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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

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In the Matter of	Docket No. 50-322-OL-3
LONG ISLAND LIGHTING COMPANY	(Emergency Planning Proceeding)
(Shoreham Nuclear Power Station, Unit 1)	June 10, 1985

Memorandum and Order
Ruling On Motion Of Suffolk County And State
Of New York For Reconsideration And Other Relief

Introduction

On May 17, 1985, Intervenors Suffolk County and New York State filed a motion seeking reconsideration of the Board's Order of May 6, 1985, delineating the scope of the oral hearing to be held on the reopened record on Contention 24.O or, in the alternative, to reopen the record on Contentions 24.N, 74 and 75, or on failure to take either of the foregoing actions, to certify the issues to the Appeal Board.

LILCO filed a response to Intervenors' motion on May 30, 1985, asserting that the three requests should be denied. NRC Staff, on June 3, 1985, filed its response, in which it also contended that the requests for relief should be denied.

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The Board has reviewed the motion and responses and has determined that movants are not entitled to any of the relief they seek. We will treat the requests for reconsideration, rehearing, and certification in turn.

Request For Reconsideration

The Board's Memorandum of May 6, 1985, noted that it was on January 28, 1985, that we granted LILCO's motion to reopen the record on Contention 24.0. The issue involved in the contention is whether the designated relocation center, the Nassau Veterans Memorial Coliseum (Coliseum) is functionally adequate to serve as a relocation center for the anticipated general evacuees. The matter evolved from a ruling on August 21, 1984, by the Board during the course of the evidentiary hearing, that there was a deficiency in LILCO's proof as was alleged in Contention 24.0, in that the Plan failed to designate a relocation center.

Contentions dealing with relocation center issues include Contentions 24.N, 74 and 75, among others. An evidentiary record was made on these contentions. Until Intervenors' filing on May 30, 1985, no one sought a broader reopening of the record than that sought by LILCO on Contention 24.0 and none was authorized.

LILCO proffered an affidavit with six attachments as constituting the evidence it would submit for the reopened record. To aid the Board in deciding what procedure should be followed for compiling the evidence for Contention 24.0, in our order of January 28, 1985, we inquired of

the parties as to their positions on the authenticity of LILCO's proffered documents, and whether there is a need to cross-examine LILCO's witness on the substance of the designation of the Coliseum as a relocation center. The Board also required the parties to submit copies of documents, narrative testimony, or an affidavit of any witness whose testimony on the merits of LILCO's designation of the Coliseum as a relocation center was said to be necessary.

Based on the responses, we ruled that an oral hearing was needed to resolve the contested issue in Contention 24.0. We decided that the proffered LILCO affidavit with attachments should be considered Applicant's prefiled testimony for the oral hearing. At no time was that determination intended to indicate that the documents were accepted into evidence; nor were they. To the contrary, we stated that "the parties have the right to object to it on customary grounds and to cross-examine on it."

The Board similarly accepted as prefiled testimony submissions from FEMA and Intervenors that deal with the adequacy of the Coliseum as a relocation center. As part of case management of a proceeding with a record in excess of 22,000 pages, the Board would not accept as prefiled testimony statements that address matters that are not within the scope of Contention 24.0. It was those statements that were submitted by Intervenors that were rejected.

To assure the legal sufficiency of the reopened proceeding the Board advised it would favorably consider a subpoena request compelling

the attendance of a nonparty, where that person has evidence that goes primarily and directly to the matter at issue. In delineating the scope of the oral hearing for the reopened record on Contention 24.0 we afforded the parties the due process required by the Administrative Procedure Act.

In seeking reconsideration, Intervenors premise their request on the assertion that "the County and State have been improperly denied an opportunity to contest LILCO's case on Contentions 24.N, 24.0, 74 and 75." The claim is without merit and no permission will be granted to permit Intervenors to litigate Contentions 24.N, 74 and 75 along with 24.0.

In looking first at Contention 24.0, the record is yet to be made. LILCO's proof will be limited to the same issue as that of all of the parties, i.e., whether the Coliseum is functionally adequate to serve as a relocation center for the anticipated general evacuees. None of the Applicant's prefiled testimony has been admitted into evidence, as Intervenors erroneously assert. Intervenors have the right to cross-examine on the testimony and to object to it. Intervenors have a similar right to present evidence dealing with the merits of the controversy. It is permissible to subpoena the attendance of a nonparty who can provide testimony on the merits.

The proceeding is limited to Contention 24.0 and only testimony relevant to that issue will be heard. For example, we will not hear

testimony on "congregate care centers", which are locations evacuees proceed to after leaving the relocation center. A different service is provided to the evacuees at the congregate care center than at the subject relocation center. Furthermore, Intervenors have had the opportunity to litigate the issue of congregate care centers, which they did. See paragraphs 631 and 639 of Intervenors' Proposed Findings of Fact and Conclusions of Law, of October 26, 1985. Reopening the record on Contention 24.O does nothing to alter the record already made on such matters as congregate care centers and on which Intervenors assert they should prevail.

Intervenors have stated that the Board would not hear evidence on the adequacy of the Coliseum by choosing to disregard testimony of its possible unavailability. The allegation is without foundation. Intervenors have been, and will be, given full opportunity to contest LILCO's case on Contention 24.O.

We find no basis upon which we could allow Intervenors to contest LILCO's case on Contentions 24.N, 74 and 75, where the reopened proceeding only involves Contention 24.O. The State and County assert in the Introduction to the motion that the Board granted LILCO's motion to reopen the evidentiary record concerning admitted relocation center "contentions". This is incorrect, as the reopening deals with the single relocation issue. Further, Intervenors were given the opportunity to litigate the three additional contentions, and in the case of Contention 24.N did so successfully for the most part.

In the Board's Partial Initial Decision of April 17, 1985, LBP-85-12, 21 NRC ___ (1985) we found in section XI.B.12 at 300-301, in regard to relocation centers for health care facilities, "Agreements between health care facilities and reception centers themselves would provide the requisite assurance that health and safety of residents will be protected. However, at this time relocation centers have not been designated and this constitutes a deficiency in the Plan." Again we found in section XII.6 at 332, in regard to schools, "However, the fact remains that reception centers have not as yet been identified. We therefore find for the Intervenors on the issue of the identity of reception centers for school children". The Board did find, contrary to Intervenors assertion in Contention 24.N, that LILCO has done all that it could be reasonably expected in its attempt to find relocation centers for hospitals that might be evacuated. See section XI.B.12. That last finding by the Board is totally unrelated to the issue in Contention 24.O, and there is no basis to relitigate that issue in the subject proceeding. Likewise, there is no basis to permit Intervenors to relitigate Contentions 74 and 75 in the subject reopened proceeding. It is noted that Contention 74, which deals with LILCO naming Suffolk County Community College and the State University of New York at Stony Brook as relocation centers, has been rendered moot.

Intervenors have failed to submit meritorious grounds for the Board to reconsider its Order of May 6, 1985, delineating the scope of the reopened proceeding on Contention 24.O, and to arrive at a different result.

Request to Reopen the Record on Contentions 24.N, 74 and 75

Suffolk County and New York State have moved to reopen the record in this proceeding for the purpose of admitting written testimony rejected by this Board's Order of May 6, 1985, wherein the Board delineated the scope of the hearing to be held on Contention 24.O. Intervenors now seek reopening of the record on Contentions 24.N, 74 and 75. We note at the outset that Intervenors' motion does not explain how the proffered testimony is related to Contentions 24.N, 74 or 75.

The standard for reopening a closed evidentiary record is not in dispute. A party seeking to reopen the record bears a "heavy burden" of meeting the following three criteria: (1) The motion to reopen must be timely; (2) the motion must address a significant safety or environmental issue; and (3) the movant must show that a different result might be or might have been reached had the newly proffered materia' been considered initially. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983).

Intervenors argue that their May 17, 1985 motion to reopen the record on Contentions 24.N, 74 and 75 is timely. Intervenors claim that they understood the Board's January 28, 1985 order granting LILCO's motion to reopen to mean that additional testimony would be taken on Contentions 24.N, 24.O, 74 and 75, and that it was not until the May 6, 1985 Board Order rejected the proffered testimony as not relevant to

Contention 24.0 that Intervenors realized that the record was not reopened on the other contentions as well. Intervenors argue that they were operating under an erroneous belief that the record had been reopened on Contentions 24.N, 74 and 75, as well as Contention 24.0. They claim that their motion to reopen is timely because it was filed soon after Intervenors learned of their error.

We find, however, that Intervenors understanding was clearly contrary to the information available to them concerning the scope of the reopening of the record. First, LILCO sought reopening specifically on Contention 24.0 in its January 11, 1985 motion. Second, the Board Order of January 28, 1985 made no mention of contentions other than 24.0. Finally, the Board's invitation to the parties to submit direct testimony also indicated the limited scope of the reopened proceeding. The parties were invited to submit testimony on the merits of LILCO's designation of the Coliseum as a relocation center. For these reasons we find that Suffolk County and the State of New York were reasonably advised that the record had only been reopened to take further evidence on Contention 24.0, which alleges that no relocation center had been identified. The motion for reopening the record is untimely.

The untimeliness is not the critical factor for denying the motion to reopen the record on Contentions 24.N, 74 and 75. The motion must be denied because Intervenors have not successfully satisfied the criteria that the motion must address a significant safety or environmental issue and movant must show that a different result might be reached had the newly proffered material been considered initially.

Intervenors' argument on the significant safety issue and different outcome criteria are wholly contained in the following:

> And, with respect to the remaining two criteria required for reopening (significant safety issue and that a different result might be reached), there can be no question that the relocation center issues raised in the proffered testimony adequately meet these criteria. 15/ Indeed, LILCO's January 11 motion to reopen admitted as much.
>
> 15/ For example, a "different result" would of course be required if Mr. Campo's testimony is accepted to demonstrate that LILCO has no congregate care centers. LILCO then clearly would not comply with 10 CFR § 50.47(b)(8) or NUREG 0654, Section II.J. And, clearly, the lack of such centers constitutes a significant safety issue -- if LILCO cannot care for evacuees, the safety of the public is certainly imperiled.

Intervenors have used only the statement of Leon Campo to support their argument that the criteria for reopening the record have been met. They cite it as an example and forgo discussing the other statements. The Board cannot proceed here by the use of an alleged example because the statements submitted by the others relate to different subjects and they would have to be analyzed individually, with respective arguments, to determine if they support the criteria for reopening the record. Intervenors in choosing to discuss only the Leon Campo statement have in effect decided to make their case on reopening solely on his submittal.

Intervenors premise their claim that there is a significant safety issue on the assertion Mr. Campo's testimony would demonstrate "that LILCO has no congregate care centers". This is an incorrect

characterization of the substance of his statement. It does not support such a claim.

Leon Campo is the Executive Assistant for Finance (Assistant Superintendent of Schools) East Meadow Union Free School District, Nassau County, New York.

His conclusion as to congregate care centers, in his statement, is as follows:

> A. LILCO and the Red Cross have no basis for their claim that there exist agreements that provide assurance that there would be sufficient sheltering capacity for evacuees during a radiological emergency at Shoreham. There is certainly no agreement between the East Meadow Union Free School District and LILCO or the Red Cross to provide such shelters, and based upon my conversations with other school officials and administrators, I believe that is the case at many or all the other schools and districts relied upon by LILCO and the Red Cross.

Intervenors' claim that Mr. Campo's statement raises a significant safety issue is based on the assertion that the statement established that LILCO has no congregate care centers. Since this is not the case there is no support for Intervenors' claim and it must fail.

In actuality Intervenors seek to relitigate a past dispute as to whether there are binding agreements between the American Red Cross and some 50 school organizations and churches, and irrespective of the foregoing, whether there is adequate assurance that there will be sufficient sheltering capacity for evacuees during a radiological emergency at Shoreham.

The referred to issues already have been made part of the parties' Proposed Findings of Fact and Conclusions of Law. Intervenors contend

in paragraph 639 at 429 that the dispute should be decided in their favor on the basis of the record made in the proceeding. The purported significant safety issue is nothing more than an attempt by Intervenors to bring additional supportive evidence, not of major consequence, to bear on an issue that has been litigated. It does not meet the criterion for establishing a significant safety issue for the reopening of the record.

The Board is unconvinced that movants have shown a different result might be reached had the newly proffered material been considered initially.

Again, Intervenors claim that Mr. Campo's statement might cause a different result is based on the assertion that the statement establishes that LILCO has no congregate care centers. Since that is not the case there is no support for Intervenors' claim and it must fail.

The criterion of movants being able to show that a different result might be reached had the newly proffered material been considered initially is not met where the additional evidence is nothing more than an attempt to further bolster the existing record with information that is not significantly different in effect from that previously presented.

Intervenors have failed to carry their heavy burden for reopening the record on Contentions 24.N, 74 and 75. Their request to do so is hereby denied.

Request for Certification to the Appeal Board

Intervenors request certification to the Appeal Board in the event that their claims for relief on the issues of reconsideration of the Board's May 6, 1985 Order and reopening of the record on Contentions 24.N, 74 and 75 are denied. The County and State admit that the Commission's Rules of Practice contain a general prohibition against interlocutory appeals. 10 CFR §2.730(f). In addition, LILCO and the NRC Staff correctly point out that absent exceptional circumstances, rulings on the admission of evidence do not provide any basis for certification. See Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98 (1976). However, Intervenors cite several exceptions to this prohibition. Those exceptions include situations where (1) in the judgment of a presiding officer prompt decision is necessary to prevent "detriment to the public interest or unusual delay or expense." 10 CFR § 2.730(f); (2) "a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission or Appeal Board and when the prompt and final decision of the question is important for the protection of the public interest or to avoid undue delay or serious prejudice to the interests of a party." 10 CFR Part 2, App. A. V.(f)(4); and (3) the ruling in question affects "the basic structure of the proceeding in a pervasive and unusual manner," Houston Lighting and Power Co. (Allens Creek Station), ALAB-635, 13 NRC 309, 310 (1981), or "threatens the party adversely affected by it with serious and irreparable impact" which, as a practical matter, cannot be alleviated by a later appeal.

Houston Lighting and Power Co. (South Texas Project), ALAB-608 12 NRC 168, 170 (1980).

Intervenors claim that "the public interest would clearly be served by prompt resolution of the issues now before the Board", yet they cite no facts to show why prompt review is necessary under any of the exceptions to the general prohibition against interlocutory appeals. Intervenors first claim fails to meet the standard for any of the above noted exceptions. Secondly, Intervenors state that the "need to compile a full and complete evidentiary record concerning LILCO's proposed use of the Nassau Coliseum is compelling - and substantially in the public's interest." Again, Intervenors do not provide the facts necessary to support such a claim.

For the most part the record in the proceeding has been completed. A partial initial decision covering most of the contentions has already issued and is on appeal. The subject reopening is limited to the area of relocation, which is one of numerous issues in the proceeding. The Board's ruling on the extent of the reopened proceeding is but a usual adjudication in a very lengthy proceeding. Intervenors have failed to provide us with any satisfactory justification to conclude that a prompt decision through the certification process is necessary to prevent detriment to the public interest or unusual delay or expense.

For these reasons we find that Intervenors have failed to demonstrate that the evidentiary rulings or the ruling on the reopening the record fall within any of the exceptional circumstances permitting

interlocutory appellate review. Accordingly, their request for certification is denied.

ORDER

The motion of Suffolk County and the State of New York for reconsideration of the Board's Order of May 6, 1985, or alternatively, to reopen the record or to certify the issues to the Appeal Board, is hereby denied.

THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
ADMINISTRATIVE LAW JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Mr. Frederick J. Shon
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 10th day of June, 1985.