

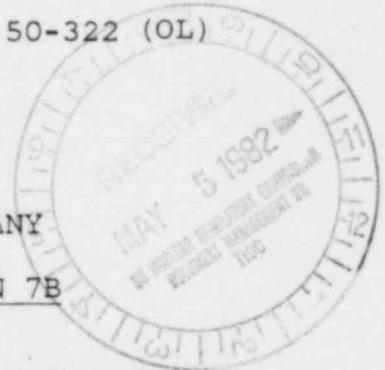
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
)
LONG ISLAND LIGHTING COMPANY)
)
(Shoreham Nuclear Power Station,)
Unit 1))

Docket No. 50-322 (OL)



MOTION OF LONG ISLAND LIGHTING COMPANY
TO STRIKE PORTIONS OF
SC/SOC DIRECT TESTIMONY ON CONTENTION 7B

On April 13, 1982, Suffolk County and the Shoreham Opponents Coalition (hereinafter SC/SOC or Intervenors) filed a lengthy and prolix piece of direct testimony concerning their Contention 7B, which this Board had carefully distilled from eight precursor contentions filed by one or the other of Intervenors.^{1/} Long Island Lighting Company (LILCO or the

^{1/} This contention, stated at p.12 of the Board's Memorandum and Order of March 15, 1982 and accompanied by an extended and careful discussion thereof (Id. at 2-15), reads as follows:

LILCO and the Staff have not applied an adequate methodology to Shoreham to analyze the reliability of systems, taking into account systems interactions and the classification and qualification of systems important to safety, to determine which sequences of accidents should be considered within the design basis of the plant, and if so, whether the design basis of the plant in fact adequately protects against every such

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footnote continued

Applicant) moves at this time, prior to the start of questioning, to strike certain portions of the SC/SOC testimony, in the areas and for the reasons stated below.

I. The SC/SOC Testimony Exceeds the Scope of the Contention Permitted By the Licensing Board.

One criterion for admission of testimony under the Commission's rules of practice, 10 CFR § 2.743(c), is that the testimony be relevant to issues in contention. It is well settled that issues outside the scope of an admitted contention are subject to a motion to strike. See 10 CFR Part 2, App. A, V(d)(7). The SC/SOC testimony violates the limits set by the Board on their Contention 7B in the following respects:

A. System-by-System Examples Beyond the Scope of Contention 7B: The Board permitted Intervenor's to file testimony going to the "general methodology" used by LILCO and the

footnote continued

sequence. In particular, proper systematic methodology such as the fault tree and event tree logic approach of the IREP program or a systematic failure modes and effect analysis has not been applied to Shoreham. Absent such a methodological approach to defining the importance to safety of each piece of equipment, it is not possible to identify the items to which General Design Criteria 1, 2, 3, 4, 10, 13, 21, 22, 23, 24, 29, 35, 37 apply, and thus it is not possible to demonstrate compliance with these criteria.

Staff to perform safety evaluations for the Shoreham plant (March 15 Order at 13). The Board concluded that the contention would have been too vague and lacking an adequate basis if applied to a "substantive system-by-system analysis". (Id.) The Board therefore restricted Intervenors, if they wished to test the methodology by particular applications, to discussion of "a maximum of three examples of plant design which in their view illustrate the inadequacy of the methodology as alleged in their restated contention" (Id.) (emphasis supplied)

Intervenors have undertaken extended discussion, at pages 42-51 of their prefiled testimony, of two examples of their methodological contentions: water level indicators (an alleged systems interaction problem, pp. 42-47) and standby liquid control systems (an asserted classification deficiency, pp. 48-51). While LILCO disagrees with the conclusions of this discussion, it does not object to its admission, since the two examples were plainly within the scope of the contention admitted by the Board. However, the following additional examples introduced by Intervenors are clearly beyond the scope of the contention as admitted by the Board:

1. Discussion of main feed water system and main turbine system (p.21, lines 4-16).

2. Allegedly improper classification of safety grade systems (p.24, 1.9 through p.30), including Table IV-1 which examines 31 separate systems or components.
3. Discussion of six sequences for accidents or transients comparing FSAR Chapter 15 design analyses with Emergency Operating Procedures (EOPS), and specifically examining the turbine bypass system (p.35 1.19) and the feed water control system (p.36 1.6). It also relies on a four-page "Exhibit 4," which lists and purports to classify every system or component identified by Intervenors as pertaining to Chapter 15 or EOPS -- over 60 systems or components in all. This comparison of accident evaluation methods is set forth in the entirety of § V.A. (pp.31-37) and particularly at pp. 34-37.
4. Enumeration of nine components or systems which are assertedly misclassified with respect to their safety function or not fully included within the list of safety-related equipment set forth in Table 3.2.1-1 of the

FSAR. The components or systems include: the Turbine Bypass System (pp. 39-40), the Level 8 Trip (pp. 39-40), the Rod Block Monitor (pp. 39-40), and RCIC (pp.39-40), the Feed Water Control System (p.40), the Feed Water Piping System (p.41), the Automatic Depressurization System (p.41), safety relief valves (p.41), and control rod insertion systems (p.41). The discussion of these systems permeates the discussion in § V.B. (p.38 1.16 through p.41), and LILCO moves that this entire section be stricken.

B. Discussion of Other Plants (§ III.C., p.12 1.8 through p.16 1.15): Intervenors set forth in this portion of their testimony a lengthy, if conclusory, characterization of the Three Mile Island accident (p.12 1.10 through p.14 1.10) and of various "BWR accidents" (p.15, lines 11-21) and a summary recapitulation (p.15 1.22 through p.16 1.16). The discussion is of an extremely broad nature with no attempt to lay a foundation specific to the Shoreham plant design of the accidents described (and accident risks presumed). There is no argument that any of the plants at which the accidents occurred were licensed in a fashion inconsistent with NRC regulations, nor that they and Shoreham are similar in any relevant way.

Contention 7B as admitted by this Board permits a discussion of alleged inadequacies in the methodology used at Shoreham by LILCO and the Staff. It does not contemplate a historiography of accidents and transients at TMI or other plants. Without an allegation that there is either a violation of NRC regulations apparent in these other plants' histories, or a specific showing of their relationship to Shoreham, or a specific area of the contention to which this portion of the testimony can be attributed -- and LILCO believes that none of these exist -- LILCO believes that this portion of the testimony must be struck as being outside the scope of the contention admitted by the Board.^{2/}

C. Discussion of Unresolved Safety Issues (§ VII.B, p.51 1.16 - p.60 1.17): Systems interaction is a primary focus of SC/SOC Contention 7B, and is the subject of NRC unresolved safety issue 17. Thus, while it is not referred to specifically in Contention 7B, its discussion as applied specifically to Shoreham is not definitionally outside the scope of the contention. The same cannot be said, however, of unresolved

^{2/} The only alternative would be to regard the discussion on these pages as being a generic criticism of the method of licensing evaluation required by the Commission -- a matter, depending on its complexion, either barred by § 2.758 or more appropriate for rulemaking than for licensing proceedings.

safety issue 47 (Safety Implications of Control Systems), which is founded neither in Contention 7B^{3/} nor in even any precursor contention (see Board Order of March 15 at 3,11). In any event, discussion of unresolved safety issues, whether 17 or 47 or any other, if permitted at all, must be directed to its specific application to Shoreham within the scope of expertise of the witnesses. The discussion is not so directed but is rather in the nature of a legal brief rather than factual testimony within the scope of expertise of the witnesses.^{4/} Even its ostensible application to Shoreham is pro forma (See p. 57 lines 3-13 for issue 47, p.60, lines 5-17 for issue 17). The extensive discussion of § VII.B should be struck.

II. The SC/SOC Testimony Includes Material Which is Conclusory and Without Foundation

Contention 7B as admitted by this Board permits, in its last sentence, analysis of the following assertion:

Absent such a methodological approach to defining the important to safety of each piece of equipment, it is not possible to identify the items to which General Design Criteria 1, 2, 3, 4, 10, 13, 21,

^{3/} Nor is it found in any precursor contention, by contrast to unresolved safety issues 17 (Board Order of March 15 at 3, 11).

^{4/} This section of the testimony is being objected to separately, in III.A below, on the ground that it constitutes legal argument rather than expert testimony.

22, 23, 24, 29, 35, 37 apply, and thus it is not possible to demonstrate compliance with these criteria.

Nowhere in the SC/SOC testimony is there any kind of systematic discussion of the need for systematic analysis of each of these General Design Criteria. Nor, more importantly, is there any such discussion of the relationship of these GDC to alleged deficiencies in the Shoreham plant. The first discussion of these criteria occurs in § IX, the Conclusion of the prefiled testimony, where each of the GDC listed in Contention 7B is litanistically referred to along with a conclusory statement of its purpose, and the cosmic conclusion drawn that "[i]t is not possible to find that Shoreham has met the above criteria until there has been a systematic analysis" of the nature contended for by SC/SOC. (SC/SOC testimony at 74 lines 14-15). Such conclusory treatment, unsupported by analysis, does not establish an adequate basis for expert testimony and should be struck.

III. Portions of the SC/SOC Testimony Should Be Struck As Legal Argument Outside the Scope of Expertise of the Witnesses.

The SC/SOC testimony contains three discussions which contain no factual material or analysis based on the Shoreham application and amount, rather, to legal argument urging legal conclusions based on case law or regulations. Such argument is

not admissible as expert opinion testimony from technically trained witnesses.^{5/} The areas in question are the following:

A. Section VII (p.51 l.17 through p.60 l.17). This section, objected to above because it is outside the scope of Contention 7B, treats unresolved safety issues A-17 and A-47. Passing for the moment the legitimacy of the inclusion of these issues within Contention 7B, this section is primarily a legal argument, rather than a technical analysis. The section begins with a three-page analysis of legal standards and string-quotes or characterizations of the views of persons or organizations not parties to this docket (p.51 l.17 through p.54 l.16).

5/ It is established within this Commission as well as other forums that legal argument does not constitute admissible expert testimony from persons whose expertise lies in other disciplines. E.g., Illinois Power Company (Clinton Power Station, Units 1 and 2), LBP-75-59, 2 NRC 579 (September 30, 1975) at 585-86, reviewed ALAB-340, 4 NRC 27, 31 (July 29, 1976). This principle is illustrated by Federal Rule of Evidence 702, permitting experts qualified in "scientific, technical or other specialized knowledge" to render opinion testimony in such areas if it "will assist the trier of fact to understand the evidence or to determine a fact in issue..." (Emphasis supplied.) The emphasis is thus on usefulness to the trier of fact in that function, and not in areas outside either that function or outside the expert's area of expertise. While the Federal Rules of Evidence are not binding on this Commission, they nevertheless provide guidance which may be made use of. Duke Power Company (McGuire Power Station) ALAB-669, slip op. at 40. These, plus the traditional restraint on non-legal experts testifying on matters of law, e.g., Spellman v. American Barge Line Co., 176 F.2d 716, 720 (3d Cir. 1949), require exclusion of legal argument masquerading as testimony from witnesses who are put forward on a claim of their technical expertise.

Then, after summarizing the Staff's treatment of unresolved safety issues 17 and 47 in the SER, the testimony leaps straight to the conclusions that this treatment is inadequate under the legal standards set forth above, and that neither of these issues can be satisfactorily addressed without the use of methodologies advocated by SC/SOC. There is no independent factual information of a technical nature conveyed in this section. While not objectionable as legal argument, it is not testimony from technical experts and should not be permitted in this proceeding.

B. The first portion of the SC/SOC conclusions (p.72 1.10 through p.74 1.19) consists of one-phrase summaries of the requirements of some thirteen General Design Criteria listed in Contention 7B, and then of the unadorned conclusion that demonstration of Shoreham's compliance with them is "not possible. . . until there has been a systematic analysis. . ." of the kind advocated by SC/SOC. The recitation of various General Design Criteria is not linked by earlier factual discussion to any specific aspect of the Shoreham plant. Nor are the cited criteria linked to the conclusion which follows their recitation by any kind of detailed analysis. In short, this material is pure argument, not technical testimony within the scope of expertise of the witnesses. It should be struck.

C. Characterization of the application of the single failure criterion (p.6 1.2 through p.8 1.4): Initial portions of the prefiled testimony appraise the consistency of the Shoreham design with the requirements of the single-failure criterion embodied in numerous of the General Design Criteria. While this type of argument is not inherently improper from technical experts as being of a fundamentally legal nature, the question is one of the thrust and "center of gravity" of the argument. The SC/SOC testimony starts out with a recitation of the definition of a "single failure" as used in the GDC (see SC/SOC testimony at 6, note 8). However, rather than proceed to analyze the Shoreham reactor as against this regulation, SC/SOC devotes three pages to outlining two distinct sets of glosses on this regulation -- the first on pages six and seven (p.6 1.2 through p.7 1.4), the second immediately thereafter (p.7 1.5 through p.8 1.4). These glosses on a regulation which speaks for itself are pure argument, unsupported by any reference to authority either factual or legal. They are not technical testimony within the scope of expertise of these witness and should not be admitted.

IV. Hearsay.

The SC/SOC testimony is rife with quotations, paraphrases and asserted conclusions from a variety of sources of

broadly varying weight. They are the most fundamental kind of hearsay. Although LILCO does not object to their use as a basis (however sound) for conclusions reached by SC/SOC, LILCO objects to their admission for the truth of the assertions contained in any of these hearsay statements. A list of such statements or references is attached hereto.

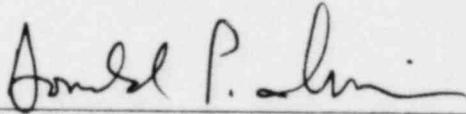
CONCLUSION

For the foregoing reasons, the portions of the SC/SOC testimony referred to above should be struck or should be limited as suggested.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

By



W. Taylor Reveley, III
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Attachment

DATED: April 30, 1982

ATTACHMENT TO MOTION TO STRIKE

The following quotations and characterizations are objected to as hearsay, pursuant to Argument IV in the Motion to Strike:

1. page 4, lines 8-13.
2. page 9, lines 4-10.
3. page 12, line 21 through page 13, line 6.
4. page 12, footnote 15.
5. page 13, line 12 through page 14, line 5.
6. page 14, footnote 19.
7. page 15, lines 17-21.
8. page 16, lines 1-11.
9. page 20, footnote 29.
10. page 45, lines 6-18 and footnote 41.
11. page 47, footnote 42
12. page 52, line 17 - page 53, line 4.
13. page 53, lines 5-10.
14. page 53, lines 11-20.
15. page 54, lines 4-15.
16. page 55, lines 12-15.
17. page 58, lines 4-13.
18. page 58, footnote 58.
19. page 59, lines 1-17.
20. page 59, footnotes 59-63.
21. page 61, lines 11-17, lines 20-27
22. page 62, lines 1-3.
23. page 62, footnote 62, lines 4-6.
24. page 66, lines 15-18 and footnote 70.
25. page 66, lines 19-21 and footnote 71.
26. page 67, lines 12-23 and footnote 72.
27. page 68, lines 1-4 and footnote 73.
28. page 70, lines 11-13 and footnote 78.
29. page 70, lines 13-16 and footnote 79.
30. page 70, lines 16-18 and footnote 80.
31. Exhibit 1.
32. Exhibit 5.

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

I hereby certify that copies of Motion of Long Island Lighting Company to Strike Portions of SC/SOC Direct Testimony on Contention 7B were served upon the following by first-class mail, postage prepaid, or by hand (as indicated by an asterisk), on May 1, 1982.

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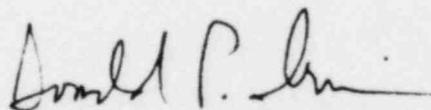
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