LILCO, January 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 MOTION TO REOPEN RECORD

LILCO hereby moves to reopen the evidentiary record in this proceeding for the limited purpose of admitting seven documents regarding the use of Nassau Veterans Memorial Coliseum as a reception center. The proffered documents are an Affidavit of Elaine D. Robinson on Nassau Coliseum, describing the Coliseum, and six Attachments:

1. Letter of Agreement between LILCO and the General Manager of the Coliseum dated September 25, 1984, and approved October 8, 1984, allowing LILCO and the Red Cross to use the Coliseum as a reception center;

2. Letter of October 1, 1984, from the Nassau County Executive to the General Manager of the Coliseum approving use of the Coliseum as a reception center;

3. Letter of Agreement between LILCO and the American Red Cross dated October 23, 1984, and approved October 24, 1984, providing for coordination between LERO and the Red Cross for these organizations' joint use of the Coliseum as a reception center;

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4. Map showing the location of the Nassau Coliseum;

5. Diagram of the Nassau Coliseum; and

6. Letter of December 31, 1984, from the Nassau County Executive to the Chairman of the Long Island Lighting Company.

I. BACKGROUND

Contention 24.0 in this proceeding alleges that "there is no relocation center designated" for a significant portion of the anticipated evacuees. Although LILCO's evidence included a list of the "congregate care" centers where evacuees would be housed, at the time the record closed LILCO had not identified a central "reception center" from which evacuees would be directed to the congregate care centers. The board noted during the hearings that this was a "void in the record." Tr. 14,806-07 (Judge Laurenson). The record closed on August 29, 1984. Tr. 15,714.

On October 8, 1984, Hyatt Management Management Corporation of New York, Inc., the lessee of the Nassau Veterans Memorial Coliseum, signed a Letter of Agreement for use of the Coliseum as a reception center (Robinson Affidavit, Attachment 2), and on October 24, 1984, a Letter of Agreement between LILCO and the American Red Cross for use of the Coliseum was finalized (Robinson Affidavit, Attachment 3). On October 30, 1984, LILCO forwarded those agreements, as well as the October 1, 1984, letter from the Nassau County Executive authorizing

use of the Coliseum as a reception center (Robinson Affidavit, Attachment 1), to the Board and parties. In its cover letter, LILCO noted, as it had in its proposed findings of fact and conclusions of law, that it believed these agreements merely confirmed the fulfillment of commitments already reflected in the record. See, for example, LILCO's Proposed Findings of Fact and Conclusions of Law on Offsite Emergency Planning ¶¶ 522, 530, 532 (Oct. 5, 1984). LILCO said that it did not believe it was necessary to formally reopen the record in order to receive such confirmatory information. Suffolk County wrote the Board on November 7, 1984, disagreeing that the identification of the Coliseum was merely confirmatory.

At the conference of counsel on January 4, 1985, LILCO reiterated its argument that this information was merely "confirmatory" and did not require a reopening of the record. Tr. 15,729 (Irwin). The NRC Staff agreed. Tr. 15,734 (Bordenick). Suffolk County and the State of New York disagreed. Tr. 15,737 (Letsche), 15,738-39 (Zahnleuter). The Board rejected LILCO's and the NRC Staff's position. Tr. 15,739-40 (Judge Laurenson). Accordingly, LILCO asked to submit this motion to reopen the record. Tr. 15,781, 15,782, 15,788 (Irwin).

II. BASIS FOR THE MOTION TO REOPEN

A. The Traditional Reopening Criteria Are Met

The "traditional" criteria for reopening a closed

evidentiary record in a formal licensing proceeding were set out in the "NRC Staff Response to Suffolk County and New York State Motion to Vacate Order Granting LILCO's Motion for Summary Disposition on Contention 24.B and to Strike Portions of LILCO's and the Staff's Proposed Findings" at 4 (Dec. 27, 1984) and in a rule proposed by the Commission on December 27, 1984, 49 Fed. Reg. 50,189 (Dec. 27, 1984).1/ The proponent of a motion to reopen a closed record must satisfy three decision criteria:

> 1. The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
>
> 2. It must address a significant safety or environmental issue.
>
> 3. It must be shown that a different result might be or might have been reached had the newly proffered material been considered initially.

49 Fed. Reg. 50,189 col. 2 (Dec. 27, 1984). As has often been noted before, a party seeking to reopen the record bears a "heavy burden." Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983). LILCO believes it meets these three criteria and that therefore the reopening of the record for the limited purpose

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1/ Although this rule is only proposed -- that is, subject to change following the receipt of comments -- it purports to codify existing case law on the reopening criteria. Accordingly, it is as reliable and authoritative a statement of those criteria as presently exists.

of admitting the documents about the Nassau Coliseum is justified, even under the traditional criteria (though, as we argue below, a somewhat different standard may apply here).

1. Timeliness

First, under the traditional criteria a motion to reopen the record must be timely. The Intervenors may well argue that because the principal evidentiary documents that LILCO now seeks to introduce were generated in October 1984, some three months before this motion, the motion is untimely. A less superficial analysis, however, shows that this is not the case.

As noted above, LILCO believed that the void in the record identified by the Board was not so significant as to require a reopening of the record but rather could be left to a license condition, compliance with which could be monitored by the NRC Staff and FEMA. That this was not an unreasonable judgment is demonstrated by the fact that the NRC Staff agreed with it.

It seemed reasonable to LILCO because the emergency plan, which proposes to use a central reception center to monitor and decontaminate people and then to send them to "congregate care centers," had been thoroughly litigated. Indeed, just about every aspect of relocation centers except the identity of the central reception center was aired at the hearings. See, for example, Tr. 14,816-17 (sheltering people 40-50 miles from their homes), 14,825-30, 14,854, 14,878-82, 14,888

(monitoring and decontamination). The list of congregate care centers was put into the record, and it was these congregate care centers that were the subject of, for example, Contention 75 about the number of showers and toilets, cooking facilities, and so forth. None of the admitted contentions about monitoring and decontamination depends on the location of the central reception center; Contention 77, for example, deals narrowly with the type of instrument used for monitoring. Only Contention 24.0, a narrow contention alleging that "there is no relocation center" is affected by the identification of Nassau Coliseum.

Nor does the identity of the reception center raise new issues. The activities to be conducted at the central reception center are straightforward and have been discussed in testimony in the record. LERO personnel monitor and decontaminate people if that is necessary; then the Red Cross directs people to congregate care centers. See LILCO's Testimony on Phase II Emergency Planning Contentions 24.0, 74, and 75 (Relocation Centers), ff. Tr. 14,707; Tr. 14,801 (Rasbury).

Nevertheless, LILCO's opinion on this matter (and the NRC Staff's) was ruled wrong by the Board on January 4. This motion, preceded by notice of intent to file, comes only a week later. It is timely.

There is no danger here that any party has been surprised or otherwise prejudiced by the timing of this motion. The documents that LILCO seeks to submit could not possibly

have been submitted before the record closed, because they did not exist until several weeks thereafter. Once they did exist, LILCO promptly provided them to the other parties.

Accordingly, there has been no dilatoriness on LILCO's part. LILCO can be faulted only for having made a reasonable, but ultimately wrong, judgment about the evidentiary significance of the identity of the central reception center.

2. Significant Safety Issue

Second, a motion to reopen must address a "significant safety or environmental issue." As noted above, although LILCO thought that the identification of the Nassau Coliseum was not such a significant issue, we must conclude that the Board's ruling of January 4 reaches the contrary conclusion. Presumably the Intervenors will agree that the Coliseum identification is a significant safety issue.

3. Different Result Might Be Reached

Third, a motion to reopen must show that a "different result might be or might have been reached had the newly proffered material been considered initially." Again, LILCO did not think that the identity of the central reception center would cause a change in result, but we must conclude that the Board has now ruled otherwise. Likewise, the Intervenors have argued that without the identification of the reception center, the Board cannot find for LILCO on the identity and adequacy of

the relocation/reception centers. See Letter from Suffolk County Counsel to the Board at 2 (Nov. 7, 1984); Tr. 15,739 (counsel for New York State argues that Board should rule for Intervenors on Contentions 24.0, 74, and 75).

For these reasons, LILCO satisfies all three traditional criteria for reopening, and reopening for the limited purpose explained above should be granted.

B. A Different Standard May Be Applicable Here

Under these circumstances, however, and given that it is the applicant who seeks the reopening, the "traditional" reopening standard may not apply. A standard that is sometimes applied is that the request be timely and that the supplementary information or evidence be of substance and importance. This point was made by a Licensing Board faced with a request to reopen a record after findings had been filed but before a decision had been reached:

> Many of the cases cited to us by the parties are addressed to motions to reopen the record of a case after an initial decision on all or a portion of the record has been written. Those precedents are not applicable here. Instead, we need only find that OCRE's motion is timely and that it raises an issue of substance. We need not find that it would change the result of an issue that we have not yet decided, even though findings of fact have already been filed.

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-52, 18 NRC 256, 257 (1983).

The application of a different standard to an applicant's motion to reopen is consistent with the approach taken by the Appeal Board in Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169 (1984). There, additional inspections and other activities with the potential to affect the Licensing Board's decision were underway before the conclusion of the hearings. That Licensing Board declined to delay its decision to consider these significant activities. The Appeal Board reversed, holding that the Licensing Board should have provided for further proceedings to allow the applicant to introduce additional evidence. In essence, the Appeal Board recognized the principle that licensing boards should be flexible in permitting applicants to introduce additional evidence of the sort here in issue.

The reopening of the record by an applicant also presents important policy questions that need to be considered by the Board in ruling on such a request. Under the traditional reopening standard, the movant must show that the issue is significant and is likely to have an effect on the outcome of the case. Where an applicant has developed new information which relates to an important matter in dispute, it is faced with a significant dilemma. Under traditional analyses, to meet the reopening standard, the applicant must essentially concede that its proof to date is insufficient in order to argue that the new information is likely to affect the result.

On the other hand, the applicant may defer any attempt to inject the new information until after the Board rules on the merits. If the ruling is adverse, the applicant can seek reopening. But the applicant then risks being told that its motion is untimely and incurs substantial delay by waiting until the case is decided to present its new evidence.

At least one licensing board has recently recognized that the reopening standard is not entirely symmetrical. In Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509 (1984), the Board applied a less stringent standard to an applicant's request to reopen:

> We are permitting Applicant to reopen the record without a showing of good cause because it does not seem to us logical or proper to close down a multi-billion-dollar nuclear plant because of a deficiency of proof. While there would be some "justice" to such a proposition, there would be no sense to it.
>
> Furthermore, we note that intervenors receive several procedural advantages in our proceedings that also are not fully symmetrical and that compensate for the application of different standards for reopening the record.

19 NRC at 530.

As a consequence of the above, LILCO believes that the appropriate inquiry when an applicant moves to reopen the record is whether the new information is timely and whether it relates to a significant issue. Given that any reopening has the potential to delay the licensing process, there should be a

strong presumption of significance when the applicant seeks to reopen. LILCO's motion meets this standard for reopening. First, LILCO's request is timely, as noted above. Second, the subject matter of LILCO's motion relates to a substantial issue, as shown by the Board's decision that a reopening is necessary.

Having considered arguments analogous to those set out above, the Brenner Board recently reopened the record at LILCO's request in the diesel generator portion of this proceeding after the close of part of the record. Order Confirming Grant of LILCO's Motion to Reopen Diesel Engine Hearing, Doc. No. 50-322-OL (Dec. 4, 1984). Having found LILCO's request to be timely, the Brenner Board said that the test that is "applicable . . . at a time before a Board is well into the process of drafting a decision on the merits and therefore is relatively close to issuing such a decision" is "[w]hether the proposed new evidence relates to a significant safety (or environmental) question and reasonably might materially affect the outcome of the proceeding." Id. at 2. Close to or at the decision stage, the Board said, the standard would be the more stringent one of whether the new evidence would materially affect the outcome on a significant issue. Id. at 3. If the choice of the test does indeed depend on the progress of the Board's work on its decision, then this Board is the only one in a position to decide which test applies. LILCO's view is that the reopening of the record to include the identity of the

Nassau Coliseum, while apparently dispositive on one discrete issue, will not have any broader effect on preparation of an initial decision that must encompass scores of other issues. Nor would it prejudice the other parties.

III. FURTHER PROCEEDINGS

The other parties have seven days from service of this motion (that is, until January 18, 1985) to respond to the arguments in section II above. Tr. 15,794 (Judge Laurenson). Assuming that after considering those responses the Board agrees that the record should be reopened, as LILCO believes it must under the Byron decision cited above, a decision as to further proceedings will be necessary. In the hope of expediting that decision and ultimate resolution of this issue, LILCO offers its views here.

A. Nothing But the Admission of the Documents Is Needed

Given the extremely limited self-contained nature of the reopening, which LILCO believes is signaled by the context of the Board's statement last August of a "void" in the record, LILCO submits that nothing is required except the admission of the proffered documents into evidence. This is because all that LILCO is requesting is the formal placing on the record of information requested by the Board and available to all parties for months, and indeed information that is extremely narrow:

the identity of the central reception center from which evacuees will be dispersed to congregate care centers.2/ The Board's identification of the "void" in the record suggested a very limited void; citing Contention 24.E, which says that there is no relocation center designated, the Board observed as follows:

> However, we note that there is a void in the record on this matter and that LILCO has not at this stage sustained its burden of proof that a relocation center has been designated.

Tr. 14,806 (Judge Laurenson). With the evidence proffered by LILCO today there is no longer even the shadow of a real issue under Contention 24.O as to whether a reception center exists.

B. In the Alternative, Written Responses Should Suffice

If the Board rejects the above suggestion, then in the alternative it should allow the other parties to respond in writing to the proffered documents. This procedure was followed in the Limerick proceeding recently, where the Board accepted revised implementing procedures into the record, while allowing written comments by the other parties:

2/ While some of the specific details about Nassau Coliseum in the attached Affidavit of Elaine D. Robinson on Nassau Coliseum may not have been provided before now, all of it is publicly accessible information of which any interested party could have informed itself at any time following the designation of the Coliseum as a reception center.

> As the reader may note, almost none of our citations to implementing procedures are to the record. This is because only early revisions of the pertinent implementing procedures appear in the record, in App. Ex. 33, and yet we early on discovered that the latest revisions of these procedures, filed by the Applicant after the completion of the hearing on this subject, made moot some of the controversies in this proceeding. Thus, we acquired the habit of referring to the latest revisions, even on matters which have remained unchanged from revision to revision. The parties were given an opportunity to set forth, in writing, any specific objections or other points they wished to make regarding these revisions.

Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), LBP-84-31, 20 NRC 446, 516 (1984).

In their written comments, LILCO submits, the Intervenors would have a considerable burden to bear in justifying more fulsome proceedings, such as further evidentiary hearings. This is because the reopening on this matter is something prompted by the Board, and it is the Board that must be satisfied, not the Intervenors. The situation is analogous to the strike issue of last summer, which was raised by the Board and which the Board declined to expand at the Intervenors' request.

At the very least, to justify further proceedings the Intervenors would have to show either that the existing contentions cover their new concerns or assert entirely new contentions with adequate basis and specificity, with a nexus to the Nassau Coliseum, and with attention to the standards for

late contentions, keeping in mind that the identity of the Nassau Coliseum was revealed to them last October. That the identity of the Coliseum was not put formally into the record, and that Intervenors could therefore afford to ignore it, will not suffice as an answer. The Intervenors knew in fact in October that the Nassau Coliseum would serve as the central reception center under the LILCO Plan; the only open issue was the evidentiary one of whether information about it must be entered formally into the record; and if Intervenors had concerns about the Coliseum, they could and should have raised them long ago.

On the face of it, there do not seem to be any new issues raised by the identification of Nassau Coliseum. The present Contention 74, which alleges the relocation centers are too close to Shoreham, has been rendered moot. As for the issue suggested by the Board (Tr. 15,730-31, 15,736) that Nassau Coliseum may be too far away, the location of the Coliseum, provided in the documents submitted today, plus the existing FEMA testimony are sufficient for a decision that the Coliseum is acceptable. See Tr. 14,622-24, 14,616-18, 14,620 (Keller) (distance is less critical because transfer points are used; beyond New York City is probably too far; explains statement about 20 miles at Tr. 14,212), 14,625 (Keller) (witness's recollection is that the Palo Verde primary monitoring center is on the order of 40 miles from the edge of the EPZ), 14,621 (Keller), 14,625 (McIntire) (acceptability depends in part on

what is available), 14,201. Any issue about the continuous availability of the Coliseum should have been laid to rest by the Nassau County Executive's letter of December 31, 1984 (Attachment 6) and the promptness with which the Coliseum can be cleared (Affidavit of Elaine D. Robinson on Nassau Coliseum ¶ 7).

IV. CONCLUSION

For the reasons recited above, LILCO moves that the Board reopen the record for the limited purpose of admitting the affidavit and attachments that accompany this motion into the record; and that if the information supplied there fills the "void" of concern to the Board, that it thereupon close the record following receipt of the other parties' comments permitted by the Board's order of January 4.

Respectfully submitted,

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DATED: January 11, 1985

CERTIFICATE OF SERVICE

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(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL-3

I hereby certify that copies of LILCO'S MOTION TO REOPEN RECORD 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 hand, or as indicated by three asterisks, by telecopy:

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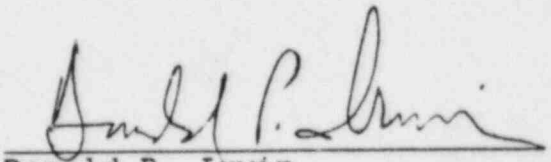

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