

LILCO, May 3, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

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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,)	Proceeding)
Unit 1))	

LILCO's Motion to Strike
Portions of Suffolk County's
Testimony on Contentions 11 and 15

Suffolk County, on March 30, 1984, filed four pieces of written testimony on Contentions 11 and 15 (conflict of interest and credibility):

1. Testimony of Arthur H. Purcell, David J. Olson, Michael Lipsky and Susan C. Saegert Regarding Contentions 11 and 15;
2. Direct Testimony of Dr. George J. Jeffers and Anthony R. Rossi on Behalf of Suffolk County Regarding Contention 15.C;
3. Direct Testimony of Robert W. Petrilak on Behalf of Suffolk County Regarding Contention 15.C; and
4. Direct Testimony of Nick J. Muto and J. Thomas Smith on Behalf of Suffolk County Regarding Contention 15.C.

Also filed was a fifth piece:

5. Testimony of Stephen Cole on Behalf of

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Suffolk County Concerning Emergency Plan-
ning Contention 15.

The schedule for filing motions to strike was set by the Board's granting of the Joint LILCO/Suffolk County Motion for Deferral of Motions to Strike Testimony on Contentions 11 and 15, dated April 5, 1984, and by LILCO's service of supplemental testimony on April 26, 1984. For the reasons set out below, LILCO moves to strike certain portions of Suffolk County's written testimony pursuant to 10 C.F.R. Section 2.743(c).

I. Testimony of Arthur H. Purcell, David J. Olson, Michael Lipsky and Susan Saegert Regarding Contentions 11 and 15

On pages 10-11: The answer beginning with "(Purcell, Saegert) The Three Mile Island" on line 3 of page 10 and ending with "that TMI-II was lost" on line 16 of page 11, including footnotes 2 and 3

This discusses the behavior of GPU, the utility that operated Three Mile Island 2. The County witnesses' reasoning is that because GPU displayed "behavior that suggests the utility was more concerned with its image and organizational maintenance than with objectively presenting information about the severity of the accident," LILCO personnel in LERO might do the same if there were an accident at Shoreham.

We believe this testimony is irrelevant, because the chain of reasoning is so tenuous that the evidence (that GPU behaved inappropriately in 1979) simply does not lead to the conclusion

that the County witnesses would have the Board draw (that LERO officers would behave inappropriately in an emergency at Shoreham).

To accept this reasoning one first has to accept the County witnesses' opinion that GPU acted as it did because of a "conflict of interest." This in itself requires a certain leap of faith. The two instances that the testimony claims show a conflict of interest are (1) a public relations director being appointed spokesman and then expressing anger at suggestions that the utility could not cope with the accident (Purcell et al. testimony 10) and (2) the GPU chairman, two months after the accident, underestimating the time that TMI-2 would be out of service (id. 11). It is hard to see how either of these incidents shows some sort of "conflict" that utilities may experience but governments will not; defensiveness about one's ability to cope with an emergency, for example, has nothing to do with whether a utility rather than a government is involved. Likewise an inaccurate estimate (three years) of how long TMI would be out of service has only the most tenuous relation, if any, to "conflict of interest."

Assuming, however, that the behavior of these two GPU officials in 1979 is evidence that they felt a conflict of interest of the type addressed by Contention 11, one must then go a step further and conclude that LERO officials would experience a similar conflict, and succumb to it, during an accident at

Shoreham, notwithstanding all the differences between GPU in 1979 and LILCO in the future. (For example, GPU was not responsible for offsite emergency planning as LILCO is.)

All things considered, the evidence of what two GPU individuals did in 1979 is simply not probative of what LERO might do in an emergency at Shoreham. Rule 401 of the Federal Rules of Evidence defines "relevant evidence." As the notes of the Advisory Committee on the proposed rules point out:

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence.

Notes of Advisory Committee on Proposed Rules, Rule 401, Federal Rules of Evidence 216 (West 1983). Although Suffolk County will probably argue that this goes to weight rather than admissibility, we believe that in this case the chain of logic is so weak that the evidence is inadmissible.

On pages 11-12: The answer beginning with "(All) The term 'mind set'" on line 17 of page 11 and ending with "unworkable emergency responses" in line 9 on page 12

This paragraph addresses "institutional biases" in the nuclear power industry (Purcell et al. testimony 11), says that utility employees are "too close to the source of the problem" (id. 12), and says that familiarity with nuclear power systems

leads to biases and mind sets (id.). The paragraph appears to have little or nothing to do with the "financial and institutional interests" of a utility addressed by Contention 11. It seems to address instead the quite different notion that people who are knowledgeable about nuclear plants lack objectivity. Accordingly, it is outside the scope of the contention and therefore irrelevant.

On page 14: The second paragraph on page 14, beginning with "Fourth" and ending with "regarding Training"

This paragraph says that LILCO personnel lack objectivity and independence because of their "inadequate training." This belongs in the testimony on the "training" issues and is outside the scope of Contention 11. It should therefore be struck as irrelevant. Also, if, as the testimony says, the subject "is discussed more fully" in the County's training testimony, then it is "unduly repetitious" here and therefore inadmissible. 10 C.F.R. § 2.743(c). It is, in the words of Federal Rule of Evidence 403, "needless presentation of cumulative evidence."

On page 21 and in the Attachments: Footnote 5 on page 21, beginning with "This desire" and ending with "command and control positions" and Attachment 4

This footnote says that recent reductions in the LILCO work force will cause job insecurity and resentment that in turn may "diminish further the capacity for objectivity of the LILCO employees in command and control positions." Attachment 4 consists of newspaper articles about the effects of the terminations.

In the first place, the effect postulated by the footnote is that (1) fear of being fired and (2) resentment because others have been fired will diminish objectivity. This is a different issue from the effect of devotion to LILCO's "financial and institutional interests" addressed in Contention 11. The testimony is therefore outside the scope of the contention.

In the second place, as with the testimony about the two GPU officials, addressed above, footnote 5 is a case in which the probative value of the testimony is so slight that it should be struck as irrelevant. The effects of recent reductions in the work force, as reported in newspaper stories about which the witnesses evidently have no personal knowledge, have so little to do with the workability of an emergency plan that may have to be activated at any time over the 40-year life of the plant that it simply should not be admitted.

On pages 26-27: The paragraph beginning in line 10 of page 26 with "Third" and ending in line 17 of page 27 with "short-term disruption"

This paragraph says that emergency decisionmakers are more likely to recommend sheltering than evacuation because sheltering is simpler and requires less disruption of the community. So far as we can tell, this point has nothing to do with LILCO's "financial and institutional interests"; any decisionmaker would prefer a less disruptive alternative, other things being equal. The paragraph is therefore beyond the scope of Contention 11 and should be struck as irrelevant.

On page 28: Footnote 6, beginning with "For instance" and ending with "LERO"

This footnote says that a LERO Director who is a LILCO employee "is less likely to critically challenge the wisdom of recommendations emanating from LILCO personnel at the plant." This is irrelevant to the "financial and institutional interests" raised by Contention 11 (further identified as an incentive to minimize public perceptions of danger). Moreover, it presumes a fact not in evidence, that the onsite recommendations need to be "critically challenged." Finally, it attempts to reopen the question of the onsite emergency plan; the recommendations from onsite personnel were a "Phase I" issue and may not be litigated now.

On pages 32-33: The three sentences beginning with "That is" in line 3 of page 32 and footnotes 8 and 9, ending on page 33

This testimony goes to the quality of the paper plan, regardless of who writes or implements it. It has nothing to do with how the public perceives the author of the plan, which is the subject of Contention 15, as can be seen by contrasting it with the immediately following testimony that begins on page 33.

On pages 35-36 and in the Attachments:
From "In addition" in line 9 on page 35
through "more negative" in line 7 on page
36 and Attachment 5

These portions of the testimony and the newspaper clippings in Attachment 5 refer to the Marburger Commission findings. This material is inadmissible for the following reasons.

First, to the extent the testimony attempts to establish the contents of the Marburger Commission report, it is inadmissible under the "best evidence" rule. The County attempts to prove the contents of a document but does not submit the document, which is readily available, as evidence.

Second, the Marburger Commission report has so little probative value for the issue of LILCO's credibility with the public that it is properly denied admission as irrelevant. The report was the product of a number of people, few of whom seem to have agreed fully on anything. It is not a consensus

document,^{1/} and, as the various views of the individual commissioners reveal, the conclusions that can be drawn from the report are multiple and varied.

Moreover, since the County's witnesses apparently have no direct personal knowledge of the Marburger Commission deliberations, the results cannot be submitted to cross-examination. The proffered testimony and Attachment 5 therefore run afoul of the hearsay rule, despite the principle that hearsay is ordinarily admissible in proceedings such as this. A similar issue was raised but left undecided in the Clinton proceeding:

In the circumstances of this case, however, there is no compelling need to reach the difficult question of the extent to which an expert witness in an administrative proceeding may make reference to articles in newspapers and other periodicals without running afoul of the hearsay rule.

Illinois Power Co. (Clinton Power Station, Unit Nos. 1 & 2), ALAB-340, 4 NRC 27, 31 (1976) (footnote omitted). In this case, given the peculiarly multifarious nature of the Marburger findings, we believe the evidence is inadmissible.

^{1/} The cover letter from the chairman of the Commission says this:

The tardiness of the report may be attributed to the complexity of these issues, to the diversity of views among the Panel members, and to the difficult logistics of assembling the Panel members as often as necessary to achieve, if not consensus, at least the mutual recognition that further efforts to achieve consensus would bring diminishing returns.

On pages 37-38 and in the Attachments:
The words "St. Andrew's School Board" in
the third line from the bottom on page 37;
the words "and the Board of Trustees of
the New Interdisciplinary School" in line
5 on page 38; and the letter and resolu-
tion from St. Andrew's and two letters from
the New Interdisciplinary School in Attach-
ment 6

These schools are not in the Shoreham ten-mile EPZ. How
they view LILCO is therefore irrelevant to the adequacy of the
emergency plan.

On pages 37-38: The sentence at the bottom
of page 37 beginning with "Each" through the
end of the paragraph at the top of page 38,
ending with "Shoreham emergency"

This part of the testimony recites that various school
board resolutions identify "problems" with LILCO's Transition
Plan and conclude that the plan is inadequate or is not "real-
istic or workable." This testimony goes to the issue of wheth-
er the school boards think that the plan will work, prior to
any NRC decision on whether it will work. The theory is that
certain school boards' prejudgments about the adequacy of the
plan show that school officials would not follow protective ac-
tion recommendations under the plan, once the plan was approved
by the NRC. The testimony has so little probative value that
it should be struck as irrelevant.

On pages 40-44 and in the Attachments:
All of pages 40, 41, 42, and 43 and page
44 from the top through the words "manage
an emergency" in line 6; Attachments 7-11

These portions of the testimony, including Attachments 7-11, are about recent press reports of (1) problems with the emergency diesel generators, (2) the delay and increased costs of Shoreham, (3) allegations of mismanagement made by the staff of the New York Public Service Commission and other agencies, and (4) a reported LILCO policy of not responding to press reports. Attachments 7-11 are newspaper clippings on these subjects. It is true that on pages 42-44 the testimony attempts to link perceptions about management competence to perceptions of credibility in an emergency, but on balance the relevance of such things as the diesel generator problems is so slight that the testimony should be ruled inadmissible.

On page 44: The sentence beginning in line
1 of page 44 with "Third" and ending with
"standards of competence" in line 3

The statement is that "perceptions about LILCO's incompetence will also lead to suspicions that LERO personnel have not been trained to acceptable standards of competence." This is irrelevant. First, Contention 15 gives no indication that it is about training. Second, once again the chain of cause and effect the testimony postulates is so tenuous that the testimony is not probative. Here the County has inserted "training"

into the chain: newspaper articles lead to public perceptions of incompetence, which lead to "suspicions" of poor training, which lead to people's ignoring protective action recommendations in a radiological emergency.

On page 44: The sentence starting on line 3 with "Thus any" and ending with "emergency" in line 6

This sentence is

Thus any mistakes made by individual LERO personnel will confirm the existing presupposition that LERO as a whole is incompetent to manage an emergency.

This goes to the issue of the effects of "mistakes" by individual LERO personnel during an emergency and is outside the scope of Contention 15.

On pages 51-52: The paragraph beginning with "Responding" at the bottom of page 51 and ending with "for LILCO" on line 13 of page 52

This paragraph reads as follows:

Responding to an emergency affecting a community, particularly a radiological emergency, fundamentally requires the use of authority in the command and control of movements of population segments to areas of safety. Government is the only entity in our society that regularly exercises authority in matters of public safety. Only government officials, typically, can get people out of their homes, order people about, command priority service, and so on. The exercise of authority means not only issuing sensible orders, but also being able to have confidence that those orders

will be accepted. They will not be accepted unless the entity which issues them has been granted the authority to do so and/or is perceived as legitimate and credible by the public and members of organizations which are expected to follow orders. This will not be the case for LILCO.

This paragraph addresses the alleged lack of legal authority raised by Contentions 1-10. It is outside the scope of Contention 15 and therefore irrelevant.

On pages 52-60: The question on page 52 beginning with "Q. Are there any other reasons" through the answer on pages 58-60 ending with "their areas of concern and expertise" in line 2 of page 60

This testimony is outside the scope of Contention 15. Upon close examination, it is apparent that this is Suffolk County's testimony on Contentions 12 and 13, both of which were denied admission by the Board. Special Prehearing Conference Order, slip op. 5 (Aug. 19, 1983).

Among other things, Contention 12 alleged that LILCO personnel would not be able to exercise effective command and control because, among other things, they would not be familiar with the "legal and jurisdictional limitations" of "other entities who may assist or participate in response to a Shoreham emergency." The contention went on to say that LILCO personnel lack familiarity with "conditions in Suffolk County" and that LILCO personnel do not have training and experience that would give such familiarity. The contention added that "LILCO

command and control personnel will not be aware of how the various entities, institutions, organizations and the population operate or interact with each other on a day-to-day basis or in an emergency situation."

Contention 13 alleged that LILCO's attempt to exercise authority over non-LILCO support organizations "conflicts with the normal chains of command, assignment of responsibilities, and internal operating procedures according to which these organizations function." The contention said that there is no assurance that the procedures set forth in the plan will be followed by non-LILCO organizations, "particularly in the event that the support organization supervisors or the individual emergency workers decide that a different procedure would be better or more appropriate in a given situation."

In the Board's August 19, 1983, Special Prehearing Conference Order, it admitted Contention 15, but only the main contention. The subparts, such as 15.A, are "subsumed within the main contention and may be treated as reasons in support thereof." By contrast, Suffolk County has used 15.A as a means of resurrecting Contentions 12 and 13.

To put it most succinctly, Contention 15 alleges that the public will not trust LILCO's advice, and that members of the Red Cross and other organizations, being members of the public, will also not trust LILCO's advice, and that this will be an additional problem over and above that of the public's

noncompliance. What the testimony cited above says, on the other hand, is that LILCO personnel will lack intimate, everyday working relationships with support organizations, and that this will hinder a cooperative working relationship in an emergency. In short, the testimony is outside the scope of Contention 15 and irrelevant to it.

In addition, the detailed testimony (from line 12 on page 53 through line 18 on page 57) about the qualifications of a handful of individual LERO workers is the sort of minutiae that are inadmissible under either the Waterford principle or the principle that the probative value is so slight as to be outweighed by the burden of admitting and hearing it.

On page 58: The words "and fire departments" in lines 10-11 on page 58

The LILCO plan does not rely on fire departments, so the reference to fire departments is irrelevant, notwithstanding the mention of fire organizations in contention subpart 15.A.

On page 59: The words "and the Suffolk County Police Department" in the last two lines of page 59

Since the plan does not depend on the police, the fact that the Suffolk County Police Department does not believe the plan to be workable is irrelevant, notwithstanding the mention of "local law enforcement agencies" in contention subpart 15.A.

On pages 65-66: The entire paragraph beginning with "Second" on page 65 and ending with "workers will be met" in the middle of page 66

This paragraph says that the public's refusal to obey LILCO employees (apparently this refers to traffic guides) will be increased by the employees' inability to answer questions. The point, that traffic guides will allegedly not be able to provide information, is outside the scope of Contention 15.

On page 66: The sentence beginning "The inability of LILCO's field workers" in line 10 on page 66 and ending with "will be met" on line 13 on page 66

This should be struck for the reason given immediately above.

On pages 68-69: The two paragraphs, beginning with "Second, a critical "fact" in line 4 on page 68 and ending with "by the public" in line 7 on page 69

This says the LILCO traffic guides and security personnel have not had on-the-job training and that the public will know it. This is testimony about the training program and is therefore outside the scope of Contention 15.

On pages 69-70: The paragraph beginning with "Third" in line 8 on page 69 and ending with "is most essential" in line 6 on page 70

This testimony addresses the alleged lack of "potential for regular feedback and self-correction that is intrinsic to governmental bureaucracies." This is beyond the scope of Contention 15, and the mere mention that the "public will know" about this alleged shortcoming does not cure the inadmissibility.

On pages 75-76: all of page 75 (except the end of footnote 25 at the bottom) and the first five lines of page 76

This testimony says that the LILCO employees assigned to rumor control lack experience, knowledge, and abilities needed to perform those functions. This has to do with training or personnel selection, not with LILCO's credibility with the public. The statements in the testimony that for these reasons they would not be able to "overcome" the problem of LILCO's lack of credibility does not bring the testimony within the scope of Contention 15.

On page 79: The paragraph beginning with "(Saegert) The public" in line 4 on page 79 and ending with "read such material" near the bottom of page 79

This paragraph (notwithstanding the mention of the word "disregard") says that people will not read the brochure, not that they will read it and not believe it. It is thus outside the scope of Contention 15. Moreover, the testimony that many people around Indian Point said they "had not received" a brochure distributed by Consolidated Edison has so little bearing on the question whether people around Shoreham will believe the LILCO brochure that it should be struck as irrelevant.

II. Testimony of Stephen Cole on Behalf of Suffolk County Concerning Emergency Planning Contention 15

On page 14: The first paragraph, beginning with "Recent research" and ending with "the Shoreham plant"

The recital of various matters such as cost overruns for Shoreham have so little probative value for the issue of whether the public would follow LERO's protective action recommendations in an emergency that this testimony should be struck as irrelevant.

III. Direct Testimony of Robert W. Petrilak on
Behalf of Suffolk County Regarding Contention 15.C

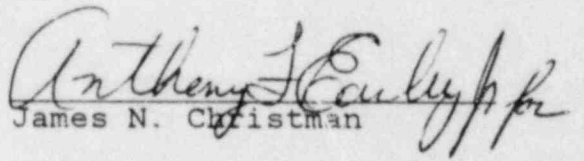
On page 2: The sentence "LILCO does not have the authority to direct the actions that would be expected of school districts" on page 2, lines 9-10

The sentence, "LILCO does not have the authority to direct the actions that would be expected of school districts" goes to an issue of "legal authority" (like Contentions 1-10) and not to "credibility." It should be struck as irrelevant, since it is outside the scope of Contention 15.

Respectfully submitted,

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BY


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DATED: May 3, 1984

CERTIFICATE OF SERVICE

In the Matter of
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(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL-3

I hereby certify that copies of LILCO'S MOTION TO STRIKE PORTIONS OF SUFFOLK COUNTY'S TESTIMONY ON CONTENTIONS 11 AND 15 were served this date upon the following by first-class mail, postage prepaid or, as indicated by an asterisk, by Federal Express, or, as indicated by two asterisks, by hand:

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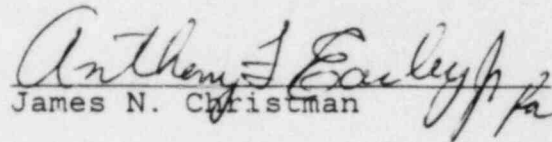
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