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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'84 APR -9 P12:12

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)

SUFFOLK COUNTY RESPONSE TO LILCO'S MOTION TO  
STRIKE PORTIONS OF THE "GROUP II-B" TESTIMONY  
OF SUFFOLK COUNTY

On March 27, 1984 LILCO moved to strike portions of the Group II-B testimony filed on behalf of Suffolk County on March 21, 1984. See LILCO's Motion to Strike Portions of the "Group II-B" Testimony of Suffolk County (hereafter, "Motion"). Suffolk County hereby responds and urges that LILCO's Motion be denied. The County addresses below each specific portion of the Group II-B testimony sought to be stricken by LILCO, following the format of the LILCO Motion.

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I. Direct Testimony of David Harris and Martin Mayer on Behalf of Suffolk County Regarding Contentions 24.J, 24.N, 60, 63 and 72 (the "Harris and Mayer Testimony")

A. Page 12, line 13 through page 21

This Board has stated:

In ruling on these motions, we have applied the standard of 10 C.F.R. § 2.743(c): For evidence to be admissible in NRC proceedings, it must be "relevant, material, and reliable evidence which is not unduly repetitious." Any other type of proffered evidence is subject to motions to strike. 10 C.F.R. § 2.757(b). Such a motion, however, must state with particularity how the evidence deviates from that standard (10 C.F.R. § 2.730(b)).

Amended Order Ruling on Motions to Strike, dated January 23, 1984, at 1 (emphasis supplied).

Although LILCO divides the identified portions of pages 12 through 21 of the Harris and Mayer testimony into 11 passages, LILCO makes only one argument to support its motion: that these portions are allegedly outside the scope of Contentions 60 and 63. (Motion at 3-4.) LILCO has failed to meet the Board's particularity requirement in stating how these portions of the Harris and Mayer testimony are irrelevant, immaterial or unreliable, and therefore its Motion should be denied.

LILCO's only argument for striking pages 12 through 21 of the Harris and Mayer Testimony is that Contentions 60 and 63, in LILCO's view, address only the "guidelines used by LERO to make the decision to recommend selective sheltering or selective evacuation, and the procedures by which the LERO organization would implement its recommendation under the LILCO Transition Plan." (Motion at 4; emphasis supplied.) LILCO then uses this characterization of the contentions (as discussed below, this in fact constitutes a serious mischaracterization of the contentions) to argue that the portions of the Harris and Mayer testimony that refer to the special facilities and their staffs and patients who, under the LILCO Plan, are expected to implement LILCO recommendations of selective sheltering or selective evacuation, are "outside the scope" of the contentions. LILCO's characterization of Contentions 60 and 63 is incorrect. It is clear on the face of those contentions that they are not limited to a discussion of "LERO personnel."

It is true that both contentions refer to the Plan's failure to include guidelines to be used by command and control personnel in choosing to recommend selective sheltering or selective evacuation, and in determining who should be the subject of such recommendations. Both contentions also contain the following statement, however, which the LILCO Motion ignores:

In addition, there are no procedures which indicate the means by which such a recommendation would or could<sup>1/</sup> be implemented. The Plan thus fails to comply with 10 C.F.R. Sections 50.47(a)(1) . . . .

Each of the 11 portions of pages 12 through 21 of the Harris and Mayer testimony which LILCO mentions at pages 4-5 of its Motion address the above quoted portions of Contentions 60 and 63. They are relevant and material, and LILCO has stated no basis for striking them.

Under the LILCO Plan, the staffs of special facilities are expected to perform all the work of actually implementing a recommendation to shelter individuals who could not be safely evacuated due to their medical condition (see Appendix A at IV-173, IV-174), and all the required actions except transportation, involved in a selective evacuation. Moreover, in OPIP 3.6.5, hospital administrators are expected to decide whether their facilities will be evacuated. LERO would only make the recommendation; it would do nothing to implement such a recommendation or to make the evacuation decision for hospitals. Accordingly, to read the implementation portions of Contentions 60 and 63 as addressing only actions by LILCO or LERO would be

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<sup>1/</sup> Contention 60 reads "would or could;" Contention 63 reads "could or would."



to interpret them as addressing matters not even contemplated by LILCO's own Plan. LILCO's argument simply has no basis and should be rejected. We discuss briefly below the individual passages of the Harris and Mayer testimony referenced by LILCO in its Motion.

1. Page 12, lines 13-15.

The referenced passage consists of the following sentence:

Sheltering is not a viable alternative for many such persons in special facilities for several reasons.

Clearly this statement addresses the allegations in Contention 60 that the Plan does not indicate how selective sheltering could be implemented, and that it fails to comply with Section 50.47(a)(1) which requires that protective measures "can and will be taken." It should not be stricken.

2. Page 13, lines 1-19.

LILCO seeks to strike this passage of the Harris and Mayer testimony, because it discusses how special facilities would implement a selective sheltering recommendation. This portion of the Harris and Mayer testimony states that, contrary to the assumption expressed in the LILCO Plan (see Appendix A at IV-173, IV-174), hospitals and other special facilities do not

have in place plans to shelter their patients or residents. Evidence that special facilities have no procedures for implementing a selective sheltering recommendation is not outside the scope of Contention 60, which alleges that the Plan includes no procedures for implementing a selective sheltering recommendation.

3. Page 13, line 20 through page 15, line 12;  
Page 15, lines 13-18;  
Page 15, lines 19 through page 16, line 20;  
Page 16, line 21 through page 17 line 11;  
Page 17 line 12 through page 18, line 8;  
Page 18, lines 9-22; Page 19, lines 1-11.

These passages are similarly directly related to the question whether the LILCO proposal for selective sheltering could or would be implemented by special facilities. Specifically, the paragraph beginning near the bottom of page 13 and carrying over to page 14, states that LILCO's visits to special facilities have not resulted in the development of plans or procedures for implementing selective sheltering. Thus, this paragraph is relevant to and probative of the allegations in Contention 60 that no such procedures exist, and that the LILCO selective sheltering proposal could not be implemented.

Likewise, the remainder of page 14 through line 11 of page 19, are also within the scope of Contention 60. The testimony on these pages discusses the specific reasons that the proposal

in the LILCO Plan for selective sheltering would not or could not be implemented as assumed by LILCO. Contention 60 states, "There are no procedures which indicate the means by which such a recommendation [i.e. selective sheltering] would or could be implemented." The point of this allegation is not just that the LILCO Plan does not contain any procedures, but also that it must contain procedures that address all the actions that in reality would have to be taken in order to implement the protective action of selective sheltering. The testimony on pages 14 through 19 describes those very "means" by which a selective sheltering recommendation would have to be implemented, in discussing the inadequacy of LILCO's Plan. Clearly, these passages are relevant to Contention 60.

4. Page 19, line 12 through page 20, line 3.

LILCO characterizes this testimony as discussing "the inability of administrators to decide between sheltering and evacuation." (Motion at 5) Such a discussion is relevant to Contentions 60 and 63. As LILCO admits, both those Contentions challenge the LILCO Plan because it does not contain guidelines by which command and control personnel could decide whether to choose selective sheltering or selective evacuation as a desirable protective action. The LILCO Plan expressly assigns

hospital administrators the responsibility for determining (1) whether sheltering those patients unable to evacuate would be acceptable, and (2) whether any patients should be selectively evacuated. Specifically, LILCO states:

Sheltering will be the primary protective action recommendation for Mather, St. Charles, and Central Suffolk Hospital due to their distance from SNPS and the shielding afforded by their structures. If an evacuation is desired by their administrators for all or part of their patient population, arrangements will be made using available resources.

(OPIP 3.6.5, at 1; emphasis supplied).

Because the LILCO Plan thus assigns the decision making responsibility to hospital administrators, evidence that they are not provided adequate guidance is directly within the scope of Contentions 60 and 63.

5. Page 20, line 4 through page 21.

LILCO moves to strike this passage which deals with selective sheltering of handicapped individuals at home. LILCO asserts that this protective action is not "contemplated" in the LILCO Plan or in Contentions 60 and 63 (Motion at 6). The Plan states at page 3.6.5:

The sheltering option may be recommended as an effective option for individuals who

could not be safely evacuated. This would include individuals who have been designated medically unable to withstand the physical stress of an evacuation . . . .

(emphasis supplied). This passage is quoted in Contention 60. As the Harris and Mayer testimony explicitly states at page 20, many homebound individuals are likely to fall within the class of people identified by LILCO who could not withstand the physical stress of an evacuation. Thus, a discussion of selective sheltering for the homebound is relevant to Contention 60 and LILCO's assertion to the contrary is groundless.

Further, the two paragraphs on pages 20 and 21 which LILCO seeks to strike address only issues expressly raised by Contention 60. The first paragraph discusses the absence of procedures or guidelines by which it could be determined whether homebound individuals should be sheltered rather than evacuated. The second paragraph describes some of the means or actions necessary to implement selective sheltering for homebound persons who could not be safely evacuated and notes that the LILCO Plan contains no provisions that assure that those necessary actions could be taken. Thus, this passage is relevant to issues raised by Contention 60 and should not be stricken.



B. Page 25, line 7 through page 26, line 15

LILCO moves to strike this portion of the Harris and Mayer testimony again based on its own reading of Subpart C of Contention 72. LILCO asserts at 6, 7 of its Motion that Subpart C "merely identifies an alleged deficiency in the Plan, that is, that such reception or relocation centers are not identified in the Plan." (Motion at 6-7). LILCO uses this characterization of the Subpart to argue, in essence, that any words in the Harris and Mayer testimony beyond the statement that "the LILCO Plan fails to identify relocation centers" are "outside the scope" of the Subpart. There is no basis for LILCO's interpretation of Subpart 72.C or for its motion to strike this portion of testimony.

First, Subpart C of Contention 72 cannot be read in isolation. Contention 72 alleges that LILCO's proposals to evacuate special facility patients could not and would not be implemented "for the following reasons," which are then set forth in the subparts. The allegation in Subpart C -- that LILCO has not identified in the Plan medical facilities that could receive evacuated special facility patients -- is a simple fact, which is not disputed by LILCO. The Harris and Mayer testimony addresses the point of Subpart C which is made

in the main part of Contention 72 -- that is, why the fact that LILCO has not identified relocation centers renders the LILCO evacuation proposal unworkable. Thus, Drs. Harris and Mayer discuss why an adequate number of such facilities must be located in advance of attempted implementation of LILCO's evacuation proposals. Indeed, LILCO itself has recognized that this issue is relevant to Subpart 72.C, by discussing in its testimony, its view that prior identification of adequate reception centers is not necessary. See Answer 18 of LILCO's Testimony on Contentions 24.J, N, 72.C, D, and 96.B (Planning for Special Facilities).

The challenged portions of the Harris and Mayer testimony discuss the large numbers of patients who would be evacuated under LILCO's proposals and the limited number of beds that could be made available in the hospitals in the vicinity of the Shoreham EPZ, in explaining why LILCO's evacuation proposals could not be implemented if prior arrangements for reception centers were not made. Clearly, this testimony is relevant to Contention 72 and LILCO has stated no basis to justify striking it.

C. Page 29 through page 36, line 3

Despite this Board's requirement that motions to strike testimony "state with particularity how the evidence deviates from [the standard of 10 C.F.R. § 2.743(c)]", LILCO moves to strike seven pages of the Harris and Mayer testimony on the basis of an unsupported and unexplained assertion that the testimony is outside the scope of what LILCO characterizes as the issues raised in Subpart A of Contention 72. Thus, pages 7 through 9 of the LILCO Motion consist of nothing but one sentence paraphrases of pages of the Harris and Mayer testimony, repetitions of the three issues LILCO believes to be raised by Subpart A of Contention 72, and assertions that the testimony is outside what LILCO defines as the scope of the contention. LILCO fails to meet the Board's particularity requirement and its motion should be denied for that reason alone.

Moreover, LILCO's assertions concerning this portion of the Harris and Mayer testimony are once again based on a mischaracterization of the contention. Subpart A of Contention 72 alleges in pertinent part:

Assuming the necessary vehicles were available to LILCO and were mobilized, the time necessary, following mobilization, to accomplish the proposed evacuation of special facilities will be too long . . . .  
Evacuation will take too long as a result

of . . . . the time necessary to load and  
unload passengers from ambulances . . . .

(Emphasis supplied.) LILCO appears to be arguing in its motion that "the time necessary to accomplish" the process of loading patients into ambulances does not include the time required to perform the tasks necessary to bring the patients to the point where they can actually be lifted and deposited inside an ambulance. Thus, LILCO appears to be suggesting that any discussion of time beyond that number of seconds necessary to lift a stretcher or wheelchair off the ground and into an ambulance is "outside the scope" of Contention 72. LILCO's argument is without basis in logic or in the contention. Clearly, it is the evacuation process, and the time required to accomplish it, which is at issue in Contention 72 and Subpart A. The Board should disregard LILCO's attempt to dissect that process into meaningless increments.

The Harris and Mayer testimony at pages 29-35 answers the question "Why will LILCO's evacuation plans for special facilities take too long?" It is relevant, focused, and provides the specific reasons for Drs. Harris and Mayers' agreement with the allegations in Contention 72 and Subpart A, concerning the time necessary to accomplish the processing of evacuation. Thus, at pages 29 and 30, they discuss why the

time necessary to accomplish LILCO's proposed process of notifying evacuating and receiving facilities and obtaining necessary information from them would result in a delay in the evacuating facilities' preparation of patients for evacuation. They explain that this delay would mean that the process of loading the patients could not be accomplished within the time assumed by LILCO in its evacuation time estimates. The testimony is clearly relevant to the issues raised in Contention 72 and Subpart A.

Page 31 of the Harris and Mayer testimony contains a discussion of whether existing special facility disaster plans would decrease the amount of time necessary to accomplish the tasks involved in the evacuation process. This testimony is also relevant to the Contention, as evidenced by LILCO's own testimony, which asserts that special facilities would be helped in an evacuation by their experience at exercising existing disaster plans. (See LILCO's Testimony on Contentions 24.J, N, 72.C, D, and 96.B (Planning for Special Facilities) at 21.) Moreover, the effect of prior experience or planning on the time necessary to accomplish tasks is clearly relevant to the issues raised in Contention 72 and Subpart A. Pages 32 and 33 of the Harris and Mayer testimony discuss the amount of time necessary to prepare patients to be evacuated, including the



assembly of items necessary for the evacuation, and the allocation of limited equipment that must accompany patients. Until the various medically necessary actions discussed by Drs. Harris and Mayer are completed, patients cannot be transported away from the facilities; consequently, the time needed to perform these steps is a necessary portion of the time needed to accomplish the loading of patients into vehicles. Thus, the testimony on pages 32 and 33 is relevant to Contention 72 and Subpart A.

Pages 34 and 35 of the Harris and Mayer testimony address the impact of available staffing on the time necessary to accomplish evacuation, an issue that is relevant to Subpart 72.A even under LILCO's interpretation of the Subpart. That is, even if Subpart 72.A refers only to the time needed to lift patients into ambulances or ambulettes, the fewer people available to accomplish that task, the longer it will take. Clearly, pages 34 and 35 of the Harris and Mayer testimony, which discuss how staffing patterns at hospitals would result in reduced numbers of personnel to help load patients, is relevant.

Finally, LILCO's argument that the paragraph beginning at line 19 of page 35 should be stricken should be denied, because the only basis for LILCO's motion is that this paragraph

summarizes the testimony which precedes it. As discussed above, the testimony preceding this paragraph is relevant to issues raised under Contention 72.A. Therefore, LILCO's motion to strike this paragraph is meritless.

D. Page 40, line 13 through page 41, line 7

LILCO moves to strike this portion of the Harris and Mayer testimony on the grounds that "there is no indication in 72.E that the issue of confusion, anxiety, and fright is encompassed by the Contention." (Motion at 10.) Subpart 72.E alleges that because LILCO has no plan for hospital evacuation but instead will attempt to evacuate on an ad hoc basis, "there is no assurance that adequate protective measures could or would be taken for hospital patients . . ." In the challenged passage, the witnesses discuss one reason that LILCO's failure to plan ahead for such an evacuation, would prevent adequate protective measures being taken for the patients of hospitals. Thus it is relevant to Subpart 72.E and should not be stricken.

II. Testimony of Fred C. Finlayson, Gregory C. Minor  
and Edward P. Radford Regarding Contention 61.

LILCO moves to strike the Testimony of Fred C. Finlayson, Gregory C. Minor and Edward P. Radford on Contention 61 (hereinafter, "Finlayson testimony") in its entirety. (Motion at 11). The LILCO motion is based, however, not on the contents of that testimony or its relevance to Contention 61, but rather upon LILCO's misinterpretation of the NRC regulations, LILCO's mischaracterization of Contention 61 and the Finlayson testimony, and LILCO's inaccurate description of what it believes to be the County's "legal theory." LILCO's motion is without basis and should be denied.

First, as LILCO notes (Motion at 11, n.3), its motion is essentially identical to its November 28, 1983 Motion to Strike the Testimony of Fred C. Finlayson, Gregory C. Minor and Edward P. Radford on Contentions 65, 23.D and 23.H (hereinafter, "November Motion"). The NRC Staff also filed a motion to strike the Finlayson testimony on Contentions 65 and 23. Although the Board granted those motions, it is significant that the basis of the Board's ruling was that the previously submitted Finlayson testimony was not relevant to Contentions 65, 23.D and 23.H. The Board did not reach the other grounds for striking that testimony which were argued by LILCO in the

November Motion, and which are repeated in the most recent LILCO Motion. See Order Granting Motions to Strike the Testimony of Fred C. Finlayson, Gregory C. Minor, and Edward P. Radford, dated January 11, 1984, at 7. The NRC Staff has not moved to strike the Finlayson testimony on Contention 61.

The ground upon which the Board granted LILCO's November Motion is simply not present with respect to the Finlayson testimony now at issue. As will be demonstrated below, the Finlayson testimony is directly relevant to Contention 61; indeed, in its Motion LILCO does not even challenge the relevance of the testimony to the contention. Instead, LILCO makes contorted arguments about the testimony allegedly being irrelevant to NRC regulations, and irrelevant to what LILCO believes are the legal issues involved in this proceeding. None of LILCO's arguments constitutes a proper basis for striking the Finlayson testimony. The testimony is reliable, probative and material evidence that is relevant to an admitted contention in this proceeding.

A. The Finlayson Testimony is Relevant to Contention 61.

Although the LILCO Motion ignores altogether the dispositive issue of whether the Finlayson testimony is relevant to admitted Contention 61, a review of the testimony reveals that almost every question asked of the witnesses is taken, practically word-for-word, from Contention 61. Similarly, the witnesses' responses to the questions are directly related to the specific issues raised in the contention. The Finlayson testimony is short, focused, and limited to the precise factual issues identified in Contention 61. There is thus no basis to argue that it is not relevant to the Contention or that it should be stricken.

Specifically, the testimony begins with a definition of "shielding factors," which are referenced in several places in Contention 61, and then identifies which homes in the EPZ reduce doses by 50 percent as referenced in the first sentence of subpart G of Contention 61. See Finlayson testimony at 2-3.<sup>2/</sup> Next, the witnesses state their agreement with the second

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<sup>2/</sup> Significantly, LILCO's Testimony on Contentions 60, 61, 63 and 64, at 19-21 on Contention 61, addresses these same matters. Thus, it is totally inconsistent for LILCO to move to strike the County testimony when LILCO witnesses address the same topic.



sentence in subpart G (which states: "In a severe accident, a 50 percent dose reduction will still result in health-threatening doses"). They then explain the basis for their agreement with that sentence by identifying and quantifying the likely doses taking into account a 50 percent dose reduction, and by explaining the threat to health resulting from those doses. See Finlayson testimony at 4. Testimony which provides the bases for witnesses' agreement with a fact alleged in an admitted contention cannot possibly be irrelevant or subject to being stricken.

Next, the testimony states the basis for the reference in subpart H of Contention 61 to the average shielding factor of 0.7. See Finlayson testimony at 5. Then, the witnesses state, and explain the basis for, their agreement with subpart I of Contention 61. Following that, the witnesses explain why they agree with the portion of Contention 61 which follows subpart I, and which alleges:

Moreover, even if people were willing and able to follow a sheltering recommendation, there is no assurance that taking such action would provide any significant dose savings and thus prevent persons in the EPZ from receiving health-threatening radiation doses . . . .

See Finlayson testimony at 7-8. Finally, the witnesses

address the last sentence contained in subpart B of Contention 61. See Finlayson testimony at 8-9.

In short, it cannot reasonably be argued that the Finlayson testimony goes beyond the specific and discrete factual issues raised in Contention 61. The testimony clearly is relevant and material as required by 10 CFR § 2.743(c), and LILCO has stated no proper basis for striking it. The Finlayson testimony is not argumentative, repetitious, cumulative or irrelevant, and therefore under 10 CFR §2.757(b) there is no basis for striking it. Moreover, in making its blanket motion to strike the testimony in its entirety without even addressing the specific contents of the testimony, LILCO has failed to meet the Board's particularity requirement concerning motions to strike.

B. The Finlayson Testimony is not "Irrelevant to the NRC Regulations"

LILCO's so-called "irrelevancy" argument fails to address any issue that is properly considered by the Board in ruling on a motion to strike. Although couched in terms of "irrelevancy," in fact LILCO argues that the Finlayson testimony is somehow inconsistent with LILCO's reading of the NRC regulations. Thus, LILCO asserts that the Finlayson testimony "is irrelevant to anything at issue in this litigation because it is irrelevant to NRC regulations." (Motion at 13).

This LILCO argument goes to the findings and conclusions of law which the Board will make after having considered the relevant factual evidence submitted by the parties in support of admitted contentions. LILCO's argument is, in reality, a premature attempt to argue the ultimate legal issues in this case, in the guise of a motion to strike factual evidence. Disputes between the parties concerning legal interpretations of the regulations are not a proper basis for striking factual testimony. The LILCO "irrelevancy" argument should therefore be rejected.

LILCO also makes several subarguments in its "irrelevant to the regulations" argument, which we address separately below. First, LILCO argues that the Finlayson testimony is not

relevant to NRC regulations because it does not tend to prove compliance or noncompliance with those regulations. (Motion at 13). LILCO attempted to make this same argument in its November Motion, and the County responded in its December 20, 1983 Response to that Motion, which is hereby incorporated by reference.<sup>3/</sup> In its current motion, although LILCO refers to the specific regulations cited in Contention 61 (10 CFR §§ 50.47(a)(1) and 50.47(b)(10)), it ignores the plain fact that the Finlayson testimony does not discuss those regulations; rather, it addresses the factual reasons stated in Contention 61 to support the allegation that LILCO has failed to comply with those regulations. LILCO's argument is simply inapposite and must be rejected. The Finlayson testimony is clearly probative and relevant to the facts at issue in the contention and as such it clearly must be admitted into evidence. Once the Board has weighed all the factual evidence, it then will be in a position to provide legal interpretations of the various regulatory requirements.

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<sup>3/</sup> See Suffolk County Response to LILCO and NRC Staff Motions to Strike the Testimony of Fred C. Finlayson, Gregory C. Minor and Edward P. Radford on Behalf of Suffolk County Regarding Contentions 65, 23.D and 23.H, dated December 20, 1983 (hereinafter, "County Response") at 6, 7 and 11.

LILCO is correct in stating that the County expects this Board ultimately to rule upon whether the protective actions proposed in the LILCO Plan provide reasonable assurance that adequate protective measures can and will be taken in the event of a Shoreham emergency. A finding of adequacy with respect to proposed protective measures is clearly required under the NRC regulations cited in Contention 61. Contention 61, however, contains specific factual allegations which support the conclusion that the LILCO Plan fails to provide the required assurance concerning the adequacy of its proposed protective action of sheltering. It is those factual allegations that are addressed by the Finlayson testimony.

Although LILCO is also correct in stating that the County's witnesses do not discuss the ultimate legal issue, raised in the contention or in this proceeding as a whole, there is simply no foundation for LILCO's argument that either Contention 61 or the Finlayson testimony are "irrelevant" to the NRC regulations. In order to make a determination on the legal issue, this Board must review the pertinent facts about LILCO's proposed Plan, and the results of its proposed implementation. A finding that a particular protective action provides adequate protection simply cannot be made in a factual vacuum, as LILCO seems to suggest. The Finlayson testimony



addresses the facts set forth in Contention 61, which the Board must consider in ruling on that Contention, and in making its ultimate determination as to LILCO's compliance with the regulations.

Second, as part of its "irrelevant to the regulations" argument, LILCO discusses what it describes as "the County's implicit legal theory." (Motion at 15). LILCO's speculation as to the County's legal theory is wrong. The County has never stated that an emergency plan must "guarantee" that "no one will receive a health-threatening dose of radiation," as alleged by LILCO. Such a statement by the County is not contained in Contention 61, in the Finlayson testimony, or to the County's knowledge, anywhere else. Contention 61 states that because a severe Shoreham accident could result in substantial numbers of people receiving health-threatening radiation doses, even assuming that LILCO's proposed protective action of sheltering were capable of being implemented, sheltering would not constitute an "adequate protective measure" as required by the regulations. There is no mention in the Contention of guarantees. LILCO's Motion, therefore, constitutes a deplorable mischaracterization which seeks to speculate on motives rather than being confined (as it should be) to the facts.

LILCO's third argument, that its interpretation of the County's legal theory "is at odds with NRC regulations," (Motion at 15) based upon its citation of Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 523 (1983), is identical to the argument made in LILCO's November Motion at 7.<sup>4</sup>/ LILCO asserts in its current Motion that the County "is seeking to show that the possibility of radiation exposure, which is assumed by the regulations, shows that the regulations are not met."

LILCO's characterization of what it believes the County "seeks to show" is, once again, simply incorrect. Neither Contention 61 nor the Finlayson testimony are "at odds" with the underlying assumption of the NRC regulations, as stated in San Onofre, that "a serious nuclear accident may occur." Indeed, Contention 61 and the Finlayson testimony make precisely that assumption and thus are completely consistent with the regulations. And, as a reading of Contention 61 reveals, it is not the "possibility of radiation exposure" which allegedly renders LILCO's Plan in violation of 10 CFR § 50.47(a)(1). The contention and the Finlayson testimony examine the likely results, if

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<sup>4</sup>/ The County responded to this argument at page 15 of the County Response, which is hereby incorporated by reference.

one specific protective measure proposed in the LILCO Plan were recommended and/or implemented in the event of a serious accident at Shoreham. Contention 61 alleges that the sheltering actions proposed by LILCO fail to provide reasonable assurance of adequate protection, given the assumptions of the NRC regulations. That is precisely the issue which the Board must address in making the required findings under 10 CFR § 50.47(a)(1). The Finlayson testimony addresses the facts upon which the allegation in Contention 61 is based. There is nothing about the Finlayson testimony that is "at odds" with the NRC regulations.

LILCO's fourth argument is the following:

A good way to test the relevance of the Finlayson testimony is to ask what the legal conclusion would be if every word of the testimony were found to be correct. The answer is that there would be no light shed on the legal issues at all.

(Motion at 16). First, LILCO is wrong in suggesting that testimony by expert witnesses is supposed to address "legal issues." Such testimony would be stricken. The purpose of testimony in NRC proceedings is to provide evidence on technical or factual issues within the knowledge and expertise of witnesses.<sup>5/</sup> That is precisely what is contained in the

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<sup>5/</sup> As the County has noted in its Motions to Strike LILCO's Group II-A and Group II-B testimony, LILCO's practice of

(Footnote cont'd next page)

Finlayson testimony -- expert testimony concerning the facts alleged in Contention 61. The findings on the legal issues raised in the contention are to be made by the Board following the briefing of those legal issues by the parties' lawyers. In their proposed findings of fact and conclusions of law, the lawyers for the parties presumably will apply the facts adduced through testimony and cross examination to suggest to the Board what findings should be made concerning the pertinent legal issues.

Moreover, the facts presented in the Finlayson testimony clearly "shed light" on the findings the Board is required to make, both in ruling on Contention 61, which has been admitted for litigation, and in evaluating LILCO's Plan as required under 10 CFR §50.47. The Board must assess pertinent facts in order to determine, as required by Section 50.47(a)(1): (a) whether proposed measures, if implemented, provide adequate protection, and (b) whether those measures can or will in fact be implemented. Whether the sheltering proposed by LILCO provides protection at all, and the extent of such protection,

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(Footnote cont'd from previous page)

having its non-lawyer expert witnesses testify as to legal matters is improper.



if any, both of which are discussed in the Finlayson testimony, clearly "shed light" on the ultimate issues to be determined by the Board.

LILCO's fifth argument, that it is necessary for a rulemaking before this Board is "in a position" to make the finding required by 10 CFR § 50.47(a)(1) (see Motion at 16-17), is specious. In order for this Board to determine compliance or noncompliance with 10 CFR § 50.47(a)(1), there is no requirement either for a rulemaking or for the word "adequate" to be "translated" into "probabilistic dose guidelines" as LILCO flippantly asserts. This Board is obligated to apply the existing NRC regulations in determining the adequacy of LILCO's Plan. It is also obligated to consider evidence presented by the parties that is relevant and material to admitted contentions. The Finlayson testimony is relevant and material to Contention 61 and should be considered by this Board. If the Board finds itself unable to understand that testimony, as LILCO suggests in its Motion, it can question the witnesses to obtain whatever clarification it may require. This LILCO argument should be disregarded.<sup>6/</sup>

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<sup>6/</sup> Similarly, LILCO's reference in its Motion to 48 Fed. Reg. at 10,775 (March 14, 1983) (Motion at 17) is irrelevant and should be disregarded by the Board. The citation, which LILCO never bothers to identify or discuss in its

(Footnote cont'd next page)



Sixth, at page 18 of its Motion LILCO makes a circular argument which does nothing to support its Motion. It states that the County's testimony is irrelevant because if a sheltering recommendation were to produce unacceptable doses, LILCO would recommend evacuation. This LILCO argument simply wishes away the issue raised in Contention 61. It also ignores the fact that given the admitted contentions in this proceeding, the Board must make a finding concerning the adequacy of each of LILCO's proposed protective actions, including sheltering and evacuation. For reasons stated elsewhere in the

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(Footnote cont'd from previous page)

Motion, is to the NRC's Policy Statement on Safety Goals for the Operation of Nuclear Power Plants. That Policy Statement follows a discussion by the Commission of its Safety Goal Development Program, and the Policy Statement is expressly identified as containing "preliminary safety goals and preliminary numerical design objectives" that "are subject to change at the end of a two-year evaluation period." The Commission also states:

It should be noted that, during the evaluation period, the preliminary safety goals and preliminary numerical design objectives will not replace the NRC's reactor regulations. Rather, NRC will continue to use conformance to regulatory requirements as the exclusive licensing basis for plants.

48 Fed. Reg. 10,772 (March 14, 1983). Contention 61 refers to existing regulatory requirements, and not to any of the Commission's preliminary safety goals or design objectives. LILCO's citation to the Commission's Policy Statement is inapposite.

contentions and admitted testimony, the County believes that LILCO's proposed protective action of evacuation also fails to provide adequate protection to the public. However, that is not the issue being addressed in Contention 61 or in the Finlayson testimony. Contention 61 deals only with LILCO's proposed protective action of sheltering, and the Finlayson testimony also addresses that subject. LILCO's attempt to prohibit the County from litigating the adequacy of its sheltering proposal, by saying "well, if it is inadequate, we wouldn't order it anyway," must be rejected. Such an argument provides no basis for striking the Finlayson testimony.

Finally, LILCO attempts to distinguish the Fermi case which was cited by the County in its December 20, 1983 Response to LILCO's November Motion. (Motion at 19-20). LILCO's attempt is without basis and, in any event, is unsuccessful. As noted in the County's Response to the November Motion, the Fermi case makes clear that evidence relating to health effects and projected radiation doses is pertinent to the question whether protective actions proposed by an applicant are feasible. See County Response at 13.

LILCO's assertion that Fermi is not applicable because no party to that proceeding objected to the use of "consequence

evidence," is beside the point. Clearly, whether another party to the proceeding objected or not, the licensing board in Fermi would not have ruled as it did if, as contended by LILCO, prior "guidance" was necessary for it to make a ruling, or the issue presented by the Intervenor was "irrelevant" to NRC regulations. Similarly, LILCO's argument that in Fermi "alternative" protection actions were under consideration is also beside the point. The fact is that the Fermi board considered whether a proposed protective action measure -- evacuation along the Pointe Aux Peaux Road -- provided adequate protection. In doing so it considered evidence relating to projected radiation doses and resulting health effects. It found that the proposed measure did provide adequate protection. What the County expects in this proceeding is not substantially different from what the Fermi board did: this Board must consider the evidence submitted in support of Contention 61 and must rule on that contention and determine whether LILCO's proposed measure of sheltering provides adequate protection. The County believes it does not for the reasons stated in Contention 61 and supported in the Finlayson testimony.

C. LILCO's "Law of the Case" Argument is Wrong

At pages 10-11 and 20-22 of its Motion LILCO argues that in submitting the Finlayson testimony the County is improperly attempting to litigate the LILCO PRA. As the County has stated every other time LILCO has raised this red herring, the LILCO PRA is simply a non-issue. First, neither Contention 61 nor the Finlayson testimony relate to the matters discussed in the Phase I decisions in this case that are cited by LILCO. Neither Contention 61 nor the Finlayson testimony concern whether LILCO is required to have performed a PRA, whether it relies on a PRA, or whether any LILCO PRA is good, bad, or indifferent. The County does not intend to litigate in Contention 61 the adequacy or accuracy of any PRA that may have been performed on behalf of LILCO. Neither in Contention 61 nor in the Finlayson testimony does the County give any indication that it wishes to litigate LILCO's intention or non-intention to rely upon its PRA, nor does the County wish to litigate the propriety or methodology of any PRA performed by or on behalf of LILCO. LILCO provides no discussion or explanation of its unfounded assertions regarding the County's motives or intentions in submitting either Contention 61 or the Finlayson testimony. This LILCO red herring argument is inapposite, of no relevance, and should be disregarded by the Board.



Similarly, LILCO's reference to the Commission's Safety Goal Development Program to argue that the Finlayson testimony "is a challenge to NRC regulations" (Motion at 20-21) is also irrelevant. Neither Contention 61 nor the Finlayson testimony in any way challenges, discusses, or even mentions the preliminary safety goals or objectives that are discussed in the Federal Register citation referenced in the LILCO Motion. See also footnote 6 above. This LILCO argument is another red herring which should be rejected.

D.    The Testimony at Page 4 of the Finlayson  
Testimony is Relevant and Should not be Stricken

At pages 22-23 of its Motion, LILCO moves to strike a paragraph sponsored by Dr. Radford on page 4 of the Finlayson testimony. The referenced paragraph discusses the health effects of a 30 rem dose. LILCO's entire argument in support of its motion to strike this testimony is the following:

The purpose of emergency planning is to achieve dose savings. The means for doing so can and should be litigated without becoming enmeshed in the generic issue of the health effects of particular doses.

(Motion at 23). LILCO provides no basis for these assertions, and no link between them and the referenced testimony. Its statement quoted above ignores the fact that Dr. Radford's



testimony addresses an issue explicitly raised in Contention 61. There is no basis for striking it.

Despite LILCO's clear desire to avoid consideration by this Board of the realities of an accident at the Shoreham Plant and the effects of such an occurrence on the people in Suffolk County, one aspect of those realities is raised in Contention 61. The Board has admitted Contention 61, and the County is entitled to submit testimony that addresses it. The Finlayson testimony does so and LILCO has stated no cognizable basis for striking it.

III. Direct Testimony of Robert W. Petrilak on Behalf of Suffolk County Regarding Contentions 24.E, 24.N, 61.C, 69, 70 and 71 (the "Petrilak testimony")

A. The third sentence of page 14

The sentence LILCO seeks to strike is:

Indeed, as I noted in my testimony concerning Contention 25, we would have fewer personnel than normal available due to role conflict.

LILCO's basis for moving to strike this sentence is that it is "cumulative to testimony previously filed" on Contention 25 (Motion at 24). The issues in this case are complex and interrelated, and it is neither practical nor desirable to attempt to deny the interrelationships among the various issues.

In this instance, the witness briefly notes in a portion of a sentence that a problem previously addressed on a general basis would also affect evacuation of school children which he discusses in the present testimony. He does not repeat the testimony previously submitted, he merely references it and notes its relevance to the issue he is currently addressing. Given the relevance and brevity of the challenged passage, it should not be stricken.

B. Paragraph beginning at line 19 of page 14

LILCO seeks to strike this testimony because it alleges that Mr. Petrilak is not qualified to testify about the matters in the challenged paragraph. LILCO is incorrect. Mr. Petrilak's testimony discusses the policy of his own school district, and his understanding of the lack of certification among LILCO's bus drivers. On the basis of his own experience as a school administrator and the facts stated in his testimony, he then states his opinion about the likely behavior of the parents of school children and other school administrators. The basis for Mr. Petrilak's opinion on this subject is specifically stated and, given his personal background and experience, is more informed than the unexplained and baseless assumptions by LILCO in its Plan concerning the likely behavior

of schools, nursery schools, and other special facilities.

This testimony should not be stricken.

IV. Direct Testimony of Dr. George J. Jeffers and Anthony R. Rossi on Behalf of Suffolk County Regarding Contentions 24.E, 24.F, 61.C, 69, 70 and 71 ("Jeffers and Rossi testimony")

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A. Page 5, footnote 2

LILCO moves to strike this footnote in the Jeffers and Rossi testimony on the ground that it is irrelevant to Contention 61.C.1 as well as the other contentions addressed by Dr. Jeffers and Mr. Rossi. (Motion at 26.) Once again, LILCO supports its motion with nothing more than a bald assertion. As discussed above, the Board has made it clear that in this proceeding motions to strike must state with particularity why the challenged testimony is not admissible. LILCO fails to do so, and therefore its motion should be denied.

Moreover, contrary to LILCO's assertion, the contents of footnote 2 are directly relevant to Contention 61.C.1. That contention states, in pertinent part, "the Plan fails to indicate how, if at all, such an order could or would be implemented by the schools." In footnote 2, the witnesses discuss one reason that a LILCO sheltering recommendation might not be implemented in their school district as expected by LILCO:

they state that they would not know whether or not particular recommendations would apply to certain of their schools. The testimony in the footnote is clearly relevant to Contention 61.C.1, and therefore LILCO's motion should be denied.

B. First Paragraph of page 9

LILCO seeks to strike this passage of the Jeffers and Rossi testimony on the ground that it is cumulative of testimony concerning traffic congestion and role conflict. (LILCO Motion at 26). This Board has already ruled that testimony is not cumulative when one witness bases his opinion upon the position of other witnesses expert in areas outside his own area of expertise. (See Order Ruling on Motions to Strike, dated January 16, 1984, at 6). Accordingly, LILCO's argument that the challenged reference to testimony by Suffolk County and New York State traffic witnesses is cumulative has already been raised and rejected in this proceeding and should be rejected in this instance also.

LILCO also seeks to strike the witnesses' reference to role conflict and to their previous testimony on the ground that it is cumulative. (Motion at 26.) The issues in this proceeding are complex and frequently overlap. In the challenged passage the witnesses briefly note that the problem of



role conflict, which they discussed previously in general, would affect the early dismissal process which they discuss in their present testimony. The witnesses only refer to their previous testimony; they do not repeat the earlier testimony. The challenged passage is both brief and relevant to the issues raised by Contention 69.C, and therefore, it should not be stricken.

LILCO also argues that the first paragraph of page 9 of the Jeffers and Rossi testimony addresses issues outside the scope of and irrelevant to Contention 69.C. Contention 69.C states:

The time required to accomplish an early dismissal is likely to be substantially greater, due particularly to congested road conditions and role conflict experienced by bus drivers and other personnel in authority.

(emphasis supplied). LILCO's motion ignores the plain language of Contention 69.C and should be denied.

- V. Direct Testimony of Nick J. Muto and J. Thomas Smith on Behalf of Suffolk County Regarding Contentions 24.E, 24.F, 24.N, 61.C, 69, 70, and 71 (the "Muto and Smith testimony")

LILCO seeks to strike the paragraph beginning at line 5 of page 12 of the Muto and Smith Testimony, because, LILCO alleges, the testimony is unreliable since neither witness is



connected with any nursery schools. (Motion at 27, 28). Contrary to LILCO's assertions, the witnesses testify, on the basis of their experience as school administrators, about their understanding of the certification standards for school bus drivers. The witnesses then note their understanding that LILCO's bus drivers do not meet these standards. On the basis of their experience as school administrators and the facts stated in their testimony, the witnesses then state their opinion of the options that would be open to the administrators of nursery schools. Thus the bases for the witnesses' opinion are stated clearly in their testimony, and those bases are within the personal knowledge of the witnesses. Accordingly, there is no merit to LILCO's argument that this passage is unreliable, and LILCO's motion should be denied.

VI. Direct Testimony of Gregory C. Minor Regarding Contention 85.

LILCO seeks to strike essentially all the testimony of Mr. Minor concerning Contention 85 because, according to LILCO, it is "beyond the scope of" that contention. LILCO's motion is based on a misinterpretation of both Contention 85 and Mr. Minor's testimony. LILCO's Motion should be denied.

LILCO asserts that Contention 85 alleges only that there is no recovery and re-entry plan included in the LILCO Plan.

Accordingly, LILCO argues, any words in Mr. Minor's testimony other than "a plan for recovery and re-entry does not exist" are beyond the scope of the contention. LILCO's argument is without merit and should be rejected.

First, LILCO ignores the actual contents of Contention 85. It is true that the words "no such plan exists" appear in that contention. However, it is also clear from a review of the contention in its entirety that the point of the contention is that the words in the LILCO Plan concerning recovery and re-entry are insufficient or inadequate to comprise the "general plans" required by the regulations cited in the contention. Clearly, neither Contention 85, nor Mr. Minor, contend (nor could they) that the LILCO Plan does not contain some provisions that pertain to recovery and re-entry. The Plan in fact contains a section titled "Recovery and Re-Entry" and OPIP 3.10.1 also deals with recovery and re-entry. The point of Contention 85, however, is as stated in that contention: the contents of the LILCO Plan concerning recovery and re-entry, which in essence provide that a Recovery Action Committee will be appointed and will plan and implement certain actions, are insufficient to comply with 10 CFR § 50.47(b)(13) and NUREG 0654 Section II.M. Contrary to LILCO's assertion (Motion at 31), Mr. Minor's testimony that LILCO's recovery and

re-entry provisions in its Plan "require additional elaboration" is precisely the issue raised in Contention 85.

The portions of Mr. Minor's testimony which LILCO seeks to strike state with specificity particular aspects of the recovery and re-entry related provisions in LILCO's Plan and procedures that form the basis for his opinion that those provisions do not constitute the "general plans" required by the regulations cited in the contention. His testimony also explains why those provisions result in the Plan's failing to meet the regulatory requirements. LILCO simply has no basis for moving to strike this testimony.

In addition, LILCO's motion fails to meet the Board's requirement that Motions to Strike be stated with particularity, in that LILCO seeks to strike testimony in its entirety without even purporting to address the specifics of that testimony. For the reasons stated above, the County believes that all of Mr. Minor's testimony is within the scope of Contention 85, and is therefore relevant and material and should not be stricken. Specifically, the testimony which LILCO seeks to strike is Mr. Minor's response to the question:

Why is the provision of the LILCO Plan referenced in Contention 85 contrary to the requirements of NUREG 0654 Section II.M as stated in that contention?

His response (1) states the portions of NUREG 0654 that are cited in the contention, (2) discusses the portions of the Plan that are cited in the contention, (3) discusses the procedure related to recovery and re-entry that is part of the LILCO Plan, and then (4) explains why those provisions do not constitute a general plan as required by the regulations. The testimony clearly is relevant to Contention 85 and the LILCO Motion should be denied.

VII. Direct Testimony of Gregory C. Minor Regarding Contention 88.

LILCO seeks to strike one clause of Mr. Minor's testimony concerning Contention 88. LILCO has no basis for its Motion, and it should be denied.

Contention 88 states in pertinent part:

The Plan also fails to state the dose criteria that will provide the basis for a determination that it is safe for the public to re-enter previously evacuated areas. The Plan calls for a cost-benefit analysis based on a \$1,000/person-rem during temporary re-entry (OPIP 3.10.1 at 5), but provides no guidance on how to analyze a situation in order to be able to apply this criterion. Thus, the Plan fails to comply with 10 CFR § 50.47 (b)(13) and NUREG 0654 Section II.I.10, and II.M.1.

In his testimony, Mr. Minor discusses the above-referenced portions of Contention 88. In the course of that discussion, he states the following:



In addition, LILCO's Plan and implementing procedures provide no guidance as to how to conduct a cost-benefit analysis for temporary re-entry of an area, and thus do not include a description of the means by which a decision regarding temporary re-entry could or would be made as required by NUREG 0654 Section II.M.1.

LILCO seeks to strike the underlined portion of the above passage. Following that passage, Mr. Minor goes on to explain the basis for his conclusion that the LILCO Plan provides no guidance as to how to conduct a cost-benefit analysis for temporary re-entry. LILCO does not seek to strike the explanation.

The asserted basis for LILCO's Motion is: "The essence of the contention is that the Plan does not provide guidance about how to apply the \$1,000/person-rem criteria." Based upon this interpretation of the contention, LILCO asserts that the underlined clause of the above-quoted passage in Mr. Minor's testimony "goes beyond the issue" in Contention 88 and "improperly" shifts the focus of that contention from cost-benefit analysis to whether the plan describes the basis for a decision regarding temporary re-entry.

LILCO's objection makes no sense. The basis for making a decision as to temporary re-entry, according to the LILCO Plan,



is by means of a cost-benefit analysis. The statement by Mr. Minor, which recognizes the link between cost-benefit analyses and the temporary re-entry decision, merely reflects what LILCO's own Plan provides. Moreover, the issue of the application of the cost-benefit analysis to decision-making is directly raised in Contention 88, since it states that the Plan "provides no guidance on how to analyze a situation in order to be able to apply this criterion." There is no basis for striking this testimony, and LILCO's Motion should be denied.

VIII. Conclusion

For the foregoing reasons, LILCO's Motion to Strike Portions of the "Group II-B" Testimony of Suffolk County should be denied.

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April 5, 1984

Attorneys for Suffolk County

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 (O.L.)  
) (Emergency Planning)  
)  
)

CERTIFICATE OF SERVICE

I hereby certify that copies of Suffolk County Response to LILCO's Motion to Strike Portions of the "Group II-B" Testimony of Suffolk County have been served on the following this 5th day of April, 1984 by U.S. Mail, first class, except as otherwise noted below.

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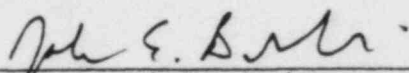
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