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

In the Matter of	Docket No. 50-322-OL-3
LONG ISLAND LIGHTING COMPANY	(Emergency Planning Proceeding)
(Shoreham Nuclear Power Station, Unit 1)	June 14, 1985

MEMORANDUM AND ORDER
(Ruling On Motion To Intervene)

Introduction

By motion dated May 21, 1985, the Long Island Coalition for Safe Living petitioned the Board for leave to intervene in the reopened proceeding on Contention 24.0, scheduled to be heard on June 24, 1985, at Hauppauge, New York. 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, resulting from a radiological emergency at Shoreham.

Petitioner represents itself as a coalition of some 13 named groups in Nassau County, who are concerned with the health and well being of the residents of Nassau and Suffolk Counties. It seeks to have the

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Commission invalidate the proposed use of the Coliseum as part of the LILCO evacuation plan on two grounds:

1. The Nassau County Board of Supervisors never approved the use of the Coliseum as part of the LILCO evacuation plan in the event of a nuclear accident at Shoreham; and

2. The use of the Coliseum as a radiation decontamination center poses great danger and harm to the residents of Nassau County.

LILCO filed an answer on June 10, 1985, opposing the petition on the grounds: 1) it is inexcusably late and fails to meet the standard for untimely filings, and 2) the matters Petitioner seek to raise are collateral to the Board's inquiry and are thus specifically excluded by the Board's May 6, 1985 Memorandum and Order.

In its response of June 7, 1985, NRC Staff requested that the late filed petition be denied. The Staff did so on the grounds that Petitioner never discussed the elements of the five factor test contained in 10 CFR 2.714(a)(1), which the Board must balance and weigh in Petitioner's favor in order to entertain a nontimely filing to intervene, and that if one were to examine each of the factors, they would show Petitioner has no basis for intervention. Staff saw no need to address Petitioner's alleged failure to establish standing to intervene, as required by 10 CFR 2.714(d), because Petitioner had not met the five part test for late intervention.

On June 11, 1985, one day after the due date for filing responses, Suffolk County filed a motion for leave to submit a late response to the petition to intervene. The basis for the County's motion was the

confusion surrounding the County's emergency planning position. The County's motion was accompanied by its proferred filing. The Board grants the motion and accepts the filing.

In the response, the County asserts the petition to intervene should be granted. It contends that Petitioner's filing was timely submitted because it was not until the Board's ruling of May 6, 1985, that Petitioner could know that its concerns were not going to be covered in the litigation called for by the Board. The County further claimed that as a matter of sound policy the Board should permit and encourage Petitioner's appearance and participation because it is a group which is prepared to bring serious matters before the Board.

No other party filed a response to the petition for leave to intervene.

Discussion

As pertinent, 10 CFR 2.714(a)(1), on the matter of nontimely filings for intervention, provides:

> Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d) of this section:
>
> (i) Good cause, if any, for failure to file on time.
>
> (ii) The availability of other means whereby the petitioner's interest will be protected.
>
> (iii) The extent to which the petitioner's participation may reasonably be expected to

assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The threshold question is whether the May 21, 1985 petition is a nontimely filing. The record shows that it is.

Petitioner states that the residents of Nassau County knew of the designation of the Coliseum as part of the LILCO Plan when Nassau County Executive Francis T. Purcell, offered it for use. This places general knowledge of the subject in the County in October 1984, when Mr. Purcell's action took place. See Attachment 2 to LILCO's petition to reopen the record on Contention 24.0, to designate the Coliseum as a relocation center, of January 18, 1985.

The designation of the Coliseum as a reception center was first brought before the Board in October 1984, when LILCO sought to introduce documents into the record, naming the facility as a reception center, without reopening the record, by characterizing the information as merely confirmatory. The Board's denial of the procedure resulted in the filing of the motion to reopen, of January 18, 1985. The matter has been under continuous litigation ever since. On January 28, 1985 the Board ordered that the record be reopened on Contention 24.0. Matters in dispute have involved the nature of the procedure to be followed for the reopened proceeding, the extent of the issue to be litigated, and the kind of evidence that would be presented. All parties actively

participated in this litigation. Petitioner did not do so, for it was not until the end of May 1985 that it sought to intervene in the proceeding.

Official notice is taken of the fact that Petitioner presented views on the use of the Coliseum as a relocation center to Supervisors of Nassau County in mid-January 1985.

Clearly the petition was some four months late, should one conservatively measure from the time LILCO petitioned the Board to reopen the record to designate the Coliseum as a relocation center. The lateness could reasonably be measured from October 30, 1984, when LILCO sought to introduce documents into the record designating the facility as a reception center, without a reopening.

The four month tardiness should further be viewed in the context of the overall proceeding. Hearings on the emergency planning phase of the Shoreham case commenced in December 1982. The hearing was closed on August 29, 1984, after a record of some 22,000 pages was compiled . Issues pertaining to the relocation of evacuees were litigated during the course of the hearing. Contention 24.0 is but a part of the issues. The Board issued a partial initial decision, dated April 17, 1985, which decided most of the contested issues in the proceeding. Cross appeals by Applicant and Intervenors are pending before the Appeal Board.

Petitioner's lateness in making its filing also encompasses a critical time for the reopened proceeding. Since January 1985, the nature of the reopened proceeding was fully delineated, and prefiled testimony was submitted for the June 25, 1985 hearing. Petitioner has

not been a participant to any of this. Thus the petition must be considered late not only because of the time that has elapsed since the issue first became known to Petitioner but also it comes late in a proceeding that is now close to completion.

The above recitation of the history of the litigation surrounding the reopened proceeding makes it obvious that the County's claim that the Petitioner's filing at the end of May 1985 is timely, is without merit. The time for timely filing for participation is when it may affect the outcome of the matter and not long after it was determined that Petitioner's concerns are not at issue in the reopened proceeding. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 398 (1983).

The Five Factor Test

Having found that the Petitioner's motion to intervene is nontimely, we next determine whether the Petitioner can meet the five part test of 10 CFR 2.714(a)(1) for acceptance of a late-filed petition. In order to succeed, a late petitioner must discuss each of the five factors and demonstrate that, on balance, they favor intervention. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980). Petitioner's motion is deficient on its face because it does not address any of the factors, nor does it even attempt to demonstrate why any specific factor should be weighed in its favor. However, as provided by regulation, we will consider each factor as best we can from the filing before us.

The petition will be treated as a request for participation in the hearing now scheduled to begin June 25, 1985, the scope of which has long been established. A late petitioner is constrained to take the proceeding as it finds it, even if its petition is admitted.

(a) Good cause for failure to file on time.

It is firmly established that Petitioner has not filed its petition to intervene on time. No explanation was given by Petitioner for the failure to file on time so that a finding of good cause cannot be made. We therefore conclude Petitioner has failed to meet its burden under 10 CFR 2.714(a)(1)(i).

The Appeal Board has ruled that "In the absence of good cause for its tardiness, a petitioner must make a compelling showing on the other four factors in order to justify late intervention." Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982).

To the extent Petitioner seeks to litigate issues that are beyond the scope of the reopened proceeding it will not be capable of satisfying the four remaining factors. They have no applicability to irrelevant issues.

(b) Protection of petitioner's interests by other means.

The issues Petitioner seeks to litigate are outside the scope of the hearing as defined by the Board. It is therefore irrelevant whether Petitioner's interest will be protected by other means. Setting this aside, Petitioner has submitted issues that could be treated by

local courts. It has available to it recourse to local courts to resolve the matter of the alleged failure of the Nassau County Board of Supervisors to approve the use of the Coliseum in the event of a nuclear accident at Shoreham. In conjunction with its second issue that "no Department of Environmental Conservation impact study has occurred" (Petition, at 5), it appears to the Board that relief could be sought before state agencies and state courts that have appropriate jurisdiction.

Petitioner has not been persuasive that its interests may not be protected by other means. It has failed to meet its burden under 10 CFR 2.714(a)(1)(ii).

(c) Petitioner's ability to assist in developing a sound record.

With respect to the matter of developing a sound record, the Appeal Board has stated that the petitioner should set out "with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses and summarize their proposed testimony." Mississippi Power and Light Co (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982), and cases cited therein. Petitioner has not demonstrated how it might show that its allegations are true. Neither has it indicated that it would present any evidence or witnesses, nor has it summarized its proof. Petitioner does not demonstrate that it has any special expertise which would assist the Board in deciding Contention 24.0. Furthermore, the prospective intervenor has not shown it will make a "valuable contribution beyond that to be expected of the existing parties." Long Island Lighting Co.

(Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 400 (1983).

Petitioner's vague and unsupported statements are insufficient to meet the standard set by the Appeal Board in Grand Gulf, supra, and Shoreham, supra. We weigh this factor against Petitioner.

(d) Representation of Petitioner's interests by existing parties.

10 CFR 2.714(a)(1)(iv) requires us to determine whether the Petitioner's interests will be adequately represented by the existing parties. It states that it is concerned with the health and well being of the residents of Nassau County, as well as those of Suffolk County. Both Suffolk County and New York State have vigorously litigated the emergency planning issues. We note that Suffolk County has previously sought to litigate issues of concern to Petitioner. Even if Suffolk County were not directly concerned with the matters important to citizens of Nassau County, we find that New York State can adequately represent Petitioner's interests in the upcoming hearing on the use of the Coliseum as a relocation center. We find against Petitioner on this criterion.

(e) Delay and broadening of the issues.

The matter of the functional adequacy of the Coliseum as a relocation center is set for hearing beginning June 25, 1985. The parties to this proceeding have already submitted prefiled testimony on the issues. Without a doubt, the admission of the Petitioner would cause delay where prefiled testimony has already been filed and Petitioner has not demonstrated any capacity to effectively participate

in the proceeding. This would ultimately delay the issuance of a final initial decision of the Shoreham emergency plan. Factor 10 CFR 2.714(a)(1)(v) must be weighed against Petitioner.

Balancing of factors.

We find that all factors weigh against admission of Petitioners as a party at this point in the proceeding. Thus, we have no basis under 10 CFR 2.714(a)(1) upon which to grant the Petitioner's motion to intervene.

Standing

We note that Petitioner has not provided any information which could enable us to determine whether it has standing to intervene, even were there cause to allow intervention under 10 CFR 2.714(a)(1). In order to show standing the Petitioner must demonstrate that it is within the "zone of interest" of the relevant statutes and that it would sustain "injury in fact". Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976). The Staff correctly points out that those who signed the petition have not shown that they have authority to file the motion on behalf of the listed groups or that any member of those organizations had status and authorized the filing of the petition. See Detroit Edison Co., (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 583 (1978); Houston Lighting and Power Co., (South Texas Project, Units 1 and 2), LBP 79-10, 9 NRC 439, 444, aff'd, ALAB-549, 9 NRC 644 (1979). However, since we have balanced the five factor test of 10 CFR 2.714(a)(1)

against Petitioner, we need not and do not resolve the question of standing.

Finally, we note that Suffolk County argues that "as a matter of sound policy" we should permit the participation of any citizens group which is "prepared to bring serious matters before the Board." Suffolk County Brief, at 3. The County reasoning is incorrect on two counts. First, the Coalition has not demonstrated that it is prepared to present any evidence or testimony that would assist the Board in deciding Contention 24.0. Secondly, the Commission's standard is based on the five part test and not that proposed by Suffolk County.

ORDER

Upon consideration of all of the foregoing, it is hereby ORDERED that the motion to intervene of the Long Island Coalition for Safe Living is 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 14th day of June, 1985