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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

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

SUFFOLK COUNTY AND STATE OF NEW YORK MOTION FOR LEAVE TO FILE REPLY TO LILCO'S RESPONSE TO FEBRUARY 19 PROFFERED TESTIMONY ON THE DESIGNATION OF NASSAU COLISEUM AS A MONITORING AND DECONTAMINATION CENTER

LILCO's February 26, 1985 Response to Intervenors' Proffered Testimony on the Designation of Nassau Coliseum As a Reception Center (hereinafter, "Response") contains factual and legal misstatements which must be corrected and arguments which require a response. Accordingly, pursuant to 10 CFR § 2.730(c), Suffolk County and New York State request leave to file a reply to the LILCO Response.

Furthermore, LILCO's Response, and the attachments thereto, primarily dispute the merits of the testimony proffered by the County and State. They are filled with factual allegations, conclusions, and arguments properly pursued through cross-examination, through rebuttal testimony, or in post trial briefs after all relevant evidence has been considered. Such arguments -- that, in essence, the County and State witnesses are wrong in



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their factual assertions or their expert opinions -- have no place in a Response intended to deal only with the threshhold issues of whether to admit proffered evidence or to have a hearing on admitted evidence. More importantly, should this Board consider in any way any of the alleged "facts" or arguments based on such alleged facts that are in either LILCO's Response or the attachments thereto, under this Board's own procedures set forth in the January 28 Order, the County and State are entitled to respond to such facts before any determination is made concerning further proceedings. Accordingly, the Board should either disregard all factual assertions relating to the substance of the County and State testimony that are contained in LILCO's Response, or permit the County and State an opportunity to respond to them prior to any ruling.

In addition, the County and State must be granted an opportunity to file a detailed reply because LILCO's Response in essence, constitutes a motion to strike proffered pre-trial testimony. It is of course obvious under the most fundamental concepts of a fair proceeding that a party must have an opportunity to oppose motions to strike its testimony.

Finally, the County and State must be granted an opportunity to file a reply because of the importance of the issues to be addressed and the serious misstatements by LILCO upon which this Board might otherwise rely. Thus, a County/State reply would

address, among others, the following matters raised in LILCO's Response:1/

1. LILCO asserts that since the authenticity of LILCO's documents is not addressed by the County's and State's February 19 filings, "those documents are unchallenged" and "therefore should be admitted into the record." Response, at 3. In a reply, the County and State would demonstrate that LILCO's assertion is incorrect. Clearly, although the County and State have not challenged the authenticity of LILCO's documents, it cannot seriously be suggested that their substance has not been challenged, in light of the testimony filed by the County and State on February 19. Further, the County/State position on the admissibility of LILCO's documents has been clear from the start -- if they are admitted into evidence, the testimony proffered by the County and State must also be admitted, and an opportunity must be provided for cross-examination of LILCO's witness.

2. LILCO argues that the submission of cross-examination plans only to the Board, consistent with all prior practice in this proceeding, does not comply with the Board's January 28 Order and "denies LILCO the opportunity to respond." Response, at 3. The County and State reply would demonstrate the lack of basis for this argument, particularly in light of LILCO's 38-page

1/ LILCO's Response contains so many arguments and assertions that the County and State in this Motion merely highlight the matters which clearly merit a detailed reply. In our reply, we would address all of LILCO's arguments and assertions.

Response, with additional affidavits and other documents attached.

3. LILCO asserts that the County's and State's February 19 testimony raises issues outside the scope of the Board's January 28 Order, and that, therefore, the County and State are required to meet reopening standards and/or standards for admission of new contentions. Response, at 3-4 and throughout. The County and State reply would demonstrate what the February 19 testimony itself makes clear: that is, that the testimony addresses the merits of LILCO's designation of the Nassau Coliseum as a reception center, precisely the matter identified in the Board's Order. Clearly, as the County/State February 19 testimony shows, that designation by LILCO has substantial ramifications upon many different aspects of LILCO's proposed Plan -- ramifications that LILCO chose to ignore in its submission of evidence. The reply would demonstrate that LILCO's failure to address matters which are clearly relevant to existing admitted contentions and the adequacy and implementability of LILCO's latest relocation center scheme does not render inadmissible perfectly proper testimony on those subjects by the County and State.

4. LILCO asserts that every piece of the County's and State's testimony is "untimely" (see, e.g., Response at 6, 11, 14, 17, 20, 26, 29) on the theory that each one of the issues raised by the County and State supposedly could have been raised with respect to the relocation centers LILCO had proposed in its

three earlier relocation center schemes. A County/State reply would demonstrate the speciousness of this argument. First, none of LILCO's prior relocation center schemes ever involved a concrete reality; LILCO never had an agreement with <u>any</u> of the various facilities it proposed during the period May 1983 through October 1984, as Intervenors stated in their original Contentions 24.N and 24.O. It was clear from the beginning, to all except LILCO, that LILCO's "proposals" to utilize various named facilities were precisely that -- "proposals," and nothing else. To have submitted testimony going to the merits of their use as relocation centers -- when as a threshhold matter they were categorically unavailable for that purpose -- would have been a waste of time and resources. Thus, the reply would demonstrate that the issues addressed in the County and State testimony did not exist, and a discussion of them could not have taken place, until <u>after</u> LILCO came up with (1) a facility that actually purported to be available for use as a relocation center, and (2) a relocation scheme that was final and related to actually-available real facilities. <u>See</u> Suffolk County and State of New York Proposed Findings of Fact and Conclusions of Law on Offsite Emergency Planning (October 26, 1984), at 421-26, 430-31. Clearly that did not happen until October 30, 1984, when, for the first time, LILCO produced some evidence that a facility actually might be available for LILCO's use as a relocation center, and indicated that it intended to use the Nassau Coliseum as a

"reception center" in an overall relocation scheme also involving "congregate care centers."

Second, this reopening of the record occurred at LILCO's request, and over Intervenors' objection based on LILCO's untimeliness, solely to enable LILCO to attempt to fill a void its own prior failures concerning relocation schemes had left in the evidentiary record. In this context, a County/State reply would show that LILCO's suggestions that Intervenors are "untimely" in responding to LILCO's new evidence and that Intervenors must meet a reopening or late-filed contention standard in responding to LILCO's new evidence are wholly without basis in fact, logic or reason.

Third, the reply would demonstrate that LILCO is asking this Board for a favor and inviting this Board to commit clear error. The relocation center issues were litigated in 1984 and the County and State clearly prevailed on those issues. This Board, over County and State objections, ruled in January that LILCO should have yet another chance -- its fourth -- to try and carry its burden of proof. LILCO wants to add to that, however, that the County and State essentially are bound to last year's record -- so that any evidence that conceivably might have been thought of last year (but was unnecessary to the County and State prevailing last year) would now be inadmissible. LILCO cannot have it both ways. If LILCO gets a new chance to prove its case, the County and State get an equal chance to oppose LILCO's case. The

concept of untimeliness, therefore, is just a device by which LILCO attempts to buttress its case, rather than a justifiable legal principle in this reopened proceeding.

5. LILCO asserts that matters raised in the State's testimony are "matters for New York State agencies" that are "not cognizable" in this proceeding, or are "irrelevant to NRC regulations." See, e.g., Response, at 20, 24, 26, 27, 30, 33-36. A County/State reply would demonstrate that these assertions are wrong. How can LILCO suggest that this Board cannot recognize the fact that LILCO's latest relocation center scheme is illegal because it clearly violates applicable New York State laws? Similarly, how can LILCO suggest that documented potential harm to the public's health and safety resulting from LILCO's latest relocation center proposal is "not relevant to NRC regulations," which are expressly designed to protect the public's health and safety? Whether New York State agencies may independently seek to prosecute violations of New York law is what is not relevant here. The fact is that this Board, by law, cannot close its eyes to facts which indicate that LILCO's proposal cannot lawfully be implemented and that, if implemented, could seriously endanger the residents of Suffolk and Nassau Counties.

6. LILCO attempts to submit additional evidence in the form of two affidavits and other attachments to its Response. A County/State reply would demonstrate that LILCO's attempt violates this Board's Orders of January 4 ("LILCO will file with its

Motion [to Reopen] the evidence it proposes to have considered" (Tr. 15,794 (Laurenson)) and January 28, 1985. The procedure established for LILCO's proposed reopening nowhere contemplated the filing by LILCO of additional or rebuttal testimony, affidavits, or other evidence after it had filed its Motion to Reopen.

7. LILCO asserts that "no relocation center for any other nuclear plant in New York State has been required to apply for a SPDES permit" (Response, at 27, n. 12) or "has been the subject of a state environmental impact statement" (Weismantle Affidavit, ¶ 1). Not only is this kind of factual argument improper in LILCO's Response which is supposed to go only to the admissibility and need for a hearing issues, it is also inapposite and grossly misleading. Among other things, the County/State reply would demonstrate that LILCO neglects to mention that each of the operating nuclear plants in New York State began commercial operation before the effective dates of both the State Environmental Quality Review Act ("SEQRA") and the Environmental Conservation Water Pollution Control Act. This is not the case for the Shoreham plant.

8. LILCO attempts to argue that as a matter of law SEQRA does not apply to LILCO's proposed use of the Nassau Coliseum as a decontamination center. Response, at 21-25. A County/State reply would demonstrate that these arguments are irrelevant and, in any event, incorrect as a matter of law. Moreover, whether

LILCO believes New York's witness, the Executive Deputy Commissioner for the New York State Department of Environmental Conservation, has improperly interpreted or applied the law he is by statute empowered and required to administer and enforce, simply does not matter. The fact this Board cannot ignore is that the State of New York has taken the position that LILCO's proposed use of the Nassau Coliseum violates State law, and Nassau County's purported agreement to permit LILCO to use the Coliseum is therefore without effect, since without an environmental impact statement, or a negative declaration, Nassau County has no power to permit the use requested by LILCO.

9. LILCO baldly asserts that "New York State's actions indicate that their [sic] primary interest in this issue is to delay further a decision in the emergency planning proceedings." Response, at 24. A County/State reply would demonstrate that this assertion is absolutely baseless and should be rejected out of hand. Further, a County/State reply would demonstrate that, contrary to LILCO's suggestions, the four-month limitation period for court action relating to SEQRA noncompliance does not even begin to run until after the agency (here, Nassau County) has either issued a negative declaration or performed an environmental impact study -- neither of which has occurred yet in this case.

10. LILCO references Contention 81 to argue that the New York testimony by Ms. Meyland is improper. Response, at 29-33.

A County/State reply would demonstrate that the mere fact that Contention 81 and LILCO's testimony on that contention mentioned "contaminated water" does not bar the proffered New York State testimony concerning the new, previously undisclosed health threat posed by LILCO's recent proposal to decontaminate potentially thousands of automobiles and persons at the Nassau Coliseum, where contaminated water would threaten the water supply relied upon by residents of Brooklyn, Queens, Nassau and Suffolk Counties. Furthermore, the reply would show that LILCO's argument that "NRC regulations do not require particular provisions for decontaminating the general public" is also beside the point, in the face of the clear threat to public health and safety that is <u>created</u> by LILCO's proposed use of the Nassau Coliseum. Testimony on that threat is clearly relevant and probative and cannot be ignored by this Board.

11. LILCO asserts that the testimony of Leon Campo is "outside the scope" of, or "irrelevant" to, this proceeding. Response, at 5-10. A County/State reply would demonstrate that this LILCO argument is completely without basis. Whether Mr. Campo focuses on the "congregate care" portion rather than the "reception center" portion of LILCO's latest relocation scheme is immaterial. Clearly, the fact that the so-called "agreements" between the Red Cross and proposed congregate care centers, relied upon by LILCO in its documents filed on January 11, <u>do not exist</u> is something that this Board cannot ignore. Indeed, what

could be more relevant to a contention that there are no agreements with facilities relied upon for relocation purposes (Contention 24.N) than Mr. Campo's testimony that, in fact, no such agreements exist?2/ Further, a reply would demonstrate that the remainder of LILCO's Response concerning Mr. Campo's testimony consists of unsupported conclusory allegations and LILCO's wishful thinking that boil down to nothing but a suggestion that this Board should ignore the plain facts set forth by Mr. Campo. Obviously, this Board cannot follow LILCO's suggestion, since to do so would be a plain violation of the Board's obligations under NRC regulations.

12. LILCO asserts that the testimony of James H. Johnson, Jr. "is not probative." Response, at 11-13. A County/State reply would demonstrate that this entire LILCO argument goes solely to the weight to be accorded Dr. Johnson's testimony, and is based on LILCO's presumption that, upon proper cross-examination, Dr. Johnson had, as alleged by LILCO, "no basis" for his opinions and no "evidence, literature or studies to support his hypothesis." Id., at 11, 12. LILCO conveniently ignores the fact that in his testimony, Dr. Johnson cites specific surveys

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2/ Indeed, since Mr. Campo advised the Board in his testimony filed February 19, 1985 that the East Meadow Union Free School District had not entered into any agreement with LILCO or the Red Cross to shelter Shoreham evacuees, at least three other school districts have informed the Board that they also have no agreements with the Red Cross or LILCO permitting the use of their facilities to shelter Shoreham evacuees. Copies of letters written by the superintendents of the Garden City Public Schools, the West Hempstead Union Free School District and Oceanside Union Free School District are attached hereto.

that support his opinions. Should LILCO wish to probe the bases for such testimony further, it can do so during a hearing. A County/State reply would therefore show that LILCO's conclusory assertion that the testimony "is not probative" must be rejected.3/

13. LILCO asserts that the testimony of Chief Roberts and Mr. Kilduff is an "attempt to expand planning boundaries beyond the 10-mile EPZ." Response, at 15. A reply would demonstrate that it is LILCO's recent proposal to use a facility located 43 miles from the plant that has "expanded the planning boundaries," not Intervenors' testimony. Further, the reply would demonstrate the absurdity of LILCO's suggestion that the County and State are trying to expand EPZ boundaries. The fact is that this testimony addresses potential congestion that could affect the use of the Nassau Coliseum as a monitoring/decontamination center. That is hardly beyond the scope of this proceeding when in her affidavit Ms. Robinson also addresses such congestion in the parking lots and streets surrounding the Coliseum. Again, the reply would demonstrate that LILCO wants one standard to apply to the admission of its testimony and a wholly different standard to apply to the testimony of the County and State.

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3/ In a reply, the County and State would also demonstrate that the FEMA informal discovery response (attached to LILCO's Response), addresses almost exclusively the location of congregate care centers from plant sites -- not centers for monitoring and decontaminating evacuees, which is the subject of Dr. Johnson's testimony. Accordingly, the suggestion that the FEMA documents should have been referenced by Dr. Johnnson is without basis.

14. LILCO also asserts that the driving times in Chief Roberts' testimony are not linked to NUREG 0654, Section II.J.12. Response, at 18. In a reply, the County and State would demonstrate that the time needed to get from a LILCO transfer point (already outside the EPZ) to the Nassau Coliseum must be added to the time necessary to get out of the EPZ (already discussed in litigation of Contention 65, and estimated by LILCO, for the full EPZ, to be between 4-1/2 to 6 hours, and by the County and State to be between 12-17 hours) which clearly shows LILCO's noncompliance with the 12-hour monitoring time in Section II.J.12.4/

15. LILCO asserts that the Roberts and Kilduff testimony is "factually flawed" because it assumes that all EPZ evacuees will travel to the Coliseum. Response, at 18. A reply would demonstrate that LILCO's own proffered evidence (Robinson Affidavit, Attachment 3) explicitly states that "all evacuees will be directed to go to the Coliseum."5/ Further, in asserting that the testimony is "untimely," LILCO confuses the number of evacu-

4/ In a reply, the County and State would also show that LILCO mischaracterizes Chief Roberts' testimony. That testimony does not state that two hours is the "maximum driving time to the Coliseum" (Response, at 18); indeed, it makes clear that during an emergency at Shoreham, actual driving times would likely be hours longer than the times compiled by the Suffolk County Police under normal traffic conditions.

5/ Since LILCO's proffered evidence of January 11 for the first time revealed that LILCO now intends to direct all evacuees to the Nassau Coliseum, the County and State would also demonstrate in a reply that the testimony of Dr. Radford, which raises concerns regarding the ability of LILCO to monitor and decontaminate Shoreham evacuees at the Coliseum, is not untimely, as alleged by LILCO. Response, at 14.

ees who will likely seek shelter in relocation centers with the number of evacuees who will go to the Coliseum to be monitored and decontaminated. The first issue has been litigated previously and is not discussed in the February 19 testimony; the second issue has not.

16. Finally, LILCO asserts that Dr. Radford's testimony "offers no data" to support his hypothesis that use of the Nassau Coliseum would likely result in an incremental increase in adverse health effects. Response, at 13-14. In a reply, the County and State would demonstrate that Dr. Radford's testimony is based upon his professional opinions and the testimony of qualified traffic experts (Chief Roberts and Mr. Kilduff). This Board has previously ruled that the factual support for a witness' expert opinion can properly be premised on the testimony of others, and clearly, LILCO can further probe the bases for Dr. Radford's conclusions upon cross-examination.

Respectfully submitted,

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