

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

In the Matter of )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Plant, )  
Unit 1) )

Docket No. 50-322-OL-3  
(Emergency Planning)

February 17, 1984

Response Of Governor Mario Cuomo,  
Representing The State Of New York,  
In Opposition To LILCO's Motion To  
Strike Direct Testimony On  
Emergency Planning Contention 65

Introduction

On January 24, 1984, the State of New York submitted to the Board testimony by four State witnesses on four specific issues raised in Emergency Planning Contention 65.<sup>1/</sup> Over LILCO's objection, the Board admitted the State's testimony on January 26, 1984 (Tr. 3292). On February 10, 1984, LILCO filed a Motion To Strike Portions Of New York's Direct Testimony On Emergency Planning Contention 65 (hereinafter Motion). LILCO's Motion seeks to strike the State's testimony on two issues: (1) the potential for aggressive behavior against LILCO's traffic guides (Direct Testimony at 15-16) and (2) the

<sup>1/</sup> Direct Testimony of Dr. David Hartgen, Richard D. Albertin, Robert G. Knighton and Foster Beach On Behalf Of New York State Regarding Emergency Planning Contention 65 -- Evacuation Time Estimates [hereinafter Direct Testimony].

adverse effect of road construction on evacuation time estimates (Direct Testimony at 16-19). For the reasons set forth below, LILCO's Motion should be denied.

### Discussion

The State's Direct Testimony questioned the reliability of LILCO's evacuation time estimates. The evacuation time estimates were based on KLD's computer model. One of the crucial points of the State's Direct Testimony is that KLD's computer model should have incorporated aggressive behavior and highway construction factors because these factors affect highway capacity and evacuation time estimates. A computer model which neglects to include such factors fails to reflect real life conditions. Hence, the State's Direct Testimony is germane to this proceeding and should be part of the record before this Board.

### Aggressive Behavior

LILCO seeks to strike the State's Direct Testimony on aggressive behavior on two grounds. The first ground is that the State's discussion of the stress experienced by the people attending the Lake Placid Olympics, and the ensuing aggressive behavior of some of those people, is not relevant to the issue of how people will behave under stress during a radiological emergency. LILCO's second ground is that the State witnesses sponsoring this portion of the State's Direct Testimony are not qualified to testify about aggressive behavior under stress. LILCO's arguments fail on both grounds.

While couched in terms of relevance, LILCO's Motion appears in fact to attack the merits of the State's testimony by disagreeing with the conclusions drawn by the State's witnesses. Such an objection is not a proper basis for a motion to strike.

Nevertheless, the State's testimony is clearly relevant to the issues presently before the Board. The State's testimony on aggressive behavior is based upon the actual personal experiences of Messrs. Albertin and Knighton. As employees of the New York State Department of Transportation, they responded to a state of emergency declared by former Governor Carey in the wake of the disastrous transportation situation which existed during the first few days of the Lake Placid Olympic Games. The purpose of their testimony is to show that the people experiencing the stressful conditions at Lake Placid reacted aggressively and uncooperatively toward attempts by DOT personnel, identifiable only by orange vests, to direct transportation operations. In addition, the purpose of their testimony is to show that some of the stressed people confronted the DOT personnel because they perceived the DOT personnel to be the persons responsible for causing the transportation problems. Members of the public remained unruly until State Police and other uniformed officers came on the scene.

The relevance of this testimony to the situation at Shoreham is obvious and central to the contentions at issue here. LILCO's Plan calls for LILCO's traffic guides to attempt to direct traffic in an emergency with no color of authority

to do so and, consequently, no outward indicia of authority. Indeed, the only distinctive apparel contemplated in LILCO's Plan for its personnel will be orange vests worn by its traffic guides. As occurred at Lake Placid, and in the stressful circumstances of a radiological emergency at Shoreham, the public is not about to accede to the authority of someone whose only symbol of authority is an orange vest. This is especially so at Shoreham where it will be clear to the public that LILCO's traffic guides and other LILCO emergency personnel, in contrast to the DOT personnel at Lake Placid, are in the weak position of having no legitimate authority to direct traffic or undertake other emergency functions. The testimony of Messrs. Albertin and Knighton thus goes directly to the issue of what happens when a person attempts to direct or control the public's response under stressful emergency situations. LILCO is certainly entitled to explore at trial the basis for Messrs. Albertin's and Knighton's conclusions and the consequences of those conclusions for emergency planning at Shoreham. However, the relevance of their testimony is beyond dispute since their testimony involves human behavior during an emergency condition.

The second ground advanced by LILCO to strike the State's Direct Testimony on aggressive behavior is that, in LILCO's view, neither Mr. Albertin nor Mr. Knighton are qualified to testify on the issue. In particular, LILCO claims that neither witness has obtained "significant education, training

or experience in behavioral sciences." (Motion at 3-4). LILCO's claim is without basis because a party to litigation always has the right to present witnesses other than hired academic experts and consultants. Indeed, in this instance, the State is presenting witnesses with germane first-hand experience and knowledge -- clearly valuable testimony here. The testimony of these witnesses is focused on what they actually saw and experienced at the Lake Placid Olympics as transportation experts who were requested to respond to the emergency situation. Thus, it is clear that they are qualified to discuss their personal experiences and to draw conclusions from those experiences.

#### Construction

LILCO also argues that the State's entire Testimony on the effects of roadway construction on evacuation times (Direct Testimony at 16-19) should be stricken on two grounds. The first ground is that one of the State's attachments (Attachment D) is similar to Attachment 11 of the Suffolk County Police Department's testimony which the Board previously struck as untimely. The second ground is that LILCO claims that one of the State witness's deposition testimony does not support his direct testimony. Again, neither of LILCO's arguments provide any basis for striking the State's Direct Testimony on the effects of construction.

First, it is important to bear in mind that Attachment D is only that -- an attachment listing construction projects in Suffolk County for the next several years. While relevant to the testimony offered by the State's witnesses, it is only one supporting document for testimony which is much broader in scope and goes far beyond the mere listings in Attachment D. Yet, LILCO has seized upon the similarity between Attachment D and Attachment 11 in the Police Department's testimony in an effort to strike the State's Direct Testimony on construction in its entirety. LILCO is plainly grasping at straws. The similarity of the State's Attachment D to the County's previous Attachment 11 has no bearing on whether the State's Direct Testimony on construction should be stricken.<sup>2/</sup>

Second, on the issue of timeliness, it is important to bear in mind that, despite LILCO's unwarranted and inappropriate allegation of "tag-team tactics," the State of New York and Suffolk County are separate parties to this proceeding. Therefore, a ruling against one party for failing to submit relevant evidence in a timely manner is not binding on another party under different circumstances. In the case of Suffolk County, its Police Department witnesses first submitted their direct testimony on November 18, 1983. In response to the many revisions in LILCO's Plan appearing after that date, the Police Department witnesses submitted amended direct

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<sup>2/</sup>

The State's testimony goes far beyond the listing of construction projects in Attachment D. For instance, it discusses roadway projects which took place inside the EPZ in 1983 (Direct Testimony at 17), projects due to start this April (*id.*) and the general effects of roadway construction on traffic (*id.* at 17-19). Thus, it would be improper for the Board to strike all of the State's testimony pertaining to construction.



testimony on January 16, 1984. The January 16 amended direct testimony contained an attachment (Attachment 11) which had not previously appeared in their November 18, 1983 submittal. Attachment 11 consisted of a computer printout listing, among other things, construction projects scheduled for the roadways in and around the EPZ for the next several years. On January 18, 1984, the Board ruled that the County had not shown good cause for filing Attachment 11 on grounds that that document could have been included in the County's November 18, 1983 submission. (Tr. 2403).

The State, however, is in a completely different posture. The State filed its Direct Testimony on January 24, 1984 which the Board admitted on January 26, 1984. Since that time, the State has not attempted to supplement or amend that testimony, unlike the case with the County's Attachment 11. Thus, the timeliness of the State's Direct Testimony is no longer an issue and the Board's previous ruling on the Police Department's Attachment 11 has no bearing on the timeliness of Attachment D to the State's Direct Testimony. LILCO's unspecified assertions of "notions of common fairness" (Motion at 6) do not alter that fact. Indeed, the only notion of common fairness that makes sense here is how best to protect the public safety. And the best way is for the Board to consider the State's testimony, not to ignore it as LILCO is asking this Board to do.

The State's Direct Testimony on the issue of the effect of construction, including Attachment D, is both relevant and non-cumulative. LILCO has not claimed otherwise. For those

reasons, and because the issue of timeliness has no relevance to the State's testimony, the State's testimony clearly meets the criteria of 10 CFR 2.743(c) for the admissibility of evidence.

Finally, LILCO's argument that Mr. Beach's testimony appears, in LILCO's erroneous view, to conflict with his direct testimony is no proper basis for a motion to strike. If LILCO suspects that a discrepancy might exist, LILCO's proper remedy is to explore the matter on cross-examination. This Board may not strike relevant testimony based on a mere assertion by LILCO that LILCO perceives such testimony as being inconsistent with some other testimony.

#### LILCO's Supplemental Testimony

Finally, the State notes that LILCO has taken full advantage of its opportunity to file testimony which purports to address the issues raised in the State's Direct Testimony. (See Supplemental Testimony of Matthew C. Cordaro, John A. Weismantle, Edward B. Lieberman and Dennis S. Miletì On Behalf Of Long Island Lighting Company In Response To New York State Testimony On Phase II Emergency Planning Contention 65 (February 10, 1984)). Recognizing the need for all sides to be heard, the State does not oppose the admission of that testimony.

However, the State submits that if any part of the State's Direct Testimony is stricken, the corresponding portion of LILCO's supplemental testimony should also be stricken since the sole basis for admitting LILCO's testimony would be to address the issues raised by the State.




CONCLUSION

For the above reasons, LILCO's Motion To Strike Portions Of New York's Direct Testimony On Emergency Planning Contention 65 should be denied.

Respectfully submitted,

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DATED: FEBRUARY 17, 1984  
ALBANY, NEW YORK

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD  
Before Administrative Judges  
James A. Laurenson, Chairman  
Dr. Jerry R. Kline  
Mr. Frederick J. Shon

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LONG ISLAND LIGHTING COMPANY )

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the RESPONSE OF GOVERNOR MARIO CUOMO, REPRESENTING THE STATE OF NEW YORK, IN OPPOSITION TO LILCO'S MOTION TO STRIKE DIRECT TESTIMONY ON EMERGENCY PLANNING CONTENTION 65 has been served to each of the following this 17th day of February 1984 by U.S. Mail, first class, except as otherwise noted:

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Albany, New York  
February 17, 1984