May 17, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

SUFFOLK COUNTY AND STATE OF NEW YORK MOTION FOR RECONSIDERATION OF MAY 6 ASLB ORDER OR, IN THE ALTERNATIVE, MOTION TO REOPEN THE RECORD ON LILCO'S RELOCATION CENTER SCHEME

I. Introduction

In its May 6 Memorandum and Order (Reopening of the Record) (hereinafter, the "Order"), this Board granted LILCO's motion to reopen the evidentiary record in this proceeding so that LILCO could attempt to fill the "void" in the record concerning admitted relocation center contentions and LILCO's inability to satisfy 10 CFR Part 50 and NUREG 0654 requirements regarding relocation centers for evacuees. That Order,

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however, contains clear legal error: it permits LILCO and the NRC Staff (through its agent, FEMA) to submit evidence on LILCO's latest relocation center scheme, and at the same time it arbitrarily and without rational or legal basis prohibits Suffolk County and the State of New York from presenting factual evidence which demonstrates that

(1) LILCO's recently proffered new evidence, as well as that already in the evidentiary record concerning relocation centers, is false;

(2) LILCO's latest relocation center proposal violates State law and does not comply with NRC and NUREG 0654 requirements concerning relocation capabilities; and

(3) LILCO's relocation center scheme cannot lawfully, or as a practical matter, be implemented.

In so ruling, in disregard of the State and County submissions on this subject and the NRC's own Rules of Practice, this Board violated the State's and County's statutory and constitutionally protected due process right to a fair and impartial hearing.

By this Motion, we ask the Board to reconsider and correct its ruling or, in the alternative, to reopen the record for the purpose of considering the County's and State's evidence that demonstrates the falsity of LILCO's evidence in the record and

LILCO's failure to carry its burden of proof on admitted relocation center contentions. In addition, should the Board refuse to reconsider its Order or refuse to grant the alternative motion to reopen, we request that it certify the matter to the Appeal Board so that prompt correction of the Board's error can be made.

II. Background

An understanding of the events which preceded the filing of LILCO's motion to reopen is essential. It is only with such an understanding that it becomes clear that the County and State have been improperly denied an opportunity to contest LILCO's case on Contentions 24.N, 24.O, 74 and 75. For the Board's convenience, we summarize the significant background and chronology below.

A. Proceedings on Relocation Center Issues Between June 1983 and the Closing of the Record in August 1984

Intervenors' emergency planning contentions, including the four which deal directly with the NUREG 0654 requirements concerning relocation centers (Contentions 24.N, 24.O, 74 and 75), were filed on July 26, 1983.1/ Those contentions were based on

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1/ The first version of these contentions, which was presented in a different organizational format, was filed on June 23, 1983.

the original version of LILCO's Plan, Revision 0, issued in late May 1983, which proposed Suffolk County Community College, BOCES Islip Occupational Center, and the State University of New York at Stony Brook ("SUNY-Stony Brook") as "primary" relocation centers, and the State University of New York at Farmingdale ("SUNY-Farmingdale") and St. Joseph's College as "back-up" relocation centers. These were the only "relocation centers" then proposed by LILCO, and all the services which later were separated into two categories to be performed in separate locations -- i.e., "reception" centers (including monitoring and decontamination), and "congregate care" centers (including food, lodging and relocation assistance) -- were to be performed at each one.

Contentions 24.N, 24.O, 74 and 75, which we do not repeat here since they are set forth in Appendix C to the April 17 Partial Initial Decision, all relate to the requirements of NUREG 0654 that an offsite emergency plan must include:

(1) Identification of relocation centers in "host areas" (Sections II.J.10.a, 10.g and 10.h);

(2) Agreements governing the availability and use of all facilities relied upon (Sections II.A.3 and II.C.4);

(3) Relocation centers at particular locations (Section II.J.10.h); and

(4) Relocation centers in host areas with particular capacities, facilities and equipment, including a capability of monitoring evacuees within a 10-hour period (Sections II.J.10.g and J.12).

The contentions identify particular deficiencies in LILCO's proposed relocation center plans, including its inability to implement its proposals for providing food, lodging, relocation services, medical care, necessary sanitation facilities, registration, radiological monitoring, and decontamination services, and LILCO's failure to comply with each of the NUREG 0654 requirements summarized above.

The subsequent Revisions 1, 2 and 3 of the LILCO Plan, which were issued in August, November, and December 1983, respectively, made no change in the relocation centers originally proposed by LILCO, despite the specific deficiencies, including the lack of agreements with the owners of such centers and the unavailability of Suffolk County Community College for use by LILCO, which were identified in Intervenors' Contentions 24.N, 24.O, 74 and 75 and their respective preambles.

Subsequent to the March 1984 filing of testimony by LILCO and Suffolk County on Contentions 24.N, 24.O, 74 and 75,2/

2/ This testimony addressed LILCO's relocation center proposal contained in Revision 3 of the LILCO Plan.

LILCO indicated that it intended to change the relocation centers relied upon in its Plan because some of those facilities were in fact not available for use by LILCO.3/ The Board then ordered LILCO to file supplemental testimony on the relocation center contentions by June 15, 1984.

LILCO's first round of "supplemental" relocation center testimony discussed a new LILCO proposal to use the BOCES II Center, SUNY-Farmingdale, and St. Joseph's College as "primary" relocation centers, and Dowling College as a "backup" center. Again, these proposed relocation centers were to provide at each facility what later became known as "reception" and "congregate care" services. LILCO's June 15 testimony indicated that this second relocation center scheme would be contained in Revision 4 of the Plan, which had not yet been issued. On June 26, 1984, Suffolk County filed revisions to its previously filed direct testimony on the relocation center issues.

3/ Of course, the unavailability of the Suffolk County Community College was well known to LILCO at least as early as the summer of 1983, when Intervenors' contentions were filed; similarly, LILCO presumably was always aware that neither it nor the Red Cross had any agreements with the owners of the BOCES and SUNY facilities for the use of those buildings by LILCO during a radiological emergency. Nonetheless, it was not until after the parties had filed testimony concerning those facilities, and more than nine months after the contentions had been filed, that LILCO acknowledged its inability to respond to those contentions without changing its relocation center scheme.

After denying a LILCO request for additional time within which to pursue additional discovery on the relocation center issues, the Board ruled that any additional revised or supplemental testimony filed by LILCO on the relocation center issues had to be filed on or before July 31, 1984. Tr. 12,834.

On July 30, 1984, LILCO requested that the Board allow LILCO to withdraw its previously filed testimony on Contentions 24.0, 74 and 75 -- i.e., its second version filed on June 15 -- and requested permission to replace that testimony with revised testimony on the same issues. LILCO's proposed revised testimony dated July 30, 1984 -- its third attempt to address relocation center issues -- failed to identify any relocation centers to which LILCO intended to send evacuees.4/ Instead, the

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4/ The testimony did include a long list of facilities which, according to LILCO, represented buildings available for LILCO's use in housing evacuees during an emergency. The list included buildings such as fire truck garages and churches, and entire public school districts. None of the facilities was designated as a relocation center, however, and no agreements for their use by LILCO were submitted. Furthermore, during litigation of the relocation center issues in August, 1984, LILCO testified on cross examination that the particular facilities to be used to house evacuees during an emergency would not in fact even be determined until an actual emergency at Shoreham had been declared and evacuees had left the EPZ and appeared at whatever location LILCO hoped in the future to identify as the facility where monitoring and decontamination would be performed. See Tr. 14,801-02 (Rasbury).

testimony merely asserted that LILCO intended, at some unidentified time in the future, to identify relocation centers; in addition, it acknowledged that LILCO had no agreements to use Suffolk County Community College or SUNY-Stony Brook as relocation centers, and stated that they were not relied upon in Revision 4 of the LILCO Plan.

On August 13, 1984, the County and the State filed a Joint Motion for Summary Disposition of Emergency Planning Contentions 24.0, 74 and 75 (Relocation Centers) and Opposition to LILCO's Motion to Admit Revised Testimony on Contentions 24.0, 74 and 75. The summary disposition motion, which was accompanied by a "Statement of Material Facts Not in Dispute," was based upon the fact that neither the LILCO Plan nor LILCO's July 30 third round of testimony designated specific relocation centers upon which LILCO intended to rely in the event of an emergency, and that LILCO had failed to controvert or even address the issues raised in Contentions 24.0, 74 and 75, since it had not identified the facilities it intended to use. The County's and State's summary disposition motion was denied by the Board (Tr. 14,648); LILCO's motion for admission of its July 30 testimony was granted. Tr. 14,663.

During cross-examination of LILCO's witnesses in August, 1984, concerning the July 30 version of LILCO's testimony and its third relocation scheme, it became clear for the first time that, contrary to all LILCO's prior relocation center proposals, and contrary to the statements in the new Revision 4 of the LILCO Plan, LILCO was then proposing to rely on two different types of relocation facilities -- one or more very large facilities called "reception centers," and approximately 50 smaller facilities called "congregate care centers." Tr. 14,779 (Rasbury). According to LILCO's oral testimony (Tr. 14,807-08 (Weismantle)), all radiation monitoring and decontamination activities were to take place at the new so-called "reception centers." However, no proposed, much less actual, reception centers were designated or identified by LILCO.5/ In addition, it was revealed that the identities and locations of the so-called "congregate care centers," which were part of the new relocation center proposal disclosed during the cross-examination of LILCO's witnesses, were not even to be determined until after evacuees appeared at the unidentified "reception centers" during an actual emergency.

5/ Furthermore, LILCO's witnesses refused even to identify the candidate facilities then under consideration and with which negotiations were underway. Tr. 14,793-94 (Rasbury).

Tr. 14,801-02 (Rasbury). LILCO's witness, Mr. Rasbury, did testify, however, that the Nassau County Red Cross had agreements permitting the use of particular school buildings as so-called "congregate care" relocation centers following a Shoreham emergency. These school buildings were listed in an attachment to a purported "letter of agreement" between the Nassau County Red Cross and LILCO dated July 25, 1984.6/

During the August 1984 relocation center hearing, the Board made clear that LILCO had failed in its most recent (i.e., third) attempt to persuade the Board that it had made adequate arrangements for evacuees. Rather, the Board noted pointedly that there was a "void" in the record (see Tr. 14,806-07) -- a void which was not addressed by LILCO until January 1985.

6/ This "letter of agreement" was Attachment 1 to LILCO's July 30 testimony.

B. Proceedings on LILCO's 1985 Relocation Center Proposal

On January 28, 1985, this Board, over the County's and State's objection,7/ granted LILCO's January 11 motion to reopen the evidentiary record.8/ LILCO's motion was necessitated by LILCO's failure, despite three prior attempts, to meet its burden of proof on the admitted contentions concerning relocation centers. Having failed to prevail on those contentions with any of its three earlier relocation center schemes (as acknowledged by the Board in its "void in the record" comment (Tr. 14,806-07)), LILCO, in October 1984, came up with a new scheme which it sought to have litigated by its motion to reopen. According to the evidence proffered by LILCO with its motion to reopen, the new relocation center proposal would involve the use of the Nassau Coliseum as a "reception" relocation center, and "congregate care centers operated by the Red Cross, chosen from among those on the list provided with the Letter of Agreement between Long Island Lighting Company and

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7/ See Suffolk County and State of New York Opposition to LILCO's Motion to Reopen the Record, dated January 18, 1985 (hereinafter, "County/State Opposition").

8/ Memorandum and Order Granting LILCO's Motion to Reopen Record, dated January 28, 1985 (hereinafter, "January 28 Order").

the American Red Cross dated July 25, 1984." See Attachment 3 to LILCO's Motion to Reopen Record (letter dated October 23, 1984 from Matthew C. Cordaro to Frank M. Rasbury).

Pursuant to the Board's January 28 Order, Suffolk County and New York State, on February 19, 1985, submitted testimony concerning the merits of LILCO's new relocation center scheme. The County's testimony demonstrated that:

(1) LILCO's assertion in its evidence proffered with the motion to reopen and in testimony already in the evidentiary record is false. In fact, contrary to LILCO's assertion, there are no agreements between the Nassau County Red Cross and many if not all of the facilities to which evacuees will be sent for "congregate care" relocation purposes after they have reported to the Nassau Coliseum. (See Direct Testimony of Leon Campo on Behalf of Suffolk County Regarding LILCO's Proffered Evidence of January 11).

(2) LILCO's proposal to use the Nassau Coliseum as a reception relocation center would increase the evacuation shadow phenomenon resulting from a Shoreham accident from that discussed during the prior litigation, when relocation centers located much nearer the edge of the EPZ were being proposed by LILCO. (See Direct Testimony of James H. Johnson, Jr. on Behalf of Suffolk County Regarding LILCO's Proffered Evidence of January 11).

(3) LILCO's use of the Nassau Coliseum as a reception relocation center would

likely result in an incremental increase in adverse health effects following a Shoreham accident. (See Direct Testimony of Edward P. Radford on Behalf of Suffolk County Regarding LILCO's Proffered Evidence of January 11).

(4) LILCO's use of the Nassau Coliseum as a relocation reception center would result in serious and substantial traffic congestion that would cause delays in evacuees reaching the center where they are to be monitored and decontaminated, and could result in evacuation times substantially higher than those discussed during the prior litigation, since that litigation was premised upon use of three separate relocation facilities all much closer to the EPZ than the Nassau Coliseum. (See Direct Testimony of Deputy Chief Inspector Richard C. Roberts on Behalf of Suffolk County Regarding LILCO's Proffered Evidence of January 11).

In addition, New York State's testimony demonstrated that:

(1) LILCO's use of the Nassau Coliseum as a reception relocation center would result in serious traffic congestion that would cause significant delays to evacuees attempting to reach the Coliseum. (See Direct Testimony of Charles E. Kilduff on Behalf of New York State Regarding LILCO's Proffered Evidence of January 11).

(2) The use of the Nassau Coliseum as a reception relocation center violates New York State law and is impermissible because Nassau County has not prepared an environmental assessment pursuant to the New York State Environmental Quality Review Act; this

fact renders Nassau County's purported "agreement" to permit LILCO to use the Coliseum without effect. (See Direct Testimony of Langdon Marsh on Behalf of the State of New York Regarding LILCO's Proffered Evidence of January 11).

(3) LILCO's use of the Nassau Coliseum as a reception relocation center, where decontamination of individuals and automobiles would take place, poses a serious health threat to the public and threatens the water supply relied upon by residents of Brooklyn, Queens, Nassau and Suffolk Counties. (See Direct Testimony of Sarah J. Meyland on Behalf of the State of New York Regarding LILCO's Proffered Evidence of January 11).

The County's and State's testimony was challenged by LILCO in a February 26, 1985 response, which asserted that the testimony should not be admitted into the record and did not establish the need for evidentiary hearings on the reopened relocation center issues.9/ Because LILCO's February 26 Response contained factual and legal misstatements and arguments which required correction and a response, Suffolk County and New York State, on March 1, 1985, moved for leave to reply to LILCO's Response.10/ Although a substantive reply was not attached to

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9/ LILCO's Response to Intervenors' Proffered Testimony on the Designation of Nassau Coliseum as a Reception Center, dated February 26, 1985 (hereinafter, "LILCO Response").

10/ Suffolk County and State of New York Motion for Leave to File Reply to LILCO's Response to February 19 Proffered

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the March 1 Motion, there were attached three letters, from officials responsible for purported congregate care facilities with which LILCO had asserted it had agreements, stating that no such agreements for the use of their facilities as relocation centers of any kind in fact exist. Subsequently, after learning of the Appeal Board's February 13, 1985 Waterford ruling,11/ the County and State stated their intent to submit the substantive reply referenced in the March 1 Motion, unless otherwise directed by the Board.12/ Receiving no response from the Board, the County and State on March 20, 1985, filed a reply to LILCO's February 26 Response.13/ Thereafter, on April 12, 1985, the County filed a Supplement to the Direct Testimony of Leon Campo Regarding LILCO's Proffered Evidence of January

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Testimony on the Designation of Nassau Coliseum as a Monitoring and Decontamination Center, dated March 1, 1985 (hereinafter, "March 1 Motion").

11/ Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3) (Feb. 13, 1985).

12/ See Suffolk County and State of New York Notice of Intention to File Reply Memorandum, dated March 13, 1985.

13/ See Suffolk County and State of New York Reply to LILCO's Response to February 19 Proffered Testimony on the Designation of Nassau Coliseum as a Monitoring and Decontamination Center, dated March 20, 1985 (hereinafter, "County/State Reply"). In its May 6 Order, the Board refused to consider the County/State Reply. Order, at 4.

11. This Supplement included nine statements from school districts, including the three identified in the March 1 Motion, all to the effect that Mr. Rasbury's and LILCO's representations about the alleged availability of their facilities and agreements with the Red Cross were false.

Notwithstanding the evidence presented by the County and State in opposing the LILCO motion to reopen, including the letters attached to the March 1 Motion and the County's April 12 Supplement, which conclusively demonstrated the falsity of LILCO's proffered evidence, the Board in its May 6 Order accepted the evidence proffered by LILCO on January 11, i.e., the Robinson affidavit and the six attachments to that affidavit, as LILCO's prefiled testimony for the oral hearing ordered by the Board. Order, at 4. Not only did the Board commit error in accepting LILCO's proffered testimony while apparently ignoring the evidence attached to the March 1 Motion and the County's Supplement, it also erred in precluding essentially all the County and State testimony filed in response to LILCO's proffered evidence -- all of which addressed admitted contentions and issues directly raised by LILCO's proffered evidence. In fact, the Board denied entirely the testimony of County witnesses Leon Campo and James H. Johnson, Jr., and the testimony of all three State witnesses (Charles E. Kilduff, Langdon Marsh, and Sarah J. Meyland).

Furthermore, even the limited portions of the testimony of County witnesses Radford and Roberts admitted by the Board was so emasculated as to be rendered essentially meaningless. For example, the Board "limited the scope" of Dr. Radford's testimony to whether the Nassau Coliseum can accommodate the number of persons anticipated during a Shoreham emergency. Facts concerning the adverse health effects from having to travel the long distances between the EPZ and the Coliseum before monitoring and decontamination procedures are implemented were inexplicably denied admission by the Board. Similarly, Chief Roberts' testimony was accepted only to the extent that it addresses parking capacity and traffic congestion in parking lots at the Coliseum. The other more substantial factual matters discussed in the testimony, including the effects on evacuation of anticipated traffic congestion enroute to the Coliseum, were denied admission.

III. Argument

A. The Board Should Reconsider Its Order and Accept the Proffered Testimony of Suffolk County and New York State

The Board's refusal to accept the evidence submitted by Suffolk County and New York State has no rational basis and violates fundamental principles of due process. The Board's ruling not only ignores facts which demonstrate that evidence accepted by the Board is false and that LILCO's witnesses lack veracity and credibility, but also defies logic and reason. There is absolutely no basis articulated anywhere in the Board's Order, nor could there be, for a limitation of the reopened issues only to one relocation center contention -- Contention 24.O -- or to the Board-derived "issue" of whether only one-half of LILCO's relocation scheme -- the Nassau Coliseum -- is "functionally adequate to serve as a relocation center." See Order, at 3, 4. Nevertheless, the Board purports to base its May 6 exclusion of the County's and State's evidence on these arbitrary limitations.

Contention 24.O was only one of several relocation center-related contentions submitted by Intervenors at the time LILCO's original relocation center scheme was the basis for litigation. Of course, there are no admitted contentions using

the words "congregate care centers," or even "reception centers," since those terms had not been coined by LILCO or injected into the LILCO Plan until the hearing in August 1984 on LILCO's third round of relocation center testimony. There are, however, other contentions which directly address the services which LILCO now proposes to provide at "congregate care centers," rather than the previous all-purpose "relocation centers" -- they are Contentions 24.N, 74 and 75. This Board cannot close its eyes to the fact that LILCO's entire relocation center scheme is required to be litigated in this case. The proffered testimony of Suffolk County and the State of New York directly addresses aspects of that scheme, as described in the evidence proffered with LILCO's motion to reopen.

Furthermore, LILCO's proffered evidence, which forms the basis for this reopened proceeding, clearly has implications beyond the artificially narrow "issue" (i.e., whether the Nassau Coliseum is "functionally adequate" to serve as a relocation center) used by the Board to reject the State and County testimony. For example, there can be no denying the fact that the location of a reception center will impact evacuation times, that the length of time between exposure to radiation and decontamination can have adverse health consequences, and that the release of contaminated water into the ground poses a

serious health threat. Similarly, it would be baseless to suggest that the actual unavailability of LILCO's proposed facilities -- regardless of their theoretical so-called "functional adequacy" or capacity -- is a fact that a licensing board charged with ruling on the implementability of a plan can ignore.

Indeed, the testimony stricken by the Board directly challenges LILCO's ability -- in fact and actuality -- to implement its latest relocation center scheme. Mr. Campo's testimony, for example, establishes that Nassau County school districts relied upon for use by LILCO and the Red Cross as congregate care relocation centers during a Shoreham emergency are, in fact, not available for such purpose. In effect, for LILCO's purpose these facilities do not exist. The facts in Mr. Campo's testimony also make clear that the representations made by LILCO's witnesses, Mr. Rasbury and Ms. Robinson, concerning the alleged "availability" of school facilities and the alleged "agreements" with school districts consenting to the use of their facilities to implement the LILCO Plan are false. In fact, no such agreements exist and, contrary to the testimony now in the record, the facilities will not be made available for LILCO's use. This Board cannot ignore these critical facts and deficiencies in LILCO's relocation center proposal, as

described in the evidence the Board has accepted in this reopened proceeding.

The County and State respectfully remind the Board that in admitting LILCO's evidence, the Board admitted LILCO's assertion that persons would be cared for at "congregate care centers operated by the Red Cross, chosen from among those on the list provided with the Letter of Agreement between Long Island Lighting Company and the American Red Cross dated July 25, 1984." See Attachment 3 to LILCO's Motion to Reopen Record. Having admitted the evidence of LILCO with the foregoing assertion, there can be no basis at all for denying the evidence of Mr. Campo, which specifically contests that assertion. This constitutes a clear deprivation of due process. See, e.g., The Chicago Junction Case, 264 U.S. 258, 265 (1924).

Moreover, the testimony rejected by the Board does not just challenge the veracity and credibility of LILCO's witnesses. In addition, it clearly reveals that LILCO's latest relocation center proposal, like its previous proposals, cannot in fact be implemented. This is so not just because sufficient congregate care centers to shelter evacuees will not be available, or because LILCO's proposal is illegal under State law. See, e.g., the Testimony of Langdon Marsh and Sarah J. Meyland. In addition, LILCO's proposal is unworkable because:

(1) The Coliseum's location and distance from the EPZ would increase the magnitude and geographic extent of the evacuation shadow phenomenon, leading to increased traffic congestion and resulting in greater evacuation times and long delays in reaching the Coliseum, where evacuees must report to be monitored and decontaminated. (See Testimony of James H. Johnson, Jr.).

(2) Even without this increased shadow phenomenon, evacuees would nevertheless experience substantial delays in attempting to reach the Coliseum because of the heavy traffic congestion which must be expected during a Shoreham emergency, the distance of the Coliseum from the EPZ, and the heavily-congested local roadways in the Nassau Coliseum area due to signalized intersections, heavy side friction and roadway construction projects. (See Testimony of Deputy Chief Inspector Richard C. Roberts and Charles E. Kilduff).

(3) Thus, as a result, adverse health effects to evacuees would be more severe than if closer, more easily accessible center(s) were utilized. (See Testimony of Edward P. Radford).

To deny the County and State an opportunity to put forth their case through the submission of the above-discussed testimony, as the Board has done, denies the County and State the opportunity to present on the record all the relevant facts pertaining to LILCO's latest proposed relocation scheme, or to challenge the evidence presented by LILCO on admitted contentions in this proceeding. The Board's ruling clearly violates the County's and State's rights under NRC regulations. See,

e.g., 10 CFR § 2.743(a) ("Every party to a proceeding shall have the right to present such . . . evidence . . . as may be required for full and true disclosure of the facts.") (emphasis added). It also violates Section 189a of the Atomic Energy Act (42 USC § 239(a)) (see Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1444 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 815 (1985)) and the fundamental due process right to a fair hearing. See, e.g., The Chicago Junction Case, 264 U.S. at 265; Bowden v. McKenna, 600 F.2d 282, 284-85 (1st Cir. 1979) (once plaintiff was allowed to testify on a relevant matter, "defendants were plainly entitled to rebut"), cert. denied, 444 U.S. 899 (1979); Miller v. Poretsky, 595 F.2d 780, 785 (D.C. Cir. 1978) ("admission of appellees' witnesses testifying to their freedom from discrimination and the exclusion of appellant's witness testifying to the contrary was . . . an abuse of discretion"); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 620 (2d Cir. 1965) ("The Commission has an affirmative duty to inquire into and consider all relevant facts"), cert. denied, 384 U.S. 941 (1966). See also ICC v. Louisville & N. Ry. Co., 227 U.S. 88, 93 (1913) ("[M]anifestly there is no hearing when [a] party . . . is not given an opportunity to test, explain or refute").

Thus, the Board's decision to strike the proffered County/State testimony and arbitrarily to limit the reopened hearing to the narrow confines of Contention 24.0 violates constitutional rights of due process and also is contrary to the public interest. Moreover, it raises significant legal and policy questions which should be promptly resolved for the protection of the public interest, and to avoid undue delay and serious prejudice to the County's and State's interests. The Board's ruling makes clear that the County and State are only permitted to challenge the single issue of whether the Nassau Coliseum itself is "functionally adequate to serve as a relocation center . . ." Order, at 4. By artificially limiting the Nassau Coliseum issues to the question of the Coliseum's "functional adequacy," the Board is, in effect, precluding any inquiry into the bases for LILCO's proposal to use the Coliseum as a monitoring and decontamination facility. Indeed, taken to its logical conclusion, the Board's ruling implies that if the Coliseum can "accommodate" the anticipated number of evacuees (e.g., if there are sufficient shower and toilet facilities and adequate parking capacity), the Board will find in LILCO's favor, irrespective of the Coliseum's location and distance from the EPZ, whether there is adequate access to and from the Coliseum or sufficient facilities to which evacuees can be sent for

shelter after being monitored and decontaminated, and whether State law prohibits the use of the Coliseum proposed by LILCO. Such a ruling defies both logic and law.

The Board's Order also affects the basic structure of this proceeding in a pervasive and unusual manner. By granting LILCO's motion to reopen and accepting its evidence into the record, yet barring the County's and State's evidence, the Board has effectively prohibited the County and State from presenting facts relevant to LILCO's proposed use of the Coliseum -- facts which demonstrate the inadequacy of LILCO's proposal. Accordingly, any decision rendered by the Board will be based upon an incomplete and one-sided factual record in LILCO's favor. The NRC's rules -- and court decisions founded on constitutional principles -- bar any NRC ruling based on such a one-sided record.

The Board should therefore reconsider its May 6 Order and prevent the immediate and serious irreparable harm to the County and State which has resulted from the decision to preclude their proffered testimony and to limit the reopened hearing to Contention 24.O and the issue of whether the Coliseum is "functionally adequate" to serve as a relocation center. In circumstances such as are present here, where the testimony can be

admitted without affecting the Board's proposed schedule for litigation, there is no sound reason to await an initial decision to remedy this harm. Moreover, in the view of the County and State, there is a substantial likelihood that the Board's decision would ultimately be determined on appeal to be incorrect, and substantial delay and expense would have been unnecessarily incurred. Therefore, the Board should reconsider and reverse its May 6 Order.

B. In the Alternative, the Board Should Reopen the Record on Contentions 24.N, 74 and 75 to Consider the Impact of LILCO's Latest Relocation Scheme on Previously Litigated Issues

Should the Board refuse to reconsider and reverse its May 6 Order, the County and State hereby move to reopen the evidentiary record in this proceeding for the purpose of admitting the testimony rejected by the Board. The County and State submit that the Commission's traditional criteria for reopening are met in this case, and thus, should the Board not reverse its May 6 Order, the stricken testimony should nevertheless be accepted by the Board. The criteria for reopening, as noted by the Board's January 28 Order granting LILCO's motion to reopen, are as follows:

(1) The motion must be timely;

(2) It must address a significant safety or environmental issue; and,

(3) It must be shown that a different result might be or might have been reached had the newly proffered material been considered initially.

January 28 Order, at 5.

LILCO may argue that because it moved to reopen the record on January 11, some four months ago, this Motion is untimely. This is not the case. The County and State believed that when the Board granted LILCO's motion to reopen, the relocation center issues were to be the subject of further evidentiary hearings conducted in a fair manner and permitting the parties a meaningful opportunity to challenge the adequacy of LILCO's proposed use of the Nassau Coliseum. This was a reasonable assumption, given the Board's request that the parties, other than LILCO, submit the direct testimony of any witness whose testimony on the merits of LILCO's designation of the Coliseum was felt to be necessary. See January 28 Order, at 9. Nevertheless, the County's and State's opinion on this matter was ruled wrong by the Board on May 6, when it rejected the County/State testimony directly pertinent to LILCO's proposal. This motion to reopen comes only one week later. It is timely.14/

14/ LILCO's January 1985 motion to reopen was deemed timely by this Board. That motion was filed many months after LILCO learned of new facts that it wanted the Board to rely upon. LILCO was excused for the delay based on its mistaken assumption that its new evidence could be considered

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Further, there is no danger here that any party has been surprised or otherwise prejudiced by this Motion. The testimony requested by the Board was timely filed on February 19 and once it was rejected by the Board, the County and State promptly moved for reopening. Accordingly, there has been no dilatoriness on the part of the County and State. And, with respect to the remaining two criteria required for reopening (significant safety issue and that a different result might be reached), there can be no question that the relocation center issues raised in the proffered testimony adequately meet these criteria.15/ Indeed, LILCO's January 11 motion to reopen admitted as much.

(Footnote cont'd from previous page)

without a motion to reopen. If the Board decides that a motion to reopen is required by the State and County, the same timeliness rationale applies: these parties were reasonable (if mistaken) in assuming that no motion to reopen was necessary. When the Board issued its ruling that a reopening motion was required (i.e., in barring the State and County testimony), the State and County acted promptly to file this Motion.

15/ For example, a "different result" would of course be required if Mr. Campo's testimony is accepted to demonstrate that LILCO has no congregate care centers. LILCO then clearly would not comply with 10 CFR § 50.47(b)(8) or NUREG 0654, Section II.J. And, clearly, the lack of such centers constitutes a significant safety issue -- if LILCO cannot care for evacuees, the safety of the public is certainly imperiled.

Should the Board neither reconsider and reverse its May 6 Order nor grant the County/State request to reopen, it is requested that the Board certify the issues raised in this Motion to the Appeal Board. In requesting such certification, the County and State realize that the Commission's Rules of Practice contain a general prohibition against interlocutory appeals. 10 CFR § 2.730(f); see, e.g., Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258 (1973). Nevertheless, there are exceptions to this prohibition. See, e.g., 10 CFR §2.718(i).16/ For example, discretionary interlocutory review is permitted when failure to resolve an issue promptly would cause "detriment to the public interest or unusual delay or expense." See 10 CFR § 2.730(f); see also Public Service Co. of Indiana (Marble Hill), ALAB-405, 5 NRC 1190, 1192 (1977), and cases cited therein. In addition, interlocutory appeals are appropriate when "a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission or the Appeal Board and

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16/ The Commission's Rules of Practice appear to contemplate "certification" under 10 CFR § 2.718(i) where a licensing board does not first decide the disputed question, and "referral" under 10 CFR § 2.730(f) when the board first rules and then requests interlocutory review. The distinction, however, appears to be unimportant. See Southern California Edison Company (San Onofre), LBP-81-36, 14 NRC 691, 699, n.7 (1981).

when the prompt and final decision of the question is important for the protection of the public interest or to avoid undue delay or serious prejudice to the interests of a party." 10 CFR Part 2, App. A, § V(f)(4). They are also appropriate when the ruling in question affects "the basic structure of the proceeding in a pervasive and unusual manner," Houston Lighting and Power Co. (Allens Creek Station), ALAB-635, 13 NRC 309, 310 (1981), or "threatens the party adversely affected by it with immediate and serious irreparable impact" which, as a practical matter, cannot be alleviated by a later appeal. Houston Lighting and Power Co. (South Texas Project), ALAB-608, 12 NRC 168, 170 (1980).

The issues involved here meet all of the above standards, any one of which is sufficient to justify appellate review of interlocutory rulings. For example, as demonstrated above, the public interest would clearly be served by prompt resolution of the issues now before the Board. And clearly, under the circumstances at issue here, the need to compile a full and complete evidentiary record concerning LILCO's proposed use of the Nassau Coliseum is compelling -- and substantially in the public's interest. Thus, certification in this case is entirely appropriate.

Respectfully submitted,

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May 17, 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)	

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY AND STATE OF NEW YORK MOTION FOR RECONSIDERATION OF MAY 6 ASLB ORDER OR, IN THE ALTERNATIVE, MOTION TO REOPEN THE RECORD ON LILCO'S RELOCATION CENTER SCHEME, have been served on the following this 17th day of May, 1985, by U.S. mail, first class, except as otherwise noted.

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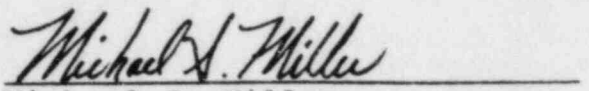

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* By Hand
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