LILCO, March 11, 1985

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-3
	)	(Emergency Planning
(Shoreham Nuclear Power Station, Unit 1)	)	Proceeding)
	)	

LILCO'S ANSWER TO "MOTION OF SUFFOLK COUNTY AND NEW YORK STATE TO ADMIT NEW CONTENTION" (INCLUDING A REQUEST THAT THE ISSUE BE CERTIFIED TO THE COMMISSION AND THAT THE NEW ISSUES BE SEVERED FROM THE REST)

I. INTRODUCTION

On February 25, 1985, Intervenors Suffolk County and New York State moved this Board to admit a new three-part contention alleging that LILCO's emergency plan does not adequately provide for medical treatment for members of the public exposed to high levels of radiation. The proposed contention was prompted by the District of Columbia Circuit's decision construing the phrase "contaminated injured individuals" in 10 C.F.R. § 50.57(b)(12)1/ in GUARD v. U.S. Nuclear Regulatory Commission, No. 84-1091 (D.C. Cir., February 12, 1985).

1/ Subsection 50.47(b)(12), in full, sets out a requirement that: "Arrangments are made for medical services for contaminated injured individuals."

In this Answer LILCO (1) urges denial of the contention as premature since the mandate has not yet issued in the GUARD case, (2) does not dispute that the Intervenors have met four out of the five criteria for admission of a late-filed contention and that therefore a contention, if properly drafted and not premature, could be admitted, but (3) takes exception to the wording of the contention submitted by the Intervenors as overbroad.

Moreover, LILCO requests that the Board certify the issue of how to interpret 10 C.F.R. § 50.47(b)(12) to the Commission, and also that the Board render a decision as soon as possible on those many issues in this case that are fully tried and briefed and ripe for decision, and save until a later decision the medical care issue and any aspects of the relocation center issue that require further proceedings, if there are any such aspects.

II. THE CONTENTION IS PREMATURE

The D.C. Circuit's decision in the GUARD case was issued on February 12, 1985. Rule 14(c)(1) of the D.C. Circuit's local rules automatically allows 45 days for the filing of any motion for rehearing in any case in which the U.S. government or any agency thereof is a party. The Court on February 12 issued a sua sponte order staying issuance of the mandate in the GUARD case until 7 days after disposition of any timely filed motion for rehearing. Notice for rehearing will thus be due 45 days after February 12, i.e., on March 29. If no motion

is filed, the mandate could issue that day; if a motion is filed, it could issue no earlier than April 5.

Prior to entry of the mandate the decision is of no binding effect. The mandate's issuance may be further stayed by motions for reconsideration or petitions for certiorari. It makes no sense for this Board to prematurely expend its own resources and those of the parties on a matter which may never become ripe.2/ The Board should deny Intervenors' motion to admit this new contention as premature at this time, or at least place it in abeyance pending issuance of the D.C. Circuit's mandate, the Board should also not let the contingent pendency of this issue delay its ultimate disposition of other issues before it.

III. THE FIVE FACTORS FOR LATE-FILED CONTENTIONS

On pages 5-9 of their Motion the Intervenors argue that they have met all five factors that a board must consider in admitting late-filed contentions. The factors are the following:

(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.

2/ Of all the parties in this case, LILCO probably has the least incentive to incur any delay in resolution of issues. In the event the mandate ever issues LILCO will urge and cooperate in the implementation of expedited procedures for resolution of a contention of appropriate scope and specificity.

(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.

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

As to four of the five factors (all, that is, except the last one about broadening the issues and delaying the proceeding), LILCO does not dispute that the factors favor admission of a late-filed contention, assuming it is drafted so as to address the precise issue decided in GUARD.3/

With respect to the fifth factor (that is, the extent to which the petitioner's participation will broaden the issues or delay the proceeding), the Intervenors claim that the new contention "would not delay this proceeding to any significant degree" (Motion at 9). This statement is incredible, but it matters little as long as hearing and decision on the contention are severed from the Board's decision on the other fully briefed issues now before it, since the weight of the other factors is in the Intervenors' favor.

3/ As to the third factor (that is, the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record), LILCO does not concede that there is likely to be any value to hearing Suffolk County witnesses Harris and Mayer yet another time. LILCO's concession on this point goes only to the proposition that, on the face of the Intervenors' pleading, and ignoring the merits of testimony that has been presented earlier in this proceeding, the petition satisfies the NRC criteria for late-filed contentions.

Thus, LILCO does not dispute that, on balance, the Intervenors have met the standards of 10 C.F.R. § 2.714 for a late-filed contention, presuming the contention is properly drafted. It is to that question we turn next.

IV. THE CONTENTIONS

Leaving aside the preamble to the contention, which is unnecessary surplusage, the contention reads as follows:

> A. LILCO has no agreements with the hospitals listed in the LILCO Plan (see OPIP 4.2.2, Attachment 1) which provide that those facilities will be available and capable of rendering necessary medical treatment to contaminated individuals in the event of a radiological emergency at Shoreham. In the absence of such agreements, the LILCO Plan does not and cannot comply with 10 CFR Sections 50.47(a)(1), 50.47(b)(1), 50.47(b)(3), 50.47(b)(8), 50.47(b)(12), and NUREG 0654, Sections A.3 and C.4.
>
> B. Medical personnel at the hospitals identified in the Plan have not been trained to perform necessary medical services during a radiological emergency. In addition, Intervenors contend that medical staff preparedness is deficient because there has been inadequate training with respect to proper decontamination procedures and treatment. Furthermore, the Plan provides no assurance that training can and will be provided to such medical personnel. As a result, the LILCO Plan fails to comply with 10 CFR Sections 50.47(a)(1), 50.47(b)(12), 50.47(b)(14), 50.47(b)(15), and NUREG 0654, Sections II.L, N and O.
>
> C. LILCO has developed no plans for the hospital and medical services relied upon in the Plan to provide treatment for contaminated individuals, including plans for transporting contaminated injured individuals to such hospitals, many of which are located substantial distances

> from the Shoreham plant. Thus, there is no assurance that facilities and medical personnel will be adequately prepared or able to handle and treat contaminated individuals in the event of an emergency at Shoreham, as required by 10 CFR Sections 50.47(a)(1), 50.47(b)(8), 50.47(b)(12), and NUREG 0654, Section II.L.

This contention is inadmissible as written. The reason is that all three parts refer to "contaminated individuals" or "decontamination," and contaminated individuals and decontamination are not placed in issue by the GUARD decision.

In LILCO's view, the phrase "contaminated injured individuals" in 10 C.F.R. § 50.47(b)(12) covers two categories of people and does not cover a third. The three categories are:

1. People who are both contaminated and have some conventional injury such as a wound or a broken bone (the "contaminated and injured");

2. People who are contaminated but not injured; and

3. People who have been "exposed" to high levels of radiation ("radiation-exposed people").

The first category -- persons who are both radioactively contaminated and conventionally injured -- is covered under the Commission's regulations at § 50.47(b)(12) but was not at issue in GUARD, and existing arrangements under the LILCO Plan, already available for litigation, are as legally acceptable now as they ever were. The second category -- persons who require decontamination but are not injured -- is not addressed at § 50.47(b)(12)4/ and was, again, not at issue in the GUARD

4/ For example, monitoring of evacuees at relocation centers is covered by § 50.47(b)(10) and by NUREG-0654 planning standard J-12.

case. LILCO has made arrangements for monitoring and decontaminating members of the public at the Nassau Coliseum and, while those arrangements are being contested by the Intervenors as they try to reopen the relocation center issue, they are not affected by the GUARD decision.

The third category -- persons who have been exposed to high levels of radiation but are not otherwise injured -- is the only category addressed by the GUARD case. The issue in GUARD was "arrangements . . . made for medical services" for persons "exposed to dangerous levels of radiation." GUARD, slip op. 3, 6, 9, 10. These are the "radiation-exposed public." GUARD, slip op. 10.

Accordingly, the contention submitted by the Intervenors would be admissible only with the following changes:

A. In contention subpart A, change "contaminated individuals" to "radiation-exposed individuals."

B. In contention subpart B, strike the second sentence ("In addition, Intervenors contend that medical staff preparedness is deficient because there has been inadequate training with respect to proper decontamination procedures and treatment.").

C. In contention subpart C, change "contaminated individuals" to "radiation-exposed individuals" both places it occurs; change "contaminated injured individuals" to "radiation-exposed individuals."

Finally, since only 10 C.F.R. § 50.47(b)(12) was at issue in GUARD, references to other regulations, and to NUREG-0654 standards other than II.L, should be deleted from the contention.

LILCO does not concede that the contention, even if rewritten as proposed above, would necessarily present a factual question that requires a public hearing; some or all of the contention might be resolved by legal briefs or a motion for summary disposition. For example, it is not clear from the GUARD decision that there is a legal requirement that there be agreements with hospitals or that there be assurance that medical personnel have been trained. Nor is it apparent that there is an obligation to provide a hospital-specific plan for each and every hospital in the list of hospitals that was formerly all that was required by the NRC. The court, in fact, left completely open what is required, holding only that the list formerly required is insufficient.

V. REQUEST FOR CERTIFICATION TO THE COMMISSION

Assuming the contention is rewritten to properly address the issue decided in GUARD, it is still unquestionably a contention about a generic issue, one affecting, presumably, all the nuclear plants in the country. The Commission has already ruled that the NRC interpretation of 10 C.F.R. § 50.47(b)(12), at issue in GUARD and raised by the Intervenors' proposed contention, involves "a significant issue of policy that affects other plants and proceedings," therefore meriting directed certification. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-27, 16 NRC 883, 884 (1982); see also GUARD, slip op. at

7. Although the issue arose in the specific context of the San Onofre proceeding, the Commission made its interpretation generic. See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528 (1983). Now that the court has overruled that interpretation, it is clearly the case that a new generic interpretation is needed. The meaning of 10 C.F.R. § 50.47(b)(12) is still a "significant issue of policy" affecting licensed plants and other licensing proceedings, and the reasons for making a generic interpretation are at least as strong now as they were when the Commission first addressed the issue.

Accordingly, LILCO asks this Board to certify to the Commission the question how 10 C.F.R. § 50.47(b)(12) is to be interpreted in light of the GUARD decision. In particular, the precise questions to be certified are the following:

(1) Does the phrase "contaminated injured individuals" as used in 10 C.F.R. § 50.47(b)(12) require applicants for nuclear power plants to provide arrangements for medical services only for members of the public who have suffered traumatic [physical] injury and are also contaminated with radiation?

(2) If the answer to Question 1 is no, to what extent does 10 C.F.R. § 50.47(b)(12) require advance, specific arrangements and commitments for medical services for the general public as opposed to the general knowledge that facilities and resources exist and could be used on an ad hoc basis?

These are, of course, the questions addressed by the Commission originally in San Onofre. They now must be readdressed in light of GUARD. LILCO urges prompt certification of this

question and, placing proceedings on the pending petition in abeyance, pending its outcome if the Board has not denied the motion as premature.

VI. LILCO'S REQUEST FOR PROMPT DECISION

The Intervenors have now mounted two major efforts to require this Board to conduct additional hearings, first on the Nassau Coliseum reception center and now on medical care for radiation-exposed members of the public. LILCO has no way of knowing what additional issues the Intervenors may attempt to reopen in the future. Hearings themselves are burdensome enough, but in addition the extensive discovery in which the Intervenors insist on engaging for every issue is likely to consume a large amount of time.

In particular, there may be considerable delay in resolving the medical care issue. The D.C. Circuit's mandate in GUARD has not yet issued. Until it does, the decision is not binding on the Commission. If the Commission or the intervenor utilities in GUARD seek review by the U.S. Supreme Court, the granting of certiorari will stay the mandate of the Court of Appeals. Thus, there may be a considerable length of time before it is settled whether the Commission need do anything about GUARD at all.

The record in this proceeding has been closed some eight months, since August 26, 1984. It has been fully briefed on all factual issues since November 14 and on all legal issues since November 25, 1984. The Commission has indicated that a

decision in this case is expected this month. LILCO believes that the Board should proceed to render a partial initial decision on all issues that are ripe for decision, including the "legal authority" issues (Contentions 1-10). If either the relocation center issue or the medical care issue becomes the subject of full-blown litigation (and delay of decision on other issues provides an incentive to spawn such litigation), then resolution of these issues ought simply to be separated from the other issues and treated in a later partial initial decision.5/

Any delay in the rendering of a partial initial decision on all the other issues now fully briefed would prejudice LILCO. As we have noted recently, there are indications that the absence of a decision is already delaying planning for an exercise (see LILCO's Renewed Motion for Summary Disposition of Legal Authority Issues on Federal-Law Grounds, February 27, 1985, at 9-10). As a very important practical matter, if the Board finds any deficiencies in the emergency plan, LILCO may need time to correct the problem, and that time cannot begin to run until a decision is issued.

5/ Intervenors have indicated their intent to litigate the results of a graded exercise when one is held. Since such an exercise (and litigation of it, if successfully developed) is a prerequisite to a full-power license, Intervenors will not be prejudiced by decision of reception center and hospital issues then, rather than holding the Board's decision on the literally scores of other litigated emergency planning issues hostage to two late issues (plus any others that the Intervenors manage to add later on).

Accordingly, LILCO requests the Board to render its partial initial decision on all of those issues that can now be resolved, including the legal authority issues, as soon as possible. Any other issues -- including the medical care issue -- can and should be left for a later decision.

Respectfully submitted,

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DATED: March 11, 1985

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO'S ANSWER TO "MOTION OF SUFFOLK COUNTY AND NEW YORK STATE TO ADMIT NEW CONTENTION" (INCLUDING A REQUEST THAT THE ISSUE BE CERTIFIED TO THE COMMISSION AND THAT THE NEW ISSUES BE SEVERED FROM THE REST) were served this date upon the following by first-class mail, postage prepaid or, as indicated by an asterisk, by Federal Express, or, as indicated by two asterisks, by telecopy and Federal Express:

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