

197

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
James A. Laurenson, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

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

Docket No. 50-322-OL-3

(Emergency Planning Proceeding)

July 9, 1984

MEMORANDUM AND ORDER
DENYING LILCO'S MOTION TO FILE SURREBUTTAL TESTIMONY ON
PHASE II EMERGENCY PLANNING CONTENTION 67

A. The Motion and the Responses

On June 4, 1984, LILCO filed its Motion to File Surrebuttal Testimony on Phase II Emergency Planning Contention 67. The proffered surrebuttal testimony of Edward B. Lieberman was attached to that motion. Suffolk County, New York State, and NRC Staff oppose the LILCO motion.

We will briefly review the pertinent events which led up to the filing of the instant motion. Contention 67 concerns the evacuation of persons inside the ten mile EPZ who do not have access to an automobile. LILCO presented the direct testimony of its panel of witnesses, Dr. Matthew Cordaro, John Weismantle, and Edward Lieberman, on May 3, 1984.

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(ff. Tr. 7980.) Upon completion of the testimony of LILCO's witnesses on Contention 67, Suffolk County presented its panel of witnesses, Edwin J. Michel and Phillip B. Herr, on this contention on May 4, 1984 (ff. Tr. 8150). Thereafter, New York presented a panel of witnesses on the same contention. (ff. Tr. 8289). Upon completion of the testimony of all three panels, we granted LILCO's motion to present rebuttal testimony of Edward B. Lieberman. (Tr. 8362). Mr. Lieberman testified on May 4 and May 8. Upon completion of Mr. Lieberman's rebuttal testimony, we granted Suffolk County's motion to present surrebuttal testimony of Phillip B. Herr. (Tr. 8480-81). Professor Herr's testimony was completed on May 8.

The instant hearing began on December 6, 1983. When we were first confronted with the question of rebuttal evidence, we received briefs and prepared a written order. Subsequently, on March 16, 1984, we denied a written motion of New York to submit rebuttal testimony and we announced that in the future we expected only oral motions to submit rebuttal testimony and that such motions would be dealt with on the record at the hearing. On March 20, 1984 we discussed this ruling and amplified our holding that we expected motions to submit rebuttal evidence to be made orally, while all witnesses were available, at the conclusion of each contention. (Tr. 3900-01.)

LILCO's instant motion acknowledges the above order but goes on to assert that "given the circumstances of the litigation of Contention 67 and the nature of this testimony, it could not have been submitted

orally following Professor Herr's surrebuttal testimony" LILCO's Motion at 1. In a footnote, LILCO notes that it "expressly reserved the right to file responsive testimony, upon a showing of good cause following review of the census information used by Professor Herr in his surrebuttal testimony." Ibid. In support of its assertion that the proffered testimony could not have been filed at an earlier time, LILCO claims that it "filed this testimony as soon as possible following the acquisition of the detailed census information needed to respond to the assertions made by (sic) the first time by Professor Herr in his surrebuttal testimony." Id. at 5. Curiously, LILCO had earlier conceded that "the census data, which were available at the time direct testimony was filed on Contention 67" Ibid. The essence of Mr. Lieberman's proffered surrebuttal testimony is that Professor Herr is wrong in his assertion that travel times are revealed by the census data to be very much higher than those reported by LILCO.

Suffolk County suggests that LILCO's motion should be denied for the following reasons: (1) it is in violation of the Board's March 16 Order precluding the filing of outdated written motions to submit rebuttal testimony; and (2) no good cause is established for such testimony, particularly because the testimony is four weeks late. New York opposes the LILCO motion because it "flagrantly violates" the Board's Order of March 16, 1984. NRC Staff recommends that LILCO's motion should be denied and the testimony should not be admitted. NRC Staff argues that "the proffered testimony is clearly cumulative . . ." and "LILCO has not shown that this testimony is timely filed." NRC Staff Response at 2-3.

B. Analysis

Enough's enough. We have already spent the better part of three days listening to testimony on Contention 67. LILCO, Suffolk County, and New York presented panels of witnesses who sponsored direct testimony on this contention. There was full opportunity for cross-examination by all parties. We granted the motions by LILCO and Suffolk County to recall their primary witnesses to elicit rebuttal testimony. LILCO now asks us to allow it to present a third round of direct testimony on this contention. We decline to do so.

To put this matter in perspective, Contention 67 involves the evacuation of persons inside the ten mile EPZ who do not have access to automobiles. However, the controversy giving rise to the instant motion is only a minute part of that contention, to wit: the distribution of travel times for workers. We note at the outset that the subject of this contention is not listed in the 16 standards for offsite emergency response plans at 10 C.F.R. § 50.47(b). While it may be that Mr. Lieberman and Professor Herr can massage the census and other data ad infinitum, we decline to allow any more of our hearing time to be devoted to this subject when we have long since passed the point of diminishing returns.

Suffolk County and New York are correct in their assertion that this motion is untimely and contrary to our earlier orders concerning the submission of rebuttal testimony. Nevertheless, if a strong showing

were made that this surrebuttal testimony was important to our decision, we would have had to weigh the evidence carefully. However, LILCO makes no such showing here. We agree with the parties opposing the motion that the proffered testimony is cumulative of testimony already in the record and that LILCO failed to establish that the testimony was incapable of being filed in a more timely manner. We think the matter was put in proper perspective by the NRC Staff's conclusion as follows:

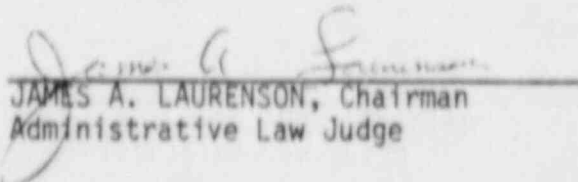
though the issue of the proper data base to use in calculating the number of commuters who will not return home and hence the number of transit dependent population in the EPZ is relevant to the testimony originally filed on this contention, the continued analysis and re-analysis of essentially the same data is cumulative and untimely and weighs against admitting the testimony.

NRC Staff Response at 3-4.

ORDER

WHEREFORE, IT IS ORDERED that LILCO's Motion to File Surrebuttal Testimony on Phase II Emergency Planning Contention 67 is DENIED.

ATOMIC SAFETY AND
LICENSING BOARD



JAMES A. LAURENSEN, Chairman
Administrative Law Judge

Bethesda, Maryland