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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL 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 BRIEF IN RESPONSE TO INTERVENORS' APPEAL OF LICENSING BOARD'S AUGUST 26, 1985 CONCLUDING PARTIAL INITIAL DECISION ON EMERGENCY PLANNING

Robert G. Perlis
Counsel for NRC Staff

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I. INTRODUCTION

On August 26, 1985, the Licensing Board conducting the emergency planning portion of the Shoreham operating license proceeding [1/] issued its "Concluding Partial Initial Decision on Emergency Planning." LBP-85-31, 22 NRC 410. The emergency planning contentions for Shoreham fall into sixteen categories. The Board had previously issued a Partial Initial Decision on April 17, 1985 (LBP-85-12, 21 NRC 644) in which the Board ruled on all the contentions other than those dealing with

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1/ The Shoreham operating license proceeding was litigated before three distinct licensing boards. The board chaired by Judge Brenner had general jurisdiction over the case; additional boards were convened to hear contentions involving low power operation (chaired first by Judge Miller and later by Judge Kelly) and emergency planning (chaired first by Judge Laurenson and then by Judge Margulies). The appeal at issue here involves only rulings by the emergency planning board. The Staff's use of the term "Licensing Board" in this brief refers to the emergency planning Board chaired by Judges Laurenson or Margulies.

relocation centers (Category X). [2/] The Board did not rule on relocation centers in April because of its earlier decision on January 28, 1985 to reopen the record to consider evidence designating the Nassau County Coliseum as the relocation center to be used in the event of an emergency at Shoreham. See LBP-85-12, 21 NRC at 648. Hearings on the limited issue involved in the reopening were held on June 25 and 26, 1985. The Board subsequently issued its August 26th decision (hereafter referred to as "CPID") in which it ruled on all the remaining contentions (those dealing with relocation centers) and made its concluding finding that no operating license could be issued for the Shoreham facility (22 NRC at 426-32).

On September 5, 1985, LILCO filed a notice of appeal from the CPID; Intervenors filed separate notices of appeal on September 5th (Suffolk County), September 9th (State of New York) and September 10th (Town of Southampton). [3/] The Staff addressed the issues raised by LILCO's appeal in a brief filed on November 21, 1985; this brief addresses only those issues raised by Intervenors' appeal.

Intervenors filed their brief supporting their appeal from the CPID on November 6, 1985. In that brief, Intervenors charge that the Licensing Board made a number of procedural and factual errors that

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2/ Both LILCO and Intervenors took appeals from LBP-85-12; those appeals have already been briefed and, in the case of LILCO's appeal, argued.

3/ The Town of Southampton joined in the brief filed by the State and County. See County and State Motion for extension of time dated October 8, 1985 at 3.

require reversal. Intervenors also challenge the correctness of the Licensing Board's, unpublished memorandum and order of August 21, 1985 denying the admission of a contention sponsored by Intervenors challenging LILCO's compliance with 10 C.F.R. §50.47(b)(12). 4/

The Staff herein responds to the issues raised by Intervenors in their brief in support of their appeal from the CPID. For the reasons presented below, the Staff submits that Intervenors' appeal should be denied.

II. BACKGROUND

A. RELOCATION CENTERS

An understanding of the history of the litigation of relocation center issues is essential in order to come to grips with Intervenors' appeal. As will be shown in Part III, infra, the central theme in Intervenors' appeal is the allegation that the Licensing Board improperly limited the scope of the reopening of the relocation centers issues. The history of the proceeding shows that the limitations placed upon the reopening and the Board rulings that flowed therefrom were proper and correct.

Category X of the emergency planning contentions contained five contentions: 24.0, 24.P, 74, 75, and 77. See CPID, 22 NRC at 413.

4/ 10 C.F.R §50.47(b)(12) states:

> (b) The onsite and, except as provided in paragraph (d) of this section, offsite emergency response plans for nuclear power reactors must meet the following standards:
>
> (12) Arrangements are made for medical services for contaminated injured individuals.

Contention 77 is not involved in Intervenors' appeal. See Intervenors' Brief at 2, 4. The other four contentions were admitted by the Board on August 19, 1983; they read as follows:

> Contention 24.O. The Plan designates Suffolk County Community College as the relocation center to be used by evacuees from 8 of the 19 zones in the EPZ (zones A-E, H-J). LILCO estimates the population of these zones to be 18,599 (25,574 in the summer). (See Plan, Appendix A, at IV-75 to 162). Suffolk County Community College is an entity of the Suffolk County government. LILCO has no agreement with Suffolk County to use Suffolk County Community College as a relocation center. Furthermore, pursuant to Suffolk County Resolution No. 456-1982 and Resolution No. 111-1983, the Suffolk County Community College will not be available for use in implementing the LILCO Plan. Therefore, there is no relocation center designated for a significant portion of the anticipated evacuees. Thus, the proposed evacuation of zones A-E, H-J cannot and will not be implemented.
>
> Contention 24.P. LILCO relies upon the American Red Cross (ARC) to provide services, including medical and counselling services, at relocation centers. (Plan 2.2-1, 2.2-2, 3.6-7 and at 4.2-1). However, LILCO has no agreement with the ARC to provide such services. In the absence of such agreements, 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 II.J.10.H.
>
> Contention 75. The LILCO Plan provides no estimates of the number of evaucees 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, Section II.J.10.g and J.12.

The contentions raise fairly discrete issues. Contention 24 generally addresses letters of agreement. Contention 24.O asserts that

LILCO has no letter of agreement allowing it to use a designated relocation facility (Suffolk County Community College), that Suffolk County will not make the facility available, and as a result no relocation center has been designated for a significant portion of the anticipated evacuees. Contention 24.P involves the alleged lack of an agreement with the Red Cross to provide relocation-associated services. Contention 74 asserts that two of the three designated relocation centers are too close to the Shoreham EPZ. Contention 75 alleges that the LILCO plan does not demonstrate that the relocation facilities will be sufficient in capacity to provide service's for the number of evacuees that may require such services. 5/ Even allowing for a broad interpretation of the contentions, the only issues raised by the State and County involve the acquisition (with a letter of agreement) of a relocation center sufficient to accommodate the anticipated number of evacuees (24.0), the acquisition of a letter of agreement with the Red Cross to provide relocation centers (24.P), the distance of relocation centers from the EPZ (74), 6/ and the adequacy and capacity of relocation centers for housing evacuees (75). At no time did the State or County seek to amend the admitted contentions or move for permission to file additional contentions on relocation center issues.

5/ The inadequacies cited in Contention 75 include "adequate space, toilet and shower facilities, food and food preparation areas, drinking water, sleeping accommodations and other necessary facilities."

6/ It must be noted that Contention 74 is specifically directed to the problem of relocation centers being located too close to the facility.

Direct written testimony on Contentions 24.O, 24.P, 74 and 75 was filed in March of 1984. The testimony addressed Revisions 0 through 3 of LILCO's emergency plan, which relied upon five designated relocation centers in Suffolk County. Three of the five centers were buildings run by either the State or County. Prior to commencement of the hearing, the Red Cross informed LILCO that two of the centers, SUNY-Stonybrook and Suffolk County Community College, would not be made available for use in emergency planning for Shoreham. By agreement of the parties, relocation center issues were then removed from the hearing schedule. See Tr. 9573-74.

On June 8, 1984, the Board issued an Order directing the parties to file supplemental testimony. On June 15th, LILCO filed its supplemental testimony, identifying new relocation centers in Suffolk County. 7/ Intervenors filed their supplemental testimony eleven days later, consisting primarily of two essentially identical letters from two facilities indicating that the facilities would not be made available to LILCO for use in emergency planning. As a result, LILCO requested and was granted permission to withdraw its original and supplemental relocation centers testimony. LILCO filed new testimony on July 30, 1984, and a hearing addressing the relocation contentions was finally held in August of 1984.

At the hearing, witnesses were presented by LILCO, Suffolk County, and FEMA. The testimony revealed that because of the problems involved

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7/ The new facilities included the BOCES II Occupational Center, SUNY-Farmingdale, St. Joseph's College and Dowling College.

in procuring any agreement with facilties in Suffolk County, LILCO had decided to transfer all relocation-related activities to Nassau County. In addition, LILCO introduced a two-tiered approach to the issue, differentiating between "reception" centers and "congregate care" centers. All evacuees in need of either monitoring or emergency shelter would be instructed to report to a central "reception" center. Monitoring and decontamination activities would take place at the reception center. Evacuees in need of shelter would then be referred by the Red Cross to various congregate care centers run by the Red Cross in Nassau County. See CPID, 22 NRC at 414.

At the time of the August 1984 hearing, LILCO had not negotiated an agreement with any facility to serve as a reception center (as opposed to congregate care centers), and no such potential reception centers were identified. 8/ The rest of LILCO's scheme (insofar as it was relevant to Contentions 24.P, 74 and 75) was fully litigated in August of 1984. The testimony from Mr. Rasbury of the Nassau County Chapter of the American Red Cross indicated that the Nassau County Chapter agreed to provide congregate care services for LILCO. Mr. Rasbury identified the potential sites that the Red Cross could use for congregate care facilities, and explained that the actual sites would be selected from among the potential sites as needed during an emergency. The shelters were described as having the capacity to provide shelter for up to 48,000

8/ Because of the previous difficulties LILCO had encountered in reaching (and maintaining) agreements with facilities to serve as relocation centers, the Board refused to require LILCO to identify potential reception centers. Tr. 14,805-06.

people, half again as much as the 32,000 people LILCO estimated as the maximum number that might seek shelter. 9/ See Cordaro et al., ff. Tr. 14,707 at 12-25, Attachment 1; Tr. 14,744-46 (Rasbury); see also, CPID, 22 NRC at 419-22. Although not strictly relevant to Contention 74, FEMA witnesses also addressed the adequacy of locating the reception centers and congregate care centers in Nassau County, further away from the EPZ. See e.g., Tr. 14,201-02 (Keller and McIntire); 14,575-577 (Keller and Kowieski); 14,615-24 (Keller and McIntire). The FEMA witnesses concluded that if closer facilities could not be acquired, a relocation center located forty miles from the EPZ would be acceptable. Tr. 14,624-25 (Keller).

As for Contention 24.0, the Board noted that LILCO had not met its burden of proof on this contention. In denying a motion made by Suffolk County to identify potential relocation centers, 10/ Judge Laurenson (speaking for the Board) stated the following:

> ... Contention 24.0 says that there is no relocation center designated.
>
> At this time, that contention may be correct. However, Suffolk County wants to probe the negotiations underway by the American Red Cross for the identification of such facility or facilities ...
>
> * * *

9/ The 32,000 figure constitutes 20% of the population living in the 10-mile EPZ. This figure was based on studies of persons who evacuated from previous disasters and on planning assumptions made by Suffolk County itself before the County decided not to participate in emergency planning activities. Cordaro et al., ff. Tr. 14,707 at 18-20; Tr. 14,821 (Robinson).

10/ See Note 8, supra.

> ... We deny the Suffolk County motion to compel Mr. Rasbury to disclose the identification of the two sites under consideration...
>
> However, we note that there is a void in the record on this matter and that LILCO has not at this stage sustained its burden of proof that a relocation center has been designated. Therefore, by sustaining the objection and denying the motion to compel, the Red Cross may continue to negotiate without disclosure but the void in LILCO's proof on this record remains.

Tr. 14,806-07.

At the close of the August 1984 hearing, all parties filed proposed findings of fact on relocation center issues. For their part, the State and County claimed that LILCO had not established that they could not have acquired relocation centers in Suffolk County closer to the Shoreham EPZ. Intervenors also argued that LILCO had not yet identified any reception centers and that the planning process seemed incomplete and would lead to an "ad-hoc" response in the event of an emergency. Significantly, Intervenors did not even hint at any of the deficiencies they were to raise later in their February 1985 testimony. See Intervenors' Proposed Findings of October 26, 1984 at 421-32.

By letter dated October 30, 1984, LILCO notified the Board and parties that agreements had been finalized to permit the use of the Nassau County Coliseum as the sole reception center to be used in the event of an emergency at Shoreham. Attached to the letters were various letters of agreement between LILCO, the Red Cross, the management of the Coliseum, and the Chief Executive of Nassau County. 11/ According to

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11/ The County owns the Coliseum and leases it to Hyatt Management, which in turn manages the facility.

LILCO, these agreements merely confirmed commitments already in the record, and there was thus no need to reopen the record.

On November 7, 1984, Suffolk County wrote the Board and noted its disagreement that the identification of the Coliseum was a confirmatory issue and requested that the Board disregard the "extra-record" information submitted by LILCO. The Board convened a conference of counsel on January 4, 1985 to, inter alia, resolve this difference of opinion. After hearing from all the parties, the Board ruled that the designation of the Coliseum was not a confirmatory item and that the void in the record remained. Tr. 15,739-40. At that same conference, LILCO announced its intention to promptly file a motion to reopen the record. Tr. 15,780-81.

On January 11, 1985, LILCO filed a Motion to Reopen the Record "for the limited purpose of admitting seven documents regarding the use of Nassau Veterans Memorial Colisem as a reception center." Motion at 1. LILCO made clear in its Motion that it sought a limited reopening that only affected Contention 24.0:

> As noted above, LILCO believed that the void in the record identified by the Board was not so significant as to require a reopening of the record, but rather could be left to a license condition, compliance with which could be monitored by the NRC Staff and FEMA. That this was not an unreasonable judgment is demonstrated by the fact that the NRC Staff agreed with it.
>
> It seemed reasonable to LILCO because the emergency plan, which proposes to use a central reception center to monitor and decontaminate people and then to send them to "congregate care centers," had been thoroughly litigated. Indeed, just about every aspect of relocation centers except the identity of the central reception center was aired at the hearings. See, for example, Tr. 14,816-17 (sheltering people 40-50 miles from their homes), 14,825-30, 14,854, 14,878-82, 14,888 (monitoring and

> decontamination). The list of congregate care centers was put into the record, and it was these congregate care centers that were the subject of, for example, Contention 75 about the number of showers and toilets, cooking facilities, and so forth. None of the admitted contentions about monitoring and decontamination depends on the location of the central reception center; Contention 77, for example, deals narrowly with the type of instrument used for monitoring. Only Contention 24.0, a narrow contention alleging that "there is no relocation center" is affected by the identification of Nassau Coliseum.
>
> Nor does the identity of the reception center raise new issues. The activities to be conducted at the central reception center are straightforward and have been discussed in testimony in the record. LERO personnel monitor and decontaminate people if that is necessary; then the Red Cross directs people to congregate care centers. See LILCO's Testimony on Phase II Emergency Planning Contentions 24.0, 74, and 75 (Relocation Centers), ff. Tr. 14,707; Tr. 14,801 (Rasbury).

Motion to Reopen at 5-6 (emphasis added).

Appended to LILCO's motion, pursuant to the Board's ruling at the prehearing Conference (Tr. 15,794), was the evidence LILCO wished to have considered: a three page Affidavit of Elaine Robinson [12/] attached to which were three letters of agreement concerning the availability of the Coliseum, a floor plan of the Coliseum, and a letter from the Nassau County Executive confirming that the Coliseum would be made available in the event of an emergency.

The Staff supported LILCO's Motion to Reopen; the State and County opposed it, largely on grounds of timeliness. On January 28, 1985, the

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12/ Ms. Robinson's Affidavit simply describes the Coliseum and the various attachments appended to her Affidavit, and notes that the parking lots of the Coliseum could be completely cleared within 1½ hours. The Affidavit and attachments are bound into the record ff. Tr. 15,870.

Board found that the motion met the timeliness requirement, and agreed to reopen the record "for the limited purpose of assessing the adequacy of LILCO's proffered evidence considering the Nassau Veterans Memorial Coliseum as a relocation center to be used in the event of an emergency at Shoreham." Order at 9.

A number of pleadings and Board rulings on a variety of issues followed in quick succession. In their appeal, Intervenors complain about the propriety of three Board rulings (in addition to the decision to grant the Motion to Reopen): the decision to deny discovery for the reopened proceeding (Orders of February 5 and 12, 1985), the decision to strike the great majority of Intervenors' testimony (Order of May 6, 1985, and the denial of Intervenors' subsequent motion to reopen the record (Order of June 10, 1985). The Staff describes the procedural history associated with each ruling seriatim.

On January 31, 1985, Intervenors sent informal discovery requests to LILCO, the NRC Staff, and FEMA, and noticed the deposition of Ms. Robinson. LILCO opposed the discovery requests in a pleading filed on February 1, 1985, and moved for a protective order. The Board granted the protective order on February 5th; it denied reconsideration of its ruling on February 12th. The Board found the issues involved in the reopening to be narrow, and further found discovery unnecessary:

> The Board ruled that the subject matter did not require discovery, it neither being new nor complex. The fact that the Coliseum was the designated center was announced in October, 1984. The details of LILCO's evidence had been made known previously to the County and State, with the proffering of the affidavit and attached statements. There will be no surprises as to Applicant's offering. The area involved is very limited. The general matter of relocation centers for Shoreham was extensively litigated during the hearings.

> A special expedited procedure was invoked setting forth in very specific terms the steps the parties are to follow. It did not call for discovery, for none is required. We are not to hold a full-blown adjudicatory hearing with all of the attendant trappings on the narrow issue to be developed. An abridged procedure is to be followed with prompt responses made on the basis of information parties have available to them. No more is required to reasonably develop the record on this limited issue.

Order of February 12, 1985 at 3-4.

Intervenors submitted their testimony on the reopened issue on February 19, 1985. The testimony of seven witnesses was included, addressing the following issues:

1) Use of the Nassau Coliseum would increase the evacuation shadow phenomenon, and thus increase the number of people likely to require relocation (testimony of James H. Johnson, Jr.);

2) Increased adverse health effects as a result of the distance from the EPZ to the Coliseum (Edward P. Radford);

3) Increased traffic congestion and thus greater evacuation times than previously discussed (Richard C. Roberts and Charles E. Kilduff);

4) The Coliseum has not prepared an environmental assessment pursuant to State law (Langdon Marsh);

5) Decontamination activities at the Coliseum would adversely affect the water supply of Brooklyn, Queens, and Nassau and Suffolk Counties (Sarah J. Meyland); and

6) The Red Cross does not in fact have agreements with the listed congregate care centers (Leon Campo).

LILCO opposed the admission of the proffered testimony on the grounds that it raised "new issues outside the scope of the limited purpose for which the Board reopened the record" and "Intervenors ... made no effort to meet the reopening standards or to raise new contentions." LILCO response of February 26, 1985 at 4. In its ruling of May 6, 1985, the Board reiterated its position that the reopening was for a limited and narrow purpose:

> The Board finds that an oral hearing is needed to resolve the contested issue in Contention 24.0 as to whether the designated relocation center, the Coliseum, is itself functionally adequate to serve as a relocation center for the anticipated general evacuees. The number of general evacuees that can be expected to use a relocation center has already been litigated and that subject will not be reheard. The Board will only consider evidence that goes primarily and directly to the question of whether the Coliseum is adequate for use as a relocation center. Collateral matters will not be heard.

Order at 4. The Board found almost all of Intervenors' testimony outside the scope of the reopening. Id. at 5-7.

Eleven days after the Board issued its ruling, Intervenors filed a Motion for Reconsideration or, in the alternative, a Motion to Reopen the Record. LILCO and the NRC Staff filed responses (on May 30th and June 3rd, respectively) urging that both motions be denied. On June 10, 1985,

the Board issued a Memorandum and Order denying Intervenors' request for relief. As to the Motion for Reconsideration, the Board reiterated its view that the reopening was narrow in scope and limited to Contention 24.0. Order at 2-6. In denying the Motion to Reopen, the Board found the motion to be untimely, and further found that Intervenors had not carried their burden in addressing the other factors for reopening (safety significance of the issue and whether a different result might have been reached). Id. at 7-11.

Hearings on the reopened issue were held on June 25 and 26, 1985. Proposed findings were filed by all parties, 13/ and the Board issued its decision on August 26, 1985. Intervenors subsequently filed the instant appeal.

B. MEDICAL SERVICES

On February 12, 1985, the United States Court of Appeals for the District of Columbia Circuit issued its decision in Guard v. NRC (753 F.2d 1144) vacating the Commission's interpretation of 10 C.F.R. § 50.47(b)(12). That Section requires that arrangments for medical services be made for "contaminated injured individuals." Prior to Guard, the Commission had divided "contaminated injured individuals" into two classes. It was expected that very few individuals offsite would become both contaminated and physically injured; preparations for accommodating onsite individuals so affected were determined to be adequate for offsite

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13/ LILCO filed its proposed findings on July 11, 1985; Intervenors filed on July 16, 1985; the Staff filed on July 22, 1985; and LILCO filed reply findings on July 26, 1985.

individuals. 753 F.2d at 1146, fn. 3. For individuals exposed to radiation but not physically injured, the Commission determined that the identification of existing facilities that could treat such individuals satisfied Section (b)(12). The Court of Appeals did not invalidate the Commission's interpretation of the regulation as it pertained to the first class of individuals, but found that the interpretation was unreasonable as it applied to the second class. In so ruling, the Court did not impose any interpretation of the regulation upon the Commission, but rather ruled that if "arrangements" were necessary, a mere listing would not suffice. Id. at 1146.

As a result of the Guard decision, Intervenors filed on February 25, 1985 a contention challenging the adequacy of LILCO's compliance with Section 50.47(b)(12). 14/ LILCO and the Staff responded (on March 11 and 12, 1985, respectively) and urged that the Board defer any ruling until the Commission addressed the decision by the Court of Appeals. The Commission issued a Statement of Policy on the decision on May 16, 1985 (50 Fed. Reg. 20892, May 21, 1985); the Staff provided the Board and parties with a copy of the Statement by letter dated May 29, 1985. No further filings were made by any party.

14/ Intervenors had not previously challenged LILCO's compliance with Section 50.47(b)(12). Two contentions had been filed previously citing Section (b)(12), but in rejecting Contentions 54 and 55, the Board found them redundant to other admitted contentions and ruled that the contentions more properly raised issues unrelated to Section (b)(12). See Unpublished Memorandum and Order of August 19, 1983 at 20.

On August 21, 1985, the Board issued an unpublished Order denying admission of the contention because of the Commission's intention to address the subject on a generic basis. Intervenors appealed this ruling as part of their appeal of the CPID. Brief at 65-68.

III. ARGUMENT

A. RELOCATION CENTERS

In their appeal of the relocation center issues, Intervenors focus on four procedural rulings issued by the Licensing Board. First, Intervenors claim that the Board erred in granting LILCO's Motion to Reopen the record. (Brief at 19-29). Intervenors also challenge the Board's later rulings in denying discovery (Brief at 29-32), refusing to admit the bulk of Intervenors' testimony (Id. at 32-47), and denying Intervenors' subsequent Motion for Reconsideration or in the alternative to Reopen the Record (Id. at 42-53). Intervenors further challenge certain factual rulings in the CPID (Id. at 53-64). The Staff addresses each argument seriatim.

1. The Board Properly Granted LILCO's Motion to Reopen

Intervenors raise two assertions of error with regard to the Board's decision of January 28, 1985, to grant LILCO's Motion to Reopen the Record to admit certain information pertaining to the use of the Nassau Coliseum as the reception center to be used at Shoreham in the event of an emergency. First, Intervenors claim that the Motion to Reopen should have been denied as untimely. Second, Intervenors assert that the Licensing Board ignored the prejudice to Appellants resulting from grant of the motion.

In addressing these assertions of error, as indeed in addressing all of Intervenors' assertions relating to relocation centers, it is important to keep the events in their proper context. The parties had fully litigated all relocation centers in August of 1984, with the exception of a portion of Contention 24.0. As noted earlier, that contention asserted that LILCO had not designated a relocation center for a sizable portion of the EPZ. At the August hearings, LILCO testified that sheltering would be provided by the Red Cross at congregate care centers, and that LILCO would "soon designate" a relocation center where LILCO would perform monitoring and decontamination activities before turning evacuees over to the Red Cross for referral to congregate care centers. Cordaro et al., ff. Tr. 14,707 at 15-18. The congregate care centers were identified in LILCO's testimony. Id. at Attachment 1. While there was clearly a void in the record at then end of the August hearing (See Tr. 14,805-07), that void was limited to the failure (at that time) to have designated a reception center to handle the expected number of evacuees.

LILCO identified the Nassau Coliseum as its reception center in its letter of October 30, 1984 to the Board and parties. The Staff (and LILCO) then took the position that the identification of the Coliseum was a confirmatory item, that the void in the record no longer existed, and that no reopening was necessary. See Staff Proposed Findings of November 5, 1984 at 237, note 44; See also Tr. 15,734 (Bordenick). The Staff continues to believe that no reopening was necessary. The documents attached to the October 30, 1984 letter clearly solve the designation problem. The question of whether the Nassau Coliseum

is sufficiently large to handle the expected number of evacuees is not a difficult one, and Intervenors do not allege on appeal that the Coliseum was insufficient in size. Under the circumstances, the issue should have been handled as a confirmatory one and no reopening should have been required. This renders Intervenors' claim of error regarding reopening (and, indeed, most of the balance of Intervenors' claims of error) harmless at best.

On the question of timeliness, there seems to be little question that LILCO notified the Board and parties of the availability of the Coliseum within a short time of the finalization of negotiations for use of the facility. As is clear from the attachments to LILCO's letter of October 30th, all the necessary approvals involving LILCO, the Red Cross, Nassau County, and the Coliseum Management were not finalized until October 24th. Given the sensitive nature of the issue and the fact that LILCO had had significant problems in acquiring facilities for use in emergency planning activities (see, e.g., Tr. 14,793-806), LILCO can hardly be faulted for not notifying the Board and parties before October 24, 1984. Intervenors argue, however, that "LILCO's delay of almost three months in filing the motion to reopen (to January 11, 1985) still required denial of the motion." Brief at 21 (emphasis in original). Intervenors also argue that the Board applied a double standard in granting LILCO's motion after having rejected as untimely Intervenors' strike-related contention filed on August 20, 1984. Id. at 22-26.

The Board properly determined that LILCO's Motion to Reopen was filed in a timely manner. In so ruling, the Board noted that LILCO did not attempt to keep the proffered information to itself for two and a

half months, but had instead notified the Board and parties within six days of acquiring all the necessary approvals for the use of the Coliseum. While the Board disagreed with LILCC's belief (shared by the Staff) that the information was confirmatory in nature, it acknowledged the possibility of ambiguity and noted that, when informed of its error, LILCO acted promptly to put the matter before the Board. 15/ Order of January 28, 1985 at 6-7.

The Staff has addressed the issue of the denial of Intervenors' strike-related contention in its Brief (at pp. 16-22) filed today in response to Intervenors' Appeal of the Partial Initial Decision on Emergency Planning (LBP-85-12). Without repeating that discussion herein, the Staff notes that Intervenors' contention was well outside the scope of strike-related issues identified by the Board, and that even with the end of the hearing rapidly approaching, Intervenors did not notify the parties of their intention to file a new contention until twelve days after notification that their interpretation of the scope of the Board's issues was incorrect. See Memorandum and Order of September 7, 1984 Denying Motion of Suffolk County to Admit New Contention at 7-8. The question of establishing timeliness (or good cause for failure to file on time) is one that depends on the facts of a particular situation. In both cases involved here, the Licensing Board weighed the attendant

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15/ Indeed, as noted earlier (see Page 10, supra), LILCO gave notice of its intent to file a motion to reopen the very day the Board ruled that the information was not confirmatory.

facts and ruled accordingly. For the purpose of this appeal, it suffices to note that the grant of LILCO's Motion to Reopen was clearly correct.

As to Intervenors' claim of prejudice flowing from the reopening, Intervenors utterly fail to identify any prejudice other than that suffered by any party after a record is reopened (i.e., the record will be reopened and some additional litigation may be necessary). Intervenors do no more than claim that they have been forced to litigate the issue of relocation centers four times, and that a "fourth try" operated "to the substantial prejudice" of Intervenors. In support of this argument, Intervenors cite a Licensing Board decision in Comanche Peak for the proposition that prolongation of hearings can "at some point" represent a denial of due process to one of the parties. 16/ Brief at 26-30.

Intervenors' claim of prejudice is totally unsupported and should be rejected. Although the parties had filed three sets of testimony before the reopening, hearings were held only on the third set. 17/ The reopening was a narrow one and did not require significant expenditures

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16/ Texas Utilities Electric Company (Comanche Peak Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 531 (1984).

17/ Nor can one ignore the history of this issue, with LILCO's attempting to identify facilities for use as relocation centers while the State and County encouraged facilities not to cooperate. The fact that Intervenors helped create the need for three separate filings undercuts their complaints of unfairness and prejudice flowing from the multiple filings. See Staff's Proposed Findings of July 22, 1985 at 2, fn. 2.

in either time or money. 18/ Even considering that at some point prolongation of hearings could result in the denial of due process, neither the circumstances of this case nor the Intervenors in their Brief on Appeal demonstrate that due process was denied here. 19/

2. The Denial of Discovery Did Not Prejudice Intervenors

Intervenors complain that the Board's decision to deny any discovery on the reopening constituted "grossly prejudicial error" (Brief at 30) that warrants reversal. Once again, Intervenors fail to identify any harm or prejudice that resulted from this decision. The reopening was limited in scope to the identification of the Coliseum and its capability to serve as a relocation center for the anticipated number of evacuees. LILCO attached to its Motion to Reopen the appropriate letters of agreement and a diagram of the Coliseum. Under the circumstances, it is difficult to see why discovery would have been either necessary or even helpful. Nor do Intervenors provide any enlightment in their brief on

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18/ It is interesting that Intervenors attempted to greatly expand the reopening (see Pages 27-30, infra), and yet also complain about the hardships worked by the reopening.

19/ Although the Licensing Board in Comanche Peak stated that another round of litigation could "at some point" result in a denial of due process, the Licensing Board in that case called for detailed submissions of additional technical information on a broad range of issues after lengthy litigation the first time around. See LBP 83-81, 18 NRC 1410, (1983); see also LBP-84-10, supra, 19 NRC at 531. That board did not refuse to consider any new information because of due process grounds. The reopening in Shoreham was far more limited in scope than the submission called for by the Board in Comanche Peak.

this score. 20/ The only example cited by Intervenors is the refusal of the Coliseum to provide information relating to the "ordinary business use of the Coliseum and its availability for use by LILCO as a relocation center," a copy of the agreement or contract generally used in permitting the use of the Coliseum, and documents relating to the physical layout of the facility. Brief at 31, fn. 30. This offer hardly demonstrates the necessity of discovery. A floor plan was included with LILCO's testimony, and Intervenors had (and used) the opportunity to cross-examine during the reopened hearing on inter alia, the layout and availability of the Coliseum. See, e.g., Tr. 15,894-902, 15,924-26, 15,978-79 (Robinson). The relevance (and certainly the necessity) of the general form of agreement for the Coliseum is questionable at best. Further, it seems highly unlikely that the State of New York and Suffolk County need discovery to determine the ordinary business use of the Coliseum. Intervenors have simply pointed to no area where lack of discovery hindered their cross-examination, or interfered with their ability to produce direct evidence. As the Board noted in its February 12th Order (at 4), the area involved in the reopening was very limited, LILCO's evidence had already been made available to Intervenors, and there was no possibility of surprise. See Pages 12-13, supra. The Board thus determined that no discovery was needed "to reasonably develop

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20/ Intervenors claim in their Brief (at p. 31) that they had demonstrated to the Licensing Board in their Motion of February 7, 1985 for Reconsideration of the Board's February 5th Order Denying Discovery "precisely why discovery was necessary." A review of the February 7th filing reveals that the earlier document provides no more information than is in Intervenors' Appeal Brief.

the record on this limited issue." Id. As the Appeal Board pointed out in an earlier decision in the Shoreham proceeding, a party complaining of "prejudicial" rulings must demonstrate actual prejudice. ALAB-788, 20 NRC 1102, 1151-56 (1984). Intervenors have shown no prejudice resulting from the denial of discovery; even if incorrect, the Board's ruling was at most harmless error.

3. Intervenors' Testimony was Properly Rejected as Outside the Scope of the Reopened Proceeding

In its order of January 28, 1985 granting LILCO's Motion to Reopen, the Licensing Board provided the other parties the opportunity to submit testimony on the adequacy of the Nassau Coliseum as a reception center before ruling on the evidence submitted by LILCO with its motion. On February 19th, Intervenors submitted testimony from seven witnesses. 21/ LILCO filed a detailed response on February 20th challenging all the proffered testimony. In an order issued on May 6, 1985, the Licensing Board rejected practically all of Intervenors' testimony as not directed to the issue raised under Contention 24.0 -- the adequacy of the Coliseum as a relocation center. Order at 5-7. On appeal, Intervenors argue that the Board improperly limited the scope of the reopening and, alternatively, that the rejected testimony fell within the narrow scope of the hearing set by the Board. Both arguments are meritless and should be rejected.

Intervenors assert that there was "no basis established in the May 6, order, nor could there be, for the so-called limitation of the reopen issues only to one relocation center contention -- Contention 24.0..." Brief at 37. To the contrary, there was every good reason to

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21/ See Pages 13-14, supra.

so limit the reopening. The issues raised in the other contentions were fully litigated in August of 1984, including the identity and capacity of the congregate care centers (see, e.g., Cordaro et al., ff. Tr. 14,707 at Attachment 1); the role to be played by the Red Cross (see, e.g., Cordaro et al., ff. Tr. 14,707 at 14-25; Tr. 14,748 (Rasbury)); the decision to subdivide the relocation function into reception centers where monitoring and (if necessary) decontamination would be performed by LILCO and congregate care centers where the Red Cross would provide shelter (see, e.g., Cordaro et al., ff. Tr. 14,707 at 15-16; 14,801-02 (Rasbury)); and the question of geographical limitations on the location of reception centers (see, e.g., Tr. 14,615-25 (Keller and McIntire)). The "void in the record" pointed to by the Board referred solely to the lack of identification of any reception center (see Tr. 14,793-807). Thus, back in August of 1984, it should have been clear that the litigation of all contentions other than 24.0 had been completed.

Although the history of the litigation provides basis enough for the limitation placed on the reopening, there is an equally compelling basis to support the limitation. Only one party filed a motion to reopen the record in January of 1985. That party, of course, was LILCO; it is plainly evident from LILCO's Motion to Reopen that a limited reopening applying only to Contention 24.0 was sought. See, e.g., LILCO Motion at 2-3 ("Background" discussion refers only to Contention 24.0 and the identification of the Coliseum as a reception center), 5-6 (LILCO points out that other contentions were fully addressed and that "[o]nly Contention 24.0," a narrow contention alleging that "there is no relocation center," is affected by the identification of Nassau

Col'seum), 7 ("Significant Safety Issue" discussion refers only to identification of the Coliseum), 12-13 (a limited reopening with the only issue being the identity of the central reception center, an issue tied only to Contention 24.0), 14-16 (no other issues involved). Intervenors were certainly free to move for a reopening on their own; they chose not to do so. Given the scope of both LILCO's Motion to Reopen and the Litigation in August of 1984, the Board properly limited the scope of the reopening.

Contention 24.0 is an extremely narrow one. Literally, the contention does no more than assert that no relocation center has been designated. The designation of the Coliseum properly resolved this contention and, absent any new contention, the matter should have been brought to an end. 22/ No new contentions in this area were ever filed. The Board nonetheless allowed the parties to submit testimony whose primary focus was on the functional adequacy of the Coliseum to serve as a reception center. Presumably, the Board had in mind the issue of whether the Coliseum contained sufficient capacity to allow for all the reception center functions to be performed. 23/ It is clear from even a cursory review of the testimony proffered by Intervenors that the testimony went well beyond the scope of Contention 24.0. Interventors

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22/ In the Staff's view, this is why the issue should have been classified as confirmatory in nature with no need for an evidentiary hearing.

23/ Indeed, if the Board had any other isue in mind, such issues would have been clearly beyond the scope of the contention. Nor did the Board find that any serious safety matters exist and attempt to raise any issues sua sponte with regard to relocation centers. See, e.g., Texas Utilities Generating Company, (Comanche Peak Station, Units 1 and 2), CLI-81-24, 14 NRC 614 (1981).

attempted to either resurrect issues previously litigated or to inject completely new issues which in many cases required new contentions and in all cases should have been raised far earlier in the proceeding. A brief description of each piece of testimony and the reasons for its rejection follows.

The proffered testimony of Leon Campo essentially asserted that the Red Cross did not have agreements with various of the congregate care centers identified at the August hearings. This testimony has absolutely nothing to do with the Nassau County Coliseum; it would apply equally to any reception center or centers. It also was months late; the congregate care centers were identified at the August hearings (Cordaro, et al., ff. Tr. 14,707 at Attachment 1). Clearly this testimony was outside the scope of LILCO's Motion to Reopen; it was properly rejected.

The proffered testimony of James H. Johnson, Jr. raised the issue of the evacuation shadow. As the Board noted in its order of May 6, 1985 (at 5), the issue of evacuation shadow phenomenon had already been litigated. Nor does Mr. Johnson explain in his testimony why use of the Nassau Coliseum would have a greater effect on this phenomenon than any other relocation center in Nassau County. 24/ Yet this issue was not even mentioned by Intervenors during the August hearing. The testimony potentially raises the question of the number of evacuees for whom relocation activities may be required; this number was also identified in

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24/ It was clear in the August hearing that LILCO planned to locate all its relocation facilities in Nassau County. See, e.g., Tr. 17,783-85 (Robinson).

August (see Cordaro etal., ff. Tr. 14,707 at 18-20; Tr. 14,821 (Robinson)) and no motion to reopen was filed by Intervenors. The testimony is not unique to the Nassau County Coliseum and is clearly beyond the properly limited scope of the reopening.

The testimony of Charles Kilduff was directed towards traffic congestion that might be faced by evacuees in reaching the Coliseum. Again, this testimony could for the most part be applied to any relocation center in Nassau County. Yet this concern was not raised in August. The litigation in August did indicate that the use of relocation centers more than forty miles from the EPZ would be acceptable (See Tr. 14,615-25 (Keller and McIntire)). If Intervenors wished to relitigate this matter, at the very least a motion to reopen should have been filed. This testimony is simply not relevant to the reopened issue arising from Contention 24.O. 25/

The testimony of Langdon Marsh raised the issue of compliance with the New York State Environmental Quality Review Act (SEQRA). Once again, Intervenors' testimony is directed to an issue both outside the scope of the reopening and not raised at an earlier date. Surely it was apparent to Intervenors that no environmental review as assertedly required by SEQRA had been proposed for any of the earlier designated relocation centers. If Intervenors wished to litigate the necessity of such an environmental

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25/ The testimony also may be totally irrelevant to any decision to be made by the Board. Not only does it appear to be unrelated to any admitted contention (and certainly to the admitted relocation center contentions), but no attempt was ever made to show that any congestion would result in the violation of any regulatory requirement.

review, a contention to that effect should have been filed back in 1983. 26/ See Duke Power Company (Catawba Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983) (contentions should be filed as early in a proceeding as possible). This issue is again clearly beyond the scope of LILCO's Motion to Reopen.

Sarah Meyland's proffered testimony raises the issue of potential adverse health effects associated with decontamination activities at the Coliseum. This testimony is on the same footing as that of Mr. Marsh's. This issue could have been raised with respect to any relocation center; it is completely unaffected by the actual identity of the facility designated to serve as a monitoring and decontamination center. It is also outside the scope of all the admitted relocation center contentions, yet no additional contention was ever filed and, indeed, no mention of this issue was ever made until the reopened proceeding. Ms. Meyland's testimony was properly rejected.

Dr. Radford's testimony raises the possibility of increased radiation exposures due to the longer distances evacuees would have to travel to get to relocation centers. The fact that longer distances would be traveled was known in August. The issue of the acceptability of locating relocation centers in Nassau County was beyond the scope of the reopening. The designation of the actual reception center does not have a real impact on Dr. Radford's testimony. His testimony simply failed to

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26/ The Staff does not concede that such a contention would have been admissible or that the State statute has any application whatsoever to relocation centers. Those matters simply need not be addressed at this time.

address the reopened issue. 27/ Although the Board did admit that portion of Dr. Radford's testimony that dealt specifically with the ability of the Coliseum to accommodate the anticipated number of evacuees, it properly dismissed the balance of the testimony.

The testimony of Richard Roberts was practically identical to that of Mr. Kilduff. It was properly rejected for the same reasons mentioned above with reference to Mr. Kilduff's testimony. See Page 28, supra. 28/

4. Intervenors' Motion to Reopen was Properly Denied

As noted above, the Board in its May 6th order properly found the great bulk of Intervenors' testimony beyond the scope of the reopening. On May 17, 1985, Intervenors filed a Motion for Reconsideration and, in the alternative, a Motion to Reopen the Record. The Board denied both motions on June 10, 1985. Intervenors argue on appeal that both motions were improperly denied. Brief at 47-53. The Staff has already demonstrated the correctness of the May 6th Order rejecting Intervenors'

27/ Dr. Radford's testimony also does not appear to relate to any NRC regulatory requirements. If his testimony stands for the proposition that it is preferable to perform monitoring and decontamination at an earlier rather than later time, the Staff would certainly agree. The testimony in August did not indicate that relocation centers in Nassau County would be preferable to centers in Suffolk County, but rather that such centers would be adequate. See Tr. 14,675-25 (Keller and McIntire). Dr. Radford does not identify any regulatory requirements that would render relocation centers in Nassau County unacceptable.

28/ The Board did admit that portion of Mr. Roberts' testimony that specifically addressed the capacity of the Coliseum itself to handle the expected number of vehicles. See Order of May 6, 1985 at 6.

testimony (see Pages 27-30, supra); the Motion for Reconsideration necessarily fails for the same reasons.

The Motion to Reopen fares no better. Motions to reopen must be timely, they must relate to a significant safety or environmental issue, and they must have the potential to change the result that might otherwise be reached. See, e.g., Metropolitan Edison Company (Three Mile Island Station, Unit 1), ALAB-774, 19 NRC 1350, 1355 (1984). In the first place, the motion was fatally untimely. Intervenors argued in their Motion to Reopen (at 27) that they reasonably believed the testimony to have been within the scope of the reopening granted by the Board on January 28, 1985. Given the explicit nature of LILCO's Motion to Reopen (see Pages 25-26, supra), Intervenors can hardly claim that they expected the broad-scoped testimony they submitted on February 19th to be within the scope of the "limited" reopening set out by the Board at pages 9-10 of its January 28, 1985 order. More important, Intervenors' Motion to Reopen would have been untimely even if filed in Janaury. Intervenors' testimony addressed issues that were either litigated in August of 1984 (the acceptability and identity of the congregate care centers and of locating the reception and care centers in Nassau County), litigated earlier still (evacuation shadow), or unrelated to any admitted contentions (environmental effects of decontamination and need for an envrionmental statement). None of the striken testimony depended upon the actual designation of the reception center. If Intervenors believed reopening of the record was warranted, they should have filed their own motion to reopen without regard to the timing of LILCO's mution. There

was certainly no reason to wait until four months after LILCO filed its Motion to Reopen.

The Board also found that Intervenors had not met their burden 29/ in establishing the significance of the safety issues involved and the possibility that a different result might have been reached if the new information were considered. Order of June 10, 1985 at 8-11. Intervenors addressed these factors in an extremely cursory fashion. See Motion to Reopen at 28; Order of June 10, 1985 at 9. The only piece of testimony Intervenors referred to was that of Mr. Campo. Mr. Campo's testimony asserted that the Red Cross lacked letters of agreement with many of the identified congregate care centers. Intervenors in their Motion did not attempt to demonstrate the safety significance of the asserted lack of letters of agreement. In the first place, Mr. Campo did not assert that many of the facilities would actually refuse to make themselves available to the Red Cross in the event of an emergency. 30/ Moreover, even if the designated facilities were to declare that they would not be available in the event of an accident at Shoreham, it is unclear that the absence of designated mass shelter facilities presents any kind of safety problem, particularly in light of the past success of the Red Cross in

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29/ The proponent of a motion to reopen bears a heavy burden in demonstrating that the standards for reopening are met. See, e.g., Kansas Gas and Electric Co. (Wolf Creek Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1979).

30/ Indeed, Mr. Campo, as a representative only of the East Meadows School District, could hardly speak for any other facilities on this subject.

providing care for people in the aftermath of emergencies. Intervenors may have addressed their Motion to Reopen to an issue of regulatory compliance, but they did not carry their burden of demonstrating either timeliness or the significance of the safety issue involved. 31/

5. The Appeal Board should Reject Intervenors' Allegations of Error in the Concluding PID

Intervenors challenge four rulings in the CPID: the ruling on congregate care centers (Brief at 53-60); the finding that the Coliseum would be available in the event of an emergency (Id. at 60-62); the finding that the decontamination procedures are compatible with the use of the Coliseum (Id. at 62-63); and the ruling on Contention 74 (Id. at 63-64). The allegations of error are all groundless; the relevant portions of the CPID are supported by the facts and should be affirmed.

a. Congregate Care Centers

Intervenors' chief claim of error regarding congregate care centers revolves around the excluded evidence proffered by Mr. Campo. The Board found that the estimate of 32,000 for the number of evacuees that might require shelter was adequate. LBP-85-31, 22 NRC at 422. The Board approved the Red Cross standards in selecting and assessing the adequacy of shelters and found the shelters identified by the Red Cross to be

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31/ In addition, a good portion of Intervenors' testimony was not relevant to any admitted relocation centers contention. See Pages 27-30, supra. Consideration of irrelevant testimony clearly could not have changed the Board's ruling on any contention.

acceptable. 32/ Id. at 421-23. The Board did, however, note that the agreements between the Red Cross and various facilities are reversable at will and instructed LILCO and the Red Cross to confirm the agreements. The Board left the confirmation of these agreements to Staff oversight. Id. at 423.

Intervenors claim that the Board ignored "the facts before it" (Brief at 53), and argue that the confirmation of agreements can not be left to the Staff. Essentially, Intervenors are complaining that the Board ignored extra-record information (the Campo testimony and the various letters attached to it) indicating that the Red Cross lacks agreement with congregate care centers. To the contrary, the factual record before the Board indicated that the Red Cross did have agreements with shelter facilities (see, e.g., Tr. 14,760-64 (Rasbury); Cordaro et al., ff. Tr. 14,707 at 12 and Attachment 1)). As the Intervenors themselves noted in their November 7, 1984 letter to the Licensing Board, extra-record information should not be considered by a licensing board.

Despite the fact that the record did not reflect a lack of agreements, the Board took the prudent step of directing that these agreements be confirmed. Intervenors argue that this matter can not be left to the Staff's oversight. The Intervenors here have misconstrued the Board's ruling. The Board did not delegate to the Staff the task of "assessing the adequacy of facilities" (see Intervenors' Brief at 57). The Board found that the Red Cross standards used in identifying shelters

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32/ The adequacy of shelters is the focus of Contention 75. See Pages 4, 5, supra.

ensure that the shelters selected will be adequate for the task. 22 NRC at 421, 423. All that the Staff must determine is that agreements with the shelters in fact exist, a ministerial task that can properly be delegated to the Staff. See, e.g., Louisiana Power and Light Company (Waterford Station, Unit 3), LBP-82-100, 16 NRC 1550, 1567 (1982), affirmed, ALAB-732, 17 NRC 1076 (1983). 33/

Contention 75 challenges the adequacy of the congregate care centers. The Board properly found that the Red Cross has identified suitable centers; the Board further found that if facilities become unavailable, the Red Cross would find other suitable facilities. 22 NRC at 421-23. The only remaining issue is that of assuring that letters of agreement remain valid, an issue that can be delegated to the Staff. The evidence of record supported the Board's conclusions on the adequacy of the congregate care portion of LILCO's relocation scheme.

b. Availability of Nassau Coliseum

Applicants presented the Board with letters indicating that the Nassau County Executive approved the use of the Coliseum as a reception center and that Hyatt Management agreed to make the facility available when needed. Attachments 1-3, 6 to Affidavit of Elaine Robinson, ff. Tr. 15870. Intervenors claim in their Brief (at 60-62) that the Nassau Coliseum will not be available because use of the Coliseum violates New

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33/ In Waterford, the Licensing Board left to post-hearing resolution by the Staff the confirmation of the existence of letters of agreement concerning the provision of various vehicles. On appeal, the Appeal Board approved the delegation of various matters to the Staff or FEMA for post-hearing resolution; including the existence of such letters of agreement. 17 NRC at 1103-08.

York environmental statutes and such use has not received the approval of the Nassau County Board of Supervisors. The testimony of Mr. Marsh was properly excluded (see Pages 28-29, supra); there is nothing in the record to indicate that the facility will be unavailable because of state law. As to the question of local politics, Intervenors take the position (without providing any legal authority) that this agency can not rely on agreements from the highest elected official in Nassau County and the Company selected by the County to manage the Coliseum. The New York courts are better equiped than this agency to determine (assuming Intervenors wish to raise this issue) whether the County Executive acted outside his authority. See, e.g., Northern States Power Company (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978). Until a State court decides to the contrary, the County Executive should be presumed to have acted lawfully. There is much in the record to indicate that the Coliseum would be made available in the event of an emergency at Shoreham; there is nothing in the record to indicate that the facility would not be made available. Given this state of the record, the Board's conclusion on the availability of the Coliseum was both well-supported and inescapable.

c. Compatibility Ruling on Decontamination Procedures

The Board's "compatibility" ruling can be found in the CPID under the heading of "Functional Adequacy of the Nassau Coliseum to serve as a Relocation Center." After describing the procedures to be used to decontaminate people at the Coliseum, the Board found that "these procedures are compatible with the proposed use of the relocation center building." 22 NRC at 418. While the exact meaning of the sentence is

unclear, it seems from the context that the Board is addressing the issue of whether the necessary decontamination activities can be performed at the Coliseum. As the Board clearly sets out (with certain exceptions not relevant to Intervenors' appeal), the record supports the conclusion that decontamination can be performed at the Coliseum. Id. at 417-19. Intervenors in their Brief challenge the adequacy of the Coliseum on the grounds not that decontamination activities can not be performed at the site, but rather that such activities might threaten the Nassau County water supply. This issue, raised in the testimony proffered by Ms. Meyland, was properly rejected by the Board as outside the scope of the reopened proceeding. 34/ The Board properly found that the necessary monitoring and decontamination activities could be performed at the Coliseum.

d. Ruling on Contention 74

Contention 74 asserts that two of the three originally designated relocation centers were located too close to the Shoreham facility, contrary to the "requirements" of NUREG-0654 §II.J.10.h. 35/ The Nassau County Coliseum is located 33 miles beyond the plume exposure zone. Clearly the Board was correct in finding that the selection of the Coliseum rendered Contention 74 moot.

34/ See Page 29, supra. Indeed, Ms. Meyland's testimony was beyond the scope of any admitted contention. Id.

35/ Evaluation Criterion II.J.10.h recommends the establishment of "[r]elocation centers in host areas which are at least 5 miles, and preferably 10 miles, beyond the boundaries of the plume exposure emergency planning zone." (Emphasis in Original).

Intervenors on appeal now challenge the Coliseum as being too far from the EPZ. First, this assertion is outside the scope of Contention 74 and any other admitted contention; no motion for a new contention was filed by Intervenors. More important, this issue was discussed at the August 1984 hearing sessions. It is true, as FEMA witnesses testified, that as a general matter decontamination should be performed as soon as possible, thus favoring relocation centers located closer to the EPZ boundary. Tr. 14,621 (Keller). On the other hand, FEMA witnesses testified that sites as far as 40 miles from the EPZ could be acceptable. Tr. 14,624 (Keller). Interverors have pointed to no requirement that renders use of the Coliseum unacceptable because of its location 33 miles from the EPZ. 36/ Thus even if Intervenors are correct in their assertion that the distance of the Coliseum from the EPZ is within the scope of Contention 74, the record supports a finding that the site of the Coliseum is adequate.

B. INTERVENORS' MEDICAL SERVICES CONTENTION WAS PROPERLY REJECTED

In denying Intervenors' Contention challenging LILCO's compliance with 10 C.F.R. §50.47(b)(12), the Licensing Board relied on the Commission's May 16, 1985 Statement of Policy providing interim guidance

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36/ The whole posture of this issue is somewhat bizarre. Clearly LILCO wished to have relocation facilities located in Suffolk County; equally clearly, the County (and State) refused to make such closer facilities available. Given the lack of any regulatory requirement that bars the use of the Coliseum, Intervenors' position on this issue boils down to a combination of asking that an acceptable site be traded for a better site (by moving the reception center closer), while at the same time mandating that the site be further away. Such a position does not warrant serious consideration by the Appeal Board.

to Licensing Board's for dealing with issues raised by the Guard remand and the Appeal Board's decision in Potomac Electric Power Company (Douglas Point Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974). The Appeal Board in Douglas Point noted that the determination to treat generic issues on a case-by-case basis or on a generic basis is within the discretion of an administrative agency. 8 AEC at 84. The Appeal Board also noted that "licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission." Id. at 85.

In its Statement of Policy, the Commission noted that the Court of Appeals "afforded the NRC substantial flexibility in its reconsideration of planning standard (b)(12) to pursue any rational course," and that further Commission action could range from reconsideration of the phrase "contaminated injured individuals" to the imposition of detailed arrangements for members of the public exposed to radiation. 50 Fed. Reg. at 20893. The Commission then provided interim guidance for Licensing Boards to follow pending the Commission's determination of how to respond to the Court's remand.

As interim guidance, the Commission noted (for reasons given) that Licensing Boards might find that license applicants who complied with the requirements of Section 50.47(b)(12) as interpreted by the Commission before GUARD, and who commit to full compliance with the Commission's response to the GUARD remand, meet the requirements of Section 50.47(c)(1) and could be awarded a license conditional upon full compliance with the Commission's response to the GUARD remand. The factors relied upon by the Commission in issuing this guidance included:

1) The uncertainty of what additional measures will be determined to be necessary to demonstrate compliance with Section (b)(12), including the possibility that the Commission may find that no additional measures are necessary;

2) The low probability of occurrence of an accident causing extensive radiation exposure during the period necessary to finalize a response to the GUARD decison;

3) The slow evolution of adverse reactions to overexposure to radiation; and

4) The unfairness involved in delaying license issuance in instances where applicants acted in good faith reliance on the Commission's prior interpretation of its own regulation.

50 Fed. Reg. at 20893-94.

In rejecting Intervenors' contention, the Licensing Board noted that litigation of the contention could be duplicative of or inconsistent with the Commission's generic review of the issue (Order of August 21, 1985 at 6-7); that in the instant case there was an "additional problem of the lack of a standard under which we could anticipate meaningful litigation of the medical facilties issue" (Id. at 7); that LILCO would have to comply with the Commission's eventual determination (Id.); and that denial of the contention would be consistent with the Commission's Statement of Policy (Id.).

Intervenors argue on appeal that the Douglas Point rule should not be followed here because there is presently "a binding regulation in effect ... [that] must be applied." Brief at 67 (emphasis in original). Intervenors are only partially correct; although Section

50.47(b)(12) is currently "in effect," there exists no direction whatsoever as to how the regulation should be applied. Under the circumstances, the Licensing Board properly found the better course to be to wait for the Commission to provide such direction.

Intervenors further argue that the Statement of Policy required Licensing Boards to make specific findings that could have been challenged at hearing. Brief at 68. Most of the findings mentioned in the Statement of Policy relate to the factors highlighted by the Commission in its Statement (see Pages 39-40, supra); these findings are manifestly generic in nature. There can be no question of material fact about the existence of these generic factors: the uncertainty as to what additional measures, if any, the Commission will require in this area; the probability of an accident causing extensive radiation exposure at a nuclear facility during the interim period is very low; the adverse effects of exposure to radiation evolve slowly; and any unfairness involved in delaying licenses where applicants complied with the Commission's previous interpretation of Section 50.47(b)(12) applies equally to LILCO. The only additional findings contemplated by the Commission in its Policy Statement include a demonstration of compliance with the pre-Guard interpretation of Section 50.47(b)(12) and a commitment on the part of the license applicant to comply with the Commission's future interpretation of the regulation. As to the first finding, Intervenors never challenged LILCO's compliance with Section (b)(12) prior to the Guard decision (see Note 14, supra), and there is no question that the Shoreham emergency plan contains a listing of medical facilities. See LILCO Transition Plan, §3.7 and OPIP 4.2.2,

Attachment 1. As to the final requisite finding, that of the existence of a commitment on the part of LILCO to comply with the regulation when it takes its final form, again there is no issue susceptible to a formal hearing. If a more specific commitment than that contained in LILCO's December 11, 1985 Brief (at 44) is required, the Appeal Board could properly condition the issuance of an operating license on the submittal of a commitment by LILCO.

In conclusion, it is clear that any litigation of this issue would require the Shoreham parties to engage in a broad debate over what the standards for compliance with (b)(12) should be. Such litigation would clearly be duplicative of, and subordinate in result to, [37/] the concurrent review by the Commission of the same issue. One of the lessons of Douglas Point is that such wasteful litigation ought to be avoided. Moreover, in its Statement of Policy, the Commission clearly provided for resolution of this issue without engaging in such wasteful and duplicative litigation. The Staff submits that the result reached by the Licensing Board was clearly correct.

37/ The Commission's decision would clearly take priority over any interpretive decision the Board might reach.

IV. CONCLUSION

For the reasons presented above, the Staff submits that Intervenors' appeal of the CPID should be denied.

Respectfully submitted,

Robert G. Perlis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 23rd day of December, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN RESPONSE TO INTERVENORS' APPEAL OF LICENSING BOARD'S AUGUST 26, 1985 CONCLUDING PARTIAL INITIAL DECISION ON EMERGENCY PLANNING" 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 23rd day of December, 1985.

Alan S. Rosenthal, Esq., Chairman*
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Howard A. Wilber*
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Gary J. Edles, Esq.*
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

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

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

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

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

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

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

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

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

Dr. Monroe Schneider
North Shore Committee
P.O. Box 231
Wading River, NY 11792

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

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

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

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

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

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

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

Robert G. Perlis
Counsel for NRC Staff