LILCO, November 13, 1984

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)	)	

LILCO'S MOTION TO STRIKE PORTIONS OF SUFFOLK COUNTY'S REBUTTAL TESTIMONY AND LILCO'S MOTION TO SUBMIT SURREBUTTAL TESTIMONY

Long Island Lighting Company (LILCO) moves to strike portions of the Rebuttal Testimony of Dr. Robert N. Anderson, Professor Stanley G. Christensen and G. Dennis Eley on the grounds that portions of the testimony are:

(i) totally unrelated to any of LILCO's original, supplemental or cross-examination testimony;

(ii) repetitive and cumulative of evidence already in the record;

(iii) neither relevant to an issue of decisional importance nor timely; and

(iv) a pretext to introduce new issues to modify previous County testimony.1/

1/ A "good cause" test is applied for the admission of rebuttal testimony which requires that the testimony be: (1)

(footnote continued)

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In short, the County's rebuttal testimony is not proper rebuttal. Rebuttal testimony is not an opportunity for a new or a second bite at the apple.

In support of its Motion to Strike, LILCO states as follows:

1. Question and Answer No. 5. The County uses the pretext of Dr. Well's testimony regarding the presence of stud bosses around one-third of the liner landing to interject a new issue, namely whether combustion gas could enter the cooling jacket water, into this litigation. This is not proper rebuttal. Neither the County nor LILCO introduced any testimony about combustion gas entering the cooling jacket water system. (See County Supplemental Testimony at 13). Further, since the presence of stud bosses is clearly depicted on the TDI engineering drawings, which the County has had for months, there is no reason why this new theory could not have been in the County's Supplemental Testimony.

(footnote continued)

relevant to an important point in the direct testimony; (2) arguably relevant to an issue of decisional importance in this proceeding; (3) not cumulative with any other testimony in the record; and (4) incapable of being filed in a more timely fashion. See In the Matter of Long Island Lighting Company (Emergency Planning Proceeding), Memorandum and Order dated February 28, 1984, per Judge Laurenson.

2. Question and Answer No. 5. This is cumulative and not a proper subject for rebuttal testimony. Dr. Anderson is asked "Do you stand by your testimony" that the weld material from the original EDG 103 block pulled free from the crack surface due to operating stress. Clearly, this type of question is only proper, if at all, as redirect. To hold otherwise would result in permitting a witness to use rebuttal as a device for reaffirming and restating his direct testimony.

3. Question and Answer No. 7. LILCO never addressed whether nickel-iron weld material minimizes the likelihood of tensile stress caused by post-cooling shrinkage in its prefiled testimony or in cross-examination. FaAA testified that weld repairs cause tensile stresses, but the issue of the amount of tensile stresses caused by nickel-iron weld rods was not raised by FaAA. Rebuttal testimony on this point is therefore improper. Moreover, since the testimony raises a new issue on which FaAA's opinion differs from Dr. Anderson's opinion, admission of the testimony would leave the record in an incomplete posture that would be of no assistance to the Board.

4. Question and Answer No. 9. LILCO did not address flexing of the camshaft anywhere in its testimony. The County is simply using Dr. Wells' statement in Question No. 9 as a pretext to modify the answer it gave in its initial testimony at page 176, which did not distinguish between vertical and horizontal flexing. Flexing of the camshaft could and should have been raised by the County only in its original direct testimony. To permit the County to use rebuttal to raise this point gives the County an impermissible new bite at the apple.

5. Question and Answer No. 11. This testimony purports to rebut Mr. Schuster's testimony that the initial cam gallery cracks appeared to be "arced and perhaps subsequently ground out." However, Dr. Anderson concedes that he has no basis for agreeing or disagreeing with Mr. Schuster, and he further concedes that he does not know what TDI's practice was in 1975. Clearly, this testimony is not relevant to any issue of decisional importance, and since Dr. Anderson's visit to TDI occurred long before LILCO's cross-examination, there is no reason why Dr. Anderson could not have included his statement in his previous testimony.

6. Question and Answer Nos. 12 and 13. These questions on page 8, which should be numbered 13 and 14, are not legitimate rebuttal to LILCO's testimony. LILCO offered no evidence regarding whether the oxide (and the County apparently now concedes that the material on the crack surface is an oxide) was a wustite, a hematite or a magnetite, or whether x-ray diffraction is an appropriate method of testing for the presence of these oxides. Accordingly, there is nothing for the County to rebut. Furthermore, since the County has not tested the material, and since their testimony reaches no conclusion, LILCO respectfully submits that it does not satisfy the good cause requirement since it is not even arguably relevant to an issue of decisional importance. No finding of fact regarding the ability of the EDGs to perform their intended function could be based on this testimony.

Motion to File Surrebuttal Testimony

LILCO respectfully requests that it be granted leave to submit oral surrebuttal testimony to the testimony read into evidence by Dr. Anderson on November 1, and to respond orally to any portion of the County's rebuttal testimony that is admitted into evidence. In support of its Motion, LILCO states as follows:

(1) The authorities clearly support the proposition that the party with the burden of proof should be given the opportunity to submit rebuttal to matters which develop in the course of litigation. The Licensing Board in In the matters of Philadelphia Electric Co., et al., Metropolitan Edison Co., et al., Public Service Electric and Gas Co., and Rochester Gas and Electric Corp., et al., 10 NRC 527, 529 (1979), stated: "Under familiar adjudicatory principles, parties saddled with that burden [the burden of proof] typically proceed first and then have the right to rebut the case presented by their adversaries."

(2) Here, although the County filed its testimony first, traditional practice was followed during the evidentiary hearing and LILCO's witness panel proceeded first. Further, the County was permitted to read into the record additional evidence at the time its witnesses were impaneled.

(3) LILCO has not had and will not have an opportunity to respond to the new issues raised by Dr. Anderson's additional testimony, and particularly the issue of fretting corrosion, unless it is granted leave to introduce surrebuttal testimony. The same is true with respect to new issues raised by the County in its proposed rebuttal testimony. Unless LILCO is granted an opportunity to respond, the record

will be incomplete and the Board will lack an adequate basis for resolving the new and outstanding issues raised by the County's rebuttal testimony.

(4) LILCO submits that it has good cause for submitting surrebuttal testimony. For example, the issue of fretting corrosion was raised by the County, not LILCO. The County's expert, Dr. Anderson, never suggested that fretting corrosion was a basis for his opinion prior to this hearing. Furthermore, Dr. Anderson had all the facts necessary to reach that conclusion prior to this hearing because the presence or absence of fretting corrosion did not depend on any of LILCO's testimony, such as whether the dark material on the surface of the crack was an oxide. Accordingly, although Dr. Anderson could have included his testimony on fretting corrosion in the County's Supplemental Testimony, LILCO could not have anticipated Dr. Anderson's testimony, and has not had an opportunity to respond to it.

(5) Good cause also exists for granting LILCO's Motion to admit surrebuttal on the County's rebuttal testimony, which in many instances raises new issues that were not addressed in LILCO's original, supplemental or cross-examination testimony. LILCO could not have addressed these issues earlier, and the result is a void in the record on

new issues raised by the County. The Board should permit surrebuttal testimony by LILCO to remove this gap in the evidence and to assist the Board in reaching its findings.

(6) LILCO is prepared to offer oral surrebuttal testimony at the conclusion of the County's witness panel on blocks. Further, to assure a minimum of delay and inconvenience, all of LILCO's surrebuttal testimony can be placed in evidence by Drs. Rau and Wachob, and they can be cross examined separately or in conjunction with the multiparty panel requested by the Board.

WHEREFORE, LILCO respectfully requests that the Board grant LILCO's Motion to Strike Portions of the County's Rebuttal Testimony and that the Board also grant LILCO's Motion for Leave to Submit Surrebuttal Testimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO's Motion to Strike Portions of Suffolk County's Rebuttal Testimony and LILCO's Motion to Submit Surrebuttal Testimony were served this date upon the following by first-class mail, postage prepaid, or by hand as indicated by an asterisk:

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