Affidavit at 12 (emphasis added). He also notes that "it is possible that the rapid loading requirements of nuclear emergency diesels make this type of diesel somewhat different from the average diesel . . . ." Id. at 13 (emphasis added). Significantly, Mr. Goldsmith admits that "[w]ithout firsthand observation or the analytical efforts evaluating vibration

. . . it is difficult to determine the impact of vibration on the Shoreham diesels." Id. at 12.

Other examples of speculation in the affidavit are found in the discussion of paragraph 3 of the proposed contention, relating to component cracking. There Mr. Goldsmith concludes that the corrective action for cracked capscrews "does not seem to acknowledge that there is a larger problem . . ."12/ and that cracking in the cooling water jacket cylinders "could decrease the reliability of a quick start . . . ." Id. at 15 (emphasis added). Mr. Goldsmith's musings on potential concerns fail to provide adequate information to permit the Board to conclude that significant issues do in fact exist.

The Goldsmith affidavit also includes a number of minor problems identified by LILCO or the Staff in an effort to give the appearance of widespread problems with the diesel generators. For example, in discussing paragraph 1 of its proposed contention, diesel generator testing, the affidavit mentions three discrepancies reported in I&E Report 82-35. Id. at 8-9. None of these discrepancies, however, was ultimately cited in the Notice of Violation concerning diesel generator testing (I&E Enforcement Action 83-20). Moreover, these discrepancies involve such minor issues as cross-outs and write-overs, and the recording interval for data which have no bearing on the reliability of the diesel generators. See

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12/ Mr. Goldsmith does not identify or describe any alleged "larger problem."

SNRC-859, dated March 16, 1983, at 4-7. Another minor discrepancy raised by the County is contained in paragraph 4 of the proposed contention, concerning the hot restart capability of the diesel generators. As Mr. Goldsmith's affidavit reflects, this portion of the contention was based solely on an observation made in passing by an NRC inspector that on one occasion a diesel generator failed to complete successfully a hot restart. Goldsmith Affidavit at 5. The County's contention, however, ignores the subsequent information given to Mr. Goldsmith by the NRC inspector two days later that the particular restart problem had been corrected and the diesel hot restart was successfully completed. Id. Indeed, Mr. Goldsmith concedes that this issue does not relate to diesel generator reliability. Id. at 17.

A third deficiency in Mr. Goldsmith's affidavit is its failure to note any specific inadequacies in the corrective action taken by LILCO in dealing with identified diesel generator problems. Rather, Mr. Goldsmith merely complains that insufficient information is available concerning the discrepancies. Thus, with respect to diesel generator test results, he contends that more information should have been obtained and made available to the NRC to support the resolution of the issues. Id. at 8-10. Similarly, in commenting on alleged vibration problems, Mr. Goldsmith claims that he does not have adequate data "to assess critically Mr. Youngling's conclusions." Id. at 13. And, with respect to

LILCO's trend analysis of diesel generator problems, he concludes "it is clearly too soon to tell" if a decrease in the number of problems has occurred. Id. at 18.

Finally, Mr. Goldsmith's affidavit overlooks significant facts presented in Mr. Youngling's affidavit. Concerning alleged vibration problems, Mr. Goldsmith states that Mr. Youngling's affidavit "does not address . . . the important question of resonance in particular locations . . . ." Id. at 13. Contrary to this statement, however, Mr. Youngling did discuss resonance problems and the corrective actions taken. Youngling Affidavit at 13. Mr. Goldsmith's affidavit also does not take account of the significant fact that vibration-related failures have not recurred since the initial vibration-related problems were corrected. Id. at 11-14. Another similar instance arises in connection with the discussion of component cracking. The Goldsmith affidavit contends that latent casting defects in the diesel generator cylinders do not "provide the outside observer with confidence in either the quality assurance for the diesels or in the long term reliability of the diesels." Goldsmith Affidavit at 16 (emphasis added). This statement does not take account of LILCO's commitment to replace all of the diesel generator heads even though such replacement is not necessary. Youngling Affidavit at 18-19.

In summary, Mr. Goldsmith's affidavit fails to provide the type of factual information necessary to support a reopening of the record in this case.

CONCLUSION

For the foregoing reasons, as well as those stated in LILCO's and the Staff's earlier Oppositions, Suffolk County's motion should be denied.

Respectfully submitted,

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DATED: June 9, 1983

LILCO, June 9, 1983

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO's Reply to Suffolk County's "Response" on Proposed Diesel Generator Contention were served this date upon the following by first-class mail, postage prepaid, or by hand by approximately 10:00 a.m. as indicated by an asterisk (*):

Lawrence Brenner, Esq.*
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Peter A. Morris*
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
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Washington, D.C. 20555

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DATED: June 9, 1983