

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)

LONG ISLAND LIGHTING COMPANY)

(Shoreham Nuclear Power Plant,
Unit 1))

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

SUFFOLK COUNTY'S RESPONSE TO LILCO'S MOTION
FOR DISCOVERY AND RESPONSE TO POLK TESTIMONY;
OR, IN THE ALTERNATIVE, SUFFOLK COUNTY'S MOTION
FOR DISCOVERY AND RESPONSE TO LIEBERMAN
TESTIMONY AND TO REVISION 2 OF THE LILCO PLAN

I. Introduction

On November 18, 1983, the parties filed direct written testimony on Emergency Planning Contentions 23, 25 and 65. Among the witnesses submitting testimony on behalf of Suffolk County was Peter A. Polk, of PRC Voorhees, who testified regarding Contention 23.D (the effect of the evacuation shadow phenomenon on evacuation time estimates) and Contention 65 (the effect of disabled automobiles on evacuation time estimates). Much of Mr. Polk's testimony relied on two studies recently completed by PRC Voorhees at Suffolk County's request.

Among the many witnesses testifying on LILCO's behalf was Edward B. Lieberman of KLD Associates, Inc. Mr. Lieberman testified on several contentions, including Contentions 65.A and B (mobilization time for the public) and Contention 65.C.4 (the

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effect of non-compliance with prescribed routes on evacuation time estimates). In his testimony on these contentions, Mr. Lieberman relied heavily on two studies never seen by the County before November 18, 1983. The first, entitled "Development of Time Distributions For Evacuation Events and Activities" [hereinafter "KLD TM-139"], is directly related to Contentions 65.A and B (see Attachment 10 to Cordaro, Weismantle and Lieberman Testimony). The second, entitled "Determination of Varying Route Compliance Levels and of a Proposed New Roadway on Evacuation Times Within the Shoreham EPZ" [hereinafter "KLD TM-140"], directly addresses the non-compliance issue raised in Contention 65.C.4 (see Attachment 12 to same testimony).

On November 28, 1983, LILCO filed a Motion For Discovery And Response To Polk Testimony seeking expedited discovery and the right to file supplemental testimony regarding the following areas of Mr. Polk's testimony:

1. PRC Voorhees' analysis of evacuation times for a 10-mile EPZ, accounting for the evacuation shadow phenomenon (Polk Testimony at 3-10 and Attachment 3);^{1/}
2. PRC Voorhees' analyses of the frequency of accidents in the event of an evacuation of the 10-mile EPZ (Polk Testimony at 10-12 and Attachment 4); and

^{1/} LILCO notes in its motion that this request is conditioned upon the Board's failure to grant LILCO's "motion to Strike Portions of the Testimony of Peter A. Polk," also filed on November 28, 1983.

3. PRC Voorhees' analyses of the number of automobiles expected to run out of gas in the event of an evacuation of the 10-mile EPZ (Polk Testimony at 12-16 and Attachment 4).

LILCO's motion is grounded on the assertion that Suffolk County has engaged in "knowing concealment" of the evidence on which Mr. Polk's testimony is based. LILCO contends that it has been unfairly surprised by Mr. Polk's testimony, thus requiring, pursuant to 10 CFR Section 2.740(e)(2)(ii), that this Board set aside further time for discovery and the opportunity to submit more testimony during the course of litigation of the Group I issues.

LILCO's motion is without merit. The motion is based on unsubstantiated and reckless accusations of concealment which have no basis in reality. Moreover, LILCO attempts to set a standard of conduct to which LILCO itself has not adhered during the course of discovery in this case. Thus, the motion should be denied.

However, in the event that this Board grants LILCO's motion, Suffolk County hereby moves for reciprocal discovery and the right to submit supplemental testimony regarding KLD TM-139 and KLD TM-140 which LILCO failed to provide to the County prior to November 18. Furthermore, Suffolk County moves for discovery on the substantial amount of new material contained in Revision 2 of the LILCO Plan and for discovery, as needed, on all future revisions to LILCO's Plan.

II. Discussion

A. Suffolk County Has Not Concealed Evidence From LILCO

LILCO complains in its motion that the discovery process did not reveal the contents or existence of PRC Voorhees' analyses until the time that Mr. Polk's testimony was filed on November 18, 1983. LILCO goes further to accuse the County of knowingly concealing these studies from LILCO. This accusation is unfounded. The simple answer to LILCO's complaint is that Mr. Polk's analyses were not completed until shortly before the November 18 testimony filing date. Thus, they could not have been made available to LILCO substantially, if at all, before that date. The discovery process cannot provide information on analyses or studies until they exist.

In the case of the PRC Voorhees' evaluation of the effect of the evacuation shadow phenomenon on evacuation time estimates, that analysis was not completed even in preliminary form until late October of this year. The final printouts were not supplied to counsel for the County until November 1, 1983. The crunch of completing testimony of other witnesses and an illness of Mr. Polk^{2/} precluded any meaningful review of the results for some time. Thus, there was no decision to rely upon those results until shortly before the November 18 filing date. Likewise, PRC

^{2/} Mr. Polk was ill during early November with a kidney stone. Indeed, for a time he was hospitalized. Mr. Polk was released from the hospital on November 9, as best counsel can recall (Mr. Polk was unavailable to confirm the precise date). After his release, Mr. Polk was able to resume duties on a part time basis at first and on a full time basis only the week of November 14. Only after his release from the hospital was it possible for the County to confer with Mr. Polk and decide to use his studies.

Voorhees' preliminary analysis of the effect of accidents and cars running out of gas on evacuation times (Polk Testimony, Attachment 4) was not made available to the County until the beginning of November. The County did not receive the final version until November 17, 1983 -- the day before testimony was filed.

Thus, contrary to LILCO's assertions, the County has not attempted to conceal evidence from LILCO. Rather, the evidence at issue did not come into existence until shortly before testimony was due to be filed. In light of this fact, updating the County's discovery responses would have been a meaningless exercise. The County is therefore at a loss to see how LILCO is prejudiced by having received analyses and studies only a short time after they were received and evaluated by the County.

LILCO also asserts (Motion at 5-6) that it was surprised by Mr. Polk's testimony regarding the frequency of accidents and cars running out of gas because the language of Contention 65.D allegedly "suggested" that the County would rely on the Suffolk County Police Department witnesses to support its case. LILCO's complaint is plainly wrong. While the County has presented testimony by the Suffolk County Police Department witnesses regarding the effects of accidents on evacuation times, there is absolutely no suggestion in Contention 65.D that the County would rely solely on these witnesses. In fact, the only mention of the Police Department in Contention 65.D is that it tabulated 10,000 accidents on the Long Island Expressway in 1982. That reference provides no basis for LILCO's conclusions.

B. LILCO Did Not Amend Its Discovery Responses Or Advise The County Of Two Major Studies Included In Mr. Lieberman's Testimony

At the same time that LILCO has accused the County of failing to provide proper discovery on the PRC analyses, LILCO has failed to apprise to the Board that the testimony submitted by Mr. Lieberman contained two new studies, KLD TM-139 and KLD TM-140, which the County has never before seen and on which the County has had no meaningful discovery.

Contentions 65.A and B address the County's concern that LILCO has not adequately estimated mobilization times for the public -- that is, the time it takes for the population to respond to an evacuation and commence evacuation trips -- and the effect of extended mobilization times on overall evacuation times. In Contention 65.C.4, the County also takes issue with LILCO's use of prescribed routes and the effect of deviation from those routes on evacuation times. KLD TM-139 is directly related to Contentions 65.A and B. It provides an analysis by KLD of the time estimated for the public to gather at home, wait for school children, prepare to leave and then load onto the evacuation network. Likewise, KLD TM-140 addresses the concern raised in Contention 65.C.4 by providing estimates of the effect of deviation from prescribed routes on evacuation time estimates. The County was provided with neither of these analyses nor any drafts thereof during discovery or anytime before November 18.

During the course of discovery, the County made a number of discovery requests regarding traffic issues. Among other things, the County sought all documents concerning evacuation time esti-

mates, public mobilization, traffic congestion and roadway capacities. (See Suffolk County Request 3 of August 19, 1983).

LILCO's responses never revealed the existence of KLD TM-139 or KLD TM-140 or drafts thereof nor did they provide any substantial insights into the contents of those analyses.

Counsel for Suffolk County also deposed Mr. Lieberman on September 19 and 20, 1983. With respect to Contention 65.A and B, counsel for Suffolk County explored Mr. Lieberman's assumption that it would take only 2 hours and 20 minutes for all of the population to load onto the evacuation network. Table X of Appendix A provides KLD's assumptions for the loading frequencies for each source node. Counsel for Suffolk County inquired as follows with respect to Table X:

Q. Have you conducted any studies or analysis of this table to determine whether or not you find it adequate?

A. Not as such.

Q. What process did you go through, then, to determine that it looked fine to you?

A. The only explicit comparison that we did make was with a graphical presentation of loading times that appeared in one of the Voorhees reports, and essentially what we did was plot a representative histogram on top of the[ir]'s and found that it agreed very well.

So that, that was one form of confirmation.

Other than that, we didn't see the need to go to any greater detail.

Lieberman Deposition at 63. KLD TM-139, however, does go into great detail in justifying KLD's loading frequencies. Yet, its existence was never revealed to the County prior to the receipt of Mr. Lieberman's testimony on November 18.^{3/}

During the same deposition, counsel for the County learned that Mr. Lieberman was conducting an analysis of the effect of non-compliance with LILCO's prescribed routes. It was clear that Mr. Lieberman had not finished the analysis and therefore could not provide results. In any event, counsel for LILCO prevented any meaningful inquiry into the nature of the analysis.

Q. According to your model, Mr. Lieberman, in Appendix A, would that evacuee be allowed to deviate, I guess is the term, from the plan, and go to that destination node that he perceived to be the best for his own personal safety?

A. The way you would handle that is to conduct sensitivity tests, wherein you would assume varying degrees of compliance with the assigned paths. Within the context of Appendix A, the assumption is that there is 100 percent compliance, between the actual travel patterns taken by the evacuees and the assigned paths.

Q. Have you performed sensitivity analysis such as you have described?

A. We are in the process of doing that.

Q. You are in the process of doing that?

A. Yes, we are.

^{3/} The County did receive the results of a telephone survey which was conducted for KLD and which formed a part of the underlying basis for KLD TM-139. KLD TM-139 relied only in part on that survey, however, and the existence of the survey could not have alerted the County to the existence of the far more extensive analyses contained in KLD TM-139.

Q. Who asked you to perform such analysis?

A. Well, we were requested by Mr. Irwin.

MR. IRWIN: Chris, I will just tell you right now, I will object to this witness providing answers on these, on the basis of privilege and on the base of its calling for speculation, because work is ongoing.

Q. Is there a schedule for completion of the work?

A. We don't have a schedule as such. We are proceeding as rapidly as we can.

Lieberman Deposition at 86-87. Further attempt by counsel for the County to inquire into the nature of the study was again blocked by counsel for LILCO.

Q. In order to really test the sensitivity of the trip assignment model, do you have to test different percentages of deviation?

A. Yes.

Q. Which percentages are you testing?

MR. IRWIN: We are getting close to a point where I will instruct this witness not to answer. We are really getting into the guts of the work in progress.

MR. MCMURRAY: I am not trying to intrude into the results.

MR. IRWIN: The results are interrelated to the scenarios posed.

MR. MCMURRAY: Are you instructing the witness?

MR. IRWIN: Yes, with respect to this particular question.

Lieberman Deposition at 129-30.

The analysis discussed in the preceding excerpts eventually became KLD TM-140. As was the case with KLD TM-139, the County was not provided with KLD TM-140 or any draft of it before Novem-

ber 18, 1983, nor, as is evident from the above passages from Mr. Lieberman's deposition, was the County able to determine the nature of that analysis in any significant way prior to November 18, 1983. Furthermore, with respect to both studies, LILCO did not amend its discovery responses to reflect their existence, although the County's discovery requests clearly covered the analyses performed in KLD TM-139 and KLD TM-140. Thus, it is clear that LILCO, while criticizing the County for failing to update its responses to discovery requests, has failed to scrutinize its own behavior and apply its own rigid standards to itself. If it had, it would have thought twice about accusing the County of knowing concealment of pertinent evidence.

C. Further Discovery and Supplemental Testimony At This Time Is Not Required By LILCO

Having set forth in Part B LILCO's failure to update its own discovery responses, Suffolk County is not willing to follow LILCO's path and accuse LILCO of knowingly concealing evidence -- at least not without further facts. There has been no bad faith or attempt to conceal evidence on the part of the County, and we assume the same is true for LILCO. The County was surprised with the filing of KLD TM-139 and KLD TM-140, but rather than rashly accusing LILCO of concealing evidence, it has assumed that the reason it did not learn of these studies was due to the fact that they were completed only shortly before November 18. Indeed, the dates on the covers of those studies (November 14 for KLD TM-139 and November 16 for KLD TM-140) would appear to confirm this

assumption. LILCO has been no more prejudiced by surprise than the County has. Yet, its accusations of knowing concealment are both hypocritical and demeaning to LILCO.

Since the late spring of this year, the parties have conducted formal and informal discovery on LILCO's so-called Transition Plan. Discovery has consisted of interrogatories, document requests, depositions and requests for admission. Both sides have used the discovery process extensively, expending enormous amounts of time and resources in the process. The result has been an exchange of a great deal of information between the parties relating to Revisions 0 and 1 of the Plan. Although discovery officially ended on October 14, 1983, the parties continue to exchange some information informally. The fact is, however, that this case is moving at a swift pace on multiple tracks. Therefore, it is unlikely that the case will ever be frozen in time, allowing the parties to have full and complete discovery on all issues. The County learned this harsh fact recently with respect to the 800-page Revision 2 which LILCO sprung on the County only 10 days before testimony was due to be filed. The "surprise" which LILCO is presently lamenting, if at all real, cannot begin to approach the County's surprise at Revision 2. In light of this fact, LILCO is not now entitled to further discovery from the County or its experts on the much less voluminous analyses contained in the County's testimony.

D. LILCO's Letter of November 2 Has No Relevance To The Issues Now Before This Board

In its motion, LILCO makes much of a letter sent to the County on November 2, 1983. That letter questioned the County's assertion of the work product privilege with respect to certain ongoing work undertaken by the County's experts at the request of counsel for the County in preparation for litigation. Apparently, LILCO was constrained not to file a motion to compel because "[t]he number of issues on which motions to compel could have been filed would have run into the dozens, and if filed piecemeal as they arose, would have driven all concerned to distraction." Motion at 7. LILCO's argument is unsupportable.

Counsel for LILCO was advised repeatedly by counsel for Suffolk County that if LILCO was dissatisfied with the County's assertion of the work product privilege, LILCO should file a motion to compel with the Board. Contrary to LILCO's assertion, it would not have been necessary to file a new motion each time the County asserted the work product privilege. Rather, the issue would have been a simple one -- i.e., whether the scope of the work product doctrine, as asserted by the County, was proper. Thus, the motion would have resolved any differences between the County and LILCO regarding the scope of the work product privilege. LILCO finally did file such a motion on November 10, 1983, to which it attached its November 2 letter.^{4/} Yet, it withdrew that motion on November 21, 1983 -- three days after it received

^{4/} LILCO's Motion To Compel Discovery Of Suffolk County (November 15, 1983). That Motion to compel would have been subject to summary denial because it was far out of time. See 10 CFR § 2.740(f)(1).

the testimony of the County's witnesses, including Mr. Polk. Therefore, its discussion of its November 2 letter and the November 10 motion are not relevant as they have been removed from the Board's consideration by LILCO's own withdrawal.^{5/}

It is further particularly unbecoming for LILCO to allege County improprieties concerning assertion on the work product doctrine when LILCO has done precisely the same thing. Thus, as documented by the deposition extracts quoted in Section B, supra, LILCO itself used the same work product doctrine to preclude County discovery of Mr. Lieberman. Again, LILCO wants to hold the County to a different standard than it has followed itself.

E. In The Event That The Board Grants LILCO's Motion For Discovery And Supplemental Testimony, It Should Afford The Same Right To The County

Fairness dictates that if this Board grants LILCO's motion for discovery and supplemental testimony regarding the PRC Voorhees analyses, it should grant the County an equal opportunity for discovery and the filing of supplemental testimony on the new studies revealed in Mr. Lieberman's testimony, as well as on all revisions to the LILCO Plan.

Discovery is a two-way street. As discussed above, LILCO has not afforded any meaningful discovery regarding KLD TM-139 and KLD TM-140 and the County has not had the opportunity to address those studies in its testimony. Thus, if LILCO has been prejudiced, Suffolk County has been equally prejudiced by the

^{5/} LILCO has suggested that it withdrew its Motion to Compel in part in reliance upon the Board's November 14 Order which LILCO reads to grant an opportunity for LILCO's instant motion. Suffolk County has reviewed the Board's November 14 Order and fails to understand LILCO's reliance on it.

unheralded arrival of KLD TM-139 and KLD TM-140. Those studies raised an number of questions which the County would like to pose to LILCO and Mr. Lieberman. Furthermore, the County's review of Revision 2 has revealed a number of significant changes, particularly in LILCO's routing strategies. The County, therefore, anticipates that it would need at least a full day to depose Mr. Lieberman, and may also need to depose other LILCO officials.- LILCO could also expect a number of additional interrogatories on these matters. After discovery, the County expects that it will need to file supplemental testimony. Furthermore, the County has not yet seen Revision 3. It anticipates that it will require discovery on that document, as well as all future revisions to LILCO's Plan.

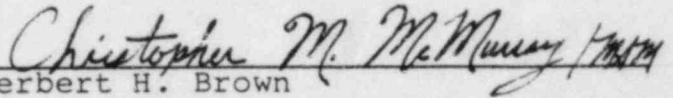
The County is willing to forego this discovery, but not at the expense of allowing LILCO to prepare its case in greater detail. Therefore, if the Board grants LILCO's motion, it should grant the County's reciprocal motion for discovery and the right to file supplemental testimony.

III. Conclusion

For the reasons stated above, the Board should deny LILCO's motion for discovery and to file supplemental testimony. If, however, the Board grants LILCO's motion, it should permit the County to conduct discovery on the new materials included in Mr. Lieberman's testimony, as well as on Revision 2 and all future revisions of the LILCO Plan.

Respectfully submitted,

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Dated: December 8, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)

LONG ISLAND LIGHTING COMPANY)

(Shoreham Nuclear Power Station,
Unit 1))

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

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY'S RESPONSE TO LILCO'S MOTION FOR DISCOVERY AND RESPONSE TO POLK TESTIMONY; OR, IN THE ALTERNATIVE, SUFFOLK COUNTY'S MOTION FOR DISCOVERY AND RESPONSE TO LIEBERMAN TESTIMONY AND TO REVISION 2 OF THE LILCO PLAN, dated December 8, 1983, have been served to the following by U.S. mail, first class, except where noted, this 9th day of December 1983.

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