517.

SUFFOLK COUNTY, FEBRUARY 8, 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
(Shoreham Nuclear Power Station, Unit 1)	)	

SUFFOLK COUNTY'S OPPOSITION TO LILCO'S MOTION TO STRIKE TESTIMONY OF DALE G. BRIDENBAUGH AND GREGORY C. MINOR REGARDING SUFFOLK COUNTY'S EMERGENCY DIESEL GENERATOR LOAD CONTENTION

For the reasons discussed below, LILCO's motion to strike portions of the County's testimony on the EDG Load Contention should be denied in its entirety.

I.A. LILCO objects to the admissibility of the portions of the County's testimony that relate to the standard practice at other nuclear plants of providing a significant margin between the maximum emergency service loads and the maximum rated loads of emergency diesel generators (LILCO Motion at 2-4). LILCO argues that such evidence is inadmissible because the Board refused to admit subpart (b) of the County's proposed EDG Load Contention which related to margin at other plants, and because this evidence allegedly is irrelevant.

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Although the Board specifically declined to admit as a separate contention subpart (b) of the County's proposed EDG Load Contention relating to margin at other plants (January 18, 1985 Order, at 7-8), that in itself is not a basis for excluding the challenged testimony. The Board previously has indicated that the rejection of a specific contention does not preclude the admission of testimony on the same subject matter if that testimony is relevant to the admitted portion of the contention.1/ Here, the evidence of margin at other plants is relevant and integral to the County's EDG Load Contention. Indeed, the Board expressly rejected the admissibility of subpart (b) as a separate contention on the ground that it was related to and, in fact, was redundant of subpart (a) of the contention.

It is true (as LILCO emphasizes) that the Board's Order ruling on admissibility of the County's Load Contention states that consideration of the margin at other plants would be irrelevant. (January 18, 1985 Order at 8). However, that cannot be construed to be a ruling on the admissibility of the

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1/ See, e.g., transcript references cited in Suffolk County's Opposition to LILCO's Motion To Strike Portions Of The Joint Direct Testimony Of Dr. Robert N. Anderson, et al., August 14, 1984, at 10-11.

evidence here in question; the Board did not even have the testimony before it at the time. The County's testimony clearly demonstrates the relevancy and materiality of that evidence to the admitted contention. The evidence of margin between the maximum emergency service loads and the maximum rated loads of emergency diesel generators at other nuclear plants demonstrates the accepted interpretation by the nuclear industry and the Nuclear Regulatory Commission of the requirements of GDC 17 as to the sufficient capacity and capability to assure appropriate responses to postulated accidents. See, e.g., Testimony of Dale G. Bridenbaugh and Gregory C. Minor Regarding Suffolk County's Emergency Diesel Generator Load Contention, January 25, 1985, at 15-17, 20-21. Such evidence is clearly relevant and material because it demonstrates how GDC 17 has been interpreted and applied in past licensing actions. Indeed, such evidence is particularly relevant to the issues in this proceeding because GDC 17 does not specify any empirical standards for evaluating the EDGs but, instead, provides only subjective guidance. In these circumstances, the regulatory standards are not totally free from ambiguity, and the past practice of the NRC and industry in interpreting and applying the regulation is the best evidence of what the regulation really means.

It is, of course, well settled that considerable deference is to be accorded an agency's interpretation of its own regulations. Thus, in North Anna Environmental Coalition v. NRC, 533 F.2d 655, (D.C. Cir. 1976), the Court upheld the NRC's interpretation of certain regulations based on the testimony of NRC Staff members who had been involved in promulgating those regulations concerning their intent in doing so. If such evidence is relevant and properly considered, then it is clear that evidence of the NRC Staff's application of its regulations (which establishes the NRC's actual practice in interpreting the regulations) is equally admissible and properly considered here.

In summary, granting LILCO's motion as to this testimony would preclude the County from introducing vital evidence concerning how the requirements of GDC 17 have been applied in the past and, accordingly, low GDC must be interpreted in the instant case. This evidence is particularly crucial here, because the Staff, without adequate justification or explanation, has taken positions in the SER which significantly depart from the established interpretation of GDC 17 requirements. The exclusion of such evidence would create a gaping hole in the administrative record and be clear error.

I.B. LILCO objects to various portions of the County's testimony that refer to uncertainties inherent in the predicted accident scenario, including system degradation and modeling and calculational errors, on the ground that the testimony is outside the scope of the contention, irrelevant, vague and speculative (LILCO Motion at 4-6). LILCO is mistaken in each of these respects.

First, as discussed above, the fact that the Board rejected the admissibility of a separate contention on an issue does not preclude the admission of relevant testimony on the same subject matter. In fact, the Board rejected subparts (a)(v) and (vi) of the proposed Load Contention because it considered those subparts to be too broad and vague to satisfy the standards for admissible contentions. (January 18, 1985 Order, at 6-7). Vagueness and overbreadth, however, are not grounds for excluding testimony because those concerns can be cured or challenged by cross-examination.2/ In any event, the County's witnesses specifically identify various "uncertainties" to

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2/ If indeed the testimony is too vague to be understood, then LILCO can feel comfortable in ignoring it because it will carry no weight. Indeed, overbreadth and vagueness are not referred to at all in the regulatory standards for admissibility of evidence, 10 CFR Section 2.743(c) [relevant, material, and reliable evidence not unduly repetitive is admissible].

which they refer. If LILCO believes that the County's testimony is without sufficient factual foundation, or based upon erroneous facts, LILCO may resolve its concerns by cross-examination. See cases discussed in the County's August 14, 1984, Opposition to LILCO's motion to strike, at 3 n.1.

Second, the challenged testimony is highly relevant to the admitted contention and is not overly speculative as LILCO claims. Indeed, the relevant Regulatory Guide itself acknowledges and accounts for "uncertainties inherent in estimates of safety loads" (Regulatory Guide 1.9, at 1.9-2); those uncertainties constitute the basis for the regulatory requirement of margin. It is absurd to suggest that testimony discussing these uncertainties should be stricken just because the uncertainties cannot be identified and quantified with absolute precision. Indeed, "accidents" would not occur but for unforeseen, and often unforeseeable, events. LILCO's objections are based upon the incorrect assumption in its testimony that LILCO has identified and quantified all possible uncertainties. The County's testimony refutes that position, and demonstrates that the consideration of uncertainties is not speculation but proper and conservative contingency planning and that margin is required to accommodate those uncertainties.

I.C. LILCO's objections to the County's testimony concerning the absence of a short-time rating for the EDGs (LILCO Motion at 2, 6-7) are absurd. That testimony does not state, imply, or assume, and the EDG Load Contention does not attack, the concept of a single qualified load. The County would not challenge the single qualified load for the Shoreham EDGs if it were adequate to encompass all loads the EDGs might reasonably be required to carry. However, the County contends that LILCO's proposed qualified load is not adequate to accomplish that purpose, as the subject testimony makes clear. Therefore, the County contends that providing for an overload (i.e., "short-time") rating is customary and indeed required in this particular case to accommodate intermittent or accidental loads that will (or conceivably could) cause the EDGs to exceed the single qualified load. Indeed, Regulatory Guide 1.9 specifically refers to short-time ratings of emergency diesel generators as a guide by which to determine whether a specific diesel generator has adequate load capability and margin to comply with GDC 17. It is therefore absurd to suggest, as LILCO does, that testimony concerning a short-time rating and the industry practice in the area is "outside the scope of the contention, without regulatory basis, and irrelevant." On the contrary, the fact that, contrary to generally accepted industry

practice, the EDGs have no overload rating to accommodate cyclic loads and various other loading uncertainties is persuasive evidence that the EDGs do not comply with GDC 17 requirements.

II.A. LILCO moves to strike as speculative answer 18, which states the witnesses' opinion as to why LILCO did not measure all loads in establishing the MESL. The County believes that the challenged testimony, as written, is essentially argument and properly reserved as such. Accordingly, the County withdraws answer 18.

In contrast, LILCO's objection that answer 17 is speculative is without merit. In that answer, the witnesses specifically state the factual basis for their opinion as to whether certain aspects of the integrated electrical test ("IET") adequately account for the total loads that may arise during accident conditions. The testimony demonstrates that the IET cannot be accepted at face value, and that there are valid reasons for believing that the IET did not reflect all such loads. This is in contrast to LILCO's testimony that the IET reflects realistic load levels. In short, the County's testimony establishes that the uncertainties about which the County is concerned are not speculative, but have a substantial basis in fact.

III. LILCO argues that the County's witnesses lack the qualifications needed to proffer testimony concerning the complexity and comprehensiveness of various Shoreham procedures and the likelihood of operator actions and errors (LILCO Motion at 7-8). To the contrary, both Mr. Minor and Mr. Bridenbaugh are adequately qualified by training and experience to provide expert opinions on these subjects. For example, as he testified in his deposition, Mr. Minor has significant experience with the design review of control room concepts used in boiling water reactors. This experience included analyzing the likelihood of operator error in making decisions and undertaking actions throughout the design process to make the system less vulnerable to operator error. See, e.g., Joint Deposition of Dale Bridenbaugh and Gregory Minor, December 18, 1984, at 4-6. In addition, Mr. Bridenbaugh testified to his considerable experience in operator training (the framework of which is operator procedures) and the practical aspects of plant startup and checkout, including conducting formal operator training programs and developing specialized simulator training programs. Id. at 5. Furthermore, as set forth in their professional qualifications which are part of this record, both Mr. Bridenbaugh and Mr. Minor testifed extensively as expert witnesses on emergency operating procedures during the Diablo

Canyon and Rancho Seco licensing proceeding. LILCO conveniently ignores all of this pertinent and readily available information demonstrating the witnesses' qualifications.

Furthermore, LILCO's objections misconstrue the law governing experts' qualifications. Here, the subject matter of the witnesses' testimony clearly falls within their experience in and overall knowledge of engineering and, therefore, qualifies them as experts. Holmgren v. Massey-Ferguson, Inc., F. 2d 856, 858 (8th Cir. 1975) (discussed in detail in the County's September 5, 1984, Opposition to LILCO's August 29 supplemental motion to strike, at 3). At the very best, all of LILCO's arguments concerning the expertise of the County's witnesses go to the weight to be given to the testimony. Clearly, the County's testimony on the complexity and comprehensiveness of the Shoreham procedures, and on the likelihood of operator error and action, is relevant and is based upon the witnesses' knowledge, skill, experience, training and education. Furthermore, this testimony will assist the Board in understanding the evidence and the facts in issue.

IV. LILCO's claim that the testimony on pages 5 to 7 of the County's testimony is irrelevant and unresponsive (LILCO Motion at 8-9) is specious. The testimony clearly is relevant because it relates the historical background which gave rise to

the EDG Load Contention, specifically discusses the pertinent aspects of Revision 34 to the Shoreham FSAR that are in issue, and lays the foundation for the testimony that follows. This testimony is responsive to the question because it provides necessary background information for the remainder of the answer (to which LILCO raises no objection and therefore impliedly concedes is responsive). In any case, LILCO's argument that the answer is not "responsive" is not a ground for objecting to the admissibility of testimony. 10 CFR § 2.743(c).

V. LILCO objects to answer 30 and portions of answer 29 of the County's testimony on the ground that they constitute an impermissible challenge to the single failure criterion of GDC 17 (LILCO Motion at 9-12). Beside mischaracterizing portions of the County's testimony as requiring the consideration of multiple, independent failures, LILCO's objections are no more than an unauthorized reply to the views expressed in the Board's January 18th Memorandum and Order, at 5-6, and in the County's January 25th Response, concerning the inapplicability of the single failure criterion to the EDG Load Contention. The Board has, in other contexts, clearly expressed its position that such supplemental replies are improper and should not be considered.

VI. Conclusion

For the foregoing reasons, LILCO's motion to strike portions of the County's EDG Load Contention testimony should be denied in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY'S OPPOSITION TO LILCO'S MOTION TO STRIKE THE TESTIMONY OF DALE G. BRIDENBAUGH AND GREGORY C. MINOR REGARDING SUFFOLK COUNTY'S EMERGENCY DIESEL GENERATOR LOAD CONTENTION, dated Feburary 8, 1985, have been served on the following this 8th day of February, 1985, by U.S. mail, first class, except as otherwise indicated.

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