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RELATED CORRESPONDENCE

LILCO, July 11, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

DOCKETED
USNRC

In the Matter of)
)
LONG ISLAND LIGHTING COMPANY) Docket No. 50-322-OL-3
) (Emergency Planning Proceeding)
(Shoreham Nuclear Power Station,)
Unit 1))

'84 JUL 13 A10:52

LILCO'S ANSWER OPPOSING SUFFOLK COUNTY'S MOTION TO ADMIT
SUPPLEMENTAL TESTIMONY OF DEPUTY INSPECTOR PETER F. COSGROVE
AND LIEUTENANT JOHN L. FAKLER ON BEHALF OF SUFFOLK COUNTY
REGARDING CONTENTIONS 39, 40, 41, 44, 98, 99 AND 100
-- TRAINING OF OFFSITE EMERGENCY RESPONSE WORKERS

On July 6, 1984, Suffolk County filed "Suffolk County's Motion to Admit Supplemental Testimony of Deputy Inspector Peter F. Cosgrove and Lieutenant John L. Fakler on behalf of Suffolk County regarding Contentions 39, 40, 41, 44, 98, 99 and 100 -- Training of Offsite Emergency Response Workers." The testimony itself, which was served the following day, discusses selected comments from the critique forms that had been provided to Suffolk County on June 1, 1984 through discovery. The County's motion states that the good cause exists for admitting the supplemental testimony on the grounds that the testimony is "relevant, not cumulative, and incapable of being filed in a more timely fashion," Motion at 4. LILCO opposes the County's motion to admit supplemental testimony on the grounds that the supplemental testimony which Suffolk County seeks to admit is contrary to the Board's Order, is not admissible evidence within the meaning of 10 C.F.R. § 2.743(c), and fails to meet the standards for the submission of supplemental testimony.

add:
J. GORN
OCA

DS03

STATEMENT OF FACTS

On April 18, 1984, the County requested production of a number of documents relating to the training contentions. Included among the document requests was a request for

all documents relating to the critiques and evaluations of LERO trainees' performance by drill and/or exercise controllers and/or observers . . . including all completed drill and/or exercise evaluation forms . . . from LERO drills and/or exercises that have been conducted.

On June 1, 1984, after hearing oral argument from the parties on a motion to compel, the Board ordered LILCO to produce the critique evaluation forms. The Board ruled that the completed evaluations and critiques were relevant to the testimony and contentions in controversy, but at the same time issued the following caveat:

[T]he mere fact that we find these documents discoverable should not be taken to establish that they are admissible in evidence or that isolated critiques may form the basis for cross-examination at this hearing.

The County is entitled to see these documents to determine if it can establish its contention by showing that the pattern of the critiques is inadequate or that the pattern of the critiques establishes an absence of objective evaluation criteria.

Tr. 9,674 (Laurenson).

On June 1, 1984, pursuant to the Board's Order, LILCO produced all critique forms that had been written by controllers and observers at LERO drills and any existing summaries of those critique forms. Hearings on the training issue did not begin until eleven days later, on June 12, 1984. Apparently, during that

intervening time period, neither the County nor its consultants performed any valid analysis, much less a statistical analysis, of the critique forms to establish a pattern. Instead, on June 13, 1984, Suffolk County attempted to enter into evidence Suffolk County EP-65, which the Board described as "a selected subset of forms drawn from a much larger collection of such forms." Tr. 11,559 (Kline).

In a detailed bench ruling on June 14, 1984, the Board denied admission of Suffolk County EP-65. In its Order the Board reminded the County that it had "cautioned against the inference that these individual evaluations of the drill performance would be admissible as evidence in this case." Tr. 11,558 (Kline). The Board further stated that

This [selective subset of forms drawn from a much larger collection of such forms] is not what the Board had in mind when it said that the form[s] collectively must exhibit a pattern which might be admissible. We did not think it necessary to state additionally that any purported pattern that might be shown must be an unbiased one within the statistical meaning of that term.

At a minimum, this would require scrutiny and a summary of the entire available database and not just a selected subset of that base

Clearly a selected subset of such survey forms would be inadmissible for the obvious reasons that subsets could be formed by selection of only those responses which were consistent with the parties' view.

Tr. 11,559-11,560 (Kline).

Subsequent to the Board's ruling of June 14, 1984, denying admission to Suffolk County EP-65, Suffolk County made repeated attempted to place into evidence portions of the critiques through the testimony of the LILCO witnesses. See Tr. 11,700-708, 11,775-778, 11,802-803, 11,974. In all cases, LILCO's objections to the admission of such evidence through the testimony of the LILCO witnesses were sustained. The Board ruled that selective subsets of the raw data were not persuasive admissible evidence and that permitting the admission of this type of evidence into the record would present a biased result, which would be of no value in the decisionmaking process and which would merely add bulk to the record, both of which the NRC regulations prohibit. The Board reiterated its conclusion that in order to yield admissible evidence based on the critiques, it would take a summary analysis of the data and documents in a statistical form. See, e.g., 11,704-705, 11,707, 11,708.

To preserve for the record the evidence which the County sought to have admitted during the hearings, Suffolk County made two offers of proof pursuant to 10 C.F.R. § 2.743(e). See Tr. 11,818-11,830, 11,975-11,978. In those offers of proof, counsel for the County read into the record selected quotations from critique forms completed by individual controllers and observers and placed in the record eight exhibits which consist of selected subsets of the critique forms.

ARGUMENT

I. The Supplemental Testimony Is Contrary To The Board's Order

In its June 14 Order denying admission of Suffolk County EP-65, the Board had specifically warned that a selected subset of the critique forms would be inadmissible as evidence and that in order to have the critique forms admitted as evidence, the County must establish a pattern through a statistical analysis of all the critique forms. See Tr. 11,558-11,559 (Kline). The supplemental testimony which Suffolk County seeks to admit does not purport in any way to be the result of or to embody a statistical analysis of the critique forms. Rather, the supplemental testimony of Deputy Inspector Cosgrove and Lieutenant Fakler consists simply of a stringing-together of selected quotations from a selected set of the critique forms produced by individual drill and exercise controllers, with the selected critique forms themselves appended as attachments. Indeed, the appended critique forms are virtually identical to the exhibits that the County placed in the record in support of its Offers of Proof.^{1/}

^{1/} Specifically, Attachment 1 is virtually identical to Suffolk County EP Exhibit 69, described as comments by individual observers regarding inadequate briefings being given to drill and exercise participants prior to the drill or exercise being conducted. Tr. 11,975 (Miller). Attachment 2 is virtually identical to Suffolk County EP Exhibit 71, which was described as documents regarding problems with communications aspects of the training program. Tr. 11,976 (Miller). Attachment 3 is virtually identical to Suffolk County EP Exhibit 72, which was described in the County's offer of proof as documents referencing problems with the use of radio equipment

As is detailed in the Statement of Facts above, the County has made repeated attempts to have selected portions of the critique forms admitted as evidence. The supplemental testimony of Deputy Inspector Cosgrove and Lieutenant Fakler is but another attempt to have admitted the same evidence in the same format. Despite its title, the County's motion is not one for admission of supplemental testimony, but is in fact a motion for reconsideration of the Board's prior rulings.

The Board's prior rulings on the issue of admissibility of selected subsets of the critique forms are clear. If the County seeks to use the critique forms as evidence then it must, as the Board has ordered, provide a statistical analysis of the critique forms. The testimony contains no such analysis.

II. The Supplemental Testimony Is Not Admissible Evidence

Under the Commission's Rules of Practice, "only relevant, material and reliable evidence which is not unduly repetitious will be admitted." 10 C.F.R. § 2.743(c). The County's supplemental testimony which consists of selected quotations from the

continued

during drills and exercises. Tr. 11,976 (Miller). Attachment 4 is virtually identical to Suffolk County EP Exhibit 74, which was described in the County's offer of proof as documents referencing problems with the emergency worker decontamination facility. Tr. 11,977 (Miller). Attachment 5 is virtually identical to Suffolk County EP Exhibit 73, which was described in the County's offer of proof as documents relating to dosimeters not be regularly checked. Tr. 11,977 (Miller). Attachment 6 is virtually identical to Suffolk County EP Exhibit 70, which was described in the County's offer of proof as documents referencing inadequate briefings given to observers and controllers. Tr. 11,976 (Miller).

critique forms completed by the individual observers and controllers and attaches a selected subset of those forms, is unreliable, immaterial and irrelevant.

This Board has ruled repeatedly during the hearings on the training contentions that evidence virtually identical to that contained in the supplemental testimony, which consisted of a selective subsets of critique forms, was not admissible evidence. See, e.g. 11,558-561, 11704. The Board stated, and LILCO concurs with the statement, that an isolated selection of comments by individual drill controllers and observers presents a biased record that is of no value to the Board in writing the findings of fact or in writing a decision in the case. Tr. 11,705, 11708 (Laurenson). What the County's supplemental testimony presents is precisely such a selected subset of survey forms. Whether the content of the forms is presented through the direct testimony of Suffolk County's witnesses, which essentially consists of reading selected quotations from the critique forms or through the Attachments which consist of a selection of critique forms themselves, the evidence suffers the infirmity of having been selected be consistent with the views of a particular party and not taking into consideration whether additional alternative hypotheses could be developed from the same data base. As the Board stated in its Order, "valid hypotheses cannot be generated by the obviously flawed methodology employed by the County in this instance." Tr. 11,561 (Kline).

For the reasons outlined above, this Board has previously ruled that the evidence the County seeks to present through its supplemental testimony was inadmissible. The evidence has not changed. It is no more reliable, relevant or material than it was on June 14 or 15. The County's motion should be denied on the grounds that the testimony is unreliable, immaterial, and irrelevant evidence and, therefore, inadmissible.

III. The County Supplemental Testimony Fails to Meet
The Standards for Submission of Supplemental Testimony

The admission of supplemental testimony or rebuttal testimony must meet a higher threshold than is required for admission of initial testimony; the party must establish good cause for its admission. This Board has previously noted that, for an adequate showing of good cause, the Board requires that the proper testimony be shown to be:

1. relevant to an important point in the direct testimony;
2. arguably relevant to an issue of decisional importance in this proceeding;
3. not cumulative with any other testimony in the record; and
4. incapable of being filed in a more timely fashion.

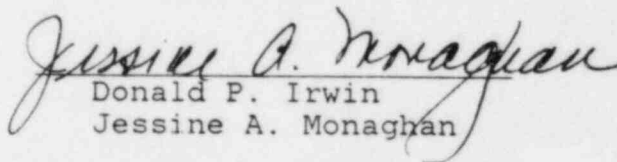
See Memorandum And Order Ruling On Suffolk County's Motion To File Rebuttal Testimony of Steven Cole and Andrea Tyree (February 28, 1984).

Even if the proffered supplemental testimony were otherwise admissible, which is it not, the County has failed to establish

good cause for admission of this testimony because it fails to meet the second criterion of the test for "good cause." The second criterion requires that the testimony offered be "arguably relevant to an issue of decisional importance in this proceeding." As the Board noted on the numerous, previous occasions on which it has rejected the County's attempts to admit this same evidence it is not probative and is of no value to the Board in its job of drafting findings of fact and writing a decision in this case. Tr. 11,558-561 (Kline). 11,704-705, 11,708 (Laurenson). Clearly, nonprobative, inadmissible evidence, which the Board itself has stated would be of no value in drafting findings or its decision, is not "relevant" to an issue of decisional importance in this proceeding.

Respectfully submitted,

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DATED: July 11, 1984

LILCO, July 11, 1984

CERTIFICATE OF SERVICE

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
(Emergency Planning Proceeding)
Docket No. 50-322-OL-3

I certify that copies of LILCO'S ANSWER OPPOSING SUFFOLK COUNTY'S MOTION TO ADMIT SUPPLEMENTAL TESTIMONY OF DEPUTY INSPECTOR PETER F. COSGROVE AND LIEUTENANT JOHN L. FAKLER ON BEHALF OF SUFFOLK COUNTY REGARDING CONTENTIONS 39, 40, 41, 44, 98, 99 AND 100 -- TRAINING OF OFFSITE EMERGENCY RESPONSE WORKERS were served this date upon the following by first-class mail, postage prepaid, or by hand (as indicated by one asterisk).

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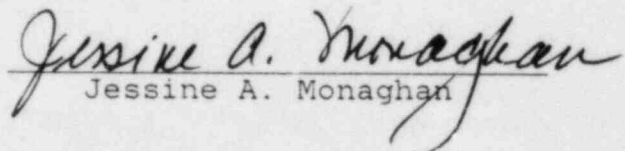
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