UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

In the Matter of	)	Docket No. 50-322-OL-3
LONG ISLAND LIGHTING COMPANY	)	(Emergency Planning Proceeding)
(Shoreham Nuclear Power Station, Unit 1)	)	September 7, 1984

MEMORANDUM AND ORDER
DENYING MOTION OF SUFFOLK COUNTY TO ADMIT NEW CONTENTION

On August 20, 1984 Suffolk County filed a motion to admit a new contention as follows:

> 1. There can be no reasonable assurance that the LERO organization would or could be re-created in light of the en masse resignations which have occurred in connection with the recent strike.
>
> 2. Even if LERO were eventually re-created, there can be no reasonable assurance that LERO would be staffed or trained to the levels described and relied upon in the LILCO Plan, or that such re-created LERO would be the same as the postulated organization that heretofore was the subject of this proceeding;
>
> 3. Even if LERO were eventually re-created, there can be no assurance that the LILCO workers in LERO would constitute a reliable organization and would dedicate themselves to achieving a level of preparedness adequate to give reasonable assurance that the LILCO Plan can and will be implemented;

4. Even if LERO were eventually re-created, there can be no reasonable assurance that LERO workers actually would or could respond to a radiological emergency in the manner set forth and relied upon in the LILCO Plan.

The County asserts that the above contention addresses issues arising out of the recent strike of LILCO employees and, although it is admittedly a late-filed contention, it meets the standards of 10 C.F.R. § 2.714.

On August 27, 1984 LILCO filed a written answer to the County's Motion to Admit a New Contention. During the hearing on August 28, 1984, New York State and the NRC Staff elected to present oral responses to the County's Motion.

A. Motion to Admit New Contention

Suffolk County cites various information in the record to indicate that the LILCO Local Emergency Response Organization, known as LERO, is comprised of approximately 1800 workers, 1200 of whom are members of labor unions. On July 10, 1984 the two labor unions representing LILCO's non-management employees went on strike. The County asserts that "all of the approximately 1200 union workers who had purportedly been members of LERO, resigned from LERO." Motion at 2. (Emphasis in original.) The County then goes on to assert that "there is considerable evidence that the strike and events relating to LILCO's austerity program, management changes and other matters which preceded and led to the occurrence of the strike, have created among LILCO's employees attitudes of deep resentment and bitterness towards LILCO's

management." Ibid. The County then states that as a result of such feelings, LERO does not now exist and there can be no assurance that it will be reconstituted to perform adequately. The County claims that it construed the first sua sponte issue in the Board's Order of July 24, 1984 as encompassing the concerns it seeks to raise now. The first of our three sua sponte issues is as follows:

> 1. Whether LILCO's ability to implement its offsite emergency preparedness plan would be impaired by a strike involving the majority of its LERO workers.

The County claims that it construed the above quoted language to include the following:

> (1) Because the recent strike resulted in the literal disintegration of LERO, LILCO could not implement its Plan now or at any time; and
>
> (2) Because of the potential for future strikes and the ill feelings engendered prior to and during the recent strike, there can be no reasonable assurance that adequate protective measures could or would be taken by the LERO, even if it were to be recreated following the recent or any future strikes.

Id. at 5-6. The County notes that on August 8, 1984 the Board stated during a Conference of Counsel, that the first issue was limited to the occurrence of a radiological emergency during a strike. The County's Motion then discusses and addresses each of the five factors set forth in 10 C.F.R § 2.714(a)(1) concerning the admissibility of late-filed contentions. We will discuss these arguments by the County infra during our analysis of the applicable regulation.

B. LILCO's Answer

LILCO addresses the five criteria set forth in 10 C.F.R. § 2.714 and concludes that four out of the five criteria weigh against admission of the County's new contention. LILCO argues that the "County's proposed contention represents a thinly veiled attempt to reopen the record on issues that have already been litigated; as such, Suffolk County has failed to demonstrate that its proposed contention meets the appropriate standards for reopening." LILCO Answer at 1. As with the Suffolk County Motion, we shall consider the LILCO position on each of the five criteria for admission of late-filed contentions when we address the specific provisions of 10 C.F.R. § 2.714. However, as to the LILCO assertion that the instant Motion is merely an attempt to reopen the record on earlier contentions, we will review the specifics of LILCO's Answer. First LILCO asserts that the instant contention is merely a refinement of Contention 39, the so-called "attrition" issue. LILCO further asserts that this is also another version of the "role conflict" alleged in Contention 25. LILCO asserts that the Motion does not meet the test for reopening the record because it is not timely, it does not present a significant safety issue and the new evidence cannot materially affect the outcome of the proceeding.

C. History of the Strike Issue in this Proceeding

On July 17, 1984 the Board notified all parties of an inquiry concerning the strike by the two unions at LILCO. Our inquiry at that point was "whether the strike presents an issue concerning the availability of LILCO's union employees for their designated LERO jobs

which should be pursued at this hearing." Tr. 13,075. Thereafter, on July 19, the Board discussed the matter of the strike with all parties. During that discussion, counsel for Suffolk County raised the issue of the quality of participation in LERO after the strike were to end. Tr. 13,844. He further suggested "an investigation about how this strike may affect the quality of further performance and willingness of LERO or LILCO employees to become LERO members or dependable LERO members is something that is an important issue . . . ." Tr. 13,851-A.

On July 24, 1984 we issued a Memorandum and Order Determining that a Serious Safety Matter Exists. Therein, we identified three issues arising out of that strike and the potential for future strikes. While it is true that our Memorandum and Order did not specifically reject the County's arguments concerning the "quality of participation" by a reconstituted LERO after a strike, we were surprised to hear the County claim that it believed this issue was incorporated in our Order when it was not listed. At the Conference of Counsel on August 8, 1984, we rejected the County's construction of the sua sponte issues. The County was informed that its position was not accepted by the Board and that its "quality of participation" assertion was not delineated as an issue or included in the clear meaning of the admitted issues. Tr. 14,005-09.

D. Applicable Law

All parties are in agreement that the admissibility of late-filed contentions is to be judged on the basis of a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1) as follows:

(i) Good cause, if any, for failure to file on time;

(ii) The availability of other means whereby the petitioner's interest will be protected;

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;

(iv) The extent to which the petitioner's interest will be represented by existing parties; and

(v) The extent to which the petitioner's participation will broaden the issue or delay the proceeding.

E. Analysis of the Five Factors Concerning Late-Filed Contentions

(i) Good cause, if any, for failure to file on time. The County asserts that the following factors support its claim that good cause exists for not having filed the proposed contention earlier: the circumstances addressed in the contention were unforeseen prior to the LILCO strike; the strike and alleged LERO resignations did not commence until July 10, 1984; the Board issued its July 24 Memorandum and Order raising sua sponte strike issues before the County had an opportunity to submit a contention relating to the strike; and the County acted promptly after the August 8 Conference of Counsel when it learned for the first time that the Board did not consider any sua sponte issue to include the items addressed in County's proffered new contention. LILCO responds by stating that the County's proposed contention is premised on events which occurred significantly before July 10. LILCO points to the allegations concerning the austerity program announced on March 6, 1984

and bargaining positions of the parties leading up to the strike. Moreover, LILCO asserts that the potential for a strike could and should have been foreseen by Suffolk County from the outset. LILCO disputes the assertion that there have been en masse resignations from LERO with an affidavit from the Manager of the LILCO Employee Relations Department. LILCO concludes by noting that 40 days passed between the occurrence of the strike and the submission of the County's new contention.

On this factor, and all other questions concerning the Motion to Admit the New Contention, New York State agrees with Suffolk County. On the factor of "good cause" the NRC Staff agrees with LILCO.

On the first factor of "good cause" for late-filing, the Board agrees with LILCO that the County has failed to meet its burden. We note that it was the County's failure to take any action concerning the strike of LILCO workers that resulted in this Board's sua sponte Order of July 24. Indeed, as early as July 17, Suffolk County Deputy Inspector Peter F. Cosgrove testified concerning the subject matter raised in the instant "new contention." (Tr. 13,289-90). The County waited 40 days from the time the strike began until it filed its new contention. Moreover, the new contention was filed at a time when the County knew that the hearing was scheduled to end in less than two weeks. While the Board believes that the first sua sponte issue is clear and unambiguous, we find that, even if the County were correct in its construction of that issue, the County did not act promptly after August 8 when it was notified that the Board did not accept the County's

interpretation of sua sponte issues. The County made no statement at the Conference of Counsel on August 8 or at any time during the week of August 14 that it intended to raise an additional issue in this proceeding. Upon consideration of all of the facts and arguments concerning "good cause", we find that the County has not established good cause for failure to file its new contention in a timely manner.

(ii) The availability of other means whereby the County's interests will be protected. The County argues that, in light of the Board's construction of the first sua sponte issue, there is no basis for believing that any means other than the admission of this contention will adequately protect the County's interests in this matter. Here, LILCO argues that the County has already raised and explained the issues asserted in the contention and that a graded FEMA exercise will determine whether LERO is a viable, functioning organization. On this issue, the NRC Staff agrees with Suffolk County.

In the final analysis, LERO's ability to perform the emergency response function assigned to it will be measured and evaluated during the FEMA graded exercise. If LILCO is unable to produce the necessary personnel to implement its Plan, FEMA will be unable to certify its adequacy to the NRC. Thus, if the County is correct in its principal argument--that the strike has done irreparable harm to LERO and LERO cannot be reconstituted--that fact will be readily apparent at the time of the FEMA graded exercise. Therefore, we agree with LILCO that the County's interest in determining whether LERO can be re-created, will be

protected by FEMA's evaluation during its graded exercise. Hence, we resolve this factor against the County.

(iii) The extent to which the County's participation may reasonably be expected to assist in developing a sound record. The County claims that it will submit testimony by the following expert witnesses who have previously testified in this case: David Olson, Michael Lipsky, John Fakler and Peter Cosgrove. The County asserts generally that it has also had discussions with other experts.

The primary thrust of LILCO's answer is that the County has failed to state its evidence with specificity as required by the earlier decision of this Board on March 19, 1984 and of the Appeal Board in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-783, 18 NRC 387, 399-400 (1983). The NRC Staff agrees with LILCO on this factor.

The Board also agrees that Suffolk County has failed to set forth with specificity the evidence which it would present. In connection with our earlier ruling of March 19, 1984 on the County's motion to file new contentions concerning the training program, we stated at page 11:

> We require that parties seeking the admission of late-filed contentions provide more specific information on the contribution they intend to make. Specific showings could include types of evidence to be offered, lists of proposed witnesses, and the substance of testimony the proponent will adduce from them.

The County's mere submission of the names of expert witnesses amounts to a failure to meet this standard and precludes us from finding that the

County's participation can be expected to assist in developing a sound record. We resolve this factor against the County.

(iv) The extent to which the County's interests will be represented by existing parties. All parties to this proceeding are in agreement that the County's interests in the proposed contention will not be adequately represented by other parties since no party has presented a similar contention. Accordingly, we resolve this factor in favor of Suffolk County.

(v) Whether the admission of this contention will broaden the issues and result in a delay of the proceeding. The County claims that the issue raised in the contention is "specific and narrowly focused." The County states that it does not believe this litigation would "take more than a few days of hearing time, if that long." Motion at 12.

LILCO's response is that "no one familiar with this proceeding can possibly believe this." Specifically, LILCO states that

> the proposed contention raises a myriad of issues, including whether LERO can be 're-created' . . .; whether that 're-created' LERO would be the same organization as the one presented in the LILCO Transition Plan, and if not what the effects of any differences are on each and every part of the Plan; whether the strike has affected LERO volunteers in a manner in which they would not 'dedicate themselves' to achieving an adequate level of preparedness; and whether the 're-created' LERO could or would respond to a radiological emergency in accord with the LILCO Transition Plan.

LILCO Answer at 11-12. LILCO concludes that rather than being narrowly focused, the new contention would reopen virtually every area of the emergency planning proceeding. On the question of delay, LILCO notes

the need to schedule discovery, written testimony, and the County's past complaints about "brisk schedules." LILCO submits that "this process could easily take a month or more." Id. at 14. On this issue the NRC Staff agrees with LILCO.

The Board finds that the admission of this contention will, indeed, broaden the issues and delay the proceeding. Despite the fact that the strike commenced on July 10 and was the subject of testimony by a Suffolk County witness on July 17, the County took no action to bring this contention before the Board until nine days prior to the close of the hearing. A schedule has been established for the submission of proposed findings of fact and conclusions of law. The County has already complained that it has not been given enough time to adequately prepare its proposed findings. To permit this late-filed contention, we would have to adjust the schedules and delay the issuance of our initial decision. This factor is strongly weighed against the County.

F. The Balancing Test

Pursuant to the foregoing analysis, we find that the only factor weighing in the favor of the admissibility of this late-filed contention is the extent to which the County's interests will be represented by existing parties. However, we find that this factor is entitled to much less weight than the other four factors which we weigh against the admission of the contention: (1) absence of good cause for failure to

file on time; (2) extent of the County's expected ability to assist in developing a sound record; (3) the availability of other means to protect the County's interest; and (4) the broadening of the issues and delay of the proceeding. In conclusion, we find that the balancing test provided in 10 C.F.R. § 2.714(a)(1) must be weighed against the County and its proffered new contention.

G. Failure to Establish Bases and Specificity

In addition to requiring the balancing test, 10 C.F.R. § 2.714(b) goes on to provide that an intervenor must state "the bases for each contention set forth with reasonable specificity." The Board also finds that the County has failed to fulfill this part of its obligation because it has not established a basis and the contention is too speculative. The primary basis asserted by the County for its contention is that 1200 of the 1800 LERO members resigned en masse. This fact is directly challenged by the affidavit of Robert X. Kelleher, Manager of the Employee Relations Department at LILCO. Paragraph six of Mr. Kelleher's affidavit states as follows:

> From July 1 to the commencement of strike July 10, 23 union workers submitted written resignations from LERO; during the strike one additional union worker tendered his written resignation; and following the strike, two other workers have formally resigned. In addition, following the strike, seven union workers have given oral resignation notices to their supervisors, but have yet to tender written notice. Following the strike, two new union workers have also joined LERO. Thus, the total loss to LERO, out of 1246 union members was 31.

On September 7, 1984, counsel for LILCO notified the Board and parties that LILCO had learned of "additional resignations from LERO which were apparently submitted by union members during the general period of the strike." LILCO then reported 106 "apparent strike-related resignations, out of over 1200 union members and approximately 1800 total members of LERO." Letter from Donald P. Irwin, September 7, 1984, p. 2.

The County did not attempt to refute Mr. Kelleher's affidavit or to support its allegations concerning the alleged "en masse" resignations. Hence, we resolve this question against the County. We find that there is no basis for paragraph one of the County's new contention.

The remaining paragraphs of the County's new contention deal only with speculation concerning a reconfiguration of the LERO organization. Whether LERO members would perform the tasks assigned to them has been the subject of other contentions in this proceeding. We agree with LILCO that the County's new contention does not raise a triable issue of fact.

ORDER

WHEREFORE, IT IS ORDERED that the Motion of Suffolk County to Admit New Contention is DENIED.

ATOMIC SAFETY AND
LICENSING BOARD

James A. Laurenson

JAMES A. LAURENSON, Chairman
Administrative Law Judge

Bethesda, Maryland