

the County filed an addendum to its motion which purports to discuss the criteria for reopening a record. For the reasons indicated below the NRC Staff opposes the County's motion and addendum.

II. DISCUSSION

A. Suffolk County, Even As A § 2.715(c) Party, Must Adhere to the Procedural Requirements Governing Parties Admitted Under § 2.714

In its Motion at pages 4-5, and in its "Addendum" filed on May 10, 1983, Suffolk County as a threshold matter states that the lateness and other factors of 10 C.F.R. § 2.714(a), discussed below, do not apply to it as a § 2.715(c) "interested county." The Staff disagrees. Once admitted to the proceeding, an "interested county" must observe all the procedural requirements applicable to other parties. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768 (1977). Indeed, the Commission has ruled that this includes the specificity and lateness standards for contentions and, where applicable, the standard for reopening the record in a case in which a § 2.715(c) party sought to raise new issues. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364 (1981).^{1/} The Licensing Board in Diablo Canyon had earlier stated:

As a representative of an interested state participating under 10 C.F.R. 2.715(c) Governor Brown is not required to submit contentions of his own, but is free to fully participate in the litigation of any contentions which are otherwise accepted by the Board. However, if the Governor wishes to raise specific issues not otherwise accepted by the Board he must comply

^{1/} See also Mississippi Power & Light Co., et al. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 15 NRC _____ (1982), in which the Appeal Board addressed the factors of § 2.714 when deciding whether or not to admit new contentions raised by an interested state.

with the requirements of 10 C.F.R. 2.714(b) for acceptable contentions, just as any other party must. [See Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977).] The Governor agrees to this proposition (Tr. 117-18). To determine the admissibility of Governor Brown's subjects as issues in this proceeding (as limited by the Board's Order of October 2, 1980) they will be considered individually as contentions and subject to the same tests as have been applied to the contentions submitted by Joint Intervenors.

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 246-7 (1981).

The only authority Suffolk County cites for the proposition that the factors governing late filed contentions and the criteria for reopening the record do not apply to it as an interested County is a Licensing Board opinion, Cincinnati Gas and Electric Co., et al. (William H. Zimmer Nuclear Station), LBP-79-22, 10 NRC 213, 216-17 (1979). That opinion was rendered prior to the Commission's decision in Diablo Canyon, and did not discuss the relevant River Bend Appeal Board decision. Accordingly, the Staff submits that the Zimmer case is clearly not controlling. This Licensing Board has already implicitly agreed with Staff's position earlier in this proceeding when it held that Suffolk County, even as a § 2.715(c) party, would have to address the standards for a late filed contention if it had sought to raise new seismic issues. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601, 617 (1982).^{2/}

^{2/} The current situation should also be contrasted with another situation that arose earlier in this proceeding. When the Town of Southampton sought late intervention as an "interested municipality" under § 2.715(c), the Board ruled that there is no time requirement regarding such a request to participate. However, this is not to say that the timeliness requirements for new contentions do not apply once the party has been admitted.

B. The Motion Should Be Denied Since it Does Not Discuss the Factors Which a Board Must Consider in Determining Whether to Reopen the Record

Since the record herein would have to be reopened before the proposed new contention attached to the County's motion could be admitted, the legal standards governing reopening of a record must be evaluated in addition to the five factors which govern the admission of late-filed contentions. See, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant), CLI-82-39, ___ NRC ___ (slip op. at 4, December 23, 1982).^{3/} This imposes a heavy burden on the one seeking to reopen the record. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619, 620 (1976). The motion must show that the issues sought to be raised are of either environmental or safety significance and that if litigated they would lead to a different result in the proceeding. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-598, 11 NRC 876, 879 (1980); Wolf Creek, supra; Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), reconsid. den., ALAB-141, 6 AEC 576; Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-34A, 15 NRC 914, 915 (1982). From the onset the movant must show from the material submitted in support of the motion to reopen that a different result would have been reached had such material initially been considered. Wolf Creek, supra; Northern Indiana Public Service Co. (Bailly Generating Station,

^{3/} These five factors set out in 10 C.F.R. § 2.714(a)(1) are addressed in the succeeding point C of this Response.

Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974).^{4/} These standards were reiterated in Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979), where, as here, the motion to reopen was filed after the record was closed but prior to issuance of a final decision by the Licensing Board.^{5/}

The County's motion fails to specifically address the factors which a Board must consider in determining whether to reopen a record. It also fails to detail how this purported "new information" concerning the deisel generators would change the results of this proceeding. The requirement of showing that "new information" would lead to a different result in the proceeding is not an empty requirement. Failure to observe it would lead to a reopening of the record every time that the Staff in the performance of its inspection duties discovered and reported a safety defect; and this and other proceedings could never be brought to completion. See ICC v. Jersey City, 322 U.S. 503, 514 (1944). On this basis alone, the County's motion should be denied.^{6/}

^{4/} It has been similarly stated that to justify the granting of a motion to reopen the record, the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition. Vermont Yankee, supra at 523.

^{5/} An additional factor to be considered in deciding the merits of a motion to reopen is whether the motion was timely filed. Although a motion to reopen may be filed, and the Licensing Board may at any time entertain it, prior to issuance of the full initial decision, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376 (1972), the question of timeliness hinges more on whether the matters sought to be addressed on the reopened record could have been raised earlier. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83 (1978). The matter of timeliness is further discussed below in connection with a weighing of the five factors set forth in 10 C.F.R. § 2.714(a)(1).

^{6/} The Staff does not believe that the "Addendum" filed by the County on May 10, 1983, cures this procedural defect of the motion. The principal basis for this conclusion is that the "Addendum" does not attempt to address the question of how a different result would have been reached if the material submitted with the motion had been initially considered by the Board.

C. A Weighing of the Five Factors Set Forth in 10 C.F.R. § 2.714(a)(1) Dictates Denial of the County's Motion to Add a Late Contention

Assuming, arguendo, that the County had specifically addressed the material elements that must be considered in determining whether to reopen a record or that the Board can infer from the County's filings that these factors have been sufficiently addressed in the context of the County's discussion of a weighing of the five factors set out in 10 C.F.R. § 2.714(a)(1), a weighing of these factors demonstrates that the motion should still be denied.

The Commission's regulations provide that nontimely contentions will not be entertained absent a favorable balancing of the following five factors:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding. 10 C.F.R. § 2.714(a)(1).

As noted above, Suffolk County's motion attempts to address these factors.

The first factor that must be weighed by the Board is whether there is good cause for the filing delay. The County at pages 6-9 of its motion urges that the problems associated with the emergency diesel generators did not become apparent "until recently". At page one of the motion, the County states "[d]uring recent weeks, significant problems with the emergency

diesel generators at Shoreham have been reported." The Staff acknowledges that recent events have highlighted problems associated with the emergency diesel generators at Shoreham. However, what the County's motion significantly fails to acknowledge is that over the last several years Applicant has experienced a broad range of mechanical problems with the Diesel Generator (D/G) Units at Shoreham. These problems have been amply documented in Repair/Rework Requests, LILCO Deficiency Reports (LDRs), Construction Deficiency Reports to the NRC, and Region I Inspection Report No. 50-322/83-07, dated March 24, 1983.^{7/} Problems were specifically identified by Region I in December, 1982, discussed at a January 25, 1983 meeting which the County attended, and then documented in Region I Inspection Report No. 63-07 dated April 12, 1983. The County had access to all these documents noted above. Significantly, it is the Staff's understanding that the County also received from Applicant some of the internal base documents involving the D/Gs (e.g. LDR's) as part of discovery they conducted during the Spring of 1982 against Applicant in connection with the litigation of contentions 12-15. Thus, it can readily be seen that the County has in fact been aware of the diesel generator problems

^{7/} Attached hereto are LDR's dated March 27, 1981, November 12, 1981, December 23, 1981 and October 15, 1982. All these LDR's were placed in the NRC's Public Document Room. Also attached is a "Part 21" notification from Transamerica Delaval which is the D/G supplier for Shoreham. The last LDR dated October 15, 1982, was specifically served by Applicant on "All Parties" including, of course, the County. Thus, under the rule laid down by the Appeal Board in Duke Power Company (Catawba Station, Units 1 and 2), ALAB-687, 16 NRC _____ (August 19, 1982), the triggering event for the filing of a contention on emergency diesel generators by the County was at least October 15, 1982, well over six months ago. Additionally, the County evidenced awareness of diesel generator problems at least as early as January of this year (see Tr. 19,422-23 (Miller)).

at Shoreham over a lengthy and continuing period of time as opposed to the claim in its motion that these problems were only recently discovered. Accordingly, under the circumstances of this proceeding, the delay in submission of a broadly worded contention renders the County "crucially tardy." South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

As noted by the Appeal Board in Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC ____ (Dec. 21, 1982) (slip opinion at 8):

While we recognize that "good cause", or its absence, is but one of five factors to be considered and not necessarily decisive, it nevertheless is one of the dominant criteria. In the absence of good cause, a petitioner must make a "compelling showing" on the other four factors in order to justify late intervention. Summer, supra, 13 NRC at 886. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC ____, ____ (Dec. 8, 1982) (slip opinion at 8-9).

Such a showing of good cause has not been made by the County. As in Fermi, the fact that the County has been aware of the diesel generator problems at Shoreham for a long and continuing period of time, at least over six months, should be dispositive of the "good cause" factor.^{8/} The other four factors, as to which the County has not made a "compelling showing" are discussed below.

The second and fourth factors, the availability of other means whereby the County can protect its interest and the extent to which other parties will represent that interest, are somewhat related. With regard to the

8/ See also Puget Sound Power and Light Company (Skagit Project, Units 1 and 2), ALAB-552, 10 NRC 1, 5 (1979) where the Appeal Board notes that no good excuse for late filing requires a "particularly strong" demonstration on the other factors.

former factor discussed by the County at pages 9-10 of its filing, other means, perhaps less expansive in scope, such as the submission, at the appropriate time, of a request for Commission action under 10 C.F.R. § 2.206, exist to obtain formal consideration of the County's perceived problems. See Fermi, at slip op. 12-15. A decision by the Director of Nuclear Reactor Regulation thereunder is reviewable by the Commission itself. Therefore, consideration of this factor does not weigh in favor of Petitioners.

With respect to the latter of these complementary or related factors, discussed at page 11 of the County's filing, the Staff notes that with regard to the emergency diesel generator problems at Shoreham, the Applicant has taken or will be taking the following actions:

- On May 12, 1983 the Applicant responded to the proposed civil penalty and enforcement package issued by Region I on April 12, 1983 (SNRC-885).^{9/} Applicant also provided on that date its proposed corrective and preventive actions (SNRC-884).^{10/}

- Mechanical and Electrical tests including all local runs have been essentially completed by Applicant, although not all test results have been approved by the Staff. Still to come are the Qualification Tests (29 consecutive starts per D/B) and the Integrated Electrical Test (Simulated LOCA and Loss of Offsite Power).

^{9/} If Applicant further contests the Notice of Violation and proposed civil penalty assessed by the Staff, in a letter dated April 12, 1983, the County could, if it chooses, also seek to intervene in any hearing which may be held.

^{10/} Copies of the Staff's letter of April 12, 1983, and Applicant's responses of May 12, 1982, have previously been served on the Board.

- The Applicant has established a Task Force, at Staff's urging, to review past D/G problems and to determine if any further corrective/preventive actions are needed. This Group's work is nearing completion.

- The Applicant has had the D/G manufacturer's representatives onsite full time for a number of months.

- The Applicant has hired at least two different outside consultants to review problems at Shoreham in the D/G area.

Additionally the Staff has taken or will be taking the following actions.

- Regarding testing of the D/Gs, as noted above, the Staff has issued a Severity Level III Notice of Violation which requires corrective and preventive actions by Applicant to address Staff testing concerns. (See page 2, Staff letter to Applicant dated April 12, 1983). Many actions to address the concerns, such as emphasis of program requirements to Startup Personnel, have already been completed.^{11/}

- Regarding the cumulative number of past D/G mechanical problems, NRC Region I has expressed its concerns to Applicant and as a result the Applicant established a Task Force, referenced above, to review the problems and actions taken. The Applicant will make a presentation of its conclusion and the NRC (Region I) will review it for adequacy.

- The NRC (Region I) has hired an expert consultant in the D/G area, who has been onsite since April 26, 1983, to review ongoing D/G

^{11/} The County's motion does not allege and the Staff does not concede that the improper testing which led to issuance of a proposed civil penalty caused or led to any of the hardware problems associated with the emergency diesel generators.

testing, past and present mechanical problems, the physical condition and operation of the D/Gs, and to review and evaluate the Applicant's Task Force.

- During April and May, 1983 the NRC (Region I) has continued to review D/G testing and other D/G issues with a region-based inspector, the Senior Resident Inspector, and with its own expert consultant.

Thus it can be seen that Region I has continued to raise D/G issues and concerns and will pursue them to an adequate conclusion. Additionally, it should be noted that Suffolk County receives copies of all NRC correspondence on the Shoreham Docket, such as inspection reports, enforcement packages, and meeting notices. The County has been an invited member at numerous meetings on Shoreham issues, including the January 25, 1983 meeting in Region I, where the D/G testing violation was discussed and at an April 16, 1983 region-based inspector exist meeting on the D/Gs, where the failure of a D/G to start on a hot restart attempt was identified. The County has also been assured by Region I that they will be notified as to future meetings and inspections regarding the D/Gs.

As can be seen from the above discussion, the Staff is clearly dedicated to assuring a safe and timely resolution of the emergency diesel generator problems at Shoreham. Additionally the County will be fully apprised of the resolution of the problems as they evolve. This Staff effort is consistent with the firmly established regulatory scheme whereby reconciliation of concerns unrelated to litigation of previously contested issues in an operating license proceeding is being resolutely pursued by the Staff. It is not the responsibility of a licensing board at the operating license stage to supplant or duplicate this effort. Summer, supra, 13 NRC at 895. Further, and most significantly, no operating license may issue unless and until this agency makes the specified safety

findings required in 10 C.F.R. § 50.57.^{12/} Any eventual full-power operating license for the Shoreham facility, including any terms and conditions relevant to the subject problem, must also receive Commission approval. In sum, the diesel generator problems at Shoreham have and will continue to receive paramount attention by the Staff. Therefore, like factor two, consideration of this factor does not weigh in favor of the County.^{13/}

^{12/} 10 C.F.R. § 50.57 provides in pertinent part as follows:

(a) Pursuant to § 50.56, an operating license may be issued by the Commission, up to the full term authorized by § 50.51, upon finding that:

(1) Construction of the facility has been substantially completed, in conformity with the construction permit and the application as amended, the provisions of the Act, and the rules and regulations of the Commission; and

(2) The facility will operate in conformity with the application as amended, the provisions of the Act, and the rules and regulations of the Commission; and

(3) There is reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the regulations in this chapter; and

* * * *

(6) The issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.

(b) Each operating license will include appropriate provisions with respect to any uncompleted items of construction and such limitations or conditions as are required to assure that operation during the period of the completion of such items will not endanger public health and safety.

^{13/} Whatever their objective merits herein, the Appeal Board has observed that these two factors are accorded relatively less weight than the other factors. Summer, supra, 13 NRC at 895. As demonstrated above, the balance of the factors weigh substantially against the admission of a very broad and vague late contention which raises no concerns not already being pursued by the Staff through regional based inspection and enforcement efforts.

The third factor, the extent to which the petitioner can assist in developing a sound record, weighs importantly against this belated attempt to add a new contention. While the Staff does not dispute that the County's consultant, Mr. Goldsmith, is a diesel expert, the County's motion has failed to supply the specifics to detail how Mr. Goldsmith's expertise will be of assistance to the Board or supplement or improve the efforts of the Staff.^{14/}

Even if the County had made a strong showing that they could assist in developing a sound record, weighing this factor in the County's favor does little to offset the unexcused lateness of the filing, and as discussed below the impact it could have if the motion is granted, on delaying this proceeding. See Fermi supra (slip opinion at 9 and 10).

Finally, factor five, the extent to which admission of the late petition will broaden the issues or delay the proceeding, weighs heavily against the County. The Staff will not unduly burden this filing with a recitation of the long history of this proceeding.^{15/} It is certainly conceivable that admission of the proposed contention may not cause any delay. However, it is also highly possible that a delay in completing this already long and protracted hearing could ensue under many and varied circumstances.

^{14/} This is not to imply that the Staff does not welcome Mr. Goldsmith's assistance during the inspection efforts described above.

^{15/} See in this regard Appendix A to Volume Three of LILCO's Proposed Opinion and Findings of Fact and Conclusions of Law in the Form of a Partial Initial Decision dated January 17, 1983.

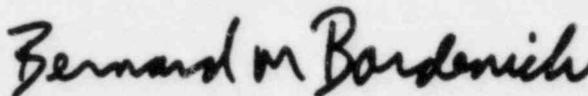
In sum, there is, at a minimum, a high likelihood that admission of a late contention could delay this proceeding.

Based on the foregoing discussion it can be seen that, on balance, the five pertinent factors which the Board must weigh substantially militate against the grant of the County's untimely motion to admit a late filed contention.

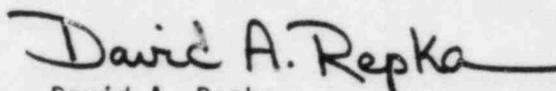
III. CONCLUSION

For the reasons noted above, the County's motion to add a late filed contention as amended by the "Addendum" should be denied.^{16/}

Respectfully submitted,



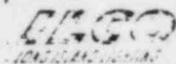
Bernard M. Bordenick
Counsel for NRC Staff



David A. Repka
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 18th day of May, 1983

^{16/} The Staff also notes that even if the motion were otherwise supportable, the contention submitted by the County is overly broad and lacks the specificity and bases required by 10 C.F.R. § 2.714(b). The contention does not appear to be limited solely to "recent" problems with the emergency diesel generators discovered by the Applicant or the Staff. As presently drafted, the contention is susceptible of being construed to include matters that could and should have been raised much earlier in time such as quality assurance/quality control and design or construction defects in the diesel generators unrelated to "recently" discovered problems.



LONG ISLAND LIGHTING COMPANY

SHOREHAM NUCLEAR POWER STATION

P.O. BOX 618, NORTH COUNTRY ROAD • WADING RIVER, N.Y. 11792

50.55(e) P. 111

March 27, 1981

SNRC-549

Mr. Boyce H. Grier
Office of Inspection and Enforcement
Region I
U. S. Nuclear Regulatory Commission
631 Park Avenue
King of Prussia, PA 19406

LONG ISLAND LIGHTING COMPANY
SHOREHAM NUCLEAR POWER STATION - UNIT 1
DOCKET NO. 50-322

Dear Mr. Grier:

On February 25, 1981 in accordance with 10CFR50.55 (e), we reported verbally to Region 1 a deficiency with the turbocharger thrust bearing lubrication system for our emergency diesel generators. This letter serves as our 30 day written report of this deficiency.

Description of Deficiency

A defect exists in the lubricating oil system that supplies oil to the turbocharger bearings for the Class 1E standby diesel generators. The present system design permits lubricating oil to flow to the turbocharger bearings only when the diesel is running and prevents oil flow to the bearings when the diesel is in the standby mode. These turbochargers were manufactured by Elliott Company of Jeannette, Pa. and are used on our Transamerica Delaval supplied diesel generators. Because of the relatively long time periods between diesel operations the lube oil can drain out of the thrust bearing for the turbocharger causing premature wearing of the bearings during starting. This problem will be eliminated by modifying the turbocharger lube oil system so that the thrust bearing receives adequate oil during pre-lubing. This modification to the prelube system to lubricate the turbocharger thrust bearing will also include a restriction orifice to prevent over-lubrication of this bearing.

Mr. Boyce H. Grier
March 27, 1981
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Corrective Action

Transamerica Delaval and Elliott Company are aware of this problem and Delaval has reported it under 10CFR21 in a December 16, 1980 letter to the Office of Inspection and Enforcement. Drawings detailing the system modifications correcting this problem have been provided by Transamerica Delaval and will be implemented on our three diesel-generators by December 1981.

Very truly yours,

J. P. Novarro for J. P. Novarro

J. P. Novarro
Project Manager
Shoreham Nuclear Power Station

TJS/gmm

cc: Mr. Victor Stello, Director
NRC Office Inspection and Enforcement
Division of Reactor Operations Inspection
Washington, DC 20555

Mr. J. Higgins
Site NRC Trailer