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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
DOCKETING & SERVICE
BOARD

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

Docket No. 50-322-OL-3
(Emergency Planning)

SUFFOLK COUNTY RESPONSE TO LILCO'S
MOTION TO FILE SURREBUTTAL TESTIMONY
ON PHASE II EMERGENCY PLANNING
CONTENTION 67

On March 2, 1984, Suffolk County, LILCO and the State of New York filed written direct testimony on Contention 67, which concerns the LILCO Plan's provisions for evacuation of people without access to automobiles. LILCO's witness panel was cross-examined on its direct testimony on May 3, 1984. Both the County's witness panel and the State's witness panel were cross-examined on May 4, 1984. Following cross-examination of all of the panels, the Board granted LILCO's motion to hear rebuttal testimony sponsored by LILCO's witness Edward B. Lieberman. Tr. 8362. Mr. Lieberman's extensive rebuttal testimony was heard on May 4, 1984 and was subject to cross-examination on the following hearing day, May 8, 1984. Tr. 8362-8383; 8440-8471. Immediately thereafter, the Board granted the County's motion to present surrebuttal testimony by the County's witness, Philip B. Herr. Tr. 8480-8481. Professor Herr's surrebuttal, which demonstrated,

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among other things, that the distribution of community travel times derived from LILCO's NCTR survey does not agree with U.S. Census data, was heard on May 8, 1984. Tr. 8481-8533.

Four weeks later, on June 4, 1984, LILCO moved for leave to file written surrebuttal testimony, again sponsored by Mr. Lieberman.^{1/} LILCO's proposed additional testimony purports to take issue with Professor Herr's oral surrebuttal testimony on the discrepancy between the NCTR survey and U.S. Census data. For the reasons stated below, LILCO's Motion to commence another round of testimony on Contention 67 should be denied.

First, LILCO's Motion, which seeks leave to file written surrebuttal testimony four weeks after the last witness was heard on Contention 67, violates of this Board's March 16, 1984 Order.^{2/} In that Order, the Board stated that in the future "we do not expect to entertain written motions to submit rebuttal testimony. Such testimony will be dealt with orally, on the record and at the hearing." Order at 6. The Board further explained its ruling at the hearing on March 20, 1984:

That means that from now on when we finish each contention or cluster as we are going through them, you will have to keep your witnesses here until all witnesses are finished if you expect to present rebuttal testimony. If you do so, you will have to make an oral motion at the time. We will consider arguments on

^{1/} LILCO's Motion to File Surrebuttal Testimony On Phase II Emergency Planning Contention 67 (June 4, 1984) [hereinafter "Motion"].

^{2/} Memorandum and Order Denying Motion of Governor Mario Cuomo Representing the State of New York for Leave to File Rebuttal Testimony on Contention 65 (March 16, 1984).

that, and we will decide immediately, and the witnesses will either testify, or they will not.

This filing of these extensive briefs and arguments back and forth is just not a productive use of anyone's time. So, we are going to abandon the written testimony aspect of rebuttal. (Emphasis added).

Tr. 3900-3901. LILCO's motion is in clear violation of the Board's ruling. Not only has LILCO sought to file written surrebuttal testimony, but it has done so some four weeks after the close of testimony on Contention 67 rather than immediately after cross-examination on the Contention as the Board's ruling mandates.

LILCO attempts to justify its non-compliance with the Board's March 16 Order by stating that "the circumstances of the litigation of Contention 67 and the nature of this testimony" precluded such compliance. Motion at 1. The only apparent basis for LILCO's position is its assertion that Professor Herr "did not express concerns about the accuracy of the distributions of commuting times obtained from the NCTR survey until his surrebuttal testimony." Motion at 5. This assertion, however, is wrong. During initial cross-examination of Professor Herr, concerning his prefiled written direct testimony, Professor Herr explained clearly his reservations about the discrepancy between the commuting time distributions in the NCTR survey and the U.S. Census data. See Tr. 8220-8221. Indeed, counsel for LILCO questioned Professor Herr on that very point on recross-examination.

Tr. 8253-8254. Thus, there is no truth to LILCO's claim that it only became aware of Professor Herr's concerns on May 8, when he offered his surrebuttal testimony.

Furthermore, LILCO's argument is irrelevant. All parties have been required to conduct themselves under the constraints imposed by the Board's March 16 Order since the time that Order was issued. The County certainly would have been able to provide much more extensive and detailed rebuttal testimony on Contention 67 -- as well as on other issues -- had it been allowed four weeks to examine the transcripts and evaluate more thoroughly all of Mr. Lieberman's data -- or other data heard for the first time during cross-examinations. The County, however, has abided by the Board's March 16 Order. LILCO should be held to the same rule.^{3/}

LILCO's Motion also argues that LILCO has established good cause for filing surrebuttal testimony. Motion at 3-5. LILCO, however, has failed to meet the four-part test for good cause set forth in the Board's Order of February 28, 1984 at 7. Those standards require that the proffered testimony be:

1. relevant to an important point in the direct testimony;
2. arguably relevant to an issue of decisional importance in this proceeding;

^{3/} If the Board rules in LILCO's favor, the County reserves its right to file written surrebuttal testimony after Mr. Lieberman's cross-examination and after thoroughly evaluating Mr. Lieberman's written surrebuttal testimony.

3. not cumulative with any other testimony in the record;
and
4. incapable of being filed in a more timely manner.

The most glaring deficiency in LILCO's effort to show good cause relates to the fourth element, timeliness. LILCO has not even provided an explanation of why it required four weeks to file its surrebuttal testimony; it certainly has failed to demonstrate that it was "incapable" of having filed the testimony in a more timely manner. LILCO makes the inaccurate argument that until the time of Professor Herr's surrebuttal testimony, "it could not have been foreseen" that the discrepancy between the NCTR survey and the U.S. Census were of concern to Professor Herr. As shown above, this assertion is directly contrary to the record.^{4/} LILCO's only other argument in support of its claim of timeliness is the bald assertion that it submitted its rebuttal testimony "as soon as possible" after reviewing the detailed census data on which Professor Herr's surrebuttal was based. Motion at 5. Such a vague, un-supporte assertion does nothing to excuse the untimeliness of LILCO's proffered testimony.

Moreover, while the surrebuttal testimony offered by LILCO is arguably relevant to the issues presented by Contention 67, its value to this Board in rendering a decision is doubtful and

^{4/} It also should be noted that LILCO itself first revealed a new analysis of the population without automobiles using census data during the County's cross-examination of the LILCO panel. Tr. 8015-8019. The County likewise had no way of knowing LILCO had conducted such an analysis until it was revealed on the stand. Nevertheless, the County went forward and offered its rebuttal testimony in accordance with the Board's March 16 Order, although the County would undoubtedly have benefitted from the opportunity to examine LILCO's new analysis in greater detail.

thus fails to meet the second prong of the Board's test. The Board has already heard two full rounds of testimony by the parties' experts. In the County's opinion, the issues and evidence relevant to the relative merits of the NCTR survey data versus the U.S. Census data, have been thoroughly discussed by the witnesses and explored through cross-examination. LILCO has failed to demonstrate that its additional proposed testimony has any decisional importance.

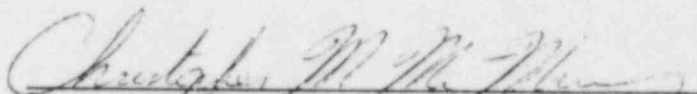
Finally, the introduction of additional census data through Mr. Lieberman would be cumulative to the extensive census data already introduced into the record by both sides. Thus, LILCO has also failed to satisfy the third prong of the Board's test.

Conclusion

For the reasons stated above, LILCO's Motion To File Surrebuttal Testimony On Phase II Emergency Planning Contention 67 should be denied.

Respectfully submitted,

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Dated: June 18, 1984

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY RESPONSE TO LILCO'S MOTION TO FILE SURREBUTTAL TESTIMONY ON PHASE II EMERGENCY PLANNING CONTENTION 67, dated June 18, 1984, have been served on the following this 18th day of June 1984 by U.S. mail, first class, except as otherwise noted.

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