LILCO, March 30, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

MOTION TO STRIKE

Preliminary Statement

LILCO moves to strike substantial portions of the Suffolk County supplemental testimony on Contention 7B on a number of grounds. Chief among these is that Suffolk County seeks by this supplemental testimony to have a second bite at numerous portions of the "7B apple." The great majority of Suffolk County's supplemental testimony constitutes restatements or rearguments of positions and points already covered in the voluminous existing 7B record. In many other instances, the County has cited documents that antedate the 7B testimony and which the County could have used or did use in its initial testimony or cross-examination. In sum, the supplemental testimony is chiefly argument and chiefly old

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argument; it is not largely, as it should be, expert facts and opinions focused sharply on matters new since the original 7B testimony. So contrary to the Board's desire to focus the testimony solely on the matters changed by Mr. Conran's affidavit, the County merely restates and reargues its prior positions.

In addition, much of the County testimony is merely a restatement of Mr. Conran's affidavit or the Staff's supplemental testimony. As the Board has recognized, mere concurrence in or disagreement with this testimony does not constitute new and probative testimony on the part of the County.

Third, portions of the County testimony are irrelevant to the issues at hand. The County attempts to introduce evidence on issues which are neither addressed in the affidavit of Mr. Conran nor directly related to the facts or the issues of this case.

Finally, the County attempts to raise issues upon which the Board has previously ruled. The ruling by the Board on the reopening of the 7B record neither creates the opportunity for a new contention nor expands the 7B issue to encompass previously rejected contentions.

In summary, the County's testimony is largely argumentative, repetitive and irrelevant and should be stricken pursuant to 10 CFR Part 2, Appendix A, V(d)(5), which states:

> To prevent unnecessary delays and an unnecessarily large record, the Board may, pursuant to § 2.757, limit cumulative testimony, strike argumentative, repetitious, cumulative, or irrelevant evidence, take other necessary and proper steps to prevent argumentative, repetitious or cumulative cross examination, and impose appropriate time limitations on arguments.

I.
The County Seeks to Raise Issues It Could Have Litigated Or Reargue Issues Already Litigated

The fortuitous reopening of the record should not provide the County with the opportunity to introduce testimony which would otherwise be untimely. Yet this is precisely what the County seeks to accomplish; substantial portions of the supplemental testimony are matters which could have been, or in fact were, litigated in 7B.1/ The inclusion of previously

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1/ The portions of the County's Supplemental Testimony that should be stricken, inclusive of footnotes, are as follows:

Page 3, line 20, through page 8, line 13
Page 10, line 17, through page 13, line 16
Page 14, line 17, through page 15, line 11
Page 16, line 9, through page 19, line 17
Page 20, line 1, through page 20, line 10
Page 21, line 1, through page 22, line 11
Page 26, line 27, through page 26, line 29
Page 27, line 13, through page 27, line 21
Page 28, line 16, through page 29, line 2
Page 30, line 11, through page 30, line 18
Page 30, line 20, through page 30, line 23
Page 32, line 11, through page 32, line 14

(footnote cont'd)

litigated matters in the Conran affidavit should not provide the opportunity for additional County testimony on matters already litigated and for which no new information has been provided. This principle was implicitly recognized by the Board in its ruling on reopening where, on the issue of untimeliness, it stated:

> I think the affidavit is very late, months late. I don't know whether it's four months or five months or six months, but in terms of new facts identified in there it is just plain late, without any apparent excuse.
>
> However, the problem here is that lateness cannot be used as an estoppel against other parties in the proceeding, particularly the County. If it were the County itself seeking to reopen because of new facts or views which would have been within its control, that would be a different matter and perhaps could serve as an estoppel against the party, although even that is complicated when you have a matter of publicly important issues rather than just a private dispute between parties.

Tr. 20,318 (Brenner, J.) (emphasis added). The Board also noted that testimony in the nature of "as we have been saying all along" was inappropriate. Tr. 20,328 (Brenner, J.).

(footnote cont'd)

> Page 32, line 15, through page 37, line 16
> Page 38, line 9, through page 39, line 25
> Page 41, line 9, through page 43, line 5
> Attachment 1

Thus, the Board ruled that untimeliness of the Conran affidavit, which was beyond the control of the County, would not prevent reopening of the record to admit the affidavit. But an attempt by the County at this time to introduce untimely matters which were within its control, such as then available documents and facts, is a different matter. No such evidence should now be admitted. To do so unfairly affords the County another opportunity to reargue its case. The following portions of the supplemental testimony vividly illustrate this.

Perhaps the most striking example is the County's criticism of the Staff's reliance on the Standard Review Plan and Regulatory Guides for substantive requirements for items important to safety.2/ The County acknowledges that Mr. Conran apparently has not changed his testimony in this regard, but still reargues the invalidity of the Staff position. For example, on page 33, the County criticizes the Staff's ability to reach conclusions about structures, systems and components based on its limited review, citing, in support, a Staff proposed finding on the scope of the Staff's review process. Indeed, the County offered its own finding on this very point.

2/ This testimony appears at page 32, line 15, through page 37, line 16.

See SC Proposed Finding 7B:66. Thus, the testimony is not new evidence. Rather, it is in the nature of a reply to the Staff's findings, a procedural opportunity not available under the Commission's rules of practice. Similarly, the rest of the County's testimony in this section attempts to provide evidence or make arguments that could have been presented during the initial 7B litigation. Staff witnesses made unmistakably clear their reliance on the SRP, Regulatory Guides and the FSAR during their initial testimony. See Spies et al., ff. Tr. 6357, at 10. The County had ample opportunity to cross-examine on the issue and address it in findings.3/ Now the County seeks to buttress its arguments by citing inadequacies in the SER (page 33), introducing a June 1980 letter from Mr. Denton to Mr. Dircks (page 34), and alleging inconsistencies between the SRP and the FSAR (pages 35-37). All of these matters could have been raised during the initial litigation of SC/SOC 7B. Indeed, in some instances they have already been addressed.4/

3/ See, e.g., Tr. 6573-85 (Rossi, Conran) (cross-examination on use of SRP); SC Proposed Findings 7B:65 (Staff use of SRP).

4/ On page 36 of the supplemental testimony, the County alleges a lack of guidance in Section 17 of the SRP on quality assurance for non-safety related structures, systems and components. This issue, too, is certainly not new; the County has already been heard on it. See SC Proposed Finding 7B:68.

The admission of this evidence would be unfair, inappropriate and would unnecessarily prolong the reopened portion of the 7B litigation.

An example of an area the County could have litigated but chose not to is the County's reference on page 36 to the Remote Shutdown System and the Recirculation Pump Trip. In the initial litigation of SC/SOC 7B, the Board gave the County an opportunity to select two examples of systems that were improperly classified. In fact, the County used five examples. LILCO addressed each and demonstrated that each was properly classified and that appropriate quality measures had been applied. Now the County seeks to use the Conran affidavit as a means of offering additional examples which could have been selected at the outset.5/

Another striking example of testimony that could have been (or was) litigated during the initial round of 7B hearings involves recitations of the history of the A-17 issue.6/ Much

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5/ It should be noted that the Recirculation Pump Trip is safety related (FSAR § 7.6.1.3.1). The Remote Shutdown System is also safety related (FSAR Table 3.2.1-1, p. 10) and was the subject of a separate contention which was settled.

6/ This testimony appears on page 3, line 20, through page 8, line 13, and page 10, line 17, through page 13, line 16.

of it is already in the record. Compare Goldsmith et al., ff. Tr. 1114, at 59 (citing NUREG-0410, NUREG-0510, NUREG-0660) with SC Supplemental Testimony at 4-8 (citing NUREG-0410, NUREG-0510, NUREG-0660). In fact, on pages 11-12 of the County supplemental testimony, the SC witnesses discuss studies by Lawrence Livermore, Battelle and Brookhaven Laboratories. These studies were mentioned in prefiled testimony and were the subject of cross-examination. See, e.g., Burns et al., ff. Tr. 4346, at 81, 95, 98, 108; Tr. 5023-32 (Dawe, Ianni), 5071-74 (Dawe). To the extent that the County seeks to embellish on this history, it is too late.

Yet another example of testimony that has already been presented is the County's testimony on pages 37-39 regarding the adequacy of the original classification of structures, systems and components. The County argues that LILCO's commitment to the Staff relating to non-safety related structures, systems and components is defective because it "assumes that the safety significance accorded to equipment and software in the FSAR, TS's and EOP's is correct" and that "future treatment . . . will be based on the original classification and QA/QC requirements." The whole point of the litgation of SC/SOC 7B was to determine the adequacy of the classification used for Shoreham. Thus, in this testimony, the County merely restates

its position that the safety classification and QA/QC treatment for the plant is inadequate.

As these examples illustrate, substantial portions of the County's supplemental testimony are nothing more than restatements or reargruments of matters and documents that were litigated in the initial 7B hearings or could have been. The County should not be permitted to succeed in this impermissible attempt to take a second bite at the apple. These portions of the testimony should be stricken (see note 1, supra at 3-4).

II.
Testimony on USI A-17 Progress is Irrelevant

County testimony concerning NRC progress or lack of progress on USI A-17 is plainly an attempt to reargue their position. But it is inappropriate here for yet another reason: it is irrelevant. The Staff has repeatedly emphasized that USI A-17 is only confirmatory in nature. E.g., Staff Supplemental Testimony, Mattson et al. (March 10, 1983) at 5; Staff Proposed Finding 7B:176. The Commission itself, in a recent pronouncement, has essentially confirmed this by stating that

> Current regulatory practices are believed to ensure that the basic statutory requirement, adequate protection of the public, is met.

48 Fed. Reg. 10,733 (1983). This Commission statement makes clear that Shoreham's compliance with current regulatory practices is adequate to meet the statutory standard and that the rate of progress on USI A-17 is not relevant.

Moreover, there are, apart from rate of progress, ample additional bases for concluding that Shoreham meets the North Anna standard. These include the Probabilistic Risk Assessment and the various deterministic systems interaction studies and programs beyond regulatory requirements. See, e.g., LILCO Proposed Findings B-280 to -285, B-314 to -316. Thus, litigation on the progess of A-17 is unnecessary and constitutes an unjustifiable waste of the time and resources of the Board and parties. Accordingly, these portions of the tesimony should be stricken.7/

7/ The portions of the supplemental testimony that should be stricken, inclusive of footnotes, are as follows:

Page 8, line 13, through page 9, line 25

III.
The County Merely States Its Agreement With The Affidavit

In a number of instances the County paraphrases or quotes portions of Mr. Conran's affidavit and states its agreement with Mr. Conran. As noted by the Board, that testimony is not appropriate here; rather, such arguments are more appropriate for findings of fact. As this Board noted,

> But we are concerned with just additional testimony from the County . . . which additional testimony is, I say, "as we have been saying all along," or that "we agree," that that kind of thing is appropriate for findings and not for testimony.

Tr. 20,328 (Brenner, J.) (quotation marks inserted).

Accordingly, the Board should strike all those instances in the supplemental testimony that quote or restate the Conran affidavit contents and then indicate the County's agreement or testimony that simply restates earlier positions.8/

8/ The following portions of the County's testimony, inclusive of footnotes, merely state agreement with Mr. Conran and should be stricken:

Page 2, line 23, through page 3, line 25
Page 9, line 27, through page 10, line 15
Page 19, line 16, through page 19, line 25
Page 20, line 12, through page 20, line 19
Page 24, line 11, through page 24, line 22
Page 40, line 1, through page 40, line 11

IV.
Salem Testimony Is Irrelevant

The material relating to the Salem Nuclear Power Station included on pages 40-41 of the County's testimony is irrelevant for two reasons.9/ First, it is unrelated to any matter raised in Mr. Conran's affidavit. As the Board ordered, this Supplemental Testimony must be "directed to the matters changed in Mr. Conran's . . . affidavit." Tr. 20,328 (Brenner, J.). Mr. Conran's affidavit contains no reference to the Salem Nuclear Power Station.

Second, unlike Salem, Shoreham is not a PWR and does not have scram breakers. Nor has there been any showing that Shoreham's Reactor Protection System is not safety related. The contrary is true. See Shoreham FSAR § 7.2.1.1.1.

In short, portions of the supplemental testimony relating to Salem are irrelevant and unrelated to Mr. Conran's affidavit. The County should not be permitted to inject extraneous matters thereby unnecessarily prolonging the hearing. Moreover, it would be a waste of this Board's time to litigate

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9/ The portions to be stricken as irrelevant are (1) page 40, line 12 to line 23 and footnote 45 and (2) page 41, line 1 through line 9 and footnote 46.

the Salem event given that NRC investigations are still underway.

V.
Testimony On A Rejected Contention Is Inappropriate

On pages 33-35 of the supplemental testimony, Suffolk County attacks, in essence, the adequacy of the Staff's documentation of compliance with the SRP. The County argues that the Staff cannot rely on Regulatory Guide 1.70 and the SRP for assurance that LILCO treated structures, systems and components properly during construction because there is no documentation of how Shoreham compares to current regulatory guides and the SRP. This argument merely restates a contention raised by SC earlier in the proceeding and rejected by the Board. SC Proposed Contention 30 alleged that neither the FSAR nor SER documented and justified deviations from current regulatory guides and the Standard Review Plan. See letter from P. Dempsey to L. Brenner dated February 15, 1982, enclosure at 36-37. But this Board held that such documentation is not required by the NRC's regulations. Memorandum and Order Confirming Rulings at the Conference of the Parties (March 15, 1982), at 15.

Subsequent to the Board's ruling, the Commission issued a final rule on the subject confirming that plants with operating license applications pending such as Shoreham are not required to document deviations from the SRP. 47 Fed. Reg. 11,652 (1982). Consequently, the County's testimony in this regard seeks to penalize Shoreham for failure to do something that is not required by regulation. This is inappropriate and the testimony should be stricken.10/

VI.
Use of ACRS
Correspondence is Impermissible

On pages 12, 14 and 15 of its supplemental testimony, the County seeks to use an ACRS letter (dated January 8, 1982) and transcript for the truth of the matters asserted. This is impermissible. The Appeal Board has so held. Thus, in Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-217, 8 AEC 61, 75 (1974), the Appeal Board stated:

10/ The portions of the testimony that should be stricken in this instance are:

Page 33, line 17, through 35, line 18

> Owing to the existence of the policy against requiring ACRS members to testify at adjudicatory hearings, ACRS letters dealing with matters in controversy at such hearings have been admitted into evidence only for a limited purpose and not for the validity of the opinions expressed therein. In this case no party attemped to utilize the relevant ACRS letters to support its position. For our part, we have based our decision on the evidence in the record, without reference to the ACRS letters.11/

Contrary to the holding of the Appeal Board, the County is offering ACRS material for the validity of the opinions expressed and not for some appropriate limited purpose. Accordingly, the Board should reject the County's use of these letters and strike the testimony.12/

VII.
Conclusion

For all the reasons stated above, LILCO respectfully requests that the Board strike those portions of the County's supplemental testimony identified in this Motion.

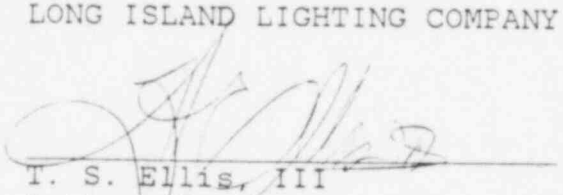
11/ Citing Arkansas Power and Light Co. (Arkansas Nuclear One Unit 2), ALAB-94, RAI-73-1 25, 32 (January 18, 1973).

12/ The portions of the County's supplemental testimony that should be stricken, inclusive of footnotes, are as follows:

Page 12, line 17, through page 12, line 18
Page 14, line 18, through page 15, line 11

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY



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CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO's Motion to Strike were served this date upon the following by hand, as indicated by an asterisk, or by first-class mail, postage prepaid.

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