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LILCO, May 30, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

LILCO'S RESPONSE IN OPPOSITION TO
SUFFOLK COUNTY AND STATE OF NEW YORK'S
MOTION FOR RECONSIDERATION OR
REOPENING ON RELOCATION CENTER ISSUES

On May 17, 1985, following this Board's May 6 Memorandum and Order on reopening the evidentiary record in this proceeding on Contention 24.O, Suffolk County and State of New York filed a motion seeking (1) reconsideration of the Board's Order denying portions of Suffolk County and New York State's proffered testimony on relocation center issues, or (2) reopening of the record on Contentions 24.N, 74, and 75 to admit the testimony, or (3) certification of the issue to the Appeal Board if the testimony is not admitted. For the reasons stated below, all three requests should be denied.

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I. The Motion for Reconsideration Should be Denied1/

The Board did not admit the following proffered testimony:

1. Mr. Campo's direct and supplemental testimony on the availability of schools as relocation centers.

2. Dr. Johnson's testimony on shadow phenomenon outside the 10-mile EPZ.

3. Portions of Dr. Radford's testimony, discussing alleged health effects and the number of evacuees to be expected to seek relocation centers.

4. Portions of Chief Inspector Roberts' testimony, discussing alleged traffic congestion on routes outside the 10-mile EPZ.

5. Mr. Kilduff's testimony on the same topic.

6. Mr. Marsh's testimony on alleged New York State law prohibitions on decontamination.

7. Ms. Meyland's testimony on alleged groundwater pollution resulting from decontamination activities.

The Intervenors argue that the Board should reconsider its May 6, 1985 Order and admit the Intervenors' proffered testimony because first, this Board allegedly erred in limiting the reopened issues to Contention 24.0, and, second, the refusal to admit the proffered testimony is allegedly a denial of

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1/ Given the plethora of filings before this Board reciting the background of the litigation of relocation center issues, LILCO has not repeated that history in this response. LILCO disagrees with certain characterizations of the facts contained in the "Background" section of the Intervenors' motion. Where those disagreements are pertinent to the arguments in this response, they are included.

due process of law. These arguments are discussed in turn below.

A. The Board Correctly Limited the Issues to Contention 24.O

The County and State argue in their motion for reconsideration that the Board's limitation of further inquiry on relocation center issues to Contention 24.O was improper. This argument should be rejected.

First, the argument is months too late. The Board's statement on the record in August of 1984 that there was a "void in the record" -- the statement that ultimately led to the reopening for the purposes of admitting documents into the record showing the identity of the reception center identified last summer as part of the LILCO Plan -- went only to the identity and adequacy of the use of Nassau Coliseum as a reception center. In granting LILCO's subsequent motion to reopen the record to allow the identification of Nassau Coliseum to be included in it, the Board's January 28, 1985 Order again limited the scope of inquiry to that contention. If Suffolk County and New York State disagreed with the scope of inquiry as defined by the Board, they should have filed a motion for reconsideration of that January 28 Order. The issues raised in the Intervenors' testimony not admitted by this Board all could have been raised at that time. Thus, the argument that the

Board has "arbitrarily limited" litigation to Contention 24.O comes too late.

Second, the Intervenors' attempt to characterize LILCO's proffered evidence admitted by the Board as expanding the issues reopened fails. The Intervenors have plucked one phrase referring to "congregate care centers operated by the Red Cross" in the letter of agreement between the Nassau Coliseum and LILCO submitted by LILCO, see Intervenors' Motion at 21, and attempt to hang about 50 pages of testimony on it. But the clear thrust of LILCO's motion to reopen, the Board's January 28 Order granting that motion, and the Board's May 6 Order determining the mechanism by which the reopened record would be pursued, is to consider the identification of Nassau Coliseum as a reception center, keeping in sight the extensive record already completed last year on relocation center issues. One line in a letter of agreement received in the record does not serve to expand the scope of the litigation to other issues.

Third, the Intervenors argue that by rejecting their proffered testimony (chiefly that of Mr. Campo), the Board is ignoring evidence that shows that LILCO's testimony is "false and that LILCO's witnesses lack veracity and credibility." Intervenors' Motion at 18. These are serious charges that prove baseless when one examines the Intervenors' testimony rejected by this Board.

The subject of Mr. Campo's testimony was litigated in this proceeding last year, when the schools relied upon by the Red Cross as relocation centers in Nassau County were identified, and letters of agreement between the Red Cross and the schools to provide shelter during emergencies for evacuees from disasters on Long Island were provided to the Intervenors voluntarily by LILCO in response to a discovery request. The County chose not to put these agreements into evidence. See, e.g., Tr. 14,764-74.

Nor were any representations made on the record by any witness that Shoreham-specific agreements with school districts existed. In fact, to the contrary, Mr. Frank Rasbury, the Executive Director of the Nassau County Chapter of the American Red Cross, specifically testified that (1) he had written agreements with all the entities on the list (the agreements that were provided to the Intervenors last summer), (2) those agreements in his view covered any disaster on Long Island that required people to take shelter, (3) the agreements were not Shoreham specific, and (4) even if the written agreements did not exist, past experience showed that during an emergency the Red Cross would be able to provide sufficient relocation center space on Long Island for those who require it. See LILCO's Response to Intervenors' Proffered Testimony on the Designation of Nassau Coliseum as a Reception Center, February 26, 1985

(LILCO's Feb. 26 Response), at 4-10.2/ In addition, FEMA testified that the Red Cross provides relocation centers and does the job well. Tr. 12,989 (Keller). Even Suffolk County's own witnesses on the relocation center issues praised the Red Cross's efforts in providing relocation centers for persons needing them during emergencies. Tr. 14,878 (Harris).

Mr. Campo's proffered testimony merely references conversations and attaches sometimes virtually identical letters from several school district administrators ranging variously from statements that their school was not part of the LILCO Plan to requests for further information. None of this proffered testimony sheds any light whatsoever on the question of whether the LILCO Plan will be implemented. The uncontested record, which would continue to be uncontested even were Mr. Campo's proffered testimony to be included in it, is that during an emergency the American Red Cross will provide shelter. Not one entity has stepped forward, despite all of Suffolk

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2/ These facts stand in stark contrast to the representations made in the Intervenors' Motion (and other relocation center filings) referring to "purported congregate care facilities with which LILCO had asserted it had agreements," and Mr. Rasbury's and LILCO's "false" representations about agreements existing between them and the Red Cross. Intervenors' Motion at 14, 16. Further, in the numerous pleadings that have been filed since the close of the record on relocation center issues, Suffolk County and New York State have consistently failed to mention that these written agreements were provided to them.

County's and New York State's political efforts to convince them otherwise, and stated that in a real emergency their facilities would not be available to the Red Cross or that the Red Cross cannot be relied upon to provide shelter to those seeking it. Thus, no purpose would be served by expanding the reopening of the record to include Mr. Campo's testimony.3/

3/ Intervenors also represent (1) that the LILCO Plan's relocation center treatment was first identified during cross-examination of LILCO's witnesses in August 1984, (2) that it is an ad hoc approach, with congregate care centers to be identified only after evacuees appeared at the reception centers, and (3) that during the hearings LILCO witnesses refused "even to identify the candidate facilities under consideration." Intervenors' Motion at 2, 9-16. This is a distortion of the record on relocation centers. First, the description of the current approach to relocation centers under the LILCO Plan appeared in testimony filed on July 30, 1984 and was discussed at length in a Board-ordered deposition of Mr. Frank Rasbury, Director of the American Red Cross, Nassau County Chapter on August 13, 1984. Second, congregate care centers will be designated at the reception center from among the facilities with which the American Red Cross has agreements, so that persons seeking shelter can be monitored at the central reception center prior to going on to a shelter. Cordaro et al., ff. Tr. 14,707, at 15-16, Att. 1 at 1; Tr. 14,805 (Rasbury); see Tr. 14,761-63, 14,779 (Rasbury). This is hardly the ad hoc approach suggested in the Intervenors' motion. See Intervenors' Motion at 9. Third, LILCO witnesses refused to identify the facilities with which negotiations were then pending for use as reception centers, because based on previous experience in obtaining agreements for relocation centers, these witnesses feared that the Intervenors would bring political pressure to bear which would impede otherwise viable negotiations. This Board declined to order the witnesses to respond to questions regarding facilities with which LILCO and the Red Cross were negotiating. See Tr. 14,792-807.

In addition, as previously discussed at some length in LILCO's February 26 Response, Dr. Johnson's testimony on shadow phenomenon has been previously litigated; Dr. Radford's testimony on the number of anticipated evacuees has been litigated; Dr. Radford's testimony on health effects has been litigated; Chief Inspector Roberts' and Mr. Kilduff's testimony on traffic congestion outside the EPZ on route to the Coliseum is outside the scope of NRC regulations; and Mr. Marsh's and Ms. Meyland's testimony regarding decontamination activities is outside the scope of any of the contentions on relocation centers admitted into this proceeding and involves issues that could have been raised in 1983 regardless of what facility was identified as being used for decontamination. Therefore, the Board correctly rejected all of this testimony.

B. Intervenors Have Been Afforded Due Process on Relocation Center Issues

The Intervenors argue that the Board has denied them due process by refusing to admit the proffered testimony. This notion should be rejected by the Board.

Title 10 C.F.R. § 2.743(a) provides as follows:

> (a) General. Every party to a proceeding shall have the right to present such oral or documentary evidence and rebuttal evidence and conduct such cross-examination as may be required for full and true disclosure of the facts.

. . . .

> (c) Admissibility. Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. . . .

The County has been afforded a full and fair opportunity to present evidence on the relocation center issues. The County was given the opportunity to cross-examine for two days on 60 pages of LILCO testimony, and to present its own testimony (37 pages), on issues ranging from sheltering people 40-50 miles from their homes, see Tr. 14,816-17; to monitoring and decontamination see Tr. 14,825-30, 14,854 (Weismantle), Tr. 14,878-82, 14,888 (Harris); see also LILCO Plan OPIP 3.9.2; to the location of Red Cross relocation centers and the manner in which they are run, see LILCO's Testimony on Phase II Emergency Planning Contentions 24.O, 74 and 75 (Relocation Centers), ff. Tr. 14,707; Tr. 14,801 (Rasbury), Tr. 14,747 (Rasbury); to written agreements for relocation centers, see Tr. 14,805 (Rasbury), Tr. 14,719-20 (Robinson), Tr. 14,818-20 (Rasbury, Robinson); to the basis of relocation center capacity used in planning, see Tr. 14,744-46 (Rasbury), Tr. 14,886-87 (Harris); to the adequacy of the relocation centers facilities, see Tr. 14,775-78 (Rasbury); to the distance of relocation and reception centers from the EPZ, see Tr. 14,616-18, 14,620 (Keller); Tr. 14,625 (McIntire). The Board is completely within its authority under 10 C.F.R. §§ 2.718, 2.721, and 2.757 to limit

further inquiry in this case to the issues delineated in the Board's May 6 Order. It is ludicrous, in the context of the length and breadth of this proceeding on relocation center issues, for the Intervenors to assert that they have been denied due process.

II. The Record Should Not Be Reopened

This Board set out as follows the usual standard for reopening the record in its January 28, 1984 Order. Any motion to reopen must meet all of the following criteria:

1) The motion must be timely.

2) It must address a significant safety or environmental issue.

3) It must be shown that a different result might be or might have been reached had the newly proffered material been considered initially.

January 28 Order at 5. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-756, 18 NRC 1340, 1344 (1983); 49 Fed. Reg. 50,989 (Dec. 27, 1984). The Intervenors have not met the "heavy burden" (Diablo Canyon, supra) of these criteria, and therefore the motion to reopen must be denied.

A. Timeliness

None of the proffered testimony is timely. As discussed at some length in LILCO's February 26 Response at 4-38, each piece of testimony not admitted by this Board involves issues that could have been or were litigated last summer:

1) Mr. Campo's testimony on congregate care centers refers to facilities on a Red Cross list provided to the parties in July 1984 (LILCO Feb. 26 Response at 6-10).4/

2) Dr. Johnson's thesis that shadow phenomenon will be heightened by the location of the reception and relocation centers in Nassau County has already been litigated (LILCO Feb. 26 Response at 10-13).

3) Likewise, Dr. Radford's thesis on health effects was already litigated, and his discussion of those effects as they relate to distance from the plant could have been raised during litigation of relocation center issues (LILCO Feb. 26 Response at 13-14).

4) Chief Inspector Roberts' and Mr. Kilduff's testimony on traffic congestion outside the EPZ on the way to the Coliseum recite themes about alleged traffic problems that were already litigated in the traffic-related contentions. In addition, the Intervenors never sought to raise previously concerns about traffic conditions encountered on the way to relocation centers (LILCO Feb. 28 Response at 16-18).

4/ It is true that some of the letters anticipated in Mr. Campo's testimony and subsequently filed with the Board are dated more recently than last summer. The Intervenors, however, could have solicited and submitted those letters last summer.

5) Mr. Marsh's testimony on compliance with SEQRA would apply to any facility designated as a relocation center, yet this issue was never raised previously by Intervenors (LILCO Feb. 28 Response at 20-21, 26-27).

6) Ms. Meyland's testimony regarding possible contaminated groundwater could have been raised about previously-designated relocation and reception centers, all of which are over the same aquifer (LILCO Feb. 28 Response at 29-34).

Thus, the Intervenors' testimony fails as untimely.5/

B. Significant Safety Issues

Emergency planning is a significant safety issue, and a subject that LILCO has pursued rigorously and seriously. But it is difficult to characterize the parade of horribles raised by Intervenors' testimony as raising new issues rising to a significance that requires this Board to reopen the record, given the remote likelihood that these horribles would come to pass, the repetitious themes already litigated before this Board, the irrelevance of the issues raised to NRC regulations, and the fact that all the Intervenors' testimony discusses alleged safety issues for evacuees who are outside the 10-mile EPZ and therefore beyond the area of risk contemplated

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5/ As LILCO noted on November 14, 1984 in its Reply Findings, the Intervenors must seek to reopen the record if they wish to raise relocation center issues not directly related to the identification of Nassau Coliseum as a reception center. LILCO Reply Findings on Offsite Emergency Planning at 197 n.104. The Intervenors have waited six months to do so.

by NRC regulations. See LILCO's Feb. 28 Response. In addition, Mr. Campo's testimony attempts to dispute the nature and meaning of agreements for shelter (for people who are out of the 10-mile EPZ and who have already been monitored and decontaminated) in the face of an undisputed record that the American Red Cross will provide shelter and that, based upon past experience, it will do so regardless of written agreements. Tr. 14,815, 14,860 (Rasbury). See Tr. 12, 989 (Keller); Tr. 14,878 (Harris); LILCO's Feb. 28 Response at 6-10. LILCO submits that, in the context of the issues already litigated in this proceeding, the Intervenors have not shown that the proffered testimony raises new significant safety issues.

C. A Different Result Might Be Reached

The Intervenors did not even attempt to explain why "a different result might be reached" on the relocation center issues if the Intervenors' testimony is admitted, except to note that Mr. Campo's testimony might require a different result if taken to demonstrate "that LILCO has no congregate care centers" (Intervenors' Motion at 28) -- a proposition that is not established by Mr. Campo's testimony, and that is irrelevant to the uncontradicted record in this proceeding (See LILCO's Feb. 28 Response at 6-10). The Intervenors have not

taken up, much less met, their "heavy burden" on this third prong of the reopening standard. Nor would their testimony, if admitted, require a different result.

The Intervenors' pleadings thus do not satisfy even one of the criteria for reopening, much less all three as required. Consequently, the record should not be reopened to admit the Intervenors' testimony.

III. Certification to the Appeal Board

This Board should deny the Intervenors' request that the Board certify the issues raised in the Intervenors' motion to the Appeal Board if the motion is denied. The Intervenors note that the Commission's rules of practice contain a general prohibition against interlocutory appeals, Intervenors' Motion at 29, but contend that they meet the public interest exceptions to that prohibition, Intervenors' Motion at 29-30. They do not. Absent exceptional circumstances, certification is not granted on questions of what evidence will be admitted. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98 (1976). The Intervenors have not established exceptional circumstances here. Accordingly, their request for certification should be denied.

Conclusion

For the reasons stated above, the Intervenors' motion for reconsideration, reopening of the record, or certification to the Appeal Board should be denied.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

BY Kathy E. B. McCleskey
Donald P. Irwin
James N. Christman
Kathy E. B. McCleskey

Hunton & Williams
707 East Main Street
Post Office Box 1535
Richmond, VA 23212

DATED: May 30, 1985

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO'S RESPONSE IN OPPOSITION TO SUFFOLK COUNTY AND STATE OF NEW YORK'S MOTION FOR RECONSIDERATION OR REOPENING ON RELOCATION CENTER ISSUES were served this date upon the following by first-class mail, postage prepaid or, as indicated by an asterisk, by Federal Express, or, as indicated by two asterisks, by hand:

Morton B. Margulies,**
Chairman
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
East-West Tower, Rm. 402A
4350 East-West Hwy.
Bethesda, MD 20814

Dr. Jerry R. Kline**
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
East-West Tower, Rm. 427
4350 East-West Hwy.
Bethesda, MD 20814

Mr. Frederick J. Shon**
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
East-West Tower, Rm. 430
4350 East-West Hwy.
Bethesda, MD 20814

Secretary of the Commission
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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

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

Bernard M. Bordenick, Esq.*
Oreste Russ Pirfo, Esq.
Edwin J. Reis, Esq.
U. S. Nuclear Regulatory
Commission
7735 Old Georgetown Road
(to mailroom)
Bethesda, MD 20814

Donna Duer, Esq.**
Attorney
Atomic Safety and Licensing
Board Panel
U. S. Nuclear Regulatory
Commission
East-West Tower, North Tower
4350 East-West Highway
Bethesda, MD 20814

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

Mary Gundrum, Esq.*
Assistant Attorney General
2 World Trade Center
Room 4614
New York, New York 10047

Herbert H. Brown, Esq.*
Lawrence Coe Lanpher, Esq.
Christopher McMurray, Esq.
Kirkpatrick & Lockhart
8th Floor
1900 M Street, N.W.
Washington, D.C. 20036

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

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

Stewart M. Glass, Esq.*
Regional Counsel
Federal Emergency Management
Agency
26 Federal Plaza, Room 1349
New York, New York 10278

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

Ralph Shapiro, Esq.
Cammer & Shapiro, P.C.
9 East 40th Street
New York, New York 10016

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

Jonathan D. Feinberg, Esq.
New York State Department of
Public Service, Staff Counsel
Three Rockefeller Plaza
Albany, New York 12223

Spence W. Perry, Esq.
Associate General Counsel
Federal Emergency Management
Agency
500 C Street, S.W.
Room 840
Washington, D.C. 20472

Ms. Nora Bredes
Executive Coordinator
Shoreham Opponents' Coalition
195 East Main Street
Smithtown, New York 11787

Gerald C. Crotty, Esq.
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

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

Kathy E. B. McCleskey

Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, VA 23212

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