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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)	)	

NRC STAFF RESPONSE TO SUFFOLK COUNTY AND STATE OF NEW YORK MOTION FOR RECONSIDERATION OF MAY 6 ASLB ORDER OR, IN THE ALTERNATIVE, MOTION TO REOPEN THE RECORD ON LILCO'S RELOCATION CENTER SCHEME

I. Introduction

On May 17, 1985, the "Suffolk County and State of New York Motion for Reconsideration of May 6 ALAB Order or, in the Alternative, Motion to Reopen Record on LILCO's Relocation Center Scheme" (Motion), was filed. The Motion seeks reconsideration of the Licensing Board's "Memorandum and Order (Reopening of the Record)" of May 6, 1985 (May 6th Order), which limited the evidence to be considered in the reopened hearing to that directly pertinent to Contention 24.0 which asserts that the LILCO emergency response plan "fails to designate a relocation center for a sufficient portion of the anticipated evacuees." May 6th Order, at 1. In the alternative, the Motion asks the Board to reopen the record on

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Contentions 24.N, 74 and 75. 1/ Intervenors further request that should its motion to reconsider the May 6th Order or reopen the hearings on Contentions 24.N, 74 and 75 be denied, that this Board certify the matter to the Appeal Board "so that prompt correction of the Board's [asserted] error can be made." (Motion, at 1-3). For the reasons set out below the NRC Staff opposes the relief sought by the Intervenors.

1/ These contentions read:

Contention 24.N. The LILCO Plan relies on the availability of non-LILCO facilities and medical institutions as relocation and reception centers for evacuees. (See Plan at 4.2-1; OPIP 4.2.1; Appendix A at IV-166 to IV-174). However, LILCO has no agreements with the owners of the proposed identified facilities which provide that the facilities will be available as relocation centers in the event of a radiological emergency at Shoreham. See FEMA Report at 10 (noncompliance with NUREG 0654 Section 11.J.10.h). In addition, the Plan does not even identify, much less include agreements with, the facilities to be used as relocation or reception centers for school children, patients in hospitals, handicapped individuals, or residents of any special facilities other than United Cerebral Palsey of Greater Suffolk, Inc. (Appendix A at IV-166-IV-174). In the absence of such agreements, the protective action of evacuation cannot and will not be implemented.

Contention 74. Two of the three primary relocation centers designated by LILCO are well within 20 miles from the Shoreham site. Both Suffolk County Community College and the State University of New York at Stony Brook are only 3 miles from the plume EPZ boundary, contrary to the requirement of NUREG 0654, Section 11.J.10.h.

Contention 75. The LILCO Plan provides no estimates of the number of evacuees who may require shelter in a relocation center, and the Plan fails to demonstrate that each such facility has adequate space, toilet and shower facilities, food and food preparation areas, drinking water, sleeping accommodations and other necessary facilities. Accordingly, there is no assurance that the relocation centers designated by LILCO will be sufficient in capacity to provide necessary services for the number of evacuees that will require them. Thus, LILCO fails to comply with NUREG 0654, Sections 11.J.10.g and J.12.

II. Background

The record in this proceeding had been reopened by a "Memorandum and Order Granting LILCO's Motion to Reopen Record," dated January 28, 1985 (January 28th Order), for further evidence on Contention 24.0, which alleges that 'there is no relocation center designated [in LILCO's emergency response plan] for a significant portion of the anticipated evacuees.'" The May 6th Order ruled upon the direct evidence proffered by the parties on Contention 24.0 concerning the designation of a relocation center. It pointed out that the January 28th Order had reopened the record on the topic of the designation of a relocation center only and that the reopening did not extend to other contentions in this proceeding that bear on relocation, where the record had already been closed. Id. at 3. The Board thus stated that it would consider the issue posed by Contention 24.0 of whether the designated relocation center, the Nassau Coliseum, "is itself functionally adequate to serve as a relocation center for the anticipated general evacuees," and would not consider collateral matters such as "[t]he number of general evacuees that can be expected to use a relocation center [which] has already been litigated and that subject will not be reheard." Id. at 4. The Board similarly ruled that it not consider matters relating to adequacy of schools designated by the Red Cross as evacuation facilities as those issues are separate from the issue of whether the Nassau Coliseum is an adequate facility. Id. at 5. Similarly, the Board rejected proffered testimony on "shadow phenomenon," traffic congestion on routes to the Coliseum and groundwater pollution as matters already heard or not

related to the subject to the reopened hearing on the adequacy of the designated relocation center. Id. at 5-6.

III. Discussion

A. The Board Correctly Rejected Proffered Evidence Going Beyond Reopened Contention 24.0 Dealing With Whether "there is a relocation center designated for a significant portion of the anticipated evacuees."

10 CFR § 2.743(c) provides:

> (c) Admissibility. Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.

The Licensing Board Order of January 28, 1985, reopened the record on only one contention (Contention 24.0), which "alleges that there is no relocation center designated for a significant portion of the anticipated evacuees'" and the ability of the Nassau Coliseum to serve such a function. At 1-2, 10. The rejected evidence which the Intervenors proffer does not go that matters pertinent to Contention 24.0. This proffered evidence instead deals with such other relocation topics as the number of evacuees, the availability of other facilities under Red Cross agreements, "shadow phenomenon," traffic congestion on public roads and groundwater polution. May 6th Order at 4-7. This proffered evidence was therefore not pertinent to the subject of the reopened hearing and properly rejected.

Indeed the Intervenors recognize at p. 18-19 of the subject motion that the excluded evidence is not relevant to Contention 24.0, but

purportedly to Contentions 24.N, 74 and 75. [2/] No basis is shown to allow evidence not pertinent to Contention 24.0 in the reopened hearing. [3/]

B. The Intervenors' Alternative Motion to Reopen the Record on Contentions 24.N, 74 and 75 is Out of Time and Should Be Denied

Intervenors, anticipating that their arguments for reconsideration of the Board's May 6, 1985 Order excluding certain proffered testimony would be rejected, alternatively move the Board to reopen the record on Contentions 24.N, 74 and 75 (motion at 26-28).

One seeking to reopen a record has a heavy burden. [4/] Intervenors correctly note, at 26-27 of their Motion, the matters they must establish

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2/ It is doubtful that the material that the Intervenors point to could be introduced as relevant to Contentions 24.N, 74 and 75, anymore than to Contention 24.0. See n. 1. Contention 24.N deals with agrrements with "identified" relocation centers and special facilities. Only the agreement with the Nassau Coliseum is here relevant as one with an "identified" relocation center. Contention 74 deals with relocation centers within 3 miles of the EPZ. The Nassau Coliseum is not such a facility. Contention 75 deals with the number of evacuees who may require shelter and the adequacy of the shelter for that number of evacuees. As the Board has recognized the number of evacuees has been established (see May 6th Order at 4) and the adequacy of the Nassau Coliseum to serve these evacuees is in issue under Contention 24.0. Thus reopening the record on Cententions 24.N, 74 and 75, would not allow Intervenors to introduce the evidence they proffer.

3/ Intervenors maintain that some of the evidence LILCO has submitted on Contention 24.0 is false or that the LILCO witnesses lack veracity. See Motion at 18. Certainly such matters can be pursued in the upcoming hearing on Contention 24.0. To the extent the Intervenors might wish to show that some other facilities other than the Nassau Coliseum are not available, such matters are not relevant to Contention 24.0.

4/ Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 620 (1976).

as a basis for reopening a record. These are: 1) that the motion must be timely; 2) it must address a significant safety or environmental issue; and 3) it must be shown that a different result would have been reached had the newly proffered material been considered initially. 5/ Intervenors' belated motion to reopen the record on on Contentions 24.N, 74 and 75 is, however, devoid of any discussion of the last two factors and may be denied for that reason alone. 6/

Intervenors' soley focus on the timeliness criterion. Intervenors argue that the motion is timely because they did not learn until May 6, 1985, that the Board would exclude portions of their proffered testimony with regard to Content n 24.0. They then claim that the current situation is similar, as regards timeliness, to the situation faced by the Board with respect to LILCO's motion to reopen the record on Contention 24.0, which was granted in January, 1985. This claim is erroneous. The situation with regard to the County's recent, belated motion to reopen the record on Contentions 24.N, 74 and 75 is different from LILCO's motion to reopen which was granted in January, 1985. The LILCO motion to reopen Contention 24.0 was filed after LILCO had been told by the Board that there was a void in the record since the Board did not view the designation of the Colisum as a relocation center to be

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5/ See Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-738, 18 NRC 177, 180 (1983). The Commission has proposed to codify these standards for reopening a record in regulation. See 49 Fed.Reg. 50189 (Dec. 27, 1984).

6/ See Kansas Gas & Electric Co., supra.

confirmatory in nature. As noted by the Board in its May 6th Order at page 3:

> Inherent in admitting Contention 24.0 for litigation is the issue of whether the designated facility [the Nassau County Coliseum] is functionally adequate to accomplish the purpose set forth in the contention. This purpose is to adequately accommodate the anticipated number of general evacuees. (Emphasis added).
>
> By an unpublished Memorandum and Order of January 28, 1985, the Board granted LILCO's motion to reopen the record on Contention 24.0. The reopening [was] limited in scope to that contention. It [did] not extend to the other contentions in the proceeding which bear on the topic of relocation. The record is closed on those contentions and they have been briefed in the parties' proposed findings of fact and conclusions of law.

Thus, the County was on notice in January, 1985 that the reopening on Contention 24.0 was limited to that Contention and did encompass matters litigable under other Contentions. If the County thought that the scope could or should have been broadened, it was free to seek a reopening in January, 1985. It is now out of time. The fact that the record may be reopened in regard to another issue litigable under Contention 24.0 "has no significance" when weighing whether to reopen the record to consider the additional matters Intervenors may wish to litigate under Contentions 24.N, 74 and 75. See Metropolitan Edison Co. (Three Mile Island Station, Unit 2), ALAB-486, 8 NRC 9, 22 (1978).

Since the County's motion to reopen the record is untimely and does not to attempt to establish that it should be granted in any event based

on the last two criteria noted above, the motion to reopen the record on Contentions 24.N, 74 and 75 must be denied. 7/

C. The Intervenors Have Failed to Establish That it is Appropriate or Necessary for the Board to Certify the Issues Raised in its Motion to the Appeal Board

Intervenors also ask at 29-30 of their motion that the Board certify the issues raised by them to the Appeal Board, should their Motion be denied.

Intervenors recognize that 10 CFR § 2.730(f) contains a general prohibition against the interlocutory appeal they seek. 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). Although 10 CFR § 2.730(f) also contains exceptions to this general prohibition on the interlocutory appeal of rulings made during the course of a proceeding, it must first be established that prompt review is necessary "to prevent detriment to the public interest or unusual delay or expense." Intervenors have failed to show such a case here. No "major, or novel question of policy, law or procedure" is shown. Cf. 10 CFR Part 2, Appendix A, § V(f)(4). Nor is it shown that the Board's May 6th Order "threatens the party adversely affected by it with immediate and serious

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7/ Further, as we have shown in n. 2, the "new" evidence Intervenors seek to introduce on Contentions 24.N, 74 and 75 does not appear to be relevant to the issues raised in those Contentions. Thus there does not appear to be any newly proffered material that could casue those contentions to be decided in a different manner. For this reason also, Intervenors request that the record be reopened must be denied.

irreparable impact which as a practical matter, cannot be alleviated by a later appeal." Cf. Houston Lighting & Power Co. (South Texas Project), ALAB-608, 12 NRC 168, 170 (1980). Similarly, there is no showing that the basic structure of the proceeding is affected in a pervasive or unusual manner. Id. It is not enough to simply make generalized statements of harm to the public interest or irreparable harm to prevail on a request for certification. Facts must be presented which support the claimed exceptions. Intervenors have not attempted to present such facts in their motion. Intervenors have failed to show that the evidentiary rulings or ruling refusing to reopen the record on Contentions 24.N, 74 and 75, is of such a nature as to cause the question to be certified for interlocutory appellate review.

IV. Conclusion

For the reasons set out above, Intervenors have failed to demonstrate why the Board should reconsider its Order of May 6, 1985. The alternative relief requested by Intervenors, i.e., reopening the record on Contentions 24.N, 74 and 75 or certification to the Appeal Board, should also be denied for the reasons noted above.

Respectfully submitted,

Bernard M. Bordenick
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 3rd day of June, 1985

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO SUFFOLK COUNTY AND THE STATE OF NEW YORK MOTION FOR RECONSIDERATION OF MAY 6 ASLB ORDER OR, IN THE ALTERNATIVE, MOTION TO REOPEN THE RECORD ON LILCO'S RELOCATION CENTER SCHEME" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 3rd day of June, 1985.

Morton B. Margulies, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

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

Stephen B. Latham, Esq.
John F. Shea, III, Esq.
Twomey, Latham & Shea
Attorneys at Law
P.O. Box 398
33 West Second Street
Riverhead, NY 11901

Fabian G. Palomino, Esq.
Special Counsel to the Governor
Executive Chamber
State Capitol
Albany, NY 12224

W. Taylor Reveley III, Esq.
Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, VA 23212

Jonathan D. Feinberg, Esq.
New York State Department of
Public Service
Three Empire State Plaza
Albany, NY 12223

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

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

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

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Gerald C. Crotty, Esq.
Ben Wiles, Esq.
Counsel to the Governor
Executive Chamber
State Capitol
Albany, NY 12224

Edward M. Barrett, Esq.
General Counsel
Long Island Lighting Company
250 Old County Road
Mineola, NY 11501

Hon. Peter Cohalan
Suffolk County Executive
County Executive/Legislative Bldg.
Veteran's Memorial Highway
Hauppauge, NY 11788

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

Donna D. Duer, Esq.*
Attorney
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

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

Robert Abrams, Esq.
Attorney General of the State
of New York
Attn: Peter Bienstock, Esq.
Department of Law
State of New York
Two World Trade Center
Room 46-14
New York, NY 10047

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

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veteran's Memorial Highway
Hauppauge, NY 11788

Ms. Nora Bredes
Shoreham Opponents Coalition
195 East Main Street
Smithtown, NY 11787

Leon Friedman, Esq.
Costigan, Hyman & Hyman
120 Mineola Boulevard
Mineola, NY 11501

Mr. Robert Hoffman
Ms. Susan Rosenfeld
Ms. Sharlene Sherwin
P.O. Box 1355
Massapequa, NY 11758

Chris Nolin
New York State Assembly
Energy Committee
626 Legislative Office Building
Albany, NY 12248

Bernard M. Bordenick
Counsel for NRC Staff