

ORIGINAL

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station
Unit 1.)

Docket No. 50-322 OL

ORAL ARGUMENT

Location: Bethesda, Maryland

Date: Thursday, September 26, 1985

Pages: 1 - 67

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6 LONG ISLAND LIGHTING COMPANY : Docket No. 50-322 OL
7 (Shoreham Nuclear Power Station :
8 Unit 1.) :
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11 ORAL ARGUMENT
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13 Fifth Floor Hearing Room
14 4350 East West Highway
15 Bethesda, Maryland
16 Thursday, September 26, 1985

17 Oral argument was heard in the above entitled
18 matter, commencing at 2:30 p.m., before the Atomic Safety &
19 Licensing Board Appeal Board Panel, Judge Alan S. Rosenthal,
20 Presiding.
21

22 PRESENT:

23 ALAN S. ROSENTHAL, Chairman

24 GARY J. EDLES, Member

25 HOWARD A. WILBER, Member.

1 APPEARANCES:

2

3 On behalf of the Applicant, LILCO:

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10 On behalf of the State of New York:

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16 On behalf of Suffolk County:

17 EUGENE R. KELLEY, Esq.
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1 APPEARANCES: (Continued)

2

3 On behalf of the Nuclear Regulatory Commission Staff:

4 EDWIN REIS, Esq.

5 RICHARD J. GODDARD, Esq.

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7 Office of Executive Legal Director

8 Nuclear Regulatory Commission

9 Washington, D. C.

10

11 Also present:

12 RALPH CARUSO, Shoreham Project Manager.

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P R O C E E D I N G S

JUDGE ROSENTHAL: Good afternoon, ladies and gentlemen.

I apologize for our late start, but I understand our reporter got caught in one of the truck accidents on our Beltway which are becoming virtually daily occurrences.

We are hearing oral arguments today on the appeal of Intervenors, Suffolk County and the State of New York, on the Licensing Board's June 14, 1985 partial initial decision in this operating licensing proceeding concerned with the Shoreham nuclear power facility.

That decision dealt with the issues in controversy pertaining to the diesel generators that the Applicant proposes to use for the first fuel cycle to supply emergency electrical power to the facility as required by General Design Criterion 17. The Licensing Board concluded that those diesel generators were acceptable for that purpose.

The oral argument is governed by the terms of our August 27, 1985 Order. As provided therein, each side will have 45 minutes for presentation of argument, and the Appellants may, if they so desire, reserve a portion of their time for rebuttal.

As also indicated in the August 27 Order, this Board is generally familiar with the relevant portions of the record, including the June 14 partial initial decision and the

1 appellate positions of the respective parties. For this
2 reason, it will not be necessary for any counsel to embark
3 upon a recitation of the background or the controversy;
4 rather, each counsel should proceed immediately to address the
5 issue raised by the appeal of the County and State.

6 At this juncture I will call upon counsel for the
7 respective parties to identify themselves formally for the
8 record, and I will start with Mr. Kelley.

9 MR. KELLEY: Thank you.

10 For the County of Suffolk, Martin Bradley Ashare,
11 County Attorney, by Eugene R. Kelley, Chief Deputy County
12 Attorney, and Lee Pilzer, Assistant County Attorney.

13 JUDGE ROSENTHAL: Thank you, Mr. Kelley.

14 Mr. Palomino.

15 MR. PALOMINO: Fabian Palomino for the State of New
16 York.

17 JUDGE ROSENTHAL: Thank you, Mr. Palomino.

18 Let me ask you this, Mr. Palomino. Have you and
19 Mr. Kelley agreed upon division of time and also order of
20 presentation?

21 MR. PALOMINO: Yes, we have, Judge. At the request
22 and with the approval of the County, I will be arguing the
23 entire matter for the State and County, and I expect to use
24 about 30 to 35 minutes on direct argument, and reserve the
25 remainder --

1 JUDGE ROSENTHAL: I take it you are not
2 participating, Mr. Kelley, in the argument itself?

3 MR. KELLEY: That is correct, Mr. Chairman.

4 JUDGE ROSENTHAL: Very good, Mr. Palomino.

5 All right, Mr. Ellis.

6 MR. ELLIS: Yes, sir. I am Tim Ellis from the firm
7 of Hunton and Williams, representing the Long Island Lighting
8 Company, the Applicant in this matter.

9 I have discussed the matter with Mr. Goddard, who is
10 counsel for the Staff. We agreed to divide our time, I
11 believe, in terms of 30 and 15 minutes. I will be taking 30
12 minutes. If the Board pleases, I can take roughly 20 minutes
13 at the outset, and perhaps if the Board wishes, I can reserve
14 10 minutes following Mr. Goddard if the Board has any further
15 questions.

16 JUDGE ROSENTHAL: I don't think so. You are the
17 Appellee and we normally provide rebuttal time only to the
18 Appellants. I think you should take your full time at the
19 outset.

20 MR. ELLIS: Yes, sir.

21 JUDGE ROSENTHAL: If we do have any residual
22 questions, of course, we have the flexibility to bring you up
23 again, but I think we should count on utilizing your time in
24 one piece.

25 MR. ELLIS: I will do that.

1 JUDGE ROSENTHAL: Mr. Goddard.

2 MR. GODDARD: Richard J. Goddard of the Office of
3 the Executive Legal Director, representing the NRC Staff.

4 JUDGE ROSENTHAL: Thank you, Mr. Goddard.

5 Mr. Palomino, we will hear from you.

6 ORAL ARGUMENT OF FABIAN PALOMINO

7 ON BEHALF OF THE STATE OF NEW YORK

8 MR. PALOMINO: It is the contention of the State and
9 County that in denying the introduction of this evidence and
10 also cross examination on the grounds of irrelevance in that
11 it was a matter collateral to the issue, the Board not only
12 erred but also denied us a right to a hearing on this issue,
13 which we are entitled to under the rules of the NRC.

14 JUDGE ROSENTHAL: What do you think that evidence
15 established, specifically? We are talking about a table, are
16 we not, in essence?

17 MR. PALOMINO: Yes.

18 JUDGE ROSENTHAL: What --

19 MR. PALOMINO: In essence it is not a table; it is
20 testimony and a table.

21 JUDGE ROSENTHAL: Let's take the table, to begin
22 with. What does the table establish?

23 MR. PALOMINO: What we sought to establish by the
24 table was that as a result of the application of the standard
25 that had been uniformly applied by the NRC in all other

1 licensing proceedings, that it would result in -- if they
2 followed this practice of adding the single load that an
3 operator could put on to the MESL.

4 JUDGE WILBER: Does the table demonstrate that, that
5 they are allowing for this added load?

6 MR. PALOMINO: The table would be the result. If
7 they follow this practice, the result would be that there
8 would be a substantial higher margin than the MESL, which
9 would be a margin of safety that would merely be a result of
10 the standard practice they followed.

11 JUDGE ROSENTHAL: Where do you get the standard
12 practice? Where in that table is there anything to support
13 the inference that the NRC as a regulatory body required this
14 additional margin? Is there anything in the table at all that
15 shows that?

16 MR. PALOMINO: Not in the table; in the testimony.

17 JUDGE ROSENTHAL: In the testimony? These were the
18 testimony of the Staff witnesses, the effectiveness of the
19 practice of the Agency?

20 MR. PALOMINO: Yes, sir.

21 JUDGE ROSENTHAL: Who were these witnesses --

22 MR. PALOMINO: Dr. Carl A. Sperling said that "many
23 plants" refers to just about every plant that I am familiar
24 with, and that is either in operation or under construction in
25 the United States. I don't know of any exceptions to that.

1 JUDGE ROSENTHAL: Does the Staff require it? We are
2 dealing here, are we not, Mr. Palomino, with a question as to
3 whether the excluded evidence establishes that the Staff had a
4 uniform interpretation of GDC-17 that requires this additional
5 margin. Isn't that the question?

6 MR. PALOMINO: We don't only prove the evidence from
7 this. There is testimony in the record that it was a standard
8 practice. If you look at page 7 of our brief, Knox, that it
9 was a standard practice of the Staff. It's not only Staff.
10 These plants were licensed by the Commission, and that was a
11 construction that applied --

12 JUDGE EDLES: Are there any exceptions that you are
13 aware of, Mr. Palomino?

14 MR. PALOMINO: I think that would be for the
15 hearing. That's just the point. That's just the point. We
16 are contending, and the --

17 JUDGE EDLES: Let's assume that's true. Are there
18 any exceptions that you are aware of?

19 MR. PALOMINO: Not that I'm aware of. I just
20 prepared for the argument. I'm not familiar with all other
21 plants. That would have been established by cross examining
22 on NEC the Staff people. They have that information. That is
23 what we sought to do, and we were denied that right. That is
24 all we are saying. We were denied a right to a fair hearing.

25 JUDGE EDLES: You were denied the right to cross

1 examine the Staff itself on this issue?

2 MR. PALOMINO: Yes. Up to a point, and then he
3 stopped. So that it goes to the heart of it. We wanted to
4 establish that this was the practice.

5 You know, the GDC-17 came in, what was it, 1971 --
6 February of 1971. So that all the plants before that would
7 not be relevant to the construction of GDC-17, and we sought
8 to establish it.

9 JUDGE EDLES: But you don't include all the plants,
10 post-1971 plants on your chart, though.

11 MR. PALOMINO: I don't know whether we do or not.
12 That was what the purpose of the hearing was. If they wanted
13 to be --

14 JUDGE WILBER: There are no PWRs on it, so we know
15 for sure you haven't included the pressurized water.

16 MR. PALOMINO: I know, but the testimony is
17 sufficient to have let us go forward on that and let them
18 rebut it if that was the case.

19 JUDGE ROSENTHAL: I thought the issue on this appeal
20 was whether or not the evidence that the State and County
21 proffered that was excluded should have been admitted. Is
22 that the issue? I didn't think we were dealing with cross
23 examination here. Is that raised by your appeal, the question
24 as to whether --

25 MR. PALOMINO: It is in the brief that we mention

1 it, yes.

2 JUDGE EDLES: At the end of your brief in says, "In
3 summary, the Licensing Board's erroneous exclusion of the
4 evidence precluded the County and the State from introducing
5 vital evidence on how the requirements --

6 MR. PALOMINO: Yes, it was vital evidence. It would
7 tend to show -- he permitted a contention which allowed this
8 evidence. It was broad enough to allow this evidence. What
9 we intended to show was if this uniform practice existed and
10 the uniform practice would result in these higher margins of
11 safety, and the chart was in support of that.

12 If they wanted to rebut it, they would have the
13 opportunity at the hearing to rebut it.

14 JUDGE WILBER: I thought that part of the contention
15 that dealt with practices at other power plants was not
16 admitted. Wasn't that part of that contention excluded?

17 MR. PALOMINO: Part of that contention was excluded.

18 JUDGE WILBER: It was the part that dealt with --

19 MR. PALOMINO: Yes.

20 JUDGE WILBER: -- margins at other power plants;
21 isn't that correct?

22 MR. PALOMINO: Yes.

23 JUDGE WILBER: So why isn't this a logical follow-on
24 on that?

25 MR. PALOMINO: Because this was representative of

1 the safety factor and the need for the safety factor.

2 JUDGE ROSENTHAL: Mr. Palomino --

3 MR. PALOMINO: Which they have been applying.

4 JUDGE ROSENTHAL: I am reading the introduction to
5 the brief that was filed on behalf of the County and the
6 State, and the introduction says the decision should be
7 reversed because the Licensing erroneously excluded evidence
8 showing that GDC-17 has been consistently interpreted and
9 applied to require that -- et cetera.

10 Now, I don't find that to raise an issue respecting
11 the denial of cross examination. From that statement and from
12 the brief as a whole, including the statement at the end to
13 which Mr. Edles referred, I got that the issue that was raised
14 by the State's and County's brief was whether or not the
15 evidence which was excluded should have been admitted as
16 establishing or tending to establish that there was a
17 particular Staff interpretation of GDC-17 that was contrary to
18 the Licensing Board's view of this matter.

19 Now, if you are raising here an issue beyond the
20 question of the exclusion of this particular affirmative
21 evidence that you sought to introduce, I would like to know
22 where in your brief you indicate that because that was not in
23 my reading of the brief. And as I say, from the very
24 introduction --

25 MR. PALOMINO: The evidence refers to the practice,

1 the testimony. It definitely refers to the practice in
2 several places.

3 JUDGE ROSENTHAL: I want to know in what specific
4 respect did the evidence which was excluded tend to establish
5 that the Staff had a uniform interpretation of GDC-17 along
6 the lines that the State and County are contending. Point
7 specifically to what there was in that evidence that would
8 tend to show that this was the Staff's consistent
9 interpretation and application of GDC-17.

10 MR. PALOMINO: The testimony of Carl Berlinger, the
11 testimony of --

12 JUDGE ROSENTHAL: Specifically, what would this
13 individual have testified to which would have established the
14 Staff practices?

15 MR. PALOMINO: "Many plants" referred to just about
16 every plant. He is talking about the practice of requiring
17 the off-site --

18 JUDGE EDLES: Mr. Palomino, where are you reading,
19 so I can follow?

20 MR. PALOMINO: It is on the top of page 17 in the
21 box. Also Mr. Bridenbaugh's testimony on page 15.

22 JUDGE ROSENTHAL: It is the testimony of
23 Dr. Berlinger that you have in mind?

24 MR. PALOMINO: "Many plants" refers to just about
25 every plant that I am familiar with that is either in

1 operation or under construction in the United States. I don't
2 know of any exceptions to that.

3 JUDGE ROSENTHAL: Is that -- the fact that these
4 plants may have that particular margin, does that make that a
5 Staff requirement? We are dealing here not with the question
6 of whether plants as a general matter do have this margin. We
7 are dealing, are we not, Mr. Palomino, with the question --

8 MR. PALOMINO: The thrust of the contention was to
9 prove that they do, and we never got a hearing on it.

10 JUDGE ROSENTHAL: I'm asking you where this evidence
11 establishes that, in point of fact, the Staff had a
12 requirement that the Staff read GDC-17 as meaning that there
13 has to be this margin. Now, where in the excluded evidence --
14 because the issue, again, Mr. Palomino, is, unless I have
15 missed the point, whether or not the Licensing Board
16 erroneously excluded this evidence as irrelevant.

17 MR. PALOMINO: We contend the proof would have
18 showed that, if given the opportunity, which we didn't get,
19 that the past practice in every plant since the adoption of
20 GDC-17 was for the Staff to require this additional test to
21 the MESL which would result in this additional substantial
22 margin of safety.

23 JUDGE EDLES: What is the minimum substantial margin
24 required under your thesis?

25 MR. PALOMINO: There is no minimum. It depends on

1 the plant. The reason you can't reach a minimum, plants have
2 different capacities. They have different diesel generators,
3 they have different loading requirements. They change the
4 loading requirements, but at least at the licensing stage,
5 they should meet this requirement because -- the reason is --

6 JUDGE EDLES: I don't understand. What is the
7 requirement that they have to reach? That there has to be a
8 difference between the two?

9 MR. PALOMINO: There has to be a difference. They
10 imposed this requirement, which was adopted by the Commission
11 uniformly in licensing these plants, that in addition to the
12 MESL, you established a maximum power limit by requiring them
13 to show the load that could be added, that the engines could
14 carry a load which a single -- a maximum electrical load which
15 a single operator could put on, either intentionally or
16 accidentally.

17 JUDGE WILBER: Are you saying Dr. Berlinger's
18 statement says that in there? I don't see that at all.

19 MR. PALOMINO: I'm saying that reading this whole
20 testimony in context, you will find that that is what it does.

21 JUDGE WILBER: By Dr. Berlinger?

22 MR. PALOMINO: Reading Bridenbaugh's testimony and
23 Berlinger's testimony.

24 JUDGE ROSENTHAL: Bridenbaugh isn't a Staff
25 employee. It seems to me that if you were endeavoring to

1 establish what the Staff's practice had been in terms of its
2 construction and application of GDC-17, you would have called
3 or sought to have called a Staff witness in a position to
4 testify as to a Staff practice.

5 MR. PALOMINO: The testimony was sufficient to raise
6 the issue. We never were permitted to reach that stage.

7 JUDGE ROSENTHAL: The question here is whether this
8 evidence established or tended to establish --

9 MR. PALOMINO: We also have Staff testimony --
10 that's not Staff. We also sought to establish it through Knox,
11 and Knox's testimony said on page 7 of our brief that it was a
12 standard practice of the Agency.

13 JUDGE ROSENTHAL: This was excluded testimony?

14 MR. PALOMINO: They permitted that testimony, but
15 that in conjunction with the other testimony --

16 JUDGE WILBER: So what is the complaint if that
17 testimony is in?

18 MR. PALOMINO: Well, the complaint was that some of
19 the other witnesses didn't have full recollections the same as
20 Knox and we should have had a full hearing on it of the NRC
21 people.

22 JUDGE EDLES: Mr. Palomino, just following up on the
23 Chairman's line of argument, it does seem to me there is
24 nothing in your brief in which you point to areas in which you
25 were denied cross examination. The issue is that you were

1 denied the right to present affirmative evidence. Am I right
2 or wrong on that?

3 MR. PALOMINO: There was a limited cross
4 examination. It is in our brief.

5 JUDGE EDLES: There are substantial references to
6 thing like "excluded evidence." That term is used frequently
7 in the brief.

8 MR. PALOMINO: On page 10, footnote 10, similarly
9 Licensing Board erred by refusing to permit the County to
10 cross examine LILCO and NRC Staff witnesses concerning a
11 substantial difference between --

12 JUDGE EDLES: Is that footnote now the sum and
13 substance of your argument with respect to the cross
14 examination point?

15 MR. PALOMINO: That would be it. I don't know. I
16 wasn't at the hearings. But I know they were limited.

17 JUDGE EDLES: I am only trying to ascertain your
18 position; I'm not being critical.

19 MR. PALOMINO: I am saying it's in the brief. There
20 is a contention raised.

21 JUDGE ROSENTHAL: In a footnote. But it does seem
22 to me that when your introduction to this brief states that
23 decisions should be reversed for a particular reason and cite
24 one reason and no others, it is asking a great deal of us to
25 expand your appeal on the basis of a passing shot in a

1 footnote in the middle of the brief.

2 MR. PALOMINO: The sentence it is attached to says
3 this evidence is clearly relevant and material, and that is
4 what he denied it on, to the EG load contention because it
5 demonstrates how GDC-17 has been interpreted in part to prior
6 licensing proceedings, as footnote 10.

7 JUDGE EDLES: That still goes back to the excluded
8 evidence point, which I understand.

9 MR. PALOMINO: The excluded evidence was broad
10 enough to entitle us to a hearing. That's my contention.

11 JUDGE ROSENTHAL: I understand that. Is your
12 contention that that is so?

13 MR. PALOMINO: The testimony and the chart under the
14 contention that was allowed was sufficient to give us a
15 hearing to prove that there was a standard practice of the
16 Staff which resulted in all the prior licenses granted under
17 GDC-17.

18 JUDGE ROSENTHAL: Why does that show a standard
19 practice of the Staff?

20 MR. PALOMINO: Not the Staff, the Commission in
21 adopting the licensing.

22 JUDGE ROSENTHAL: Why does it show a consistent
23 practice of the Commission? All it shows is that the
24 utilities had as a practice the providing of this margin.
25 Now, we don't know whether the utilities provided this margin

1 because the Staff required them to do so or whether they did
2 it on their own hook. Are you here with the matter of whether
3 there is a requirement for that margin?

4 MR. PALOMINO: I don't know either except for Knox's
5 testimony that it was a standard practice of the Staff to do
6 this. It doesn't say the utilities.

7 JUDGE ROSENTHAL: If you have testimony in the
8 record that it was a standard practice, then why did you need
9 this?

10 MR. PALOMINO: We need it to go on with it, to prove
11 it through all of them. Now the Judge raised the issue is it
12 relevant because we didn't cover all plants. You are now
13 asking do I know of another plant where it didn't happen.

14 JUDGE EDLES: What I was trying to get at is how you
15 selected -- I appreciate that you were not intimately involved
16 in this perhaps at the time in preparation, but I am trying to
17 get a flavor for how you selected the particular plants that
18 you listed in the chart since that is not a 100 percent sample
19 of all nuclear power plants since 1971.

20 MR. PALOMINO: I don't know. Mr. Bridenbaugh
21 selected them. He purports that it is, but that would be a
22 matter for dispute in the hearing. What we are trying to do
23 and what the other side is trying to do is try the case. For
24 example, they point to LaSalle, and LILCO does, and says,
25 look, they have a negative safety margin. And the fact is

1 that if you look at the figures, he transposed the figures in
2 two columns, and the typist transposed the figures in two
3 columns on that chart, and those figures would establish, when
4 transposed properly, would establish the proper percentage.

5 He points to Millstone. As I understand it,
6 Millstone was licensed before GDC-17 was adopted. All these
7 things could have been explained if there were a hearing.

8 JUDGE ROSENTHAL: All right. Was there any endeavor
9 made on the part of the County and/or State to have subpoenaed
10 a Staff witness who would have been in a position to testify
11 as to these matters? Wouldn't that have been the --

12 MR. PALOMINO: I think they sought to examine them
13 before the hearing and they never got the right people who had
14 the knowledge, and the hearing could have helped us on that.

15 JUDGE ROSENTHAL: Wait a minute. Did they call that
16 to the attention of the Board? They didn't get the right
17 people? Did they make any endeavor to get -- I'm sure there
18 must be a number of people on the NRC Staff who are quite
19 familiar --

20 MR. PALOMINO: I don't know if the right people were
21 all there. They are not there now. Maybe they are not there
22 now.

23 JUDGE ROSENTHAL: You keep talking about the denial
24 of hearing rights.

25 MR. PALOMINO: Yes.

1 JUDGE ROSENTHAL: I keep suggesting to you that I
2 don't see how the exclusion of this particular evidence denied
3 you of any hearing rights at all. It may be a question as to
4 whether this evidence was relevant on the Staff practice. It
5 seems to me at best it was a very thin tie between this
6 particular evidence and what the Staff's practice might have
7 been.

8 I would have thought that the counsel who tried this
9 case, and I realize, Mr. Palomino, it wasn't you, but you are
10 responsible today for the conduct of this case on your side.
11 I would have thought that the approach here would have been a
12 lot more direct: get the Staff witnesses who know what the
13 practice was on the stand and say to them, okay, did the Staff
14 have this practice? Was the fact that the plants had these
15 margins indicative of a Staff interpretation of GDC-17 that a
16 margin had to exist?

17 MR. PALOMINO: I think they did, and that is the
18 reason I am raising the question of the limitation of cross
19 examination on all of the Staff witnesses.

20 JUDGE ROSENTHAL: They were precluded from cross
21 examining Staff witnesses on what their practice was?

22 MR. PALOMINO: When you go to the load margins.

23 JUDGE ROSENTHAL: You weren't allowed to cross
24 examine Staff witnesses on whether there was a Staff practice
25 to require a particular margin?

1 MR. PALOMINO: To some extent that was permitted,
2 yes. There is evidence in the record of it. There is evidence
3 that we point to in the record that is in the brief where they
4 said it was a standard practice.

5 JUDGE WILBER: Then they weren't excluded from
6 testifying to it, then? You are saying that they did testify
7 to that, that it was standard practice. Is that what you are
8 saying?

9 MR. PALOMINO: It's a question of extent, what
10 plants, how many. The problem was they, as I understand it as
11 it has been told to me, didn't have recollections, they didn't
12 have the records. Were we permitted to go more into it, we
13 could have gotten them. We could have proved the point.

14 JUDGE EDLES: Mr. Palomino, let me pursue a slightly
15 different line of argument. As I understand it, the argument
16 you are making with respect to the margin of safety evolves
17 from the treatment that the Commission or the Staff may apply
18 pursuant to Regulatory Guide 1.9; is that correct?

19 MR. PALOMINO: No, we are not. We are going
20 directly to GDC-17.

21 JUDGE EDLES: But your argument, as I understand it,
22 is that the Staff has a consistent interpretation of GDC-17
23 which is reflected in Reg Guide 1.9.

24 MR. PALOMINO: No. We are saying they would have
25 applied this whether they used Reg 9 or not. We are saying,

1 as we say it, that GDC-17 is not quantitative. It talks in
2 terms of functional capacity, and that the Staff and the
3 Commission adopted it over the years by licensing this plant,
4 went to a quantitative standard, and that quantitative
5 standard of GDC-17 was the application of this.

6 We are saying that was standard, whether it was the
7 Guide went in or not.@

8 JUDGE EDLES: What your chart appears to demonstrate
9 is that to the extent there is a quantitative standard, it is
10 different at every single plant.

11 MR. PALOMINO: That is because you have different
12 loads at every plant, different capacities --

13 JUDGE EDLES: Why shouldn't we then just simply look
14 at the Shoreham plant, then whatever design load you think you
15 need to carry out, you have a diesel generator that --

16 MR. PALOMINO: We are saying it is the construction
17 of GDC-17 required that you arrive at it by this particular
18 practice, then that is what you have to do.@ The reason this
19 was not done is because if you do, you will find that these
20 engines are not qualified. They are rated at 3300. They
21 brought them up to 3585, which was higher than what they
22 allowed even for two hours in an 18-month period.

23 JUDGE WILBER: Are you contesting the MESL, the
24 Maximum Emergency Service Load?

25 MR. PALOMINO: No. We are saying if you followed

1 this standard practice the way the statute had been construed
2 over the years by the Commission, you would have reached this
3 additional load, which would be the safety factor margin we
4 are talking about, and they would not have been able to comply
5 with it.

6 And that is where, when they talk about, it wouldn't
7 have changed the result, it would have absolutely changed the
8 results.

9 And we say it is relevant because it involved this
10 construction of GDC-17, all of this evidence.

11 We also say that -- and what we would have been able
12 to prove it if we had a hearing -- we say it is not collateral
13 because it was allowed in under the contention. It may have
14 been burdensome. They may have avoided by seeking the
15 information and either rebutting it at a hearing or
16 stipulating. So that it was not -- but it definitely was not
17 collateral.

18 JUDGE EDLES: Must we make a determination as to how
19 credible the evidence is? I mean don't you have to meet
20 some minimum threshold of reliability for this evidence before
21 it triggers a responsibility on the other side?

22 MR. PALOMINO: That is the purpose of the hearing,
23 isn't it?

24 JUDGE EDLES: It might be in due course, but I
25 obviously can't serve up anything, and as long as I submit a

1 paper that automatically gives me a right to a hearing if it
2 is worthless information.

3 MR. PALOMINO: It tends to be confirmed by Dr. Knox,
4 doesn't it? When he testified, he said it was a standard
5 practice.

6 JUDGE ROSENTHAL: So you had a hearing on the issue,
7 didn't you?

8 MR. PALOMINO: We had a limited hearing.

9 JUDGE ROSENTHAL: You had a hearing in which certain
10 evidence --

11 MR. PALOMINO: On part of it. We wanted to show
12 this was a necessary result and we would have had a margin of
13 safety for the people of Long Island if they complied with
14 GDC-17 as had been in the past, which would have been the same
15 as people at other nuclear plants, and that they were entitled
16 to that.

17 JUDGE EDLES: Mr. Palomino, what would have
18 happened, if, in point of fact, there were lots of nuclear
19 power plants out there that didn't follow this method?

20 What conclusion would we draw from that?

21 MR. PALOMINO: Then he could have confirmed his
22 hearing at the 33 level. If that is not --

23 JUDGE EDLES: If it's not the standard, exclusive
24 practice?

25 MR. PALOMINO: That I don't know. That you'd have

1 to tell in the hearing, because somebody might have gotten a
2 waiver. I don't know. They may have referred to cases --
3 they do here -- which existed before the licensing proceeding,
4 before GDC-17.

5 JUDGE EDLES: What would happen if we were to
6 discover that this type of diesel generator is always tested
7 by a method different from the one used in Regulatory Guide
8 1.9? What conclusion would you draw from that?

9 MR. PALOMINO: I don't think it was because there
10 were plants that were approved with diesel generators before
11 Shoreham had its troubles, weren't there?

12 JUDGE EDLES: Yes, but I'm talking about --

13 MR. PALOMINO: So they would have applied the
14 standard. I think that would be due to the hearing, and see
15 what the circumstances were. I don't think you can avoid it
16 by doing that. In fact, Millstone, the low rating at
17 Millstone, establishes that before they adopted GDC-17, they
18 didn't have the standard that they came to. If you look at
19 all the plants after, you'll notice they had much higher than
20 what the chart shows.

21 It also shows another relevant thing. With the
22 higher power plants, there are larger margins of safety. With
23 the lower capacity plants, the 500 and 600 megawatts, they are
24 lower. And it tends to show a uniform application -- not only
25 a uniform application; evidence attached to that which might

1 have developed would have shown that it was a standard
2 practice, as stated by Dr. Knox.

3 We never got the chance. We say that it was all
4 relevant. It was relevant because it involved the
5 construction of statute. It wasn't collateral, because it
6 involved the construction of statute to determine whether they
7 could qualify.

8 They talk about different methods of reaching
9 compliance, but still you have to comply to the standard, if
10 that's the standard. It isn't the methodology you use. We
11 don't complain about that.

12 They seem to seek to sidestep the issue by implying
13 that the Judge found these diesels qualified, on this
14 qualified load under GDC-17. What they are talking about is a
15 single failure test, which has nothing to do with the GDC-17
16 requirements, as far as capacity and capability are concerned.

17 JUDGE WILBER: All GDC-17 says is that you must have
18 enough load to accomplish -- I think it's two items in there.

19 MR. PALOMINO: Basically three items.

20 JUDGE WILBER: It says nothing about error. It says
21 nothing about intermittent loads. So why isn't this technique
22 -- and they've written a Safety Evaluation Report, as I
23 understand it, on TDIs, which I will ask someone else later if
24 this is a general Safety Evaluation Report -- but why isn't
25 this an acceptable path?

1 MR. PALOMINO: It isn't acceptable because they
2 have, by required practice, it is our contention --

3 JUDGE WILBER: Under Reg Guide 1.9, they have -- all
4 of these have been evaluated under 1.9, evidently.

5 MR. PALOMINO: That's not what we're saying. That's
6 what has been established under the Reg Guide. We're saying
7 as a standard practice, Dr. Knox said, that it applied
8 uniformly to all plants. And our contention is that they did,
9 in fact, require them to meet the standard.

10 And if that is the standard, then that is the
11 construction of the statute, and we're entitled to the benefit
12 of it, and that they did it, because the fact is, GDC-17 talks
13 functionally and not quantitatively, and they felt they needed
14 a quantitative standard, and they did, and it's a very sound
15 one.

16 It is sound, indeed, because if you look at what
17 they have proved under this qualified load, the short-term
18 load is two hours in eighteen months. In any other plant,
19 it's two hours in any 24.

20 JUDGE WILBER: Under Reg Guide 1.9 or the IEEE
21 standard that goes with it.

22 MR. PALOMINO: But the point is, there's no margin
23 of safety here by all their past practices, and the people of
24 New York State are entitled to it, the inhabitants of New York
25 State, if everybody else got it, and that's the standard way

1 they have been doing it. There is no reason why we shouldn't
2 get the benefit of it.

3 JUDGE ROSENTHAL: You're close to the 35-minute
4 mark.

5 MR. PALOMINO: I'll reserve ten minutes.

6 JUDGE WILBER: Could I ask for a clarification?

7 You used the expression "maximum permitted load" in
8 your brief. In reading your brief, I find that it appears to
9 be equated to "continuous rating" at one point, "qualified
10 rating" at another, and "short-term rating" in still a third.

11 I just don't understand what it's supposed to mean.

12 MR. PALOMINO: As I understand it in the brief, the
13 maximum permitted load is the continuous rating, short-term
14 load, and as confirmed --

15 JUDGE WILBER: You just put two definitions in one
16 breath there. Short-term and continuous rating are two
17 different things.

18 Now which is it? Is it short-term rating,
19 continuous rating?

20 MR. PALOMINO: Basically it's a continuous rating,
21 and you add to it the load that any single operator could put
22 on it, accidentally or intentionally, and that's what the
23 maximum permissible load is.

24 JUDGE WILBER: Then it is not the continuous rating.

25 MR. PALOMINO: That's how they confirm the

1 continuous rating, by standard past practice. If you look at
2 it -- you're looking at me, and you seem shocked -- but
3 according to Knox' testimony on page 7 -- I'll read it to you
4 -- it says: "The Staff's standard practices confirm the
5 continuous rating, which constitutes the maximum permitted
6 load, encompasses the MESL, and the short-term rating
7 encompasses the MESL plus the single highest additional load
8 that could be connected by an operator."

9 So that was their standard practice. Maybe it
10 sounds confusing to you, but I'm just repeating what they say
11 is their standard practice.

12 JUDGE ROSENTHAL: If you think that Mr. Knox or
13 Dr. Knox as the case may be, his testimony established this
14 practice, then I don't understand why --

15 MR. PALOMINO: I don't think it did, because -- I
16 think it warranted a full hearing, let me put it that way.

17 JUDGE ROSENTHAL: It warranted a full hearing. He
18 testified. You were in a hearing. Now you are telling me
19 that his testimony was not sufficient of itself. Then, you
20 are entitled not to a new hearing, but you are entitled to do
21 something else in this hearing, which was devoted to this --

22 MR. PALOMINO: Let me say this. If that was
23 acceptable -- apparently, it wasn't acceptable to the Hearing
24 Board, because they never ruled on that basis. They just
25 stuck to the approach of qualified load, and it was sufficient

1 that you didn't have to meet GDC-17, that they did qualify --

2 JUDGE WILBER: Did they say that?

3 MR. PALOMINO: Rather that they met GDC-17 with a
4 qualified load. That's why I'm hesitant. I don't want to be
5 the judge of that. I'm just going on what they did.

6 JUDGE ROSENTHAL: Thank you, Mr. Palomino.

7 We will now hear from Mr. Ellis.

8 ORAL ARGUMENT ON BEHALF OF LONG ISLAND LIGHTING

9 COMPANY BY MR. ELLIS

10 MR. ELLIS: Thank you, Judge Rosenthal.

11 May it please this Appeal Board, as I indicated at
12 the outset, my name is Tim Ellis. I am here today on behalf
13 of the Long Island Lighting Company, the Applicant.

14 Let me go directly to what I think is a
15 misunderstanding by Mr. Palomino.

16 There was not a denial of cross-examination on that
17 point. In fact, the testimony that he repeatedly referred to
18 by Mr. Knox or Dr. Knox -- I don't recall which -- was later
19 withdrawn -- not withdrawn, but Mr. Knox was cross-examined on
20 it, and he later admitted that that was not the case. We
21 covered that in our Footnote No. 19.

22 JUDGE ROSENTHAL: What was not the case?

23 MR. ELLIS: That it was not -- that the design load
24 did not encompass the single worst operator error load. The
25 design load encompasses only the equipment required to respond

1 to the accident, the design-basis accident, and not the single
2 worst operator error load.

3 The diesels as a whole, as a unit, because they are
4 single-failure as a unit, of course, accommodate a single
5 operator load, if the single operator load is a single
6 additional failure.

7 We pointed out in Footnote 19 that if you go to the
8 transcript, Judge Brenner and the Licensing Board did permit
9 the County to cross-examine at some length on this. In fact,
10 it is my recollection -- I may have the dubious distinction of
11 being the only person in the room who was there for every one
12 of those 42 days and some of the other 100 days before that --
13 but my recollection is that the County Attorney, whoever it
14 was at the time, came back the next morning and said he wanted
15 to ask additional questions, and I cross-examined on that
16 point.

17 And the final substance was, the question was
18 generally: Do you know of any case in which there is a plant
19 where the single worst operator error load is not accommodated
20 within the short-term rating? And the answer was no, but when
21 cross-examined, it was, "No, we don't know of any case, one
22 way or the other." And further, at Transcript Page 28,200,
23 Messrs. Hodges and Knox indicated there might be.

24 The testimony was that there may be and probably are
25 licensed plants where additional operator error loads would

1 result in exceeding diesel generator ratings.

2 So I wanted to cover that straightaway and indicate
3 that there was cross-examination, and fairly substantial
4 cross-examination, and examination on that point.

5 JUDGE ROSENTHAL: Wouldn't it have been helpful to
6 have that matter explored?

7 MR. ELLIS: It was explored.

8 JUDGE ROSENTHAL: As to whether there were or
9 weren't? I thought you just told me that the answer that was
10 given is that there might or might not be.

11 MR. ELLIS: In that connection, they indicated that
12 there probably are, but their testimony was -- and this is the
13 important point -- was that the design load, in their
14 interpretation of GDC-17, is that it does not have to
15 accomplish that or encompass that.

16 JUDGE ROSENTHAL: But these plants that were listed
17 in the excluded table, all did have that margin.

18 MR. ELLIS: No, sir. The table doesn't show that.
19 As I think the Board's questions may have suggested, the table
20 shows nothing at all about operator loads at any of these
21 other plants, nothing whatever about operator loads.

22 All the table shows is -- if one takes it at face
23 value and as our brief indicates, we think there are serious
24 facial with it -- but putting to one side that even at face
25 value, all it shows or purports to show are basic loading

1 conditions. It does not show anything about the imposition of
2 a requirement. It does not show anything about the
3 interpretation of GDC-17.

4 If you want to look at what the Staff thinks of
5 GDC-17, the evidence in the record of this case and this Board
6 is quite correct. They certainly had the power to subpoena
7 people, and they didn't. They had discovery on the issue, and
8 they didn't subpoena anybody in that instance. But if you
9 look at the evidence we have in the record, what we have is
10 the testimony of the Staff saying that their interpretation of
11 GDC-17 is that it does not require that the diesel qualified
12 load, or for short-term rating, whichever method is used,
13 accommodates a single --

14 JUDGE EDLES: Why isn't it a fair point, as
15 Mr. Palomino makes, that yes, I hear them. I know what the
16 Staff says when you ask them affirmatively, but I'll show you
17 what they do here. And what they do isn't what they say.

18 MR. ELLIS: Wrong. Because when he says what they
19 do, it doesn't show what he says it shows. It does not show
20 that.

21 Moreover, there is another piece of important
22 evidence that is in the record, or at least it is available,
23 both to the County and to this Board, and that is the
24 Regulatory Guide, which adopts the IEEE standard. There is no
25 discussion in either of those of any margin. In fact, quite

1 the contrary.

2 By its terms, GDC-17, of course, doesn't require a
3 specific margin. The word "margin" doesn't apply in it --
4 doesn't appear in it. Neither does it appear in the Reg
5 Guide.

6 If you look at the Reg Guide, which adopts the IEEE
7 standard, Section 5.2.3 in the standard says: "The diesel
8 generator units may be utilized to the limit of their power
9 capabilities, as defined by the continuous and short-term
10 ratings." And it also states: "At the operating license
11 stage, the predicted load should not exceed -- the predicted
12 load should not exceed the short-term rating."

13 Mr. Knox testified several times that the design
14 load is what has to be accommodated by either the qualified
15 load, if you use the qualified load concept, or the short-term
16 rating, if you use the Reg Guide system.

17 So the evidence in the record is, I think, very
18 clear about the construction of GDC-17 and the terms of
19 GDC-17.

20 JUDGE EDLES: Why isn't the Reg Guide approach used
21 for the diesel generators at Shoreham?

22 MR. ELLIS: Why wasn't it used?

23 JUDGE EDLES: Right.

24 MR. ELLIS: It was determined by the Staff. The
25 Staff issued -- in answer to Judge Wilber's question, let me

1 just say -- the Staff did issue a generic SER that established
2 the qualified load concept. There are specific SERs that
3 apply to the results of the Shoreham qualified load testing.

4 It was determined, Judge Edles, that as a result of
5 the sequence of events that occurred after the crankshaft
6 failure -- after the crankshaft failure, the engines were
7 completely torn down. There was a design review and quality
8 revalidation program, where there was a design review of
9 components, key components, and a design review and a quality
10 revalidation, and the engines were put back together, and they
11 were subjected to an expanded preoperational test program, a
12 complete one that they had gone through before the crankshaft
13 failure, another complete one that was expanded to include
14 such things as an additional 100 starts.

15 But then because of the crankshaft, there was
16 largely some concern about the crankshaft. If you are not at
17 185 BMEP, they said, "You've got to prove to us that that's
18 going to be okay, so go to the 10 to the 7th, 10 million
19 cycles of loading, and if you do 10 million cycles of loading
20 at a qualified load which encompasses the design load, then
21 that accomplishes, functionally equivalent to the short-term
22 -- to the process of the Reg Guide."

23 It is, in fact, at least as rigorous, given the fact
24 that you've got a 10 million cycle loading test, and after the
25 other review, it is at least as rigorous as the Reg Guide,

1 which requires only 22 hours a year at a continuous rating and
2 two hours in that year at the short-term rating.

3 JUDGE EDLES: But I think you've told me what they
4 have done, and that it is just as rigorous, but I still am not
5 clear why it was that they adopted this method for these
6 diesels.

7 MR. ELLIS: Well, I think it is more rigorous. And
8 I can't tell you what was in their minds, except to say that
9 there was some skepticism about the qualification of the
10 engines, and therefore they wanted it to undergo this more
11 rigorous testing.

12 JUDGE EDLES: Maybe I'll take that up with the
13 Staff, then.

14 MR. ELLIS: Yes, sir. But I can't tell you what was
15 in their minds, except to say that an alternative method was
16 devised, which was perceived to be very rigorous and involving
17 this very extensive testing and additional testing in the
18 preoperational phase as well, and that it accomplished the
19 purpose of GDC-17, because it ensured that there was a 10 to
20 the 7th cycle test at a load that encompassed the design load,
21 which is what they construed the regulation as requiring.

22 JUDGE WILBER: Can you tell me what your definition
23 of design load is now?

24 MR. ELLIS: Yes, sir. I think my definition of
25 design load is the same definition as is used in the IEEE

1 standard and is used by the Staff. It's also LILCO's
2 definition. But, if you will permit me, in layman's terms,
3 it's the aggregate load of that equipment required to respond
4 to the design-basis accident and mitigate the accident.

5 JUDGE WILBER: That's the same as MESL, the
6 expression they used, the MESL?

7 MR. ELLIS: Yes, sir, that's correct, the MESL.

8 JUDGE ROSENTHAL: Well, you do agree that at these
9 facilities listed in that table, there is a margin that
10 exceeds the margin at Shoreham.

11 MR. ELLIS: I think what the table shows -- yes, sir
12 -- the table shows margins all the way from three percent to
13 very large percentages.

14 JUDGE ROSENTHAL: Granting that that doesn't
15 necessarily mean that there was some requirement along that
16 line, why wasn't that enough to get that table into evidence
17 for the purpose of then exploring whether the load margins
18 at those reactors was indicative of a Staff interpretation of
19 GDC-17 and accompanying requirement, or whether it was pure
20 happenstance, or whether it was simply a matter of the
21 utility's own choice?

22 In other words, even if that table, of itself, did
23 not conclusively establish that the Staff had this practice
24 which the utilities were following in regard to those
25 reactors, why wasn't it at least relevant enough to get it in

1 there and open the door to an exploration as to whether those
2 load margins did reflect the Staff practice, indicative of the
3 Staff practice?

4 MR. ELLIS: In the first place, they were not
5 precluded from asking about what -- whether there was a
6 practice. They were never precluded from that. I can show no
7 place in the record where they were precluded from that.

8 As I already indicated to the Board, there is
9 evidence in the record as to what the practice is. It is in
10 the Reg Guide and the IEEE standard, which says you use them
11 to the limit.

12 Secondly, as the Board, I think, pointed out, there
13 has got to be some threshold showing not only that it's
14 reliable under the regulation -- I've forgotten the number
15 now, but the regulation that requires some threshold showing
16 of reliability, and moreover some threshold showing of
17 relevancy, other than the mere fact of these figures.

18 Moreover --

19 JUDGE ROSENTHAL: These tables -- that table being
20 in evidence -- could the Intervenor have asked the Staff
21 witness whether the load margin in a particular plant was
22 such-and-such and the load margin in another plant was
23 such-and-such, and then have explored the reasons for that
24 margin with the witness?

25 In other words, did they need to get this table into

1 evidence, or could they have just used it as a basis for
2 cross-examination?

3 MR. ELLIS: Hypothetically, I don't know what my
4 reaction would have been and what the Judge's ruling would
5 have been.

6 I can tell you they were permitted to ask, and they
7 did ask: Do you know of any other case where the single worst
8 operator error load is not encompassed by the short-term
9 rating?

10 It is that series of testimony that I summarized at
11 the outset. Whether Judge Brenner and the Licensing Board
12 would have permitted them to go into these collateral matters
13 --

14 JUDGE ROSENTHAL: What collateral matters? Ask a
15 question of the witness, could they have taken a list of
16 plants in the United States and said to the Staff, "All right,
17 let's take them one at a time. What is the margin at Plant
18 X? What is the margin at Plant Y? What is the margin at
19 Plant Z?"

20 That would have been collateral? If so, I don't
21 understand why.

22 MR. ELLIS: That would have involved the Licensing
23 Board, given the argument that we have made in our brief,
24 given the lack of any showing of similarity or that the
25 situations were similar between Shoreham and all these other

1 plants. Indeed, one of them, as he indicated, was prior to
2 GDC-17. I think there are others as well.

3 I think that would have been collateral, to have
4 been investigating whether the 2000 hour rating is equivalent
5 to the MESL or the qualified load.

6 JUDGE ROSENTHAL: Wouldn't the answer have been, the
7 witness could have said, "Yes, there was this different load
8 margin, but it didn't reflect Staff practice. What it
9 reflected was that you had different conditions."

10 We are dealing here not with a matter of relevance,
11 but rather with a matter of what a particular piece of
12 evidence might conclusively establish.

13 MR. ELLIS: I do not believe that that evidence
14 would have been relevant.

15 JUDGE ROSENTHAL: So you don't think that they could
16 get in at all to the matter of what were load margins at other
17 plants, in connection with their inquiry into whether there
18 was a uniform Staff interpretation and application of GDC-17
19 along the lines that they are suggesting?

20 MR. ELLIS: I do think it's relevant whether there
21 was a consistent Staff interpretation of GDC-17.

22 JUDGE ROSENTHAL: You don't think it's relevant to
23 that question -- what happened at particular other facilities?

24 MR. ELLIS: Only if they could show all of the facts
25 that I indicated were predicates to relevancy -- namely, that

1 it was a Staff imposition, that it was consistent, that, as
2 this Board asked -- I think one of the opening questions was,
3 What is the consistent margin?

4 There is no consistent margin. There's nothing on
5 the table about operator error loads. That's the contention,
6 that it's operator error loads. And they have some
7 preliminary obligation to make some showing, and they
8 certainly had every opportunity. They had depositions. They
9 had hearings. They had plenty of Staff witnesses they had the
10 right to subpoena. And they did none of those things.

11 JUDGE ROSENTHAL: Were they denied the opportunity
12 to cross-examine any particular Staff witness that they sought
13 to examine?

14 Maybe I ought to ask that question of Mr. Goddard.

15 MR. ELLIS: Not to my knowledge, Judge Rosenthal.

16 JUDGE ROSENTHAL: There was not a question of the
17 Staff objecting to a particular endeavor of discovery?

18 MR. ELLIS: Not to my knowledge.

19 JUDGE ROSENTHAL: I'll ask Mr. Goddard about that.

20 MR. ELLIS: I have reviewed with the Board, the
21 Appeal Board, the fact that GDC-17, the Regulatory Guide, and
22 the IEEE standard that it endorses, do not use the term
23 "margin," do not require a margin, and on the contrary, state
24 explicitly that the diesel generators may be used to the limit
25 of their ratings. That is -- and it certainly would have been

1 quite easy for the Staff to write in, "And we require a margin
2 sufficient to satisfy the single worst operator error load
3 that may be inadvertently added."

4 JUDGE ROSENTHAL: Given the terms of GDC-17, as you
5 understand them, could the Staff, without amending GDC-17,
6 have required this additional margin, or are they stuck with
7 GDC-17 as written?

8 MR. ELLIS: I do not believe that they could -- that
9 they could construe GDC-17 to require accommodation of the
10 single worst case operator error load, because in that event,
11 they would be going beyond the single failure. They would be
12 requiring a double additional failure.

13 The diesel generators, the Shoreham diesel
14 generators -- and I will mention in a minute that that's not
15 entirely all that's there -- but the TDI diesel generators are
16 single-failure-proof, in the sense that if you add -- if an
17 operator were to erroneously or inadvertently add a single
18 worst case error, and in the unlikely event that happened, and
19 in the unlikely event that that caused a failure at the
20 diesel, two diesels are sufficient to shut down the plant, and
21 therefore there is a single failure for the Staff to construe,
22 if that each diesel has to do that -- would be well beyond the
23 single-failure criterion in GDC-17 and elsewhere.

24 May I inquire how much time I have?

25 JUDGE ROSENTHAL: Yes. I'm sorry that clock is not

1 quite functioning. You have about twelve minutes.

2 MR. ELLIS: Thank you.

3 The County's contention that GDC-17 has been
4 interpreted to involve a standard for reliable EDGs that is
5 more than 20 times higher than the standard applied to the
6 Shoreham EDGs, I think that amounts to a sleight-of-hand,
7 because what they have done is taken data for selected plants,
8 which may or may not be defined on a consistent basis --
9 there's not any indication whether peak load, as reflected on
10 that table, is uniformly defined for all of the plants.

11 The County takes the average value of this data,
12 which, in our view, is meaningless, as we point out in our
13 brief, and therefore we think the use of averages is totally
14 meaningless.

15 It also disregards conservatisms. Now Mr. Palomino
16 makes the point, where is the margin of safety? Well, I'll
17 tell him where the margin of safety is.

18 As the Licensing Board found, the IETs are a better
19 -- the integrated electrical test measurements are a better
20 measure of what the design loads are.

21 JUDGE WILBER: Dr. Berlinger, he may have said they
22 are better, but he also had a statement on the accuracy of
23 them, didn't he?

24 MR. ELLIS: Yes, sir. There is nothing that's
25 exact. I think that's his --

1 JUDGE WILBER: I thought it was because of the
2 conditions of the plant.

3 MR. ELLIS: Yes, sir. There was a very substantial
4 amount of testimony. Judge Brenner required LILCO to bring
5 back its witnesses -- I have forgotten; it was over a weekend
6 -- and spent an additional day on that subject. And the
7 County and the Board cross-examined LILCO's witnesses
8 vigorously on the conditions under the IET, and you can never
9 replicate with every last jot and tittle what's going to
10 happen right after a loop LOCA, but the IET, as the LILCO
11 witnesses pointed out, does a pretty good job, and ultimately
12 the Licensing Board was persuaded and noted in its findings
13 that it is a more accurate estimate of the MESLs than the
14 conservative methods used by LILCO in calculating and
15 measuring the individual loads.

16 So there is plenty of margin already there, on the
17 order of -- as you will recall from our figures and the
18 findings in the PID -- they are in the range of two to three
19 to four hundred kilowatts.

20 What more is there? Well, there is 10 to the 7th
21 testing. That is a very rigorous requirement. And after the
22 DRQR, after the additional preoperational testing, then it was
23 run 10 to the 7th cycles, and then it was looked at again, the
24 crankshaft was looked at again, and some other components were
25 examined again, and there were more inspections -- a very

1 rigorous standard.

2 And therefore, there is that, that other plants
3 around the country do not have. These are the actual engines
4 tested. And, of course, as Mr. Palomino knows or should know,
5 we also have the EMD diesels on site. In fact, by my
6 calculation, there's 108 megawatts of fossil power at Shoreham
7 for an 890 megawatt reactor. There are Colts in the gas
8 turbines in the EMDs.

9 In any event, there is little doubt that there is
10 ample protection for the people of New York State, contrary to
11 Mr. Palomino's remarks.

12 We also pointed out that the irrelevancy of the
13 excluded evidence and its collateral nature is quite apart
14 from its reliability, and we think that there is a threshold
15 requirement on reliability that was not made under 2.743,
16 which I have mentioned.

17 On the collateral point, we think that some of the
18 points we raised in our brief on collateral matters actually
19 also helps to underscore the irrelevancy of it -- namely, the
20 comparison of apples and oranges, or at least the uncertainty
21 of that. And we think that just hints, begins to hint at the
22 kind of scope of additional litigation you are talking about,
23 about whether that plant is really equivalent to this one,
24 about whether it was imposed, about whether the utility may
25 have put the extra margin in there for load growth.

1 Again, I bring out the fact that we don't agree with
2 some of the figures that are stated there.

3 Finally, as addressed in LILCO's brief, the excluded
4 evidence, we do not believe would have substantially affected
5 the outcome, even it had been admitted. The requirements of
6 GDC-167, as I reviewed it, are clear on its face.

7 Mr. Palomino said here and the County said in its
8 brief that it is subjective, that there aren't any standards.
9 We disagree with that. We think GDC-17 does give a clear
10 standard. Namely, it tells you, you must satisfy -- have
11 equipment operate that satisfies certain functions. That
12 equipment can be identified. The loads on that equipment can
13 be either measured or the use of nameplate loads to satisfy
14 those functions following a loop LOCA, they can be aggregated,
15 and that's what your diesel generators must accommodate, and
16 that's what was done at Shoreham.

17 JUDGE EDLES: As a layman, explain to me, how come
18 all these other plants have these wide margins?

19 MR. ELLIS: It would be speculation on my part, but
20 I can give you some idea of that.

21 In the first place, the FSAR information is often
22 updated. That is one of the reasons why I think we disagree
23 with lots of what is on the County's table. When you begin to
24 design a plant, at the outset you may want to have a lot of
25 margin to anticipate load growth, and indeed that happens at

1 every plant. There is a substantial amount of load growth in
2 the construction process, particularly if you began the
3 construction process prior to TMI and are completing it
4 post-TMI. There is a very substantial amount of load growth.

5 So that is one reason why some of those might be in
6 there, in addition to which, we really don't know what is
7 meant by peak load. We don't know whether they are talking
8 about an arithmetic addition of the loads, whether they are
9 talking about sequencing these loads. There is a great deal
10 we don't know about those.

11 But what we do know is that if a loop LOCA occurs at
12 Shoreham, we know what the loads are, both from the IET and
13 from the measurement and the nameplate, and we know from a 10
14 million cycle test that those diesels can handle that with
15 adequate assurance, more than reasonable assurance.

16 I think, as I was saying, that the excluded table,
17 even if admitted, would not have affected the outcome, for the
18 reasons that I've stated. It would have been entitled to
19 little or no weight, particularly given the Staff's
20 reaffirmation of its position in testimony and findings, and
21 the absence of any -- there were no County witnesses or
22 testimony with specific knowledge of all the listed plants.

23 We think ample conservatism has been demonstrated in
24 the Shoreham MESL and the qualified load determinations.

25 I think it is telling that, following this complex

1 litigation, the 42 days of hearings, the 32 witnesses, and
2 there was discovery beforehand, that the County and the State
3 have appealed the exclusion of just this single piece of
4 evidence.

5 No one present during all of these days of hearings
6 -- and as I said, I may be the only one with that dubious
7 distinction; I'm not sure -- could fail to conclude that the
8 Licensing Board conducted a thorough and thoroughly fair
9 hearing, and that it found the Shoreham diesels suitable for
10 nuclear service for the first fuel cycle, only after holding
11 the Applicant to a rigorously high standard which the Staff
12 had held it to through all of the Owners Group activities and
13 through this extensive DRQR and additional testing.

14 Accordingly, for all the reasons I have stated here
15 and for the reasons that are contained in the Applicant's
16 brief, we respectfully submit that the Appeal should be
17 denied.

18 JUDGE ROSENTHAL: Thank you, Mr. Ellis.

19 Mr. Goddard?

20 MR. GODDARD: Yes. Judge Rosenthal, the Staff
21 would respectfully request a brief break prior to the
22 presentation of its argument.

23 JUDGE ROSENTHAL: Five minutes. Is that sufficient?

24 MR. GODDARD: Five minutes will suffice.

25 JUDGE ROSENTHAL: We will recess for five minutes.

1 I will request Counsel to be back at the end of that five
2 minutes.

3 [Brief recess.]

4 JUDGE ROSENTHAL: Mr. Goddard, you may proceed.

5 ORAL ARGUMENT ON BEHALF OF

6 THE NUCLEAR REGULATORY COMMISSION STAFF

7 BY RICHARD J. GODDARD

8 MR. GODDARD: Thank you.

9 JUDGE EDLES: Mr. Goddard, before you proceed, or at
10 the beginning of your talk, explain to me why the Staff
11 decided on a somewhat different methodology for testing the
12 diesels at Shoreham.

13 MR. GODDARD: Yes, Judge Edles.

14 The Staff evaluated a different methodology which
15 was submitted to it by the Applicant, Long Island Lighting
16 Company, as the Applicant is permitted to do under the
17 provisions of Regulatory Guide 1.9.

18 The engines are required to meet the standard, the
19 regulatory standard set forth in GDC-17 as to capacity and
20 capability to perform certain functional requirements.

21 One of the methods of meeting that regulatory
22 standard which has past acceptance by the Staff, is that which
23 is set forth in the IEEE Standard 387-1977, which is
24 incorporated in Reg Guide 1.9 Revision 2.

25 The Applicants proposed, as result in part, of Staff

1 dissatisfaction with the acceptance of these engines without
2 significant testing, to use the methodology which we refer to
3 herein as the qualified load. And the Staff evaluated the
4 engines based upon that methodology which was proposed by the
5 Applicant.

6 JUDGE EDLES: Do I understand then that the reason
7 for not using the 1.9 methodology is that there hadn't been
8 adequate testing of the diesels under that methodology? Is
9 that what you are saying? That there wasn't time available to
10 do the testing?

11 MR. GODDARD: I would say there was time available
12 to do the testing. The Applicant chose to avail itself of the
13 Reg Guide provisions which allowed for an alternate
14 methodology for acceptance of the engine. This was part of
15 the TDI Owners' Group Program Plan recommendation which was
16 worked out conjointly between the Staff and a number of
17 TDI-owning applicants.

18 JUDGE EDLES: Then why did the Staff earlier feel
19 that the 1.9 methodology was insufficient?

20 MR. GODDARD: I don't know that the Staff ever took
21 the approach the 1.9 methodology itself was insufficient.

22 We did insist on testing which would have taken the
23 specific engines at Shoreham station, and I believe a number
24 of the other TDI engines beyond the limited testing required
25 under the Reg Guide methodology.

1 This being the case --

2 JUDGE EDLES: Is Mr. Ellis's characterization
3 accurate, when he says there was some Staff skepticism about
4 the reliability of the diesel so you wanted some testing above
5 and beyond that which otherwise had been required under 1.9?

6 MR. GODDARD: That is correct.

7 JUDGE ROSENTHAL: All right, Mr. Goddard, let me ask
8 you this.

9 Was there any endeavor of either the County or the
10 State to obtain discovery of the Staff which was rebuffed
11 successfully by the Staff?

12 MR. GODDARD: No, there was not.

13 The Staff made available for deposition or other
14 discovery means, all witnesses who they were proposing to have
15 testify as witnesses at the hearing.

16 JUDGE ROSENTHAL: Supposing that the Intervenors, in
17 their desire to ascertain precisely what the Staff practice
18 was, had sought in the discovery process or to get at Staff
19 officials or employees who would have been intimately familiar
20 with that practice under GDC-17 -- first, was that endeavor
21 made, and second of all, had it been made, would there have
22 been a problem about their getting those witnesses?

23 MR. GODDARD: No endeavor was made, certainly to the
24 best of my knowledge, other than beyond the fact that the
25 County did in fact depose Dr. Berlinger and Mr. Knox.

1 JUDGE ROSENTHAL: And these are knowledgeable people
2 as to the practice?

3 MR. GODDARD: Mr. Knox is in the branch which
4 normally performs this analysis.

5 Dr. Berlinger was in charge of the entire TDI
6 Owners' Group licensing project, for want of a more specific
7 term.

8 JUDGE WILBER: So Dr. Berlinger might or might not
9 be familiar with general practices by the NRC as far as these
10 are concerned?

11 MR. GODDARD: I think it would be fair to say that
12 he would be, insofar as this was concerned, by the nature of
13 the duties he was performing at the time.

14 Mr. Knox would be, and was, the more appropriate
15 witness.

16 JUDGE ROSENTHAL: In any case, if I understand you
17 correctly, the Staff interposed no obstacle to the Intervenor
18 reaching Staff witnesses who would have been knowledgeable on
19 the subjects of what the Staff practice was with respect to
20 the interpretation and application of GDC-17 in this respect?

21 MR. GODDARD: That is correct.

22 And, in fact, I only mentioned Dr. Berlinger and
23 Mr. Knox. The County did, in fact, depose other Staff
24 witnesses, but not directly on this point, as it affected the
25 application of GDC-17.

1 JUDGE ROSENTHAL: All right.

2 Now let me ask you if I may, a further question, the
3 question that I asked Mr. Ellis. And that is, do you think
4 that consistent with GDC-17 as written, the Staff could have
5 adopted the practice which the Intervenor claim their
6 excluded evidence suggested that the Staff had adopted?

7 MR. GODDARD: By that I trust from your earlier
8 question, Judge Rosenthal, you mean could the Staff have
9 required a margin over and above the capability to meet the
10 essential loads, to meet the functional tests of GDC-17?

11 My answer to that would be, as an attorney, no.
12 As an engineer, there is no showing that the Staff has at any
13 time required a margin.

14 The table, Suffolk County Exhibit 85, is only
15 indicative if you accept it as face value -- and as pointed
16 out by LILCO in detail in a brief and in Mr. Ellis's oral
17 argument, is subject to at least certain facial discrepancies.
18 By accepting that table at face value, it only purports to
19 show the existence of margins at certain facilities, and in no
20 way demonstrates any evidence of Staff requirements or
21 practices.

22 JUDGE ROSENTHAL: But you are telling me that in
23 your judgment as a lawyer, that the Staff could not have
24 imposed that kind of requirement without an amendment to
25 GDC-17?

1 MR. GODDARD: Or, at the very least, without an
2 interpretation of GDC-17 to show that a margin was required to
3 specifically meet a valid engineering standard.

4 JUDGE ROSENTHAL: So it could have been done on the
5 latter basis without having undertaken to amend the terms of
6 GDC-17 itself?

7 MR. GODDARD: If GDC-17 were interpreted to require
8 a margin. However, the testimony was that no margin was
9 required. And in fact, the Reg Guide 1.9, which was cited by
10 Mr. Ellis, I believe, Section 5.3.9 indicates no requirement
11 for a margin, and authorizes utilization of the engines to the
12 stated loads.

13 JUDGE ROSENTHAL: I understand you are telling us
14 that there wasn't this requirement.

15 What I'm getting at is whether, within the terms of
16 GDC-17 as currently on the books, there was room for the Staff
17 to impose that kind of requirement if it felt that as a matter
18 of safety or engineering or whatever you want to call it, it
19 was warranted.

20 MR. GODDARD: I guess I have to answer that it has
21 not been so interpreted, and I do not see any room for an
22 interpretation to require margin.

23 JUDGE ROSENTHAL: You say they would have to amend
24 GDC-17 to accomplish that.

25 Well, I take it there is some uncertainty as to

1 whether your opinion is the legal opinion of the Office of the
2 Executive Legal Director in toto. You may, if you wish,
3 supply within one business week, a short statement of the
4 Staff's position on that.

5 Do you understand the question?

6 MR. GODDARD: Yes.

7 JUDGE ROSENTHAL: My question is, we have a lot of
8 conversation here about practice -- what might or might not
9 have been the Staff's practice in this regard. Whether this
10 particular exhibit was illustrative, or might have been
11 relevant in the matter of Staff practice.

12 And my question is, whether taking the GDC-17 as
13 written, there could have in the Staff's view, lawfully been
14 the kind of practice that the Intervenors claim their table
15 establishes?

16 MR. GODDARD: I believe I can answer the question as
17 you have amplified it, Judge Rosenthal.

18 The interpretations to date, and the Staff practice
19 -- NRC Staff practice as testified to, do not require such
20 margin. GDC-17, although qualitative and not quantitative, is
21 clear on its face that it requires only the satisfaction of
22 certain functional requirements.

23 Such satisfaction, as most regulations, is only a
24 minimum test. The fact that a greater -- that a margin may
25 exist does not mean that such a margin may be required. The

1 regulation only requires that the standard be met, and by
2 definition that would appear to include no requirements for a
3 margin.

4 JUDGE ROSENTHAL: All right, that says enough.

5 MR. GODDARD: The Staff would summarize its position
6 as being that the exclusion of Suffolk County Exhibit 85 and
7 the corresponding testimony was in no way erroneous, as it was
8 irrelevant for the Applicant's chosen method of demonstrating
9 satisfaction of GDC-17 regulatory requirements, using the
10 qualified load methodology. That methodology was developed as
11 part of the TDI Owners' Group program plan in 1984 for all TDI
12 engines, plant specific safety evaluation reports for
13 Shoreham. And the other plants did issue.

14 And it would appear from the brief filed by Suffolk
15 County, and as amplified by the argument of counsel for New
16 York State today, that the objection which the County and
17 State have is to a failure to demonstrate compliance with the
18 regulatory guide.

19 As this Appeal Board and the Commission have held
20 previously in several opinions, regulatory guides are not the
21 sole means of satisfying regulatory requirements. Staff would
22 submit that the argument of the Appellant would appear to
23 confuse regulatory requirements with regulatory guide guidance
24 or advisory language as to a method by which the regulation
25 can be satisfied.

1 I think it is necessary to look at the history of
2 these engines, and the significant deficiencies which occurred
3 during the preoperational testing, the replacement of
4 components of those engines which is noted in the record, to
5 understand that the Staff had a valid basis for requiring
6 testing over and above that which would have been required if
7 the Applicant were to have chosen to follow Reg Guide 1.9 IEEE
8 87 methodology.

9 And accordingly, the Applicant chose to present a
10 demonstration of the capability and capacity of these engines
11 by a methodology which incorporated the results of actual
12 testing and measurement rather than incorporating a number of
13 conservatisms which are included in the regulatory guide
14 approach.

15 JUDGE WILBER: In your brief, and I believe also
16 in the Licensing Board's decision, they referred to this
17 qualified load concept as an interim licensing basis.

18 What does "interim" mean? Are they sometime in the
19 future going to revert back to Reg Guide 1.9?

20 I don't understand the significance of "interim."

21 MR. GODDARD: The use of the term "interim licensing
22 basis" refers to the licensing of these -- or the
23 qualification and licensing of these diesel engines up through
24 the first refueling outage, at which time by commitments of
25 LILCO and the --

1 JUDGE WILBER: No. I think the interim refers to
2 the generic safety evaluation report which are all Licensees
3 that have these diesels. In fact, I believe your footnote
4 mentions that, Footnote 6, the last sentence in your Footnote
5 6.

6 MR. GODDARD: It is my understanding, Judge Wilber,
7 that that is a reference to the idea that these engines would
8 be inspected and that they would not be simply licensed for
9 the life of the plant. If that is not the case, then I am in
10 error. That is my understanding

11 JUDGE EDLES: Mr. Goddard, is the Staff still
12 reviewing the training procedures in connection with loads to
13 the diesel?

14 MR. GODDARD: The Staff was reviewing the training
15 procedures subsequent to the issuance of the Partial Initial
16 Decision.

17 JUDGE EDLES: What is the status now of that review.

18 MR. GODDARD: May I continue with --

19 JUDGE EDLES: Bring an expert into the booth with
20 you.

21 MR. GODDARD: May I bring an expert into the booth?
22 Thank you.

23 JUDGE EDLES: Go right ahead and identify yourself
24 for the reporter.

25 MR. CARUSO: I am Ralph Caruso. I am the Shoreham

1 Project Manager.

2 The Staff has completed its review of the training
3 and procedures, and has found them to be acceptable, subject
4 to the modification of certain of those procedures by the
5 utility. The Staff is in the process of publishing the Safety
6 Evaluation Report, and expects to do that within the next,
7 approximately, two weeks.

8 JUDGE EDLES: Thank you very much.

9 JUDGE WILBER: Perhaps one more question on that
10 same line.

11 The Applicant, I believe said -- assured us -- that
12 there was no single failure where two diesels could be
13 impacted.

14 Has the Staff reviewed this? Has the Staff looked
15 at interactions?

16 MR. CARUSO: Yes. The Staff looked at the
17 procedures and determined that with the implementation of the
18 procedural changes that the Staff determined should be made,
19 with the installation of a distinctive alarm in the control
20 room to warn the operators when the engines exceeded 3300 kw,
21 if that were to occur for some reason, and with the training
22 that had been proposed by the Licensee, that there were no
23 single operator actions which could occur, which could cause
24 more than one engine to be overloaded.

25 Essentially, the way the Staff -- the Staff

1 conclusion says; with the implementation of these three
2 factors, the alarm, the training and the upgrading of the
3 procedures, the possibility of more than one diesel being
4 overloaded is reduced to an acceptable level to the Staff.

5 JUDGE ROSENTHAL: You have about one more minute,
6 Mr. Goddard.

7 MR. GODDARD: Thank you.

8 Based upon the Staff's emphasis on the
9 differentiation, which the Appellant is apparently not
10 making between regulatory requirements and regulatory
11 guidance, I will only turn briefly to the question of whether
12 or not this error, if it were such, would have impacted the
13 outcome of the proceeding.

14 It is the Staff's position that error, if there was
15 any, was harmless because of the fact that this showing of an
16 inability to meet the IEEE 387 standards, if it were in fact
17 to be demonstrated by virtue of the excluded evidence, or any
18 additional evidence which the Appellant might have produced
19 through cross examination or otherwise, and which was alluded
20 to in the oral argument here today, would not have bearing
21 upon whether or not the engines were qualified or were in
22 compliance with GDC-17 functional requirements under the
23 qualified load methodology.

24 There has at no time been any requirement that these
25 or any other engines be qualified under numerous

1 methodologies. It is sufficient if an Applicant chooses a
2 methodology by which it can be demonstrated to the
3 satisfaction of the Staff in the review process, that the
4 engines meet regulatory requirements, in the opinion of the
5 Staff this was amply done by the Applicant in its application
6 of the qualified load methodology to the Shoreham emergency
7 diesel generators.

8 JUDGE ROSENTHAL: Thank you, Mr. Goddard.

9 Mr. Palomino you have ten minutes for rebuttal.

10 REBUTTAL ARGUMENT ON BEHALF OF THE STATE OF NEW YORK

11 BY FABIAN PALOMINO

12 MR. PALOMINO: To get something very straight right
13 at the beginning. Mr. Goddard said that there was no room for
14 interpretation because nothing mentions -- neither the
15 guidance nor the GDC mentions margins.

16 Now, I have before me here your guidance, Regulatory
17 Guide 1.9, paragraph B, Discussion. Page 1.9-2, last
18 paragraph in B. It says:

19 "The uncertainties inherent in estimates of safety
20 loads at the construction permit stage of design are sometimes
21 of such magnitude that it is prudent to provide substantial
22 margin in selecting the load capabilities of the diesel
23 generating units.

24 JUDGE WILBER: And the last sentence in that
25 paragraph?

1 MR. PALOMINO: Then it goes on to the licensing
2 stage and it says you can be less conservative in the margins.

3 JUDGE WILBER: In fact, you can work up into the
4 short term --

5 MR. PALOMINO: So there is definitely room for the
6 engineers to provide the kind of margins we are saying that
7 these standards required as a standard practice. So that
8 legally there was nothing wrong with it, and it is our
9 contention they have done it.

10 There is also a sound reason even at the licensing
11 stage. As LILCO points out in its brief, that we don't show
12 the latest FSARs of these plants.

13 The reason you have margins is because they might
14 add loads. And that would impact on safety. So that you need
15 margins. And that is why the engineers' requirements --
16 undoubtedly why our contention is right, that they have been
17 applying them all along as a standard practice.

18 Now, the second thing is Mr. Goddard talked about
19 the testing was a reason.

20 The reason the hearings were going to conclude --
21 and they were going to show that these engines were not safe.
22 The fact is, they had Colt diesels there. They could have put
23 them on line. The reason they wanted to do it is use this
24 Board to load these in the rate base, to get a double
25 recovery. And that is the reason they went for this design

1 basis load.

2 The fact is --

3 JUDGE EDLES: Mr. Palomino, I thought Mr. Goddard
4 said this was part of a more generic program that involved
5 these types of diesels at other plants as well, not because of
6 the loading of the rate base at Shoreham.

7 MR. PALOMINO: It may be.

8 But it may be that this one was under challenge and
9 they wouldn't have qualified it. And then they wouldn't have
10 gotten them in the rate base.

11 Turning to interim licensing as you inquired, Judge
12 Wilber, the fact is whether it is interim or not doesn't
13 escape compliance with GDC-17.

14 The only way they could do that is by a waiver, and
15 they couldn't get a waiver because we would show they had
16 Colts ready to go.

17 As far as going into LILCO's testimony, he says the
18 table doesn't show that this was applied.

19 We said the combined table in the testimony. It
20 wasn't a thrust at just the table. We said the table showed
21 the results.

22 He went into the fact that the testing showed these
23 engines to be sufficient.

24 You know, we have heard that they are testing all
25 along. Before the crankshaft broke, there was sufficient.

1 After the crankshaft broke, before the piston bosses failed
2 they were sufficient.

3 You know this kind of puffing means nothing, you
4 know, except it just constantly proves you can't rely on what
5 they say with respect to adequacy.

6 Now he talked about the single failure rule. As I
7 pointed out before, the single failure rule presumes a
8 qualified engine, qualified units. You can't use that as a
9 basis for saying they are qualified.

10 They also talked about the integrated electrical
11 testing. That also presumes a qualified engine. It doesn't
12 prove -- doesn't make the engine qualified.

13 And he says -- which was very interesting -- and I'm
14 talking about Mr. Ellis -- you can never replicate what is
15 going to happen after a loop LOCA. That's right. That's why
16 you need margins.

17 I don't have anything further to say.

18 JUDGE EDLES: My recollection -- just let me clarify
19 with you. My recollection is you couldn't replicate, but at
20 least they knew all the loads that would be applied to the
21 diesel in the event of a loop LOCA.

22 MR. PALOMINO: Yes. You know all the loads, but
23 that doesn't replicate what could happen, and that is why
24 safety margins are required, have been required.

25 The fact is, we think we didn't get a fair hearing.

1 That we should have been able to admit evidence. There is no
2 legal inhibition why the Staff could not have applied this
3 standard.

4 If they did, it would have resulted in either a
5 safety margin sufficient for the people of New York as to
6 everybody else, or it would have resulted in these engines not
7 being qualified and them having to put the Colts on line.

8 JUDGE EDLES: Mr. Palomino, do you have a view with
9 regard to Mr. Goddard's statement that the testing program for
10 these diesels is more rigorous than the one that would have
11 been imposed under 1.9, under Reg Guide 1.9?

12 MR. PALOMINO: Let me say this. These engines are
13 troubled. The Board set a standard for testing they didn't
14 want to comply with, which might have proved otherwise.

15 I don't know about whether they would have qualified
16 them or not. But they are not ordinary, presumably good,
17 engines. They have rebutted that presumption, and they should
18 have gone through the testing that the Board required. They
19 sought to avoid it by this qualified load standard, and at
20 least to a lesser margin of safety.

21 Thank you.

22 JUDGE ROSENTHAL: I want to thank on behalf --
23 Mr. Ellis?

24 MR. ELLIS: Judge Rosenthal, I am reluctant to get
25 up, but I know of no standard of testing by the Board, by the

1 Licensing Board, that the Applicant has not complied with.

2 JUDGE ROSENTHAL: Thank you. We will note that for
3 the record.

4 On behalf of the entire Board, I would like to thank
5 counsel for their helpful presentations this afternoon.

6 The appeal of the State and County stand submitted.

7 Before, however, we adjourn, it is my understanding
8 that Mr. Kelley has a matter he wishes to raise in connection
9 with the briefing of the County's appeal from a portion of the
10 Licensing Board's Emergency Planning Decision of last spring.

11 So, we will leave diesel generators and, Mr. Kelley,
12 you may tell us what your problem is.

13 This will be off the record. The record can be
14 regarded as concluded before I got into this matter.

15 (Whereupon, at 4:15 p.m., the hearing in the
16 above-entitled matter was concluded.)

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CERTIFICATE OF OFFICIAL REPORTER

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission in the
matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power
Station Unit 1.)

Name of Proceeding: Oral Argument

Docket No.: 50-322 OL

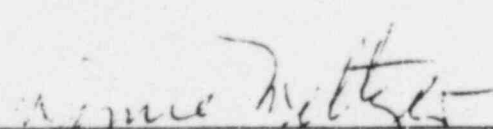
Place: Bethesda, Maryland

Date: Thursday, September 26, 1985

were held as herein appears and that this is the original
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Regulatory Commission.

(Signature)

(Typed Name of Reporter)


Mimie Meltzer

Ann Riley & Associates, Ltd.