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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

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OFFICE OF SECRETARY
LICENSING & SERVICE
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In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station,
Unit 1)

Docket No. 50-322-OL-3

(Emergency Planning Proceeding)

January 28, 1985

MEMORANDUM AND ORDER
GRANTING LILCO'S MOTION TO REOPEN RECORD

I. Procedural History

On July 26, 1983, Suffolk County and the State of New York filed contentions alleging deficiencies in the relocation centers proposed in LILCO's emergency plan. Contention 24.0 alleges that "there is no relocation center designated for a significant portion of the anticipated evacuees." Revisions 1, 2, and 3 of the LILCO Plan did not include any changes in the relocation centers originally proposed by LILCO. LILCO and Suffolk County each filed direct written testimony on the relocation issue on March 2, 1984 and March 21, 1984. After the filing of written testimony, LILCO indicated its intent to change the relocation centers because some of the facilities relied upon in its plan were not available to LILCO. LILCO suggested that the parties file supplemental testimony regarding the relocation center issue. On June 8, 1984, the Licensing Board set a schedule for filing supplemental testimony. On June 15, 1984, LILCO filed supplemental testimony

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discussing the proposed use of certain facilities as relocation centers. Thereafter, Suffolk County filed revisions to its previously filed direct testimony on the relocation center issue. On July 30, 1984, LILCO requested that it be allowed to withdraw its testimony submitted on June 15 and sought permission to substitute revised testimony on the relocation center issue. LILCO's revised testimony, dated July 30, 1984, did not identify relocation centers.

During cross-examination of LILCO's witness, Mr. Rasbury, on August 21, 1984, LILCO stated that when agreements for the use of relocation facilities were secured the identity of the facilities would be provided to all parties. Mr. Rasbury explained that such information was not immediately available because revelation of the names of the facilities with which LILCO was negotiating might impede the negotiations. Tr. 14,797. At that time the Board declined to order any disclosure of matters in negotiation, however, it ruled that the absence of an identified relocation center constituted a void in the record. Tr. 14,805-07. The record closed on August 29, 1984. Tr. 15,714.

II. LILCO's Motion to Reopen

On October 30, 1984, LILCO sent to the Licensing Board and the parties, (1) a letter dated October 1, 1984 from the Nassau County Executive to the General Manager of the Nassau Veterans Memorial Coliseum, approving use of the Coliseum as a reception center under the LILCO Plan; (2) a Letter of Agreement between LILCO and the General Manager of the Coliseum, dated September 25, 1984 and approved on

October 8, 1984, allowing the Red Cross to use the Coliseum as a reception center; and (3) a 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 those organizations joint use of the Coliseum as a reception center in response to an emergency at Shoreham. LILCO expressed its belief that this information was merely a confirmation of commitments already reflected in the record and did not require a reopening of the record in order to be considered by the Licensing Board. By letter dated November 7, 1984, Suffolk County registered its objection to admission of LILCO's proffered letters into the evidentiary record. The matter was placed on the agenda for discussion at the January 4, 1985 Conference of Counsel. At the Conference of Counsel LILCO affirmed its belief that the letters could be included in the evidentiary record without the formality of reopening. Tr. 15,729. LILCO further indicated that it believed identification of a relocation center was an implementing detail that could be left to NRC Staff oversight. Tr. 14,729. NRC Staff agreed with LILCO and stated that FEMA "will ultimately make some judgment as to the adequacy of the Nassau Veterans Memorial Coliseum." Tr. 15,734.

The Board adhered to its earlier ruling that the failure to identify a relocation center constitutes a void in the record, and further found that the identification of the Nassau Veterans Memorial Coliseum as a relocation center was not merely a confirmatory item. Tr. 15,739-40. LILCO then made an oral motion requesting 10 days to submit

a motion to reopen the record, accompanied by affidavits sufficient to support justification of the Coliseum's use, and allowing the other parties 15 days to respond with written evidentiary matter to LILCO's motion. LILCO further requested 7 days from the receipt of such response in which to reply. Tr. 15,788-89. The Licensing Board's ruling allowed LILCO the requested 10 days to submit a motion to reopen and allowed all parties 7 days to respond only on the legal issue of whether the record should be reopened. LILCO was granted permission to file the evidence it proposed to have considered. The Board ruled that the other parties were not to submit any evidence until the Board decided the legal question whether the record should be reopened. Tr. 15,793-94.

On January 11, 1985 LILCO filed a "Motion to Reopen Record" with an affidavit describing the Nassau Veterans Memorial Coliseum, and 6 attachments, including the previously submitted Letters of Agreement for use of the Coliseum. In a lengthy response dated January 18, 1985, Suffolk County and New York State opposed LILCO's Motion to Reopen. The County argues that LILCO does not meet the standards for reopening a closed evidentiary record. The NRC Staff responded on January 18, 1985, agreeing with LILCO and arguing that LILCO meets the test for reopening the evidentiary record.

III. Analysis

The parties do not dispute the traditional criteria governing the reopening of an evidentiary record in NRC proceedings. The standard

has been established in the NRC case law and has recently been offered as a proposed NRC rule. See Fed. Reg. 50,189 (December 27, 1984). This standard is a three-prong test, as follows:

- 1) The motion must be timely.
- 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.

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-756, 18 NRC 1340, 1344 (1983). In addition, as LILCO concedes, a party seeking to reopen the record bears the "heavy burden" of meeting the above criteria. Id.

A. Timeliness

The focus of the dispute between LILCO and the County centers on whether LILCO's motion is timely. LILCO argues that its Motion to Reopen is timely because it provided the relocation center information to the Board and the parties only days after securing an agreement for use of the Nassau Veterans Memorial Coliseum. LILCO points out that it promptly filed a Motion to Reopen after the Board ruled that the identification of the relocation center was not merely confirmatory information and would not be considered unless properly admitted into the evidentiary record.

Suffolk County claims that LILCO cannot meet the reopening requirement that the movant "show the issue raised could not have been raised earlier." Vermont Yankee Nuclear Power Corp. (Vermont Yankee

Nuclear Power Station), ALAB-138, 6 NRC 520, 523 (1973). The County argues that LILCO fails to meet this standard because LILCO knew as early as August, 1984 of its intention to use Nassau Veterans Memorial Coliseum as a relocation center, and its identity should have been revealed at that time. However, Suffolk County fails to give adequate consideration to the fact that although LILCO may have intended and desired to secure the Coliseum as a relocation center, LILCO had no assurance that it would be able to negotiate an agreement to do so. The earliest date upon which LILCO could be considered to have a plan approved by both Nassau County and the Red Cross for use of the Coliseum is October 24, 1984, the date of approval of the agreement between LILCO and the American Red Cross. The Board and parties were informed of this agreement 6 days later, on October 30, 1984.

The County's next line of argument is that the delay between October 24, 1984, when LILCO received assurance of the availability of the Coliseum, and January 11, 1985 when LILCO filed its Motion to Reopen, is of such duration as to render the motion untimely. Had LILCO simply kept the proffered information to itself until the filing of its Motion to Reopen, the Board would be inclined to agree with the County that the motion is untimely. However, LILCO did not do that. Although LILCO's letter of October 30, 1984 did not properly bring the identity of the relocation center before the Board and the parties, the letter does merit consideration in determining whether LILCO's motion has been timely submitted. LILCO claims that it reasonably believed that reopening of the record was not necessary. The Board's August 21, 1984

ruling that there exists a "void in the record" clearly indicated that LILCO had failed to establish the existence of an adequate relocation facility. The Board, however, acknowledges the possibility of ambiguity to the extent that LILCO could have construed this statement to mean the void could be filled simply through informal submission of the name of the relocation center. In addition, the NRC Staff was also of the opinion that the identity of the relocation center could be left to a license condition, compliance with which could be monitored by the NRC Staff and FEMA. When informed of its error, on January 4, 1985, LILCO acted promptly to put the matter properly before the Board, in the form of its January 11, 1985 motion and supporting documents. The Board therefore concludes that LILCO has met the "timeliness" requirement of the three-part test for reopening the record.

B. Significant Safety Issue

The second requirement for reopening the record is that the motion must address a significant safety issue. Diablo Canyon, supra, at 1344. LILCO argues that in light of the Board's ruling on January 4, 1985 that lack of an identified relocation facility constitutes a void in the record, the identification of the Nassau Veterans Memorial Coliseum presents a significant safety issue. The NRC Staff agrees with LILCO. Suffolk County does not directly address this question in its response, however, the County's contentions concerning the relocation issues demonstrate that the County believes the identity of the relocation center is a significant safety issue. In addition, NUREG-0654 requires that an off site emergency plan include

identification of relocation centers (Section II.J.10.a) and agreements governing the availability and use of all relocation facilities relied upon (Sections II.A.3 and II.C.4). The NUREG requirements provide an additional basis upon which the Board concludes that the identity of the relocation center presents a significant safety issue.

C. Possibility of a Different Result

The third requirement for reopening the record is that "a different result might be or might have been reached had the newly proffered material been considered initially." Diablo Canyon, supra, at 1344. Again, LILCO has changed its position in light of the Board's January 4, 1985 ruling, and now argues that failure to consider identity of the central reception center would cause a change in result on this issue. The NRC Staff points out that the designation of the Nassau Veterans Memorial Coliseum fills the void in the record, and leads to the possibility that a different result might be reached. Finally, Intervenor's 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 (November 7, 1984); Tr. 15,739. The Board concludes that the admission of LILCO's proffered evidence might result in a different outcome in this proceeding, and thus LILCO has sustained its burden on all three requirements for reopening the record.

IV. Further Proceedings

The Board agrees to reopen the record for the limited purpose of assessing the adequacy of LILCO's proffered evidence concerning the Nassau Veterans Memorial Coliseum as a relocation center to be used in the event of an emergency at Shoreham. The Board is now in possession of LILCO's proffered affidavit and the 6 documents attached to the January 11, 1985 motion. Before ruling on this evidence the Board invites the parties to state specifically their positions concerning LILCO's evidence, as follows:

- 1) Do the parties question the authenticity of LILCO's documents? If so, set forth with particularity the reasons for such a challenge and the evidence such party intends to offer to challenge the authenticity of the documents.
- 2) If a party asserts a need to cross-examine LILCO's witness on the substance of the designation of the Nassau Veterans Memorial Coliseum as a relocation Center, such party shall state the questions to be asked and the substance of what is expected to be proved by such interrogation.
- 3) If a party asserts a need to submit direct testimony or other evidence on the merits of LILCO's designation of the Coliseum as a relocation center, such party shall submit copies of all such documents and narrative testimony or an affidavit of any witness whose testimony is said to be necessary.

Upon consideration of the written submissions of the parties in accord with the schedule which follows, the Board will review the proffered evidence and material in support of the asserted need for an oral hearing. Thereupon, the Board may elect to admit in the record

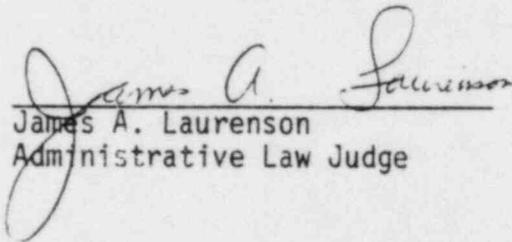
any or all of the evidence proffered or to schedule a further oral hearing.

All parties shall respond to the LILCO motion in the manner set forth above on or before February 18, 1985. LILCO may respond to those submissions on or before February 25, 1985.

WHEREFORE, IT IS ORDERED that LILCO's Motion to Reopen is GRANTED.

IT IS FURTHER ORDERED that all parties shall respond to the reopening of the record in the manner and according to the schedule set forth herein.

ATOMIC SAFETY AND
LICENSING BOARD


James A. Laurenson
Administrative Law Judge

Bethesda, Maryland
January 28, 1985