October 4, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
LOUISIANA POWER & LIGHT COMPANY	)	Docket No. 50-382
	)	
(Waterford Steam Electric Station, Unit 3)	)	

APPLICANT'S RESPONSE TO JOINT INTERVENORS' MOTION TO, INTER ALIA, REOPEN THE RECORD

Following the close of the record in this proceeding on May 12, 1982, and the submission of proposed initial and reply findings, the Board, by Memorandum and Order of August 17, 1982, reopened the record to receive into evidence Applicant's emergency planning public information brochure. In the same Order, the Board established a schedule for the distribution of Applicant's brochure to the Board and parties, and the receipt of comments by the parties both on the substance of the brochure and on the procedures for its receipt into evidence (i.e., whether the brochure and comments on it would be admitted or whether cross-examination would be necessary).

Pursuant to the Board's Order, Applicant distributed its brochure in printer's proof form,[1/] and other parties provided

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1/ See Applicant Counsel's letters of August 19 and August 20, 1982, and enclosures.

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their comments on it.[2/] The Staff recommended several specific changes to the brochure, but found that -- with the few changes -- the brochure would meet the criteria of NUREG-0654, and that it "compares favorably" to the other brochures reviewed by the Staff. The Staff has reserved its right to respond to any requests for cross-examination. Joint Intervenors have requested cross-examination of NRC and FEMA personnel as to their views on the brochure,[3/] and broadly criticized the readability of the brochure and made a number of other generalized comments, many of which were untimely and well beyond the limited scope of the reopening.

In its response to the other parties' comments,[4/] Applicant noted that its brochure is being edited for readability and to address comments of the NRC Staff and FEMA, requested that a hearing be promptly scheduled to address the adequacy of the brochure, as revised, and proposed a schedule for the limited reopened hearing. Joint Intervenors thereafter notified the Board that it intended to file certain motions, including the motion herein being responded to. Consideration of Applicant's proposed schedule was then deferred pending receipt of Joint Intervenors' motions and

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2/ See Staff Counsel's letter of September 1, 1982, and enclosures ("Staff Comments"); Gary L. Groesch's letter of September 15, 1982, and enclosures ("Joint Intervenors' Comments").

3/ "Joint Intervenors Request The Right To Cross-Examine," dated August 10, 1982.

4/ "Applicant's Response To Comments Of Parties On Emergency Public Information Brochure," dated September 23, 1982.

responses to those motions by Staff and Applicant.

On September 29, 1982, Joint Intervenors filed a "Motion to disallow the introduction of a second evacuation brochure, grant judgement on the first evacuation brochure, include unverified parts of the evacuation plan as part of any new hearings and allow new evidence and testimony to be presented on synergism and evacuation contentions" ("Motion To Reopen"). In this document, Joint Intervenors make a number of different requests -- some ostensibly in the alternative, others not; some ostensibly related, others not. Joint Intervenors appear to be advancing the following:

(1) The brochure proffered by Applicant and distributed on August 19 and 20 is inadequate and should be rejected by summary judgment.

(2) Applicant's proffer of a revised brochure is untimely and should not be allowed.

(3) If the original draft brochure is rejected (and the revised brochure is not permitted to be offered), the Board should by summary judgment find Applicant's emergency planning deficient.

(4) If the original draft brochure on emergency planning is admitted, then certain evidence on synergism earlier proffered by Joint Intervenors (and once rejected by the Board) also should be admitted.

(5) If the revised brochure on emergency planning is admitted into evidence, Joint Intervenors should be allowed to present additional evidence on synergism.

(6) The record should be reopened to consider a number of emergency planning subjects, including in one instance rebuttal on evidence already in the record and in other instances additional direct, cross and rebuttal evidence.

Applicant opposes Joint Intervenors' requests. The requests are not founded in fact or in law. No law -- regulations, statutes, or case law -- is cited in support of the motion. The requests are difficult to sort out and interpret. They fly in the face of any sense of administrative discipline and procedural regularity, and in some cases, defy logic. Applicant will discuss each of the requests, as set out above, seriatim.

The first three requests would seem to involve procedural and admissibility questions relating to the Board's August 17, 1982 Order reopening the record to receive Applicant's emergency planning public information brochure. In the current procedural context, these requests are premature. The Board had requested Applicant to mark the brochure as an exhibit, and submit it. Arguments on its admissibility, and the admissibility of a revised brochure, can be considered if and when the Board determines further proceedings are necessary on the contents of the brochure and Applicant proffers the exhibits, along with appropriate supporting affidavits or witness sponsorship, for admission into evidence. At this point, Applicant has simply responded to the instructions in the Board's Order.

Joint Intervenors first assert that -- as a matter of law -- they are entitled to summary judgment excluding the brochure

distributed by Applicant on August 19 and 20, citing their views of its inadequacies. Motion To Reopen, at 3-5. Even if Joint Intervenors were correct in their assessment of the brochure and the Board determined that the brochure was inadequate, summary judgment to exclude the brochure from evidence would not lie. In any event, it makes no sense to request summary disposition as to the adequacy of the original draft brochure. Applicant has alerted the Board and parties that the brochure is undergoing revision. Thus, the question of the adequacy of the original draft brochure is moot. It is frivolous to require the Board to spend its time deciding if summary disposition is appropriate to determine the adequacy of a brochure which will be superseded.

Joint Intervenors appear to oppose Applicant's proffer of any revised brochure on timeliness grounds. Motion To Reopen, at 5. The Board has decided (Memorandum and Order of August 17, 1982) to reopen the record to receive Applicant's brochure. Obviously, the Board wants to receive, read and evaluate the brochure which Applicant intends to use. The Board is entitled to review the most recent, up-to-date rewrite of the brochure. We do not understand why Joint Intervenors would oppose Applicant's proffer and the Board's receipt into evidence of the most recent version of the brochure, particularly where -- as here -- Applicant has proposed a hearing to allow cross-examination on the

revised brochure.

Apparently, Joint Intervenors purpose is to argue that, for timeliness and other reasons, the brochure should not be allowed in evidence, and then to argue that, no brochure being in evidence, the evacuation plan is thus inadequate and insufficient as a matter of law. Motion To Reopen, at 5. It may be that Joint Intervenors disagree with Applicant as to the adequacy of its brochure, but that is not cause summarily to exclude the brochure, much less by excluding it to find emergency planning inadequate and insufficient as a matter of law. This proceeding is not a game. The Board is called upon to take evidence and decide serious questions. The Board has determined that to reach its decision it needs to evaluate Applicant's brochure. Joint Intervenors would deny the Board the opportunity to review the most up-to-date brochure, which Applicant intends to use; such argument mocks the seriousness of the business at hand.

The last three requests all seem to go toward the question of reopening the proceeding, beyond the extent of the Board's August 17, 1982 Order, to receive evidence both on issues of emergency planning and synergism. Again, the procedural context must be kept in mind. The record has been closed for nearly five months, all parties findings and conclusions have long since been submitted, and Joint Intervenors have not even begun to show the good cause necessary to support their considerable burden in attempting to reopen a closed record. The reopening of the record by the Board on a narrow and specifically defined issue cannot

possibly be used as justification to reopen the record on other unrelated issues. Each issue for which Joint Intervenors attempt to reopen the record must stand or fall on its own merits.

Joint Intervenors request that if the original draft brochure is admitted into evidence, then certain Epstein testimony and exhibits on synergism, earlier proferred by Joint Intervenors (and rejected by the Board) should be admitted as well. Motion To Reopen, at 2. The Epstein testimony and exhibits are completely unrelated to the emergency planning brochure. Joint Intervenors' attempt to analogize the procedures for the admission of the brochure to the Board's rejection of the Epstein testimony as evidence is flawed. The Epstein testimony and exhibits were rejected for lack of a sponsoring witness to stand cross-examination. In contrast, the original brochure was proffered in response to a Board Order which invited parties to provide their views on whether cross-examination on the brochure was desired or necessary. The Board has made no decision to admit any brochure without an opportunity for cross-examination; to the contrary, the Board has properly guarded the right of parties to seek cross-examination before deciding this question. At this juncture, Applicant has proposed to offer its revised brochure and be subject to cross-examination in a reopened hearing. In short, the pending admissibility of Applicant's brochure provides no cause for reconsideration of the admissibility of the Epstein testimony and exhibits.

Joint Intervenors move that if Applicant is allowed to offer any revised brochure into evidence, Joint Intervenors should be

allowed to reopen the synergism issue to admit additional evidence -- unidentified except for a study of a Baton Rouge refinery and documents on "compounds in the Petro Processor facility near Baton Rouge." Motion To Reopen, at 2-3. Joint Intervenors' argument here is without logic. The Board's reopening of the record to receive additional evidence in one limited area does not give the parties unbridled license to pour into the record other evidence on totally unrelated subjects. Joint Intervenors' request must be analyzed as an independent motion to reopen the record on the synergism issue.

The standards for reopening are well established in NRC case law. A party requesting the reopening of a record bears a heavy burden. The proponent must demonstrate that the request is timely made, the motion must be directed to a significant issue and the outcome of the case must be at stake. See Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 N.R.C. 320, 338 (1978), and cases cited therein. See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-05, 13 N.R.C. 361, 362-63 (1981) (endorsing these principles as "longstanding Commission practice"). Where the record has been closed but a decision has not issued, the proponent must establish that the newly discovered evidence has a material bearing on the proper result in the case. See Duke Power Co. (McGuire Nuclear Station, Units 1 and 2), ALAB-669, 14 N.R.C. ___ (Slip. Op. at 20) (March 20, 1982). See also Public Service Co. of Oklahoma, (Black Fox Station, Units 1 and 2),

ALAB-573, 10 N.R.C. 775, 804 (1979) (applying standards to request to reopen filed after the record was closed, but before the board decision).

Joint Intervenors' attempt now to reopen the record to allow additional synergism evidence falls far short of meeting the established test. It is unclear that the documents to which they refer were only recently available to Joint Intervenors. Moreover, there is no attempt to describe the materiality of the documents to Waterford 3's operation or the Board's disposition of the synergism issue. Joint Intervenors' best description of the documents suggests that they offer no new information on synergism involving radiological releases from Waterford 3 per se, but rather deal with mortality rates of children of workers at a Baton Rouge refinery and with levels of chemical compounds in "the Petro Processor," also near Baton Rouge, some 100 miles from Waterford 3. Thus, not even Joint Intervenors' own characterization of the documents provides sufficient justification to warrant reopening the record under long-standing Commission standards. Nor is Joint Intervenors' burden lessened by the coincidence that additional evidence may be received on a totally unrelated and limited subject in the same proceeding.

Joint Intervenors additionally seek to reopen the proceeding to consider a variety of emergency planning topics completely outside the Board's interest in the emergency planning brochure. Motion To Reopen, at 5-6. Again, as with the request to reopen synergism issues, Joint Intervenors' request to reopen the

emergency planning record falls far short of meeting applicable established Commission standards. And again, as with synergism, Joint Intervenors are on no stronger footing because the record has been reopened to receive the brochure and related evidence on it. They make no attempt to tie their request to the brochure. Certainly the request is untimely.

Joint Intervenors first request the right now to provide rebuttal testimony on the Supplemental Testimony of Ronald J. Perry (admitted into evidence on May 3, 1982), asserting that "Joint Intervenors were not allowed an opportunity to obtain expert testimony on the 12 pages of changes in bus operation procedures." Motion To Reopen, at 5. This is a bald and gross distortion of the record. In response to Joint Intervenors' objections to the Perry supplemental testimony, the Board expressly extended to Joint Intervenors the opportunity to present witnesses to refute that testimony. See Tr. 2151, 2153, 2168-69, 2171. At the end of the hearing, the Board inquired whether Joint Intervenors would present any witnesses to rebut Mr. Perry's supplemental testimony. Tr. 3616. Joint Intervenors replied unequivocally: "... in response to your question concerning whether or not Intervenors will present any rebuttal witness testimony in regard to Mr. Perry's testimony, the answer is no." Tr. 3618. As the Commission has observed in an earlier proceeding:

> "[T]he Commission's adjudicatory system requires a certain discipline to keep it operating efficiently. It assumes that parties will assert their own interests in a timely fashion

> with adequate support, and that they will live with the costs of their decisions.

Consolidated Edison Co. of New York (Indian Point Station, Units 1, 2 and 3), CLI-77-2, 5 N.R.C. 13, 15 (1977). Here, Joint Intervenors opted not to present timely rebuttal testimony. The other parties and the Board rightfully have relied on that decision. Now, five months later, Joint Intervenors seek to reverse their earlier decision, citing no good cause to support the grant of such extraordinary relief. Their request should be denied.

Joint Intervenors also "move that hearings be held on all documents and plans which have not been verified." Motion To Reopen, at 5-6. Specifically, they cite as "documents which have not been furnished by LP&L": (1) the siren warning system; (2) agreements with surrounding parishes for buses; (3) all standard operating procedures; and (4) all evacuation evaluation procedures. Motion To Reopen, at 5. They argue that "[t]o allow these portions of the evacuation plan to be proffered by LP&L without being subjected to cross-examination by Joint Intervenors and by rebuttal testimony presented by Joint Intervenors would make the evacuation hearings a sham and a fraud upon the people of Louisiana." Motion To Reopen, at 6.

A look at the record of this proceeding would suggest that Joint Intervenors' heated rhetoric is badly misplaced. Joint Intervenors first argue that the listed documents haven't been "furnished" by Applicant. Assuming they mean by "furnishing," offering into evidence, they are simply wrong as to item (1).

The siren warning system study was offered, admitted, and subject to cross-examination at the hearings in early May; no rebuttal testimony was event hinted at by Joint Intervenors. It is correct that Items (2), (3) and (4) were not offered as exhibits.[5/] Nor are they now being offered by Applicant. Applicant is not relying on Items (2), (3) and (4) in support of its case. Thus, Joint Intervenors' complaint that it is a "sham" to allow documents to be "proffered" without an opportunity for cross-examination and for rebuttal is incomprehensible. Their argument defies both fact and logic.

It may be, however, that Joint Intervenors actually are arguing that these documents should be proffered as exhibits and, if they are offered, not to allow cross-examination and related rebuttal would make the hearings a sham. Perhaps so. But that is not the case. Their boot-strapped complaint misses the point. Joint Intervenors repeatedly argued at the hearings that the record should not be closed until all standard procedures and all agreements with surrounding parishes for buses had been completed. See, e.g., Tr. 3989-90. The Board properly noted that such documents need not be offered into evidence unless necessary to demonstrate "reasonable assurance," Tr. 2166-67, and -- after argument by all parties on whether the record could be closed prior to the completion of such documents -- the Board ruled, and closed the

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5/ It is far from clear which documents would be included in Items (3) and (4).

record. Tr. 4000-01. There was never any argument that all "evacuation evaluation procedures" should be placed into evidence. It is now some five months since the record was closed; Joint Intervenors have, in essence, belatedly requested reconsideration of the Board's rulings. Yet Joint Intervenors now provide not one single reason why the Board should reconsider its decision. Joint Intervenors provide no justification at all to reopen the record on these matters.

For the foregoing reasons, Applicant opposes each of the requests for relief in Joint Intervenors' motion. In denying the motion, Applicant urges the Board to remind Joint Intervenors of their duties as a responsible party to this proceeding. Baseless motions backed only by rhetoric do not further the administrative process. The expenditure of resources on such motions is wasteful, particularly where, as here, the hearing process is disrupted to dispose of the motions.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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Dated: October 4, 1982

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Response To Joint Intervenors' Motion To, Inter Alia, Reopen The Record" were served: by hand-delivery to Sheldon J. Wolfe, Administrative Judge and Sherwin E. Turk, Staff Counsel; by deposit with Express Mail to Dr. Harry Foreman and Dr. Walter H. Jordan, Administrative Judges, and to Joint Intervenor Gary Groesch on October 4, 1982; and that one true and correct copy of same was served by deposit in the United States mail, First Class, postage prepaid, addressed to each of the other persons on the attached service list, this 4th day of October, 1982.

Bruce W. Churchill

Dated: October 4, 1982

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