

RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION
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 USNRC

Before the Atomic Safety and Licensing Board

'84 JUN 28 P2:12

In the Matter of)

LONG ISLAND LIGHTING COMPANY)

(Shoreham Nuclear Power Station,
 Unit 1))

Docket No. 50-322-0L-3
 (Emergency Planning)

SUFFOLK COUNTY MOTION TO STRIKE
 LILCO DIRECT TESTIMONY AND SUPPLEMENTAL
TESTIMONY ON CONTENTIONS 74 AND 75 (RELOCATION CENTERS)

I. Introduction

On March 2, 1984, LILCO and Suffolk County filed direct written testimony on Contentions 74 and 75.^{1/} The County moved to strike portions of LILCO's testimony on Contentions 74 and 75 on March 9, 1984.^{2/} On the same date, LILCO moved to strike portions of the County's testimony on Contention 75.^{3/}

- ^{1/} Direct Testimony of Deputy Chief Inspector Richard C. Roberts on Behalf of Suffolk County Regarding Emergency Planning Contention 74 -- Inappropriate Proximity of Proposed Relocation Centers to the Shoreham Plant; Direct Testimony of David Harris and Martin Mayer on Behalf of Suffolk County Regarding Contentions 24.G, 24.K, 24.P, 73 and 75; Testimony of Matthew C. Cordaro, et al., on Behalf of the Long Island Lighting Company for Phase II Emergency Planning Contention 74 (Location of Relocation Centers); Testimony of Matthew C. Cordaro, et al., on Behalf of the Long Island Lighting Company on Phase II Emergency Planning Contention 75 (Capacity of Relocation Centers).
- ^{2/} Suffolk County Motion to Strike Portions of LILCO's Group II-A Testimony (March 9, 1984).
- ^{3/} LILCO's Motion to Strike Portions of the Testimony of David Harris and Martin Mayer on Contentions 24.G (Agree-

(Footnote cont'd next page)

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In light of LILCO's stated intention to change some of the relocation centers identified in Revision 3 of the LILCO Transition Plan, the Board on June 8, 1984 set a schedule for the parties to file supplemental testimony. Tr. 10,973. The County received LILCO's Supplemental Testimony on Contentions 24.0, 74 and 75 (Relocation Centers for the Public) (hereinafter, "Supplemental Testimony") on June 15, 1984 and now moves to strike that testimony on the grounds stated below. LILCO's Supplemental Testimony alters some of the original LILCO testimony that the County moved to strike on March 9, 1984. Therefore, for the sake of clarity and convenience to the Board and parties, this Motion incorporates and replaces the County's March 9, 1984 motion to strike. References herein to LILCO's original direct testimony on Contentions 74 or 75 include the inserts and revisions to those pieces of testimony that are set forth on pages 10-14 of LILCO's Supplemental Testimony.

(Footnote cont'd from previous page)

ments for Ambulances) and 75 (Capacity of Relocation Centers) (March 9, 1984).

II. Suffolk County's Motion to Strike LILCO's
Supplemental Testimony in Its Entirety

A. LILCO's Supplemental Testimony
Constitutes Unreliable Hearsay and
Is Offered by Incompetent Witnesses

The County first moves to strike LILCO's Supplemental Testimony in its entirety on grounds that it is comprised of unreliable hearsay and that LILCO's witnesses are not competent to provide the testimony proffered. It is clear from a review of LILCO's Supplemental Testimony that in discussing various decisions and determinations concerning the availability adequacy, appropriateness and anticipated use of relocation centers, the LILCO witnesses are merely passing on information purportedly provided to LILCO by unnamed representatives of the American Red Cross. See, e.g., Supplemental Testimony at 3 ("The Suffolk County Chapter of the American Red Cross has notified us . . ."; "The Suffolk County Red Cross therefore has designated . . ."). Indeed, it appears from the Supplemental Testimony that all determinations and decisions regarding the designation of relocation centers, the replacement of previously-designated relocation centers, which relocation centers have adequate capacities and facilities, and which additional facilities may or should or could become available for use, are decisions and determinations which have been or will

be made by unidentified representatives of the American Red Cross. Notwithstanding the Red Cross' apparent control over, and unique knowledge of, this aspect of the LILCO Plan, no representative of the Red Cross is included on the LILCO witness panel. As a result, the LILCO Supplemental Testimony for the most part consists of nothing but second hand, hearsay information, the precise sources of which are not identified. In fact, there is no indication that the LILCO witnesses have any first hand information or knowledge of or involvement in, any of the determinations or decisions concerning relocation centers that are reported in their Supplemental Testimony.

This form of "testimony" should not be countenanced. While hearsay is not absolutely prohibited in NRC proceedings, the Board nonetheless must assess the reliability and probableness of particular hearsay evidences and must take into account the impact upon the rights of the other parties to the proceeding of admitting hearsay into evidence. Admitting into evidence the LILCO Supplemental Testimony would place the Board and the parties other than LILCO in the position of being unable to cross examine or even assess the accuracy or reliability of the assertions contained in that testimony. For example, notwithstanding the fact that LILCO's Supplemental Testimony is based almost entirely on hearsay and speculation

about what the Red Cross may do in an emergency (with respect to both designated and unspecified relocation centers), Suffolk County will not be able to cross-examine the purported source of the information and the bases for all the determinations and decisions that are discussed in the LILCO Supplemental Testimony, since such source is, apparently, unnamed representatives of the American Red Cross. Clearly, such an opportunity for cross examination is an essential element of the County's case, since without it, the County is prohibited from effectively or completely probing the bases for the LILCO Testimony or challenging its accuracy and reliability. Because the actual sponsors of the conclusions and opinions set forth in the Supplemental Testimony are not available, either to vouch for its accuracy or to be cross examined, LILCO's Supplemental Testimony should not be admitted into evidence.

Furthermore, as this Board has recognized, it is improper for a party to base its direct case on hearsay and information provided by individuals who are not available to be cross-examined. Indeed, when LILCO attempted to support a portion of its Contention 64 testimony with excerpts from the deposition testimony of two individuals who were not available for the County to cross-examine during the hearing, the Board stated:

We find that it would be unfair to allow a party to present such direct evidence without a corresponding right to cross-examine that evidence when it is submitted. . . . Thus, we hold that Attachments 11 and 12 should be stricken [sic] since the entire answer hinges on the attached deposition transcripts and has no independent basis. The entire answer is stricken. [sic]

Tr. 8274 (Laurenson).

Here, as was the case with portions of LILCO's Contention 64 testimony, LILCO's Supplemental Testimony is wholly lacking in independent basis and should be stricken. Otherwise, the County will be unfairly precluded from cross-examining the persons who, according to the LILCO, are the ones who possess the knowledge and, in fact, have made all the decisions and determinations about relocation centers that are the bases for the Supplemental Testimony, including such factors as their capacities and the services which such relocation centers can provide. Because the Supplemental Testimony lacks the proper knowledgeable sponsors and is purely hearsay, its admission into evidence would deprive the other parties of their right to cross examine the opinions and conclusions expressed in the testimony. Therefore, the Supplemental Testimony should be stricken.

B. LILCO Has Not Revised Its Plan
to Reflect the Changes in the
Designation of Relocation Centers

The current version of the LILCO Plan -- Revision 3 -- contains proposals and information regarding relocation centers that differ in many respects from those set forth in LILCO's Supplemental Testimony. And, although the asserted reason for LILCO's need to file supplemental testimony as Con- tentions 74 and 75 was the fact that the LILCO Plan had been revised subsequent to the time LILCO's original testimony was prepared, no such Plan revisions have been made. For some time now, the Board and the parties have heard that the appearance of Revision 4 of the LILCO Plan is imminent. Indeed, on May 23, more than four weeks ago, counsel for LILCO informed the County that Revision 4 would be issued in "a few weeks." Revision 4 has still not appeared. This can only be interpreted as a delay tactic on the part of LILCO to see how well its most recent, in a continuing series of changing proposals concerning relocation centers are received, and how they fare in the litigation process, before they are incorporated into the LILCO Plan. This tactic is clearly improper. LILCO should not be permitted to keep constantly changing the data base upon which these hearings are being conducted, forcing the other parties to expend resources and time in rewriting

testimony and conducting hearings on various preliminary proposals that have not been incorporated into Plan revisions.

The focus of these hearings is the adequacy and implementability of the LILCO Plan, not of proposals under consideration, or proposals that may, in the future, be incorporated into the Plan. If LILCO is serious about designating new relocation centers, it should incorporate such relocation centers into a Plan Revision, issue that Revision, submit it to the Board, and withdraw its earlier submissions. Then litigation of the new proposals would be appropriate. To go forward with these proceedings based upon the hearsay and preliminary information that is contained only in LILCO's Supplemental Testimony, rather than in any version of the LILCO Plan, allows LILCO unilaterally to manipulate the data base so that only those selected facts that LILCO chooses to mention in its testimony -- rather than the totality of what will actually appear in some future version of the Plan -- are revealed to the Board and the parties and litigated. LILCO should not be permitted to proceed in this manner, and its Supplemental Testimony should be stricken in its entirety.

In the County's view, LILCO should be forced to litigate the LILCO Plan, not whatever proposals it chooses to put into

testimony. The Plan is in evidence, available to all the parties and the Board, and the subject of the contentions which form the framework of this proceeding. LILCO's assertions, and hearsay summaries of opinions and determinations by unidentified persons possibly affiliated with the Red Cross, are not the proper basis for litigation. If LILCO now chooses to base its request for a license on proposals different from those contained in the document submitted to this Board for licensing -- Revision 3 of the LILCO Plan -- it should revise that Plan and then the litigation could proceed upon the new LILCO proposal. Pending LILCO's revision of the Plan, however, the Supplemental Testimony should be stricken.

III. Suffolk County's Motion to Strike Portions
of LILCO's Direct and Supplemental
Testimony on Contentions 74 and 75

A. LILCO's Direct Testimony on Contention 74

1. Page 5, last line (beginning with the inserted language "At the time . . .") through page 6, line 10 (ending with "centers."). The LILCO witnesses now acknowledge that at the time Revision 3 of the LILCO Plan was issued, Suffolk County Red Cross had not finalized written agreements with the relocation centers listed and relied upon in the LILCO Plan. Nevertheless, the LILCO witnesses assert that "those are the

centers the Red Cross was considering to provide shelter during and emergency at Shoreham" and used by LILCO in planning. This assertion is not probative or reliable and should be stricken.^{4/} It is also not material to Contention 74, which deals with the facilities identified by LILCO in its Plan, which is the subject of this litigation.

For the same reason, the assertion that the "Suffolk Red Cross has now advised LILCO that it has designated other centers in Suffolk County" and that "the Plan will be amended to reflect those centers" should be stricken. This language again is irrelevant to the Contention, which concerns those relocation centers designated by LILCO to be used in an emergency. The language at issue provides no information of decisional importance to the Board. Further, the testimony concerning what the LILCO witnesses think the Red Cross "was considering" is offered without any stated or independent basis and thus constitutes gross hearsay. Testimony regarding what

^{4/} In making this objection and those which follow, the County does not waive its more basis objection to litigating LILCO proposals that have not been incorporated into the LILCO Plan which is at issue in this proceeding. For purposes of the specific motions to strike which follow, however, the County assumes that the relocation centers "designated by LILCO" are the ones discussed in the Supplemental Testimony rather than the ones discussed in the Plan itself.

the Red Cross was or was not doing or considering is not relevant and, in any event, can only be properly offered by the Red Cross, not LILCO.

2. Page 6, line 19 through page 7, line 8 and Attachments 3 and 4. The LILCO Plan does not contemplate the use of any of the unspecified Nassau County relocation centers referenced in this testimony, nor are such relocation centers referenced in Contention 74. The only issue presented in Contention 74 is whether the locations of the relocation centers designated by LILCO comply with the regulatory requirements cited in that Contention. Therefore, this portion of LILCO's testimony, which discusses numerous possible relocation centers not designated in the LILCO Plan, is irrelevant and not probative.

Furthermore, LILCO's testimony that a number of facilities in Nassau County may be available during an emergency is vague and speculative, and thus is not material to the issues presented in Contention 74. If LILCO wants to rely on Nassau County facilities, the Plan should be changed to reflect that fact, and the parties should be given proper notice and opportunity to litigate the adequacy of those facilities. In addition, this testimony is cumulative and unduly repetitions

to the testimony presented by the LILCO witness panel on Contention 24 (See, e.g., pages 25-27 of LILCO's direct testimony on Contention 24.P) and should be stricken.

3. Pages 7-12, Questions and Answers 8-11.1 and Attachments 6-11. This testimony concerns Suffolk County Community College ("SCCC") and SUNY Stonybrook, neither of which, according to LILCO's Supplemental Testimony and notwithstanding the statements in the LILCO Plan, is apparently going to be relied upon or designated by LILCO as a relocation center. The testimony discusses: (a) why these facilities are satisfactory relocation centers; (b) LILCO's assertion that these relocation centers were originally chosen by County planners some years ago pursuant to a contract; (c) New York State planners' position on the choice of those relocation centers some years ago; and (d) FEMA's response to the designation of those relocation centers. In light of LILCO's stated intention that it no longer designates or relies upon either facility as a relocation center in the event of a radiological emergency at Shoreham, this testimony is plainly neither relevant nor material to Contention 74. Testimony regarding irrelevant matters, such as what various individuals or entities may or may not have said or done regarding facilities no longer relied upon by LILCO, should be stricken.

Furthermore, the testimony regarding previous actions by Suffolk County and other planners does not address the LILCO Plan, which, under the Board's Order of June 10, 1983, is the sole Plan upon which these hearings are to focus. The testimony should therefore be stricken. For example, LILCO attempts to introduce evidence to justify the location of relocation centers designated in LILCO's Plan on the basis that County planners allegedly had selected these locations in its rejected pre-March 1982 draft of a plan, and because State of New York planners allegedly agreed. LILCO even goes so far as to attempt to introduce into evidence (Attachment 6) the September 1981 LILCO-County planning agreements that later was rescinded. That agreement bears no relevance to Contention 74.

In summary, testimony about actions taken by Suffolk County planners or others on something other than the LILCO Plan is not relevant to the Contention at issue and should be stricken -- especially when that testimony consists of nothing more than statements and characterizations of the LILCO witnesses regarding the alleged views of the County, New York State and FEMA with respect to the locations of the facilities no longer relied upon by LILCO as relocation centers. The issue is whether LILCO has complied with NRC regulations in its choice of relocations centers. LILCO's proffered testimony is

not needed in order to address this issue and results in presenting hearsay evidences from early and mid-1981 pertaining to what other planners were doing. The admission of this testimony will vastly expand this litigation, as it will necessitate the presentation of evidence to negate the implications of LILCO's testimony -- namely that the relocation centers previously relied upon by LILCO are satisfactory to the County. We submit that the testimony should stick to the issue in controversy instead of being an historical dissertation. In any event, however, testimony regarding irrelevant matters, such as what various individuals or entities may or may not have said or done regarding facilities no longer relied upon or designated by LILCO as relocation centers is irrelevant and should be stricken.

4. Page 12, lines 4-10 (last two sentences of Answer 11). Here, LILCO cites to prior decisions from other licensing boards in other emergency planning proceedings. Such purely legal citation is irrelevant and is appropriate, if at all, for post-trial attorney briefs, not expert testimony. Thus, the testimony should be stricken.

5. Page 13, lines 1-6 (first three sentences). This testimony again discusses LILCO's possible reliance on

unspecified relocation centers in Nassau County. It should be stricken for the reasons set forth in Part III.A.2 above.

B. LILCO's Direct Testimony on Contention 75

1. Page 5, lines 8-11 (last sentence of Answer 5).

This sentence contains an improper legal interpretation which the witnesses are not competent to render. Thus, this sentence should be stricken.

2. Page 5, line 17 through pages 6, line 26 (first two paragraphs of Answer 6 and Attachments 1 and 2). The LILCO witnesses assert that "evacuees prefer not to go to public relocation centers, but stay instead, in the homes of family or friends, or in a hotel." The LILCO witnesses support this assertion by referencing the studies appended to the LILCO testimony as Attachments 1 and 2.

The LILCO testimony and Attachments are outside the expertise of the LILCO witnesses. LILCO's witnesses are not social scientists or psychologists, nor do they claim to be qualified in these areas of expertise. Thus, the testimony is incompetent testimony, i.e., testimony which is neither probative nor reliable, and should be stricken.

3. Page 6, last paragraph and Attachment 3. Again, LILCO raises in its testimony irrelevant assertions regarding the fact that Suffolk County planners originally designated relocation centers for Shoreham. For the reasons set forth in Part III.A.3 above, this testimony should be stricken. Testimony on actions which may or may not have been taken by Suffolk County planners are not relevant to this proceeding. This is particularly so since LILCO is no longer relying on two of the relocation centers which are the subject of this testimony.

4. Page 8, line 19 through page 9, line 2 (beginning with "And in" and ending with "center.'"). Here, LILCO's expert witnesses once again cite and interpret NRC case law. As stated in Part III.A.4 above, such citations to NRC case law are irrelevant and are appropriate only in post-trial briefs submitted by the parties' attorneys.

5. Page 9, lines 7-13 (beginning with "No" and ending with inserted language "9,000 persons") and Attachments 6, 7 and 8. This portion of LILCO's testimony addresses Suffolk County's planning efforts, which are not the focus of this proceeding. Thus, the testimony should be stricken. See Part III.A.3 above. Furthermore, the testimony and Attachments 6 and 7 discuss SCCC and SUNY Stonybrook, neither of which is

currently relied upon by LILCO as a relocation center. Therefore, any testimony on these facilities is irrelevant.

6. Page 10, the paragraph inserted after the second line (beginning with "In addition" and ending with "arise"). This testimony addresses additional facilities in Suffolk County which have not been designated by LILCO in its Plan or in its testimony as either primary or secondary relocation centers. These additional facilities are not identified, even though LILCO asserts that they could be made available to the Suffolk County Red Cross in the event of an accident at Shoreham. As stated in Part III.A.2 above, Contention 74 concerns only those facilities designated by LILCO as relocation centers -- not other unidentified buildings which may or may not become available to the Red Cross during a radiological emergency. Therefore, the testimony is irrelevant to Contention 74 and should be stricken.

Furthermore, even assuming the testimony is relevant, it is inadmissible because it is grossly speculative about the availability of unspecified facilities in the future. LILCO's witnesses are not competent to testify about which additional facilities may be selected by the Suffolk County Red Cross to become relocation centers in the event of a radiological

emergency at Shoreham. Testimony about what the Red Cross may or may not do is only admissible, if at all, through Red Cross witnesses.

6. Pages 10-11, Questions and Answers 10 and 11; Page 12, line 3 (the words "and Nassau") and lines 11-22 (beginning with "In addition" and ending with "if needed"); and Attachments 11 and 12. This testimony again addresses possible available facilities in Nassau County. For the reasons stated in Part III.A.2 above, this testimony is not relevant and should be stricken.

C. LILCO's Supplemental Testimony

1. Page 3, lines 19-27 (last two sentences on page). In this portion of LILCO's Supplemental Testimony, its witnesses claim that if the four centers designated in their testimony become full, the Red Cross will send evacuees "to other buildings nearby as the need arises." As argued above, this vague, unsupported claim by LILCO is not relevant to the Contentions at issue, which pertain to the specific, designated relocation centers upon which LILCO will rely during a radiological emergency. Furthermore, the witnesses' speculation about what the Red Cross may do with respect to these additional facilities, (which are nowhere identified), and the

availability of additional buildings to the Red Cross during a radiological emergency are not issues on which LILCO's witnesses are competent to testify. Furthermore, since these additional facilities are apparently known only to the Red Cross (LILCO's witnesses do not identify them, they are not mentioned in the LILCO Plan, and the County certainly has no idea of their identities), this testimony is meaningless, not probative, and cannot be cross examined. The testimony should be stricken.

2. Pages 4-5, Question and Answer 6. In Answer 6, LILCO's witnesses offer reasons why it eliminated SCCC and SUNY Stonybrook are being dropped as relocation centers. They also discuss their opinion about the excellence of those facilities as relocation centers, and the alleged opinion of State and local officials on the suitability of these facilities. All this testimony is irrelevant because LILCO no longer relies on SCCC or SUNY Stonybrook as relocation centers. Thus, this testimony should be stricken.

Furthermore, this testimony contains speculation by the LILCO witnesses to the effect that SCCC and SUNY Stonybrook would actually be made available during an emergency at Shoreham. This is precisely the sort of improper speculation that the Board has consistently stricken in the past.

3. Page 6, Question and Answer 10. Again, the LILCO witnesses testify that other unidentified buildings in Suffolk County could be used to receive additional evacuees. For the reasons cited in Part III.C.1 above, this testimony should be stricken.

4. Page 7, lines 2-11 (beginning with "Experience" and ending with "essential services"). Here, the LILCO witnesses attempt to bolster their argument that less than 20 percent of the population is expected to seek shelter. This argument is also made on pages 5-9 of LILCO's direct testimony on Contention 75, where LILCO's witnesses provide a number of reasons they believe less than 20 percent of the population would use relocation centers in the event of an emergency at Shoreham. Thus, the testimony is cumulative and unduly repetitious and should be stricken.

5. Page 7, line 12 through page 8, line 2; page 8, lines 8-17 (beginning with "Another" and ending with "85,000"); page 9, lines 2-11 (beginning with "and" and ending with "Suffolk County"); and page 15, lines 2-10 (beginning with "in addition" and ending with "centers"). LILCO's testimony here again addresses unidentified additional facilities LILCO believes will be made available during an emergency. For the

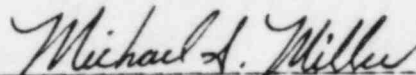
reasons stated in Part III.C.1 above, this testimony should be stricken.

In addition, the testimony proffered by LILCO's witnesses regarding possible relocation centers in Nassau County (i.e., page 8, lines 11-17 (beginning with "And as explained" and ending with "85,000"), page 9, lines 6-11 (beginning with "In addition," and ending with "Suffolk County") and page 15, lines 5-10 (beginning with "LILCO" and ending with "centers")) is cumulative and unduly repetitions (See, e.g., pages 26-27 of LILCO's direct testimony on Contentions 24.P) and should be stricken.

6. All inserts on pages 10-14 which are stricken as a result of the Board's rulings on Parts III.A and III.B above should also be stricken from pages 10-14, of the LILCO Supplemental Testimony.

Respectfully submitted,

Martin Bradley Ashare
Suffolk County Department of Law
Veterans Memorial Highway
Hauppauge, New York 11788



Lawrence Coe Lanpher
Karla J. Letsche
Michael S. Miller
Christopher M. McMurray
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

Attorneys for Suffolk County

June 26, 1984

RELATED CORRESPONDENCE

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))
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Docket No. 50-322 O.L.
(Emergency Planning)

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY MOTION TO STRIKE LILCO DIRECT TESTIMONY AND SUPPLEMENTAL TESTIMONY ON CONTENTIONS 74 AND 75 (RELOCATION CENTERS), dated June 26, 1984, have been served to the following this 26 day of June, 1984 by U.S. mail, first class; by hand when indicated by one asterisk; and by Federal Express when indicated by two asterisks.

James A. Laurenson, Chairman *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry R. Kline *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Frederick J. Shon *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edward M. Barrett, Esq.
General Counsel
Long Island Lighting Company
250 Old Country Road
Mineola, New York 11501

W. Taylor Reveley III, Esq. ##
Hunton & Willaims
P.O. Box 1535
707 East Main Street
Richmond, Virginia 23212

Mr. Jay Dunkleberger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Mr. Brian McCaffrey
Long Island Lighting Company
Shoreham Nuclear Power Station
P.O. Box 618
North Country Road
Wading River, New York 11792

Nora Bredes
Executive Director
Shoreham Opponents Coalition
195 East Main Street
Smithtown, New York 11787

Marc W. Goldsmith
Energy Research Group, Inc.
400-1 Totten Pond Road
Waltham, Massachusetts 02154

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, California 95125

Joel Blau, Esq.
New York Public Service Commission
The Governor Nelson A. Rockefeller
Building
Empire State Plaza
Albany, New York 12223

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edwin J. Reis, Esq. *
Bernard M. Bordenick, Esq.
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Stuart Diamond
Business/Financial
NEW YORK TIMES
229 W. 43rd Street
New York, New York 10036

Stephen B. Latham, Esq.
Twomey, Latham & Shea
P.O. Box 398
33 West Second Street
Riverhead, New York 11901

Docketing and Service Section
Office of the Secretary
1717 H Street, N.W.
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Hon. Peter Cohalan
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Eleanor L. Frucci, Esq. *
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

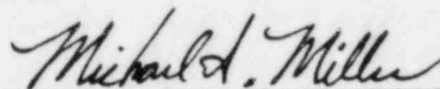
Jonathan D. Feinberg, Esq.
Staff Counsel, New York State
Public Service Commission
3 Rockefeller Plaza
Albany, New York 12223

Stewart M. Glass, Esq.
Regional Counsel
Federal Emergency Management
Agency
26 Federal Plaza
New York, New York 10278

Spence Perry, Esq.
Associate General Counsel
Federal Emergency Management Agency
Washington, D.C. 20471

James B. Dougherty, Esq.
3045 Porter Street, N.W.
Washington, D.C. 20008

Fabian Palomino, Esq. *
Special Counsel to the Governor
Executive Chamber
Room 229
State Capitol
Albany, New York 12224



Michael S. Miller
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

DATE: June 26, 1984

* By Hand
By Federal Express