LILCO, December 11, 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)	)	Proceeding)
	)	

LILCO'S BRIEF IN OPPOSITION TO INTERVENORS' APPEAL OF THE NASSAU COLISEUM AND GUARD ISSUES

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I. Introduction

In its Concluding Partial Initial Decision on Emergency Planning of August 26, 1985, the Atomic Safety and Licensing Board (ASLB) found that, with minor exceptions, the Nassau County Veterans Coliseum is an acceptable reception center for evacuees from a Shoreham radiological emergency, in the unlikely event that an evacuation might some day be ordered. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-31, 22 NRC 410 (1985) (hereinafter "CPID"). Intervenors Suffolk County, the State of New York, and the Town of Southampton challenge the decision, and various related ASLB rulings prior to it, in their brief of November 6, 1985, entitled "Suffolk County, State of New York, and Town of Southampton Brief on Appeal of Licensing Board August 26, 1985 Concluding Partial Initial Decision on Emergency Planning" (hereinafter "App. Br.").

This is LILCO's answer to that brief. For the reasons recited in the CPID and in this brief, the Intervenors' challenges to the ASLB's decision ought to be rejected.

LILCO agrees with the Intervenors (App. Br. 4) that the ASLB's decision needs to be kept in "context." But LILCO sees that context differently from the Intervenors. The context LILCO thinks important has three parts. First, the Nassau Coliseum is only one small part of a much larger emergency plan, a plan that was litigated in exhaustive, and oftentimes excessive, detail. While it is possible, as the Intervenors have done, to raise all sorts of objections to the Coliseum, none of those objections is substantial or materially detracts from the quality of the emergency plan as a whole.

Second, the Intervenors, as is their wont, insisted on having the issues about the Coliseum considered two or more times; virtually every decision the ASLB made had to be reconsidered upon motion by the Intervenors.1/ Therefore the Intervenors' claim that the ASLB "ignored" their

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1/ The Intervenors asked for reconsideration of the ASLB's discovery ruling, Motion for Reconsideration of Board's February 5 Order Prohibiting Discovery on LILCO's Proposed Use of the Nassau Coliseum, Feb. 7, 1985; its order excluding most of their testimony, 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, May 17, 1985; and its scheduling of the hearing, Letter to ASLB from Michael S. Miller, June 21, 1985, at 2; Motion of the State of New York for a Continuance of the Hearing Scheduled to Commence on June 25, 1985, June 21, 1985.

The Intervenors argued to the ASLB at least five times that their written testimony should be heard. After filing their written testimony and receiving LILCO's response, the Intervenors filed a Suffolk County and State of New York Motion for Leave to File Reply to LILCO's Response to February 19 Proffered Testimony on the Designation of Nassau Coliseum as a Monitoring and Decontamination Center, March 1, 1985, which in fact was a response on the merits, a 14-page document with three attachments, full of substantive arguments about what the Intervenors "would state" if they were allowed to reply. The Intervenors then filed a 32-page pleading called Suffolk County and State of New York Reply to LILCO's Response to February 19 Proffered Testimony on the Designation of Nassau Coliseum as a Monitoring and Decontamination Center, March 20, 1985. After the ASLB denied admission of

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arguments (see, e.g., App. Br. 28) are without basis. The fact is that the ASLB had to consider their arguments not just once, but many times. We start out, then, with the fact that the Intervenors have already had a very thorough hearing below.

A good deal of the Intervenors' complaint seems to be that the ASLB was concise in dealing with their arguments. This does not mean that the ASLB did not consider the arguments carefully; there is no requirement that a licensing board be as wordy as the lawyers appearing before it. And it must be remembered that the ASLB was faced with scores of issues, motions, briefs, pleadings, discovery requests, and so forth. Judges' decisions, like emergency plans,2/ may properly be concise without violating the parties' rights.

A third aspect of the "context" is the Intervenors' own responsibility for the problems about which they complain, particularly the "four chances"

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most of their testimony, Memorandum and Order (Reopening the Record), May 6, 1985, at 5-7, the Intervenors filed their 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, May 17, 1985. The ASLB ruled again in its Memorandum and Order Ruling on Motion of Suffolk County and the State of New York for Reconsideration and Other Relief (June 10, 1985). The ASLB ruled a third time when the Intervenors tried to introduce the same issues in cross-examining LILCO's witness (see, e.g., Tr. 15,930-32 (Robinson)), and a fourth time during cross-examination of the FEMA witnesses (see, e.g., Tr. 15,997-98 (Baldwin)). In their proposed findings on the Coliseum the Intervenors made the same arguments a fifth time. Suffolk County and State of New York Proposed Findings of Fact and Conclusions of Law on Reopened Relocation Center Issues, July 15, 1985.

2/ An emergency plan should be kept "as concise as possible." NUREG-0654 at 29.

they say LILCO was given to prove its case. Their various arguments about "fairness" ignore the fact that LILCO's difficulties over the Coliseum are the direct result of their own refusals to agree to let public buildings be used to help the public in an emergency.

That is the "context" in which the Intervenors' claims of error should be viewed. But viewed in context or not, those claims ought to be rejected, as explained below.

II. Nassau Coliseum Contentions (App. Br. 4-64)

A. Background and Overview (App. Br. 4-18)

In their brief the Intervenors set out the history of the Coliseum issues at some length.3/ Leaving aside the minor distortions,4/ their treatment of history is deficient in two respects. First, it neglects to mention that the reason that LILCO was forced to change its plan several times was that public buildings controlled by Suffolk County and the State of New York were repeatedly withdrawn after LILCO designated them and the State and County became aware of it. See, e.g., Tr. 14,727-32 (Robinson, Cordaro).

3/ LILCO prefers the statement of history in LILCO's earlier brief on the Coliseum issues that it appealed. LILCO's Brief on the Relocation Center Issues, Oct. 7, 1985, at 2-13. The NRC Staff is in general agreement with LILCO's account. NRC Staff's Brief in Support of "LILCO's Brief on the Relocation Center Issues," Nov. 21, 1985, at 2.

4/ For example, the Intervenors claim that the Red Cross witness testified that LILCO's plan represented an "ad hoc" approach, citing Tr. 14,813 (Rasbury). App. Br. 12. In fact, he said he was not comfortable with the term "ad hoc," but that he would not make a "big issue" of it.

Second, the Intervenors suggest that the Red Cross witness was not telling the truth when he said he had agreements with congregate care centers. In fact the Red Cross witness has written agreements, just as he said; the Intervenors were given them for his deposition. See Tr. 14,764-67 (Rasbury, Robinson). What has happened is that some of the signers of those agreements have come forward after the hearings to say that they now interpret the agreements not to cover an emergency at Shoreham. The ASLB resolved this problem, quite properly, by requiring that LILCO confirm that the agreements remain in effect. CPID, at 423.

B. The So-called "Repeated Errors" (App. Br. 19-64)

1. The ASLB Properly Granted LILCO's Motion to Reopen the Record (App. Br. 19-29)

At the time the hearings ended in August 1984 there was one respect in which LILCO's planning for relocation centers was still incomplete: there was still no building designated to serve as a reception center for evacuees. The Red Cross was negotiating with two possible facilities, but no agreement had been concluded, and it was not certain that one would be. Within two months this problem was solved; on October 8 LILCO concluded an agreement with the management of Nassau Coliseum, and on October 23 and 24, the Red Cross and LILCO signed a separate agreement. LILCO supplied the agreements to the ASLB and parties on October 30, 1984, noting, as it had in its proposed findings of October 5, that in its view there was no need to reopen the record.

There was good reason for this view. The only contention affected by the choice of the Coliseum was one that said, in effect, that there was no agreement for a relocation center at all, and so producing an agreement appeared to refute the contention beyond any doubt. Moreover, the Waterford decision tells licensing boards that emergency planning findings are "predictive" and that the emergency plan is to be litigated, not the detailed procedures. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103, 1107 (1983). To LILCO it appeared, and still appears, that the plan, as opposed to the details, had been fully litigated in August 1984.5/ LILCO had shown that its plan is to direct all evacuees who need shelter to a central "reception center" for registration, monitoring, and, if necessary, decontamination. From there the Red Cross would direct evacuees to dispersed "congregate care centers" for food, clothing, and shelter.

The identity of the central reception center was a detail. There was no contention about the functions that take place there -- registering,

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5/ The Intervenors were given the opportunity to cross-examine for two days on 60 pages of LILCO testimony, and to present their own testimony (37 pages), on issues ranging from sheltering people 40-50 miles from their homes, see Tr. 14,816-17; to monitoring and decontamination see Tr. 14,825-30, 14,854 (Weismantle), Tr. 14,878-82, 14,888 (Harris); to the location of Red Cross relocation centers and the manner in which they are run, see LILCO's Testimony on Phase II Emergency Planning Contentions 24.O, 74 and 75 (Relocation Centers), ff. Tr. 14,707; Tr. 14,801 (Rasbury), Tr. 14,747 (Rasbury); to written agreements for relocation centers, see Tr. 14,805 (Rasbury), Tr. 14,719-20 (Robinson), Tr. 14,818-20 (Rasbury, Robinson); to the basis of relocation center capacity used in planning, see Tr. 14,744-46 (Rasbury), Tr. 14,886-87 (Harris); to the adequacy of the relocation center facilities, see Tr. 14,775-78 (Rasbury); to the distance of relocation and reception centers from the EPZ, see Tr. 14,616-18, 14,620 (Keller); Tr. 14,625 (McIntire).

monitoring, and possibly decontaminating -- except a very narrow issue (Contention 77) about equipment. Nor did the choice of a reception center appear to raise new litigable issues; all that is needed to register, monitor, and decontaminate people is floor space and running water. Monitoring, which involves passing a probe over people, can be done anywhere. Decontamination is more complicated, but there is no NRC requirement for decontaminating the public. Under the circumstances, then, the ASLB should simply have directed the Staff to verify that LILCO had actually secured a reception center by the time of full-power operation. The NRC Staff agreed with this approach. The ASLB, however, saw things differently and required LILCO to ask that the record be reopened.

The Intervenors argue that the ASLB should not have reopened the record. Apparently they would have a completed multi-billion-dollar power plant sit idle because a needed piece of evidence became available only after the hearings. That result would make no sense whatsoever. As the licensing board said in Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509 (1984):

> We are permitting Applicant to reopen the record without a showing of good cause because it does not seem to us logical or proper to close down a multi-billion-dollar nuclear plant because of a deficiency of proof. While there would be some "justice" to such a proposition, there would be no sense to it.
>
> Furthermore, we note that intervenors receive several procedural advantages in our proceedings that also are not fully symmetrical and that compensate for the application of different standards for reopening the record.

19 NRC at 530.

In Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169 (1984), additional inspections and other activities with the potential to affect the Licensing Board's decision were underway before the end of the hearings. The Licensing Board declined to delay its decision to consider these activities. The Appeal Board reversed, holding that the Licensing Board should have provided for further proceedings to allow the applicant to introduce additional evidence. In essence, the Appeal Board recognized the principle that licensing boards should be flexible in permitting applicants to introduce additional evidence of the sort here in issue.6/

Nevertheless, the Intervenors argue against reopening, they say, first, because LILCO was untimely; second, because the reopening gives LILCO an unfair advantage; and, third, because they have been prejudiced by repeated revisions to the LILCO plan.

The first point, untimeliness, is easily dispensed with. LILCO notified all parties, and provided them with copies of the Coliseum agreements, soon after they were signed. Moreover, the agreements were subsequently the subject of a two-day hearing, at which the Intervenors had the opportunity to cross-examine and present evidence. So there is no question of surprise.

6/ See also Order Confirming Grant of LILCO's Motion to Reopen Diesel Engine Hearing, Doc. No. 50-322-OL, Dec. 4, 1984, granting an untimely request to reopen. The ASLB noted that in the unusual circumstances of the applicant's asking to reopen, it would be the movant and not the opponent who would be prejudiced by later delay if the motion were not granted immediately, id. at 3, and added that the prejudice to the opponent was not so substantial that the board should turn its back on additional evidence that might affect the outcome of the decision, id. at 4.

Also, timeliness means something different when applied to the applicant than when applied to those opposing a license application. Late-produced evidence prejudices the applicant and no one else, despite the Intervenors' arguments to the contrary.

But the Intervenors argue that reopening the record for the Nassau Coliseum agreements was inconsistent with other "timeliness" decisions in this proceeding, namely (1) the denial of Intervenors' late-filed contention on the "strike" issue, (2) the denial of leave to intervene by the Citizens for an Orderly Energy Policy, Inc. (COEP), (3) the denial of a diesel generator contention, and (4) the denial of a fourth chance for Intervenors to rewrite their onsite emergency planning contentions. Basically the Intervenors' argument is a simplistic numerical comparison: if the Intervenors weren't allowed to submit a new strike contention 27 days late, the argument goes, LILCO shouldn't be allowed to submit the Coliseum agreements 2 1/2 months late.

The answer is that such simple-minded comparisons are not dispositive. Late contentions and petitions to intervene must be justified by an analysis of the five factors of 10 C.F.R. § 2.714(a)(1); the reopening standard LILCO was held to was the three-part test of Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-756, 18 NRC 1340, 1344 (1983). Each decision is a complex analysis of several factors; in the case of a late-filed petition to intervene, for example, the decision "hinges upon the totality of the circumstances," and the Appeal Board is not "readily disposed" to substitute its judgment for the licensing board's, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 395 (1983).

In each case urged by the Intervenors for comparison with the decision to reopen the record, distinctions are easy to draw.7/ But the basic reason for granting one motion and denying another is that the "totality of circumstances" was different in each case. If the Intervenors want to show that the decision to reopen was wrong, they must show it was wrong on its merits, not just that a different result came about for a different motion under different circumstances. Since, as argued above, the motion was timely, the Intervenors cannot make such a showing.

Finally the Intervenors argue that they were prejudiced because they had to spend their resources in "factual investigations and other litigation-related efforts" (App. Br. 26) because LILCO revised its plan several times. This claim, that LILCO should freeze the plan so the Intervenors can litigate it more easily, is a misguided notion that the Intervenors pressed throughout the proceeding. This proceeding is neither a game nor a civil lawsuit; it is a proceeding in which the applicant is supposed to keep trying until he meets NRC requirements. It is also an effort to protect the public; the applicant is supposed to make changes if they improve his plan.

7/ For example, as to notice: LILCO notified everyone as soon as it had the Coliseum agreements in hand. By contrast, in the case of the strike contention Suffolk County made no statement at a conference of counsel August 8 or at any time the week of August 14 that it intended to raise an additional issue. Memorandum and Order Denying Motion of Suffolk County to Admit New Contentions, Sept. 7, 1984, at 8.

As to reasonable reliance: on the strike issue the ASLB believed that the sua sponte issue was "clear and unambiguous," id. at 7. By contrast, the ASLB acknowledged the possibility of ambiguity in its remark about a "void in the record." Memorandum and Order Granting LILCO's Motion to Reopen Record, Jan. 28, 1985, at 7.

Moreover, the Intervenors' claim of prejudice is flimsy at best. They filed only one full set of testimony on the relocation center issues, on March 2, 1984. When Suffolk County and New York State officials refused to make two of the five named facilities available, Cordaro et al., ff. Tr. 14,707, at 13-14, LILCO designated different facilities, and the Intervenors' revised testimony consisted of little more than two letters denying the use of two more State facilities. See Harris & Mayer, ff. Tr. 14,870, at 2, Att. 23. Later on, the designation of the Nassau Coliseum was not a change in the "scheme," but a filling in of a detail that could not be addressed earlier. There was no duplication of effort in addressing it.

Finally, the Intervenors' complaint that LILCO keeps changing the plan is particularly unwarranted given that the changes were necessitated by the Intervenors' own refusals to make public buildings available for sheltering the public.

2. The ASLB Correctly Denied Discovery (App. Br. 29-32)

The Intervenors next complain because they were denied discovery on the narrow reopened issue of the "functional adequacy" of the Coliseum. The essential flaw in their argument is that they have not shown any prejudice. They were afforded two days of cross-examining LILCO and FEMA witnesses; if there were evidence that discovery would have revealed, one would expect that the cross-examination would have revealed it. If the Intervenors were surprised at the hearing in any way, one would expect them to say so. And yet they have failed to identify any evidence that they might have developed,

had they been given discovery, and they have failed to identify any surprise or other prejudice.

In fact, the information in LILCO's written evidence on Nassau Coliseum was publicly accessible information of which any interested party could have informed himself. Moreover, the Intervenors' discovery requests were answered voluntarily by the NRC Staff and FEMA.8/ And by letter of February 13, 1985, the General Manager of the Coliseum provided some of the information the Intervenors' lawyers had requested. Finally, the Intervenors were offered the opportunity to subpoena the General Manager of the Coliseum, and they failed to take that opportunity.

Unless the denial of discovery is per se reversible error -- which it clearly is not9/ -- any error, even if it existed, would be harmless error.

3. The ASLB Correctly Denied Admission of Intervenors' Testimony in LILCO's Reopening of the Record (App. Br. 32-47)

The Intervenors next complain that their prefiled written testimony should have been admitted on the narrow issue reopened at LILCO's request. The answer, as the ASLB correctly found, is that this testimony was outside the scope of the reopened proceeding.

8/ The NRC Staff voluntarily responded to the Intervenors' general requests. Letter from Bernard M. Bordenick to Michael S. Miller, Feb. 6, 1985. In a letter of February 12, 1985, counsel for FEMA likewise responded to the Intervenors' request for information.

9/ As the ASLB observed, under 10 C.F.R. § 2.740(b)(1) no discovery is permitted late in a proceeding except "on leave of the presiding officer upon good cause shown." And the Intervenors did not establish good cause. Memorandum and Order (Ruling on Motion for Reconsideration of Board's February 5, 1985 Protective Order, Feb. 12, 1985, at 5.

The Intervenors argue that the "void in the record" initially found by the ASLB, LILCO's responsive motion to reopen, and the ASLB's reopening were not "specifically on Contention 24.O."10/ This is demonstrably wrong. Originally, as the Intervenors well knew, LILCO's view was that the "void in the record" could be filled simply by naming a building.11/ (Indeed, in LILCO's opinion the ASLB unnecessarily expanded the reopened issue by including the "functional adequacy" issue.12/) LILCO's motion to reopen begins as follows: "LILCO hereby moves to reopen the evidentiary record in this proceeding for the limited purpose of admitting seven documents regarding the use of Nassau Veterans Memorial Coliseum as a reception center." LILCO's Motion to Reopen Record, Jan. 11, 1985, at 1. The third sentence reads "Contention 24.O in this proceeding alleges that 'there is no relocation center designated' for a significant portion of the anticipated evacuees," id. at 2.

10/ Contention 24.O, set out at 21 NRC 979, says in essence that, since Suffolk County will not permit Suffolk County Community College to be used in LILCO's plan, "there is no relocation center designated for a significant portion of the anticipated evacuees."

11/ As the ASLB noted in connection with the County's second request for discovery, the designation of the Coliseum was neither new nor complex. Memorandum and Order (Ruling on Motion for Reconsideration of Board's February 5, 1985, Protective Order), Feb. 12, 1985, at 3-4.

12/ The ASLB found that "When the record closed, the void in the record did not extend to merely an absence of the name of the relocation facility":

> Inherent in admitting Contention 24.O for litigation is the issue of whether the designated facility is functionally adequate to accomplish the purpose set forth in the contention. This purpose is to adequately accommodate the anticipated number of general evacuees.

Memorandum and Order (Reopening the Record), May 6, 1985, at 3.

Even more pointedly, on page 6 of the motion LILCO pointed out that none of the admitted contentions about monitoring and decontamination depends on the location of the central reception center and that "Only Contention 24.O, a narrow contention alleging that 'there is no relocation center' is affected by the identification of Nassau Coliseum." Id. at 6. Elsewhere in its motion, LILCO again emphasized the narrowness of the reopening. Noting that the ASLB had cited Contention 24.O and described the void in the record as proof "that a relocation center has been designated," Tr. 14,806 (Judge Laurenson), LILCO said that "with the evidence proffered by LILCO today there is no longer even a shadow of a real issue under Contention 24.O as to whether a reception center exists." Id. at 13.

Likewise, the ASLB, in its Memorandum and Order Granting LILCO's Motion to Reopen Record, Jan. 28, 1985, at 1, summarized Contention 24.O in the second sentence and discussed no other contention in the Memorandum and Order. Throughout the Memorandum and Order it referred to the issue as the "identity of the central reception center" (see, e.g., id. at 8), and it said that it was agreeing to reopen the record "for the limited purpose of assessing the adequacy of LILCO's proffered evidence concerning the Nassau Veterans Memorial Coliseum." Id. at 9.

The Intervenors argue that the ASLB's adhering to the admitted contentions was "form over substance" (App. Br. 43). The wording of two-year-old contentions, say the Intervenors, is a "red herring"; the ASLB should have considered the safety issues the Intervenors raised, no matter how they raised them.

This argument is obviously wrong. "New" safety concerns must be raised in the proper procedural manner as late-filed contentions. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048, 1050 (1983). The Intervenors were represented by experienced counsel. They knew the importance of contentions,13/ and they had been prolific in creating them in the past. If they made no attempt to include their Coliseum issues in contentions that is their fault, not the ASLB's or LILCO's.

There is, in particular, no merit to Intervenors' claim that Mr. Campo's testimony, about the availability of congregate care centers, should have been admitted as bearing on LILCO's reopening of the record. LILCO's reopening involved only the Nassau Coliseum; Mr. Campo's testimony had nothing whatsoever to do with the Coliseum.14/

4. The ASLB Properly Denied the Intervenors' Motion to Reopen the Record (App. Br. 47-53)

13/ As Suffolk County once said, "The Board and the parties have spent large amounts of time and energy in this proceeding in an effort to obtain very detailed and very specific contentions, limited and directly tied to particular portions (and even pages or sentences) of Revision 3 of the LILCO Plan and to applicable regulatory requirements. Suffolk County Motion to Strike Portions of LILCO's Group II-B Testimony, Mar. 28, 1984, at 2-3.

14/ Mr. Campo's testimony purported to "respond to LILCO's proffered evidence of January 11, 1985," Campo Testimony at 1, by focusing on one phrase in a letter attached to LILCO's January 11 submittal on the Nassau Coliseum, in which LILCO noted that Red Cross personnel will "direct evacuees to congregate care centers operated by the Red Cross," Campo Testimony at 2. That letter describes briefly, for the purposes of the agreement between the Red Cross and LILCO, the duties of the Red Cross during an emergency at Shoreham. It does not provide a basis for reopening the entire relocation center issue.

The Intervenors then get to the real crux of their complaint and argue that the ASLB should have reopened the record, with or without an appropriate contention, to consider the safety issues raised in their written testimony of February 19, 1985. But the truth is that the ASLB was perfectly justified in declining to reopen the record to consider the new issues. For one thing, the evidence was untimely. As discussed at some length in LILCO's February 26 Response15/ at 4-38, and below, each piece of testimony not admitted by the ASLB involved issues that either were, or could have been, litigated in August 1984 when the original hearings on relocation center issues were held. Moreover, the testimony was inadmissible for a variety of other reasons, as explained below.

a. Availability of the Congregate Care Centers (Mr. Campo)

Mr. Campo, who is Executive Assistant for Finance for the East Meadow Union Free District and proferred Intervenor witness on "role conflict,"16/ filed written testimony addressed solely to the availability of congregate care centers. The Red Cross's list of these centers was placed in the record on August 21, 1984. See Cordaro et al., ff. Tr. 14,707, Att. 1.

The Red Cross has a written agreement for each of the facilities and also a "shelter profile" listing the number of toilets, square footage, and

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15/ LILCO's Response to Intervenors' Proffered Testimony on the Designation of Nassau Coliseum as a Reception Center, Feb. 26, 1985.

16/ Mr. Campo's testimony was entered into the record on January 25, 1984, ff. Tr. 3087, but he was unable to attend the hearings, and the Intervenors withdrew his testimony.

other details. Tr. 14,777-78 (Rasbury). Frank Rasbury, Director of the Nassau County Chapter of the Red Cross, testified that he does not regard these agreements as giving him a "right" to use the facilities, but that he believes permission to use them would be forthcoming in a real emergency. Tr. 14,771-72 (Rasbury). The Red Cross chooses which centers to use in an emergency. Cordaro et al., ff. Tr. 14,707, at 23-24; Tr. 14,775-76 (Rasbury). At the time of an emergency Mr. Rasbury will call the most suitable facilities on the list and ask that they be made available. Tr. 14,769, 14,772 (Rasbury). This is the way the Red Cross ordinarily does business, and it has been successful in emergencies in the past. Tr. 14,747, 14,857 (Rasbury).

There is no question that the written agreements with the congregate care centers exist; indeed, copies of them were given to the Intervenors for use in taking Mr. Rasbury's deposition. See Tr. 14,764-67 (Rasbury, Robinson). But there is a difference of opinion over whether all the agreements cover a Shoreham emergency.

Mr. Rasbury explained that the agreements with the congregate care centers varied as to the wording of "natural disasters," "disasters," or "emergencies," but that it was his understanding as a result of discussions and ongoing contacts with each of these entities that the buildings were available for any kind of emergency, whether a hurricane, a chemical spill, a fireworks factory explosion, or any other calamity. Tr. 14,760-62, 14,771-72 (Rasbury); see Tr. 14,740 (Rasbury) ("We get people to make the facilities available to us on a broad spectrum, which includes the Shoreham circumstance, certainly, but is not limited to and is not specific only to.") There

is, after all, no difference between a person seeking shelter from a storm and a person seeking shelter from a radiological accident. Tr. 14,774 (Rasbury).

Months after Mr. Rasbury testified, Mr. Campo, presumably prompted by LILCO's motion to reopen the record, wrote the Red Cross that in his opinion the agreement between the Red Cross and the East Meadow Union Free School District covered only natural disasters, not radiological ones. He also phoned some of his colleagues in other school districts, and in February-June 1985 a number of school districts, and two churches, wrote letters saying that their agreements with the Red Cross do not cover a Shoreham emergency. The letters are in the transcript, ff. Tr. 15,986. Most of them distinguish between natural disasters and a Shoreham emergency; some cite the Governor's decision not to participate in emergency planning for Shoreham.

These letters, and Mr. Campo's testimony, were untimely. There is absolutely no reason Mr. Campo could not have phoned his colleagues during the summer of 1984. Moreover, the letters are immaterial. The LILCO plan relies on the Red Cross to supply congregate care centers, and the record shows that reliance is well-founded,17/ even if some congregate care centers do not wish to commit themselves to a Shoreham emergency plan.18/

17/ As one licensing board said, "[W]e cannot attribute much weight to a concern that the American Red Cross . . . would not be adequately prepared with resources and staff to fulfill its obligation . . . ." Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-84-18, 19 NRC 1020, 1046-47 (1984).

18/ LILCO's view then, as now, is that the individual agreements between the Red Cross and the relocation centers on which it relies are a level of detail that is unnecessary for a licensing board to scrutinize agreement by agreement. FEMA testified that LILCO's agreement with the Red Cross

(Continued)

Mr. Rasbury testified that, during the last major communitywide disaster on Long Island (a hurricane), no agreements were in place and yet school districts and many others responded admirably to house the homeless. Cordaro, et al., ff. Tr. 14,707, at 17; Tr. 14,815 (Rasbury). Mr. Rasbury explained that as an added measure of planning following the hurricane experience, the Red Cross sought agreements with various school districts, but that experience showed people would respond whether or not agreements existed. Tr. 14,860 (Rasbury). He also testified that the agreements are updated periodically, that persons from his office are in contact with representatives of the various entities relied upon, and that, because no radiation monitoring or decontamination would take place at these buildings, he is treating the use of the buildings as relocation centers for Shoreham as he would treat them for any other emergency. Tr. 14,774-80 (Rasbury).

Thus, the record is clear that even without agreements, the Red Cross would provide shelter for those needing it during an emergency.19/ But the

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(Continued from Previous Page)

providing that the Red Cross will furnish relocation centers during an emergency at Shoreham is all that need be included in the LILCO Plan; while FEMA would like to have on file at its headquarters the individual agreements between the Red Cross and the congregate care centers, there is no need to include the individual agreements in the LILCO Plan. Tr. 14,611-13, 14,572-74, 14,611-15 (McIntire, Kowieski, Keller). In addition, FEMA witnesses testified that, in their view, it is an accepted fact that the Red Cross provides relocation centers and cares for people in an emergency. Tr. 12,989 (Keller). Suffolk County witnesses conceded that "it is [not] inappropriate for LILCO to rely on the American Red Cross because the American Red Cross has a good record in dealing with all sorts of natural disasters." Tr. 14,878 (Harris).

19/ As the December 31, 1984, letter from the Nassau County Executive to LILCO shows, the Nassau County government would cooperate in making facilities available to aid evacuees. Att. 6, ff. Tr. 15,870. This in itself provides substantial assurance that facilities would be available as needed.

ASLB went further and demanded that the NRC Staff verify that the Red Cross does have agreements in effect. This may be more than "reasonable assurance," but is certainly an effective way to deal with the problem. The Intervenors' argument that the Red Cross cannot be trusted, because Red Cross personnel testified as LILCO witnesses, and that the NRC Staff cannot be counted on, because they agreed with LILCO on the merits of the issue, is nonsense. The NRC cannot disqualify everyone who expresses an opinion.

b. The "Shadow Phenomenon" (Dr. Johnson)

The Intervenors' testimony by James H. Johnson, Jr., attempted to show that more people than planned would seek a relocation center because of the "shadow phenomenon." The "shadow phenomenon" (Contention 23) was litigated as one of the very first issues in this offsite proceeding, and Dr. Johnson said nothing new about it in his later Coliseum testimony. The ASLB properly excluded it.

c. Distance of the Nassau Coliseum from the Plant (Dr. Radford)

Dr. Radford's testimony showed that, the further one must travel, the longer it takes. Hence, if people are contaminated and must travel to the Nassau Coliseum, they will receive higher radiation doses than if they were reporting to a location nearer to where they started. This obvious proposition requires no testimony and no hearing.20/ It is true for every nuclear

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20/ Also, it was untimely. Dr. Radford's testimony, being generic, could have been presented in August, 1984. Indeed, the issue of having shelters 40-50 miles from people's homes was addressed at the hearings. See Tr. 14,816-17 (Rasbury).

plant and every relocation center in the country. But as the FEMA witnesses testified, one must pick relocation centers that are available, and Suffolk County and the State of New York have managed to make unavailable many facilities in Suffolk County. Tr. 14,621-25 (Keller, McIntire). There is no per se rule that a relocation center must be closer to the plant than 43 miles, and no rule that it must be at some optimal distance. As one of FEMA's answers to an interrogatory revealed, many relocation centers for other plants are 30-50 miles from the plant (see section III.B.5.d below).

d. Traffic Congestion (Messrs. Roberts and Kilduff)

The testimony of Deputy Chief Inspector Richard C. Roberts and Charles E. Kilduff raised a spectrum of issues about alleged traffic problems resulting from the use of the Nassau Coliseum. Generally, this testimony did little more than recite themes that had already been litigated in the traffic-related contentions (Contentions 23, 65, 66, and 67). Inspector Roberts' written testimony focused largely on alleged congestion and delays that would occur in reaching the Nassau Coliseum (pages 3 to 8). In addition, he argued that no provision is made for traffic guides, fuel trucks, and tow trucks outside the EPZ along major routes to the Coliseum (page 8) and that the Coliseum's parking capacity is insufficient to handle expected demand (page 8). Mr. Kilduff's testimony made similar arguments, although packaged in the language of earlier New York State witnesses.21/ Mr. Kilduff argued

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21/ See, e.g., Direct Testimony of Dr. David T. Hartgen, Richard D. Albertin, Robert G. Knighton and Foster Beach on Contention 65, ff. Tr. 3695.

generally that congestion and delays would be encountered by evacuees attempting to reach the Coliseum. As bases for this argument, Mr. Kilduff cited limited roadway capacities impacted in part by "side friction" (pages 3 to 6), intersection design deficiencies that have a propensity to increase accident rates (page 5), and future construction activities that might affect some routes to the Coliseum (pages 5 and 8).

The ASLB's refusal to admit22/ these two pieces of testimony was correct for three reasons. First, the vast majority of Inspector Roberts' and Mr. Kilduff's arguments were untimely. Concerns about traffic conditions on Long Island that would be encountered by evacuees traveling to relocation centers were never raised by either Suffolk county and New York State in earlier proceedings. Yet those issues are largely generic to any relocation center located on Long Island.23/

Second, Intervenors cited no basis in NUREG-0654 for the consideration of traffic conditions outside the EPZ. Indeed, Appendix 4 to NUREG-0654 addresses only traffic planning within the 10-mile EPZ. The only NUREG-0654 guideline that even peripherally includes traffic conditions outside a 10-mile EPZ simply provides that:

22/ The ASLB did admit such of Inspector Roberts' testimony as concerned traffic congestion and parking capacity at the Coliseum, but the Intervenors subsequently withdrew it. Memorandum and Order (Reopening Of The Record), May 6, 1985, at 6.

23/ For example, SUNY-Farmingdale, which was an earlier relocation center, is located about 13 miles from the Nassau Coliseum. Claims about congestion on the Long Island Expressway and Northern States Parkway apply equally to SUNY-Farmingdale. In addition, it can hardly be claimed, and was not by Messrs. Roberts or Kilduff, that the additional 13 miles to the Coliseum create unique problems that trigger the need for this testimony.

> . . . personnel and equipment available should be capable of monitoring within about a 12 hour period all residents and transients in the plume exposure EPZ arriving at relocation centers.

NUREG-0654, II.J.12. Even if one accepts the driving times contained in Inspector Roberts' testimony as accurate, the two-hour maximum driving time to the Coliseum is but a small percentage of the 12-hour monitoring time specified in NUREG-0654, II.J.12, and Intervenors never attempted to link travel times to the Coliseum with NUREG-0654 guidelines.

Third, most of Inspector Roberts' and Mr. Kilduff's arguments proceeded from an unsupported assumption, namely that all EPZ evacuees would seek to travel to the reception center (Roberts, page 2; Kilduff, page 2). The capacity of relocation centers, and hence the number of evacuees expected to report to those facilities, was an issue under Contention 75. There LILCO witnesses testified that no more than 20% of the population of 10-mile EPZ was expected at the relocation centers.

e. Compliance with SEQRA and New York Water Pollution Law (Mr. Marsh)

The Intervenors insist that the ASLB erred by refusing to admit testimony on the legal issues of whether the Coliseum complies with the New York State Environmental Quality Review Act (SEQRA) and whether it requires a water discharge permit. They are wrong for three reasons. First, if there were a violation of state law, it should be dealt with by state courts or state agencies, not by the NRC. Second, the Intervenors did not need a witness to argue what is a purely legal point. Third, the Intervenors are simply wrong about the law; the use of the Nassau Coliseum is perfectly lawful, as explained below.

1. The SEQRA Issue Is Not a Litigable Issue

The testimony of Langdon Marsh (pages 3-9) asserted, in part, that Nassau County has failed to prepare an environmental assessment, pursuant to ECL § 8-0109(2) of the New York State Environmental Quality Review Act (SEQRA), for the use of the Nassau Coliseum as a relocation center. Mr. Marsh's testimony did not justify a reopening of the record, let alone a finding that LILCO's plan was inadequate. First, this testimony was untimely. The issue of compliance with SEQRA is the same at any facility designated as a relocation center, yet this issue was never raised before. Second, Mr. Marsh's "testimony" was unsupported by the plain language of the statute and regulations on which it purported to rely. And third, the issue of compliance with SEQRA is a matter for New York State agencies and state courts; it is unrelated to the question of whether NRC emergency regulations have been met.

(a) SEQRA Does Not Require Nassau County to Prepare an Environmental Assessment

Mr. Marsh's testimony on Nassau Coliseum's compliance with SEQRA was essentially empty of facts. The testimony said that Nassau County had submitted neither a negative declaration to the New York State Department of Environmental Conservation (page 5) nor a written statement based on a federal environmental impact statement (page 6). The remainder was legal opinion and not proper testimony at all.

Even if accepted as testimony, Mr. Marsh's analysis of SEQRA was incorrect. Mr. Marsh's reasoning began with the statement that SEQRA requires an environmental impact statement for any action that state agencies, including counties, "propose or approve which may have a significant effect on the environment" (page 3). What Mr. Marsh neglected to say is that certain actions are exempted from SEQRA. See 6 NYCRR §§ 617.2(n); 617.13(a); 617.16. For these actions, no SEQRA findings are required. 6 NYCRR §§ 617.13(a); 617.16(d).

The use of the Nassau Coliseum as a decontamination facility is exempted from the SEQRA requirements on three grounds. First, the regulations exempt "actions which are immediately necessary on a limited emergency basis for the protection or preservation of life, health, property or natural resources." 6 NYCRR § 617.2(n)(6). The Nassau Coliseum would only be used as a decontamination facility on a "limited emergency basis."

Second, the implementing regulations contain a list of "Type II" governmental actions, 6 NYCRR § 617.13, that have been generically "determined not to have a significant effect on the environment" and that "do not require environmental impact statements or any other determination or procedure" under the SEQRA regulations, 6 NYCRR § 617.13(a). These actions include "minor temporary uses of land having negligible or no permanent effect on the environment," 6 NYCRR § 617.13(d)(19) -- a description that clearly applies to the use of the Nassau Coliseum as a reception center.

Third, both the State enabling statute (ECL §§ 8-0111(1) and (2)) and the implementing regulations (6 NYCRR § 617.16) recognize that if a federal EIS has been prepared, separate compliance with SEQRA is not required.

Mr. Marsh recognized this exemption; however, he argued that the NRC's Shoreham EIS does not address the evacu tion plan and, because of this omission, Nassau County needs to prepare a separate environmental determination under SEQRA. This strained interpretation of the NRC's Shoreham EIS and New York State's regulations is untenable. The Shoreham EIS, like EIS's for other nuclear power plants, does not include the consideration of "Class 9" accidents that give rise to offsite radiation doses and, hence, to the need for emergency plans. This omission is by no means an oversight; rather, Class 9 accidents are excluded because they are too speculative and remote to require consideration in an EIS. The NRC's categorical exclusion of these accidents has been upheld in Carolina Environmental Study Group v. U.S., 510 F.2d 796, 798-800 (D.C. Cir. 1975), and Deukmejian v. NRC, 751 F.2d 1287 (D.C. Cir. 1984) (CEQ worst case regulations do not require the supplementation of EIS's to include discussions of Class 9 accidents), vacated in part, 760 F.2d 1320 (1985). Similarly, the SEQRA regulations require the consideration only of "environmental impacts which can be reasonably anticipated," 6 NYCRR § 617.14(c) -- a standard identical to the "reasonably foreseeable" standard used by the D.C. Circuit to judge, and approve, the EIS's in Carolina Environmental Study Group and Deukmejian. Thus, a separate Nassau County assessment of the use of the Nassau Coliseum as a decontamination facility is simply not required.

(b) Compliance with SEQRA Is Not an Issue Within the Purview of the NRC

Even if compliance with SEQRA were required, it would be solely a matter for New York State agencies to pursue. Compliance with SEQRA is not a matter cognizable within an NRC licensing proceeding. Like the National Environmental Policy Act, SEQRA does not require environmental impacts to be given determinative effect. 6 NYCRR § 617.1(d). Thus, SEQRA is a procedural statute that requires the disclosure of environmental effects; discussion of compliance with SEQRA serves no purpose in an NRC licensing proceeding.

New York courts clearly have authority to review Nassau County's alleged noncompliance with SEQRA. Typically, review of a governmental agency's compliance with SEQRA is subject to a four-month period of limitations. CPLR § 217; see also Ecology Action v. Van Cort, 417 N.Y.S.2d 165, 169 (Sup. Ct. 1979). This four-month period runs from the time of the final permitting action by the appropriate governmental body. See Town of Yorktown v. N.Y.S. Dept. of Mental Hygiene, 459 N.Y.S.2d 891, 892 (App. Div.), aff'd 466 N.Y.S.2d 965, 453 N.E.2d 1254 (N.Y. 1983). Here the various agreements concerning the Coliseum were concluded in October 1984. More than a year has passed, yet New York State has never sought review of Nassau County's alleged noncompliance with SEQRA in state courts. Such an action is now time barred. New York State's attempt to avoid this time bar by raising the issue of compliance with SEQRA before the NRC should not be permitted.

Intervenors have defended their failure to file a timely challenge to Nassau County's alleged noncompliance with SEQRA in New York State courts

by arguing that the statutory time period does not begin to run until an agency takes some action required by SEQRA. Intervenors' March 20 Reply at 28-29. But Intervenors cited no case law, nor is there any, to support this novel claim, and indeed the argument makes no sense. SEQRA, like the National Environmental Policy Act (NEPA) on which it is modeled, is designed to ensure that environmental effects are considered before a government action is taken. It follows that a governmental entity's failure to consider environmental effects before taking an action becomes one component in deciding whether that action was proper. Thus, where a statute of limitations seeks to give finality to agency action, as § 217 of New York State's CPLR does, the question of noncompliance with SEQRA -- whether it be due to an incomplete environmental impact statement, to an improper finding of no significant environmental effect, or even to no action at all -- must be challenged within the statutory time frame. Intervenors have not done so; therefore, Mr. Marsh's SEQRA testimony was untimely.

2. The Issue of an SPDES Permit Is Not Properly Before this Board

Pages 9-10 of Mr. Marsh's testimony raised another purely legal issue of whether the Coliseum must get a New York State permit (SPDES permit) to discharge wash water after people and vehicles have been decontaminated.

Even assuming that Mr. Marsh were correct that an SPDES permit is required by state law, there are two reasons why his testimony at pages 9-10 would not justify a reopening of the record, let alone a finding that LILCO's plan is inadequate. The two reasons are (1) that this issue would be

precisely the same for any relocation center designated by LILCO, and yet the Intervenors did not raise it for any of the previously designated relocation centers, and (2) that this is a matter to be pursued exclusively by New York State agencies and has nothing to do with meeting NRC emergency planning regulations.

(a) The Issue of an SPDES Permit Is Untimely

LILCO designated a number of other relocation centers before finally settling on the Nassau Coliseum. In particular, the following were the relocation centers named in Revisions 0-3 of the LILCO Plan:

Suffolk County Community College (primary)
SUNY-Stony Brook (primary)
BOCES Islip Occupational Center (primary)
SUNY-Farmingdale (secondary)
Saint Joseph's College (Patchogue) (secondary)

In all the many months that these other relocation centers were designated, the Intervenors never made the slightest mention of SPDES permits. Clearly this issue is not raised by any of the existing contentions; the only contention about monitoring and decontamination at the relocation center is Contention 77, which challenges only the instrument used for monitoring. And the Intervenors did not propose a new contention, let alone address the standards for admitting late-filed contentions.

In short, the issue of whether it is necessary to obtain a state water discharge permit for the monitoring and decontamination site is one that could have been raised much earlier. It is not an issue raised by the designation of Nassau Coliseum, because it would be the same issue no matter where the reception center was located.

(b) The SPDES Permit is a Matter Entirely Outside NRC Regulations

Assuming an SPDES permit were required, it would be entirely a matter for New York State agencies to pursue, if they thought it important. The issue of whether a permit is required, whether it must be applied for now or at the time of an accident, and what its terms ought to be are all matters of state law.24/

The issue of the SPDES permit is not, on the other hand, a matter cognizable within this NRC licensing proceeding.25/ As another licensing board observed in a similar situation:

> 22. Intervenors raise as an issue whether the Office of the Governor is legally empowered to exercise the command and control responsiblities assigned to it under the South Carolina plan. In effect Intervenors are requesting us to legally interpret the State Constitution and a South Carolina statute to determine if the Office of the Governor is acting lawfully. That is not our function nor is it necessary for deciding the emergency planning issue at hand. Section II.A.2.b. of NUREG-0654 only requires that the plan contain, by reference to specific acts, codes or statutes, the legal basis for such authorities. No legal interpretations by this Commission are called for. There is a presumption that State officials are carrying out their duties in a proper and lawful manner. If Intervenors question that, they should seek a more appropriate forum than this licensing proceeding. We conclude on the record before us that the Office of the Governor can exercise the

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24/ Indeed, the Marsh testimony invited the ASLB to rule on such matters of state law as whether runoff from a parking lot is an "outlet or point source" within the meaning of ECL § 17-0803 and § 17-0105.

25/ There is also no suggestion in Mr. Marsh's testimony that the existence or nonexistence of an SPDES permit would materially affect the public health and safety. Health and safety issues are raised by Ms. Meyland's testimony, which we deal with below.

> command and control responsibilities assigned to it under the South Carolina plan.

Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-84-37, 20 NRC 933, 967-68 (1984).

LILCO believes that no relocation center for any other nuclear plant in New York State has been required to apply for an SPDES permit (see the Affidavit of John A. Weismantle, attached to LILCO's February 26 Response), and this throws substantial doubt on Mr. Marsh's interpretation of the law. The Intervenors argued that the reason why other New York State nuclear power plants have not filed state environmental impact statements or applied for SPDES permits for relocation centers is because those plants began commercial operation before the effective date of either the State Environmental Quality Review Act (SEQRA) or the Environmental Conservation Water Pollution Control Act. March 20 Reply at 29-30.

But this argument is untenable. SEQRA became effective on September 1, 1976. See Intervenors' March 20 Reply at 30 n.12. The present NRC emergency planning requirements of 10 C.F.R. § 50.47, including requirements for relocation centers, were not promulgated until August 8, 1980. That date, not the date on which a power plant began operation, is the relevant one with respect to whether the plant is required to comply with SEQRA. The key fact is that detailed radiological plans were developed by State and local agencies after the effective date of SEQRA and that they do not involve any actions under SEQRA.

Similarly, the date of initial operation of a plant is irrelevant to whether it needs SPDES permits for decontamination centers. New York State

SPDES permits, like the federal Clean Water Act which spawned their existence, are designed to limit all water discharges. Accordingly, existing nuclear power plants, like other dischargers, must obtain SPDES permits before releasing certain regulated pollutants. They are not excluded from obtaining those permits simply because they began operation prior to the promulgation of SPDES permit requirements. The fact that SPDES permits were not obtained for other decontamination centers in New York State confirms that SPDES permits are not required for those activities.

f. Contaminated Wash Water Reaching the Groundwater (Ms. Meyland)

The Intervenors' witness Sarah Jane Meyland claimed essentially that contaminated wash water from decontaminating cars or people might "conceivably" (p. 8) find its way into the drinking water on Long Island. (In fact, the LILCO plan calls for wiping automobiles with disposable wipes, creating solid, not liquid, waste. So Ms. Meyland's testimony is relevant only to shower water.) She added, at page 10 of her testimony, that "the impact of radiologically contaminated urine and feces from evacuees should not be overlooked," because the radiation might interfere with the bacteria necessary for sewage treatment. Ms. Meyland's testimony did not require a reopening of the record, or show a deficiency in LILCO's plan, for three reasons:

(1) The testimony was untimely; it raised an issue that could have been raised about other relocation centers designated earlier, all of which are over the same aquifer, and three of which are in primary recharge areas for the aquifer.

(2) The testimony raises essentially an issue about monitoring water supplies after a radiological accident that should have been raised when the 50-mile EPZ issues were still open for litigation; alternatively, it is an issue addressing one of the environmental impacts of a serious radiological accident, and the environmental impacts of Class 9 accidents are not litigable for the reasons set out above in the discussion of Mr. Marsh's testimony.

(3) The testimony raised an issue that is outside the scope of this proceeding, because NRC regulations and guidelines require no particular decontamination measures for the general public, and, indeed, NUREG-0396 provides that extraordinary measures need not be taken.

1. The Issue is Untimely

The issue of discharge of wash water from the decontamination facility could have been raised long before, when relocation centers were first designated in the plan. Clearly the same issue could have been raised with respect to those other, earlier relocation centers. As Ms. Meyland's testimony indicated (page 3), there is a single principal aquifer for all of Long Island. Moreover, as the Affidavit of John A. Weismantle attached to LILCO's February 26 Response indicates, three of the relocation centers originally designated by LILCO are located in primary recharge areas for this aquifer. Yet this issue is not included in any of the existing contentions, and the Intervenors never attempted to meet the standards for submitting late contentions.

2. The Issue Was Litigated in the 50-Mile EPZ Contentions

It is obvious that if there were an accident at Shoreham severe enough to contaminate members of the general public so that they had to be decontaminated, radioactive material would be spread over the ground, trees, buildings, etc. of some portion of the EPZ. This material would be washed into streams, rivers, storm drains, and ultimately the groundwater during the first rain after the accident. And it is equally obvious that the amount of radiation in the wash water used for decontamination would be small compared to the contamination that would be spread generally over the landscape.

These obvious facts raise two objections to the Meyland testimony. In the first place, the testimony is essentially a complaint about a portion of the environmental impact of a serious radiological accident. It has nothing to do with the emergency planning regulations, and, as noted above, the environmental impacts of Class 9 accidents are not litigated in NRC proceedings. In the second place, the concerns expressed in the Meyland testiony were addressed in the litigation of the contentions about the 50-mile ingestion pathway EPZ. The contamination of water, food, and land by the radiation from an accident is dealt with in the planning for the 50-mile EPZ, and the issue of decontamination wash water should have been raised under the contentions that the Intervenors submitted on the 50-mile EPZ. See Contentions 81, 85, and 88.26/

26/ In particular, Ms. Meyland's concern about contaminated feces and urine (page 10) is off base. The purpose of planning for the 50-mile EPZ is to prevent people from ingesting radioactive materials, and it is unlikely evacuees would ingest radioactivity before they got to the Coliseum.

Since Contention 81.C very specifically raises the issue of how wash water from washing contaminated fruits and vegetables is to be disposed of, it is evident that the Intervenors thought of decontaminating foodstuffs but failed to think of decontaminating people and cars. Indeed, concerns of the type expressed in Ms. Meyland's testimony were addressed in LILCO's testimony. For example:

> Contaminated fruits and vegetables may be washed or scrubbed in an ordinary kitchen sink. Radioactive particulates that are washed down the drain would be so diluted by the water purification process as not to pose a potential public health problem. The average American household, for example, uses 50-100 gallons of water per day.
>
> Washing fruits and vegetables to eliminate radioactive contamination is no different from washing them to remove other toxic residues. In both cases, the contamination is significantly diluted by the wash water, which is further diluted by sewer water or septic systems. By the same token, peelings and other residue should be disposed of as any other garbage would, in a trash receptacle or other container. In short, there is no need for the Plan to have specific procedure governing the disposal of radioactive wash water and residue.

Cordaro, et al., ff. Tr. 13,563, at 21-22. Similarly,

> Contention 81.D.1 is premised on the assumption that the greater portion of the drinking water supply for residents of the 50-mile EPZ would be susceptible to radioactive contamination in the event of an accident. This premise is faulty. Wells provide the only source of drinking water for residents of Nassau and Suffolk Counties. Because of the natural filtration process that occurs when surface water enters the aquifer, it is extremely unlikely that a release of radioactive material from a nuclear plant would cause the contamination of well water supplies. Therefore, it is highly unlikely that residents of Nassau and Suffolk Counties (which represent approximately 80% of the New York portion of the 50-mile EPZ) would ever be in need of "alternative drinking water supplies."

Id. at 26-27. This same testimony goes on to describe the monitoring of wells that would be done in the aftermath of an accident at Shoreham. In short, there is no excuse for the Intervenors not having presented Ms. Meyland's testimony earlier.

3. The Testimony is Irrelevant to NRC Regulations

Finally, Ms. Meyland's testimony is irrelevant to NRC regulations and to the guidelines of NUREG-0654, because the emergency planning regulations do not require particular provisions for decontaminating the general public. NUREG-0654 Standard K provides for decontamination of "emergency personnel wounds, supplies, instruments and equipment" (K.5.b) and "relocated onsite personnel" (K.7). Criterion J.12 provides for registering and "monitoring" (but not decontaminating) evacuees at relocation centers. And NUREG-0396 at page 14 provides that no special decontamination provisions for the general public need be provided:

> The EPZ guidance does not change the requirements for emergency planning, it only sets bounds on the planning problem. The Task Force does not recommend that massive emergency preparedness programs be established around all nuclear power stations. The following examples are given to further clarify the Task Force guidance on EPZs:
>
> No special local decontamination provisions for the general public (e.g., blankets, changes of clothing, food, special showers)

(Emphasis in original.) This is why licensing boards have not required specific decontamination materials, methods, schedules, etc. for the public. For example, in Shearon Harris 1 & 2, the licensing board refused to admit a contention insofar as it questioned the availability of materials for evacuee decontamination:

> The ERPs do not give, and are not called upon by regulation or guidance to give, an accounting of materials available for evacuee decontamination. Indeed, neither regulations nor guidance even mention [sic] evacuee decontamination. Rather, NUREG-0654 focuses on providing for decontamination of emergency workers, who would be likely to face greater contamination dangers than evacuees would. See the evaluation criteria under § II.K in NUREG-0654.
>
> . . .
>
> Therefore Contention 240 is admitted, but only on the following questions: (1) What agency of Chatham County government is responsible for the decontamination of evacuees at the Chatham County Shelters? and (2) Which emergency response organizeations are assigned the responsibility of providing support for the decontamination of evacuees? Perhaps all that is needed to answer these questions is authoritative clarification of the relevant sections of the ERPs.

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 & 2), LBP-84-29B, 20 NRC 389, 397, 398 (1984). Another board considered disposal of wash water, but the opinion does not reveal whether this was limited to emergency workers and their equipment or whether it covered the public as well. In any event, the board did not require particular methods for disposing of wash water:

> Contention 19(kk) alleges that the County Plan is deficient because it does not provide for disposal of contaminated equipment, vehicles, decontaminated [sic] water, or any other materials that might be contaminated.
>
> . . . .
>
> 84. Vehicles can be decontaminated by washing. Water would be released but is not likely to be a public health or safety problem -- personal health and safety of evacuees would be the initial concern. . . . The State would, however, monitor the disposal of decontamination water in the host counties.

Kansas Gas & Elec. Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 79, 111 (1984).

This view -- that wash water is not likely to be a public health or safety problem -- is consistent with the view of the Director of the New York State Radiological Emergency Preparedness Group. As he points out in the two letters27/ attached to LILCO's February 26 Response, decontamination waste water would be so diluted that it would not be a problem. This is consistent also with LILCO's testimony on Contention 81, quoted above. LILCO's witness relied on these letters, as well as the advice of LILCO's technical consultants, in concluding that any possible radioactive contaminants in wastewater flow from the Coliseum would be dealt with by "vast dilution." Tr. 15,906 (Robinson). FEMA agreed fully, relying on advice from the Environmental Protection Agency. Tr. 16,010-11 (Keller). In short, there are no NRC requirements or guidelines about how decontamination for members of the public should take place, and so the details of how LILCO will make such provisions are outside the scope of the regulations and outside the scope of this proceeding. To the extent that Ms. Meyland's testimony raised any issue cognizable by the NRC, it is an issue, as noted above, that should have been raised earlier in the context of planning for the 50-mile EPZ and was therefore untimely.

27/ In letters of August 29, 1983, from the State Director of the Radiological Emergency Preparedness Group to Mr. George Brower, Director, Disaster/Emergency Preparedness, the State Director opined that wash water from both cars and people should be allowed to flow directly into the sewer system. With respect to waste shower water for people, the opinion was rendered after consultation with the State Director, Bureau of Environmental Radiation Protection. Both letters note that the small amount of contamination would be greatly diluted by the wash water.

5. The ASLB Correctly Decided the Four Issues Challenged by Intervenors (App. Br. 53-64)

In section II.B.5 of their brief (App. Br. 53-64), the Intervenors challenge the ASLB's findings on four Coliseum issues. By and large these arguments simply repeat earlier ones, since they are based mostly on the Intervenors' excluded evidence. LILCO's response will therefore be brief.

a. Red Cross Agreements with Congregate Care Centers (App. Br. at 53-60)

What the Intervenors call the "most extreme example" of the ASLB's error is in its finding that the Red Cross will provide congregate care centers in an emergency. This claim is answered fully in section II.B.4.a. above.

b. Availability of the Coliseum (App. Br. 60-62)

The Intervenors argue, despite overwhelming evidence to the contrary, that the Coliseum will not be available because its use violates state law. The Intervenors' claim that their witness, Mr. Marsh, would have testified that the use of the Coliseum violates state law, and cite the fact that there was no approval by the Nassau County Board of Supervisors.

The letter of agreement for the Coliseum is between two private parties, LILCO and the Hyatt Management Corporation, which manages the Coliseum for Nassau County. All that the Nassau County Executive has done is to advise Hyatt Management that he supports such an agreement and to give his further written assurance that he would do everything in his power to protect the public in a radiological emergency, which is no more than he is

required to do by state law anyway. Perhaps more important, a suit challenging his action as unlawful has recently been dismissed by a state court.28/ There is therefore no basis to the Intervenors' claims.

c. Radioactive Wash Water (App. Br. 62-63)

The Intervenors claim, again on the basis of their unadmitted evidence, that the wash water from the decontamination showers would be a health hazard. This charge has been sufficiently answered above. The short of the matter is that both New York State and the federal government agree that the dilution of such wash water makes it a non-hazard.

d. The ASLB's Ruling on Contention 74 (Distance to Relocation Centers) Was Correct (App. Br. 63-64)

Intervenors argue that Contention 74, which says that three particular facilities are too close to Shoreham, should be read to say that a different facility entirely (the Coliseum) is too far away. They call this the "thrust" of the contention (p. 63). What they mean is that they should not be limited by their contentions at all.

28/ By letter of October 1, 1984, the Nassau County Executive informed Hyatt Management Corporation of New York, Inc., the lessee of the Coliseum, that he was aware of and approved the use of the Coliseum as a reception center in a Shoreham emergency. On September 11, 1985, John W. Matthews, then a candidate for the office of Nassau County Executive, brought a lawsuit in state court claiming that the County Executive had exceeded his authority. On December 2, 1985, the court dismissed the case, finding that the action of the County Executive "does nothing more than indicate the County of Nassau would cooperate to the fullest if public health and safety were involved." Matthews v. Purcell, Index No. 16697/85 (N.Y. Sup. Ct. Dec. 2, 1985).

This notion is obviously contrary to NRC regulations and practice. The parties to these proceedings have always been allowed to rely on the contentions as defining the scope of the litigation. It is virtually the only protection an applicant has against endless litigation, and in this proceeding particularly there were very few such protections, as a glance through the contentions, over 100 in number, can attest. The Intervenors' theory that any safety issue they think up must be litigated is untenable.29/

Also, the pleading record in this proceeding shows that many nuclear plants have relocation centers 30 to 50 miles away. The information provided by FEMA, and attached to "LILCO's Response to Intervenors' Proffered Testimony on the Designation of the Nassau Coliseum as a Reception Center," Feb. 26, 1985, lists these.30/

III. The ASLB Correctly Decided the GUARD Issue (App. Br. 65-68)

On February 12, 1985, the United States Court of Appeals for the District of Columbia Circuit vacated the NRC's generic interpretation of the phrase "injured contaminated individuals" in 10 C.F.R. § 50.47(b)(12) and remanded the issue to the Commission for further consideration. GUARD v. NRC, 753 F.2d 1144 (D.C. Cir. 1985). Soon thereafter, the Intervenors in this proceeding filed a motion to admit a new contention that questioned the

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29/ The distance of relocation and reception centers from the EPZ was litigated, because the congregate care centers are in Nassau County. See Tr. 14,616-18, 14,620 (Keller); Tr. 14,625 (McIntire).

30/ For example, Waterford (50 miles) and Trojan (46 miles or more). Many others from 30 to 40 miles away are listed.

planning that has been done for contaminated individuals.31/ LILCO and the NRC Staff filed responses; each argued that the ASLB should defer ruling on Intervenors' motion until the Commission had been given an opportunity to respond to the GUARD decision.32/

On May 16, the Commission issued a Statement of Policy on 10 C.F.R. § 50.47(b)(12). 50 Fed. Reg. 20,892 (May 21, 1985). Of primary importance, the Commission concluded:

> Licensing Boards (and, in uncontested situations, the staff) may find that applicants who have met the requirements of § 50.47(b)(12) as interpreted by the Commission before the GUARD decision and who commit to full compliance with the Commission's response to the GUARD remand meet the requirements of § 50.47(c)(1) and, therefore, are entitled to a license conditional on full compliance with the Commission's response to the GUARD remand.

Id. at 20,893 col. 3 (footnote omitted). In keeping with this guidance, the ASLB denied the Intervenors' motion for admission of a new contention on August 21, 1985.33/

31/ Motion of Suffolk County and New York State to Admit New Contention February 25, 1985. Intervenors' proposed contention alleged three deficiencies in the LILCO Plan: (1) that LILCO had no agreements with hospitals to treat contaminated individuals, (2) that medical personnel had not been adequately trained to treat contaminated individuals, and (3) that LILCO had not developed plans with hospitals and medical services for treating contaminated individuals. It should be noted that the Intervenors' proposed contention focused only on members of the public who had been exposed to high levels of radiation but who had not suffered traumatic injury.

32/ LILCO's Answer to "Motion of Suffolk County and New York State to Admit New Contention," March 11, 1985; NRC Staff Response to "Motion of Suffolk County and New York State to Admit New Contention," March 12, 1985.

33/ Memorandum and Order Denying Suffolk County's and State of New York's Motion to Admit New Contention (August 21, 1985) ("ASLB Order").

The Intervenors now challenge that denial and argue that the ASLB could not have found that the LILCO Plan complied with the requirements of 10 C.F.R. § 50.47(b)(12). In essence, their arguments are premised on interpreting the GUARD decision to require expanded emergency planning requirements for individuals exposed to high levels of radiation but without traumatic injuries. See App. Br. 65. The Intervenors demand that they now be given an opportunity to explore LILCO's compliance with those new requirements. Id.

The Intervenors have misconstrued the D.C. Circuit's GUARD decision. In rejecting the Commission's interpretation of § 50.47(b)(12), the court stated:

> In so ruling, we impose no tight restraint on the NRC's regulatory authority. The Commission, on remand, may concentrate on the SONGS record; it may revisit the question, not now before us for review, of the scope of the section 50.47(b)(12) phrase "contaminated injured individuals"; it may describe genuine "arrangements" for medical services for dangerously exposed members of the general public; or it may pursue any other rational course. It may not, however, interpret the section 50.47(b)(12) phrase "arrangements . . . made for medical services" as meaning something other than what those words, in the context of a nuclear power plant emergency planning standard, may rationally convey.

GUARD, 753 F.2d at 1146. Thus, the court did not expand the requirements of § 50.47(b)(12) but rather left to the NRC the question of what regulatory requirements to impose. The court required only that the Commission produce a set of rationally consistent requirements. The Commission's interim guidance to its licensing boards was in keeping with this court directive.

The ASLB faithfully followed that guidance in rejecting the Intervenors' contention. The LILCO plan clearly meets the pre-GUARD requirements of § 50.47(b)(12) for individuals exposed to high levels of radiation; it contains a list of hospitals where these individuals could be sent on an ad hoc basis. The Intervenors did not challenge this listing in their earlier contentions, nor do they do so now. In addition, LILCO has demonstrated throughout the emergency planning proceedings that it has attempted diligently to comply with NRC regulations and can well be expected to do so in the future. Thus, LILCO has complied with the Commission's interim guidance on § 50.47(b)(12), and the ASLB was completely justified in rejecting the Intervenors' proposed contention on that ground.34/

The ASLB was also correct in rejecting the Intervenors' proposed contention under the rationale of Potomac Electric Power Co. (Douglas Point Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974). ASLB Order at 6-8. As the ASLB noted, this Board held in Douglas Point that "licensing boards should not accept in individual proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission." Id. at 7. Here, the Intervenors sought to litigate what planning standards should be required for individuals exposed to high levels of radiation. This concern is part of the very issue35/ the court left to the Commission's

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34/ Since the ASLB has found several deficiencies in the LILCO Plan, it has not yet reached the point where it has needed to condition the Shoreham license on LILCO's full compliance with the Commission's ultimate response to the GUARD remand.

35/ Indeed, the Court also gave the Commission the option of finding that no planning requirements were required for this group.

discretion when it remanded the GUARD decision. The Commission is now considering this issue as part of a generic rulemaking. See 50 Fed. Reg. 20,893 (May 21, 1985). Thus, the ASLB properly rejected Intervenors' invitation to open this issue.36/

IV. Conclusion

For the foregoing reasons, this Appeal Board should affirm the various rulings challenged by the Intervenors in their November 6 brief.

Respectfully submitted,

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36/ Intervenors also argue that LILCO was required to seek an exception to the requirements of 10 C.F.R. § 50.47(b)(12) before the ASLB could find in LILCO's favor on this planning requirement. LILCO has already demonstrated compliance with the Commission's interim guidance on 10 C.F.R. § 50.47(b)(12); therefore, it had no need to seek an exception.

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO's Brief in Opposition to Intervenors' Appeal of the Nassau Coliseum and GUARD Issues were served this date upon the following by Federal Express as indicated by an asterisk, or by first-class mail, postage prepaid.

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