

February 22, 1983

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 O.L.

NRC STAFF STATEMENT OF VIEWS IN RESPONSE
TO ORDER OF FEBRUARY 11, 1983

I. INTRODUCTION

On January 25, 1983, NRC Staff counsel sent a letter^{1/} to the Atomic Safety and Licensing Board and parties stating that one of the Staff's witnesses who gave testimony on SC/SOC Contentions 7B and 19(b), James H. Conran, Sr., had informed Staff counsel "that he seeks to modify certain of his testimony in this proceeding since he no longer supports some aspects of the testimony he gave in hearings last summer." The Staff informed the Board and the parties that Mr. Conran was preparing a written statement of his present views on the matters discussed in his testimony, and undertook to file this statement as well as the Staff's assessment of whether there would be a need to reopen the record on the contentions in question.

1/ The text of the letter was read into the record by Staff counsel at the hearing session on January 26, 1983.

DESIGNATED ORIGINAL

Certified By

[Handwritten Signature]

[Handwritten Initials]

The Staff received Mr. Conran's written statement on February 8, 1983 and provided it to the Board and parties that day. ^{2/} On February 9, 1983, a telephone conference call was held among the Board and counsel for the cognizant parties. The Board directed that the parties file statements of their views on the Conran affidavit and its effects on the litigation of Contention SC/SOC 7B by February 22, 1983. In a confirmatory memorandum and order, ^{3/} dated February 11, 1983, the Board directed that three principal matters be addressed:

1. whether the record must or should be reopened to allow admission into evidence of the Conran affidavit as an amendment to his testimony;
2. whether reopening the record to admit the Conran affidavit will require that Mr. Conran be made available for follow-up questioning; and
3. whether reopening the record to admit the Conran affidavit will necessitate the proffer of additional testimony by any party.

Within each of these areas, the Board provided guidance as to additional details it expected the parties to address.

For the reasons discussed below, the Conran affidavit should be received in evidence as an amendment to his previous testimony. This result is supported by considerations of fairness in the administrative process and sound public policy as well as by NRC caselaw. The Staff

^{2/} On February 9, 1983, Mr. Conran provided a corrected copy of his statement in executed affidavit form. This was forwarded by the Staff to the Board and parties that day.

^{3/} Confirmatory Memorandum and Order Directing That Parties Submit Views on the February 8, 1983 Affidavit of James H. Conran, Sr., and Its Effects on the Litigation of Contention SC/SOC 7B, dated February 11, 1983.

would not oppose a request by any other party to conduct reasonable cross-examination. If Mr. Conran's appearance is required by the Board, the Staff would have brief questions on his affidavit. Finally, the Staff is preparing to offer additional testimony on each of the two principal subjects of Mr. Conran's affidavit.

II. DISCUSSION

A. Need to Reopen

The Staff has identified in Appendix A the principal portions of Mr. Conran's testimony in the record which are arguably changed by his affidavit and noted in each instance how the testimony is affected. Appendix B identifies the findings proposed by the parties arguably affected by the Conran affidavit. In the following paragraphs, the changes in Mr. Conran's prior testimony are summarized and their significance is discussed.

1. Systems interaction (A-17)

The Staff has identified three points in Mr. Conran's testimony which are arguably altered by his recent affidavit as it relates to the systems interaction issue. See Appendix A at 1-2. The Staff's testimony, principally through Mr. Conran, took the position that the Staff had satisfied its obligations under North Anna ^{4/} to discuss why operation of Shoreham may be permitted despite the pendency of unresolved safety

^{4/} Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245 (1978).

issue A-17. Mr. Conran's affidavit states, in pertinent part, that he "can no longer continue, in good conscience, to support the position that the Staff's systems interaction program provides currently an adequate basis for the 'justification for operation' conclusion required under North Anna" Conran Affidavit at 2; see Id. at 10. Second, the Staff's testimony through Mr. Conran discussed the "pilot plant" program as one part of the Staff's effort toward resolving A-17. Mr. Conran's affidavit asserts that the pilot plant alternative has been "discarded altogether." Conran Affidavit at 21. Finally, the Staff testified that no requirement must or should be imposed at present for comprehensive plant-specific systems interaction analyses. Mr. Conran's affidavit argues that "limited systems interaction reviews" (emphasis in original) should be required of all licensees and applicants for operating licenses. Conran Affidavit at 12.

The Conran affidavit would amend Mr. Conran's testimony on the A-17 issue in a way that is material and significant to the testimony previously given by Mr. Conran. Taken together, these statements in Mr. Conran's affidavit reflect his current view that, because of perceived deterioration in the Staff's A-17 program over the last several months, the Staff has not met its obligation under North Anna to explain why operation may be permitted and that additional plant-specific systems interaction requirements now should be imposed. Mr. Conran's current views in this respect are contrary to the position taken by him for the Staff at the Shoreham hearings last year. The Staff's position on this

issue as reflected in the present record remains unchanged. Although there is documentary and testimonial evidence in the record apart from Mr. Conran's testimony to support the Staff's position on the A-17 issue, Mr. Conran's testimony was an important part of the Staff's case and the Staff believes the record should be supplemented.

2. Safety classification

Two points in Mr. Conran's earlier testimony on the subject of safety classification are arguably changed by the Conran affidavit. See Appendix A at 2-4. Mr. Conran testified, along with the other Staff witnesses on the 7B panel, that the regulatory requirements for items important to safety at Shoreham appeared to have been satisfied despite Applicant's failure to use the term important to safety as the Staff used the term. Thus, there was "close agreement" on the substantive issues involved despite the differences over language. The Conran affidavit would modify that testimony by Mr. Conran because of his present view that there "appears to be a substantive defect in Applicant's true understanding of what is really required minimally to protect public health and safety." Conran Affidavit at 31. For this reason, Mr. Conran now says that the Board should not rely on statements by him that there has been a "meeting of the minds" on the classification issue. Conran Affidavit at 29.

The second point relates to how to tie up the remaining "loose ends" identified by the Staff to exist because of LILCo's incorrect use of the term important to safety. Mr. Conran's testimony stated that an acceptable resolution would be to have the correct definition of important to safety applied to Applicant by its own commitment or by imposition by the Board

or the Staff. The Conran affidavit states that Applicant's understanding of the meaning of important to safety and concomitant requirements must be developed and demonstrated as a prior condition to licensing. Conran Affidavit at 32-33.

Again, the Conran affidavit would amend Mr. Conran's earlier testimony on safety classification issues in a way that appears significant to the issues involved in Contention 7B. The affidavit contains no new factual information in its discussion of the safety classification issue. Nevertheless, Mr. Conran's changed judgments and opinions clearly constitute new information for the purpose of considering whether to reopen the record.

3. Supplementation of the record with the Conran affidavit

Several considerations require that Mr. Conran's affidavit be received in evidence as an amendment to his earlier testimony. Perhaps the most important of these considerations is the agency's interest in the integrity of its adjudicatory process. Clearly the Board cannot rely on testimony the current accuracy of which has been called into question by the one who gave such testimony without the Board giving full consideration to the nature of and bases for the changes involved.

An analogous situation was presented in Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-78-18, 8 NRC 293 (1978). The Commission was presented there with evidence raising questions about the accuracy of certain staff testimony after an initial decision had been issued by the Licensing Board and affirmed by the Appeal Board. The Commission remanded the proceeding for further

hearings before the Licensing Board on the new information and its effect on the substantive issue under consideration.^{5/}

The public interest in having a full exploration of the safety issues raised by Mr. Conran also argues strongly in favor of reopening the record under the unique circumstances presented here to receive the Conran affidavit in evidence. Adjudicatory consideration of the matters discussed in the Conran affidavit is important to assure the public that the significance of all reasonable questions concerning the safety of Shoreham has been assessed.

NRC caselaw on reopening a hearing record also provides a useful guide which points to the need to reopen the record here. The standard for reopening the record^{6/} has three elements: 1) timeliness of the presentation of the new information; 2) whether the new information is directed to a potentially significant safety issue; and 3) whether the new information would cause a different result to be reached.^{7/} That standard is met here. The Staff has presented the information to the Board on a timely basis and the information is directed to a potentially significant safety issue for the reasons discussed above. Further, the

^{5/} See Hudson River Fisherman's Association v. Federal Power Commission, 498 F.2d 827, 833 (1974); Greene County Planning Board v. Federal Power Commission, 559 F.2d 1227, 1233 (2d Cir., 1976), cert. denied, 434 U.S. 1086 (1978) ("an agency does have an obligation to make corrections when it has been relying on erroneous factual assumptions, especially where broad public interests are at stake").

^{6/} See Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978).

^{7/} All three elements of this standard are applicable where a party seeks to reopen after the record is closed but prior to issuance of a decision by the licensing board. See Public Service Co. of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903 (1981).

information presented does have "a material bearing upon the proper result in the proceeding."^{8/}

In sum, the record should be reopened to receive the Conran affidavit as an amendment to his prior testimony.

B. Need for Cross-Examination

The Board has asked the parties to address whether reopening the record to receive the Conran affidavit will also require follow-up questioning by any party and, if so, what areas will be inquired into and how long such examination might be expected to take. The Staff would not oppose a request by any other party to conduct reasonable cross-examination of Mr. Conran. If the Board decides to have Mr. Conran appear for further oral examination, the Staff would expect to question Mr. Conran briefly in the following areas: 1) whether existing standards and requirements provide reasonable assurance of no undue risk to public health and safety from potential adverse systems interactions; and 2) whether the Conran affidavit questions the adequacy of the Staff's deterministic review procedure. The Staff would also expect that it will be necessary to follow up briefly with questions relating to areas of examination, if any, by the other parties.

^{8/} Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-169, 15 NRC 453, 465 (1982); see also Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), LBP-80-10, 11 NRC 337, 341-42 (suggesting that reopening may be appropriate where new information "could significantly affect the testimony which has been received" or the outcome of the proceeding).

C. Need for Additional Testimony

Mr. Conran's February 9, 1983 affidavit, if received in evidence, will significantly modify evidence proffered by the Staff in support of its position in the proceeding. Fairness requires that the Staff be permitted the opportunity to supplement the record directly affected by Mr. Conran's modification of his position. The Staff is prepared to offer additional testimony on each of the two subjects addressed by Mr. Conran's affidavit. The receipt in evidence of this additional testimony is in the interest of a full and fair hearing record upon which a decision can be made. The Staff proposes to offer this testimony by affidavit.

1. Systems interaction (A-17)

The Staff is preparing additional testimony on the subjects of the status and progress of the Staff's program in support of unresolved safety issue A-17 and the basis for the Staff's position that Shoreham can be operated safely despite the pendency of unresolved safety issue A-17. That testimony will be sponsored by Ashok C. Thadani, Branch Chief of the Reliability and Risk Assessment Branch, and Franklin D. Coffman, Section Leader of the Systems Interaction Section within the Reliability and Risk Assessment Branch. The principal points of that testimony are expected to be as follows:

1. the Staff's current licensing requirements provide reasonable assurance of no undue risk to public health and safety from potential adverse systems interactions;
2. unresolved safety issue A-17 is confirmatory in nature;
3. the Staff's program on A-17 is progressing satisfactorily toward resolution;
4. no plant-specific systems interaction analyses are or should be required until completion of the Staff's program determines whether they are necessary and justified.

This testimony is directed to matters apparently altered by Mr. Connor's affidavit and is material and significant to the substantive issues involved in Contention 7B. The Staff expects this testimony to be brief. If the Staff's proposal to submit this testimony by affidavit is unacceptable and oral testimony is required, no more than one hearing day should be required for all direct and cross-examination of these witnesses.

2. Safety classification

The Staff is also preparing additional testimony on the subjects of Applicant's compliance with regulatory requirements for plant items which are important to safety but not safety-related and of an acceptable resolution of the definitional controversy between Applicant and the Staff over the meaning of "important to safety." That testimony will be sponsored by Roger J. Mattson, Director of the Division of Systems Integration, and Richard H. Vollmer, Director of the Division of Engineering. The principal points of that testimony are expected to be as follows:

1. The Staff continues to believe that Applicant has acceptably demonstrated its compliance with the substantive regulatory requirements for plant items important to safety despite Applicant's incorrect usage of the term "important to safety"; and
2. Upon consideration of the matters in Mr. Conran's affidavit relating to Applicant's understanding of regulatory requirements for plant items important to safety during the operational phase at Shoreham, and upon consideration of Applicant's letter of February 15, 1983 responding to the Staff's January 10 letter, the Staff has decided to seek from LILCo a formal amendment to its Final Safety Analysis Report. This amendment would document LILCo's commitment, for non-safety-related structures, systems and components, to include in the preventive and corrective maintenance program, the design change control program, the procedures for procurement of equipment, the procedures for modifications and removal of equipment from service, and the quality assurance program, a provision that, at a minimum, the equipment and associated software shall be accorded the safety significance given to it in the FSAR, the technical specifications and the

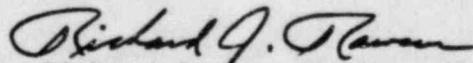
emergency operating procedures. This amendment will also document LILCo's commitment to reflect these considerations in the charters and decisions of the Review of Operations Committee, the Offsite Nuclear Review Board, and the Manager of Quality Assurance functions. These amendments would satisfy the Staff concerning LILCo's understanding of and ability to satisfy applicable regulatory requirements, including GDC-1, during the operational phase at Shoreham.

Again, the Staff expects this testimony to be brief and proposes to submit it in affidavit form. This testimony is directed to matters altered by Mr. Conran's affidavit and is material and significant to the substantive issues involved in Contention 7B.

III. CONCLUSION

For the reasons discussed, the Conran affidavit should be received in evidence as an amendment to his previous testimony. The Staff would not oppose a request by any other party to conduct reasonable cross-examination of Mr. Conran and has identified areas into which the Staff would inquire if the Board decides to have Mr. Conran reappear for further oral testimony. Finally, the Staff is preparing additional testimony on each of the two subjects of Mr. Conran's affidavit.

Respectfully submitted,


Richard J. Rawson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 22nd day of February, 1983

TESTIMONY ARGUABLY CHANGED BY AFFIDAVIT
OF JAMES H. CONRAN, SR., DATED FEBRUARY 9, 1983

1. Systems Interaction (A-17)

a. Tr. 6352, 1. 18-19

Nature of change: Affidavit would render portions of Conran testimony no longer "true and correct."

b. ff. Tr. 6357, at 36, 1. 21 through 37, 1. 2

Nature of change: Affidavit would modify testimony that A-17 program has "progressed significantly" and would question "reasonable assurance" insofar as that conclusion depends on adequacy of program for resolution of A-17. (Affidavit at 2, 10)

c. ff. Tr. 6357, at 41, 1. 12 through 42, 1. 5

Nature of change: Affidavit would question testimony (as to Conran) concerning "reasonable assurance" insofar as that conclusion depends on adequacy of program for resolution of A-17. (Affidavit at 2, 10)

d. Tr. 6374, 1. 20 through Tr. 6376, 1. 3

Nature of change: Affidavit would question "reasonable assurance" insofar as that conclusion depends on adequacy of program for resolution of A-17. (Affidavit at 2, 10)

e. Tr. 7139, 1. 1-4

Nature of change: Affidavit suggests that pilot program will not be used to try out candidate methodologies. (Affidavit at 21)

f. Tr. 7141, 1. 20-22

Nature of change: Affidavit would question adequacy of Staff's compliance with existing process for licensing insofar as it depends on adequacy of program for resolution of A-17. (Affidavit at 2, 10)

g. Tr. 7153, l. 1-4

Nature of change: Affidavit would question adequacy of Staff's compliance with existing process for licensing insofar as it depends on adequacy of program for resolution of A-17. (Affidavit at 2, 10)

h. Tr. 7509, l. 6-12

Nature of change: Affidavit suggests that a requirement for systems interaction analyses should now be imposed on applicants. (Affidavit at 12-13)

2. Safety Classification

a. Tr. 6352, l. 18-19

Nature of change: Affidavit would render portions of Conran testimony no longer "true and correct."

b. ff. Tr. 6357, at 10, l. 11-18

Nature of change: Affidavit would modify testimony (as to Conran) by stating that important to safety plant items have not been adequately addressed by Applicant because of present view that Applicant does not understand these items to be required for safety. (Affidavit at 29, 31-32)

c. ff. Tr. 6357, at 46, l. 13 to end

Nature of change: Affidavit would modify testimony (as to Conran) by stating that important to safety plant items have not been adequately addressed by Applicant because of present view that Applicant does not understand these items to be required for safety. (Affidavit at 29, 31-32)

d. ff. Tr. 6368, at 2, l. 1-5

Nature of change: Affidavit would modify testimony that there is "close agreement" as to substantive classification issues. (Affidavit at 29)

e. Tr. 6959, l. 15-18

Nature of change: Affidavit would modify testimony that there has been agreement "on the substantive issues involved." (Affidavit at 29, 31-32)

- f. Tr. 6961, l. 2-8
Nature of change: Affidavit would modify testimony that there has been agreement on substantive classification issues despite differences in language. (Affidavit at 29, 31-32)
- g. Tr. 6974, l. 12-17
Nature of change: Affidavit would modify testimony by stating that while Applicant identified the important to safety items, it did not understand them to be minimally required for safety. (Affidavit at 29, 31-32)
- h. Tr. 6977, l. 1-3
Nature of change: Affidavit would modify testimony that Applicant "met our intent" by including caveat that it did not understand or acknowledge the minimal requirement for safety. (Affidavit at 29, 31-32)
- i. Tr. 6978, l. 2-18
Nature of change: Affidavit would modify testimony that the remaining problem identified is "small." (Affidavit at 29, 31-32)
- j. Tr. 6984, l. 18-25
Nature of change: Affidavit would modify testimony that stipulation to proper definition of important to safety would be sufficient. (Affidavit at 32-33)
- k. Tr. 7003, l. 4 through Tr. 7004, l. 12
Nature of change: Affidavit would modify testimony by stating that a demonstration of understanding is required rather than simply a commitment. (Affidavit at 32-33)
- l. Tr. 7122, l. 6-16
Nature of change: Affidavit would modify testimony by stating that a demonstration of understanding is required rather than simply a commitment. (Affidavit at 32-33)
- m. Tr. 7495, l. 12 through Tr. 7496, l. 4
Nature of change: Affidavit would modify testimony that there has been a "meeting of the minds for the past." (Affidavit at 29, 31-32)

n. Tr. 7718, l. 18-22

Nature of change: Affidavit would modify testimony to state that commitment sought must be based on demonstrated understanding of regulatory requirements. (Affidavit at 32-33)

o. Tr. 7720, l. 22 through Tr. 7721, l. 13

Nature of change: Affidavit would modify testimony to state that commitment sought must be based on demonstrated understanding of regulatory requirements. (Affidavit at 32-33)

p. Tr. 7749, l. 18-24

Nature of change: Affidavit would modify testimony to state that Applicant has not demonstrated understanding of the regulatory requirements concerning items important to safety. (Affidavit at 29, 31-32)

q. Tr. 7839, l. 18-21

Nature of change: Affidavit would modify testimony to state that the industry other than Applicant understands the intent of the regulations. (Affidavit at 29, 31-32)

PROPOSED FINDINGS ARGUABLY AFFECTED
BY AFFIDAVIT OF JAMES H. CONRAN, SR.,
DATED FEBRUARY 9, 1983

1. NRC Staff's Proposed Findings

7B:37

7B:39

7B:131

7B:132

7B:133

7B:141

7B:175

7B:182

7B:188

7B:189

7B:190

7B:191

2. Suffolk County's Proposed Findings

7B:73

7B:437

7B:440

3. LILCo's Proposed Findings

B-197

B-202

B-317

B-318

B-371

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
(Shoreham Nuclear Power Station,) (OL)
Unit 1))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF STATEMENT OF VIEWS IN RESPONSE TO ORDER OF FEBRUARY 11, 1983" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, or, as indicated by a double asterisk, by hand delivery, this 22nd day of February, 1983:

Lawrence Brenner, Esq.**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ralph Shapiro, Esq.
Cammer and Shapiro
9 East 40th Street
New York, NY 10016

Dr. James L. Carpenter**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Howard L. Blau, Esq.
217 Newbridge Road
Hicksville, NY 11801

Dr. Peter A. Morris**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

W. Taylor Reveley III, Esq.**
Hunton & Williams
P.O. Box 1535
Richmond, VA 23212

Matthew J. Kelly, Esq.
Staff Counsel
New York Public Service Commission
3 Rockefeller Plaza
Albany, NY 12223

Cherif Sedkey, Esq.
Kirkpatrick, Lockhart, Johnson
& Hutchison
1500 Oliver Building
Pittsburgh, PA 15222

Stephen B. Latham, Esq.
John F. Shea, III, Esq.
Twomey, Latham & Shea
Attorneys at Law
P.O. Box 398
33 West Second Street
Riverhead, NY 11901

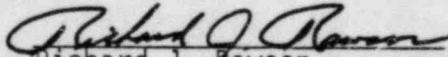
Atomic Safety and Licensing
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Herbert H. Brown, Esq.**
Lawrence Coe Lanpher, Esq.
Karla J. Letsche, Esq.
Kirkpatrick, Lockhart, Hill,
Christopher & Phillips
1900 M Street, N.W.
8th Floor
Washington, D.C. 20036

Daniel F. Brown, Esq.*
Attorney
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555


Richard J. Rawson
Counsel for NRC Staff

COURTESY COPY LIST

Edward M. Barrett, Esq.
General Counsel
Long Island Lighting Company
250 Old County Road
Mineola, NY 11501

Mr. Brian McCaffrey
Long Island Lighting Company
175 East Old Country Road
Hicksville, New York 11801

Marc W. Goldsmith
Energy Research Group, Inc.
400-1 Totten Pond Road
Waltham, MA 02154

David H. Gilmartin, Esq.
Suffolk County Attorney
County Executive/Legislative Bldg.
Veteran's Memorial Highway
Hauppauge, NY 11788

Mr. Jeff Smith
Shoreham Nuclear Power Station
P.O. Box 618
North Country Road
Wading River, NY 11792

MHR Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, CA 95125

Hon. Peter Cohalan
Suffolk County Executive
County Executive/Legislative Bldg.
Veteran's Memorial Highway
Hauppauge, NY 11788

Mr. Jay Dunkleberger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223