559

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles*
Howard A. Wilber

March 26, 1986
(ALAB-832)

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

Karla J. Letsche, Washington, D.C. (with whom Herbert H. Brown and Lawrence Coe Lanpher, Washington, D.C., Martin Bradley Ashare and Eugene R. Kelley, Hauppauge, New York, Fabian G. Palomino, Albany, New York, Robert G. Abrams, Attorney General of the State of New York, New York, New York, and Stephen B. Latham, Riverhead, New York, were on the briefs), for the intervenors State of New York, Suffolk County, New York, and Town of Southampton, New York.

James N. Christman, Richmond, Virginia (with whom Donald P. Irwin, Lee B. Zeugin, Kathy E.B. McCleskey, Jessine A. Monaghan, and Scott D. Matchett, Richmond, Virginia, were on the briefs), for the applicant Long Island Lighting Company.

Bernard M. Bordenick (with whom Sherwin E. Turk and Robert G. Perlis were on the briefs) for the Nuclear Regulatory Commission staff.

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* Since January 28, 1986, Mr. Edles has been serving as the Acting Director of the Commission's Office of Inspector and Auditor. For this reason, he took no part in the consideration or disposition of the matters covered in this decision.

D502

DECISION

The Licensing Board has rendered two partial initial decisions in the emergency planning phase of this operating license proceeding involving the Shoreham nuclear facility in Suffolk County, New York. In the first of these decisions, issued last April, the Board resolved most of the contested offsite emergency planning issues in favor of the applicant Long Island Lighting Company (LILCO). It further determined, however, that the applicant lacks the legal authority to implement material features of its emergency response plan, with the consequence that an emergency plan in conformity with Commission regulations cannot be carried out.[1]

In the second and "concluding" decision, issued the following August, the Board addressed the issues remaining before it.[2] These were primarily concerned with the adequacy of the Nassau Veterans Memorial Coliseum as a reception or "relocation" center for the monitoring, decontamination and transfer to sheltering facilities of evacuees from the area surrounding the Shoreham facility in the event of an emergency. Although the applicant prevailed on most of those issues as well, the Board ended its August decision with the declaration that the applicant's emergency

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[1] LBP-85-12, 21 NRC 644 (1985).

[2] LBP-85-31, 22 NRC 410 (1985).

response plan is "fatally defective." The bases of this declaration were (1) the Board's determination in its earlier decision that the applicant lacks the legal authority to implement its plan; and (2) the Board's belief that the opposition of both the State of New York and Suffolk County to the plan "has created a situation where at any given time it is not known whether the [p]lan would be workable."[3]

The applicant and the intervenors State and County took appeals from portions of both of these decisions.[4] With the parties' acquiescence, we separated for expedited review the applicant's appeal on the legal authority question. In ALAB-818, we affirmed the Licensing Board's conclusions on that question.[5]

The effect of that affirmance was to render academic the issues presented by the various other appeals from the April and August partial initial decisions. In granting the applicant's petition for review of ALAB-818, however, the Commission stated that "a detailed specification of issues,

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[3] Id. at 431.

[4] In addition, the Town of Southampton appealed from portions of the August decision.

[5] 22 NRC 651 (1985).

briefs and, if useful, oral argument will be deferred at least until the Appeal Board's resolution of intervenors' pending appeal on other emergency planning questions."[6] In that circumstance, upon the completion of the briefing process, we scheduled oral argument on the pending appeals.

At the argument, we raised on our own initiative the question whether, inasmuch as the result reached by the Licensing Board (i.e., the denial of a full power operating license) was favorable to them, the intervenors' appeals from the two partial initial decisions were impermissible. That question was fully explored, along with the merits of several of the numerous issues presented by those appeals and that of the applicant from the August decision.

For the reasons hereafter developed, we dismiss the intervenors' appeals, but nonetheless have considered on the merits the claims encompassed in them. Our conclusion is that the Licensing Board committed several errors requiring further proceedings before that Board. Although thus remanding to the Board for that purpose, we are instructing it to take no action in furtherance of the remand, pending a determination by the Commission as to whether the Board

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[6] December 19, 1985 Commission order (unpublished) at 1-2.

should await Commission action on review of ALAB-818.

Insofar as the applicant's appeals are concerned, the current posture of the proceeding makes it unnecessary to reach the still pending issues presented by them.[7] We are therefore holding those issues in further abeyance until such time as their resolution might become warranted.

I.

Although dissatisfied with a number of the findings contained in the April and August decisions, as well as with numerous interlocutory rulings preceding those decisions, the intervenors do not quarrel with the ultimate result reached by the Licensing Board. Nor could they. The Board's determination that the applicant lacked the legal authority to carry out its emergency response plan in full rendered inconsequential all of the findings and procedural rulings adverse to the intervenors. For, as the Board observed in the August decision, given that determination no operating license for Shoreham can issue. That is the precise outcome that the intervenors sought.

It is well-settled that a party may appeal from a Licensing Board decision only if aggrieved by the ultimate

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[7] In addition to its appeal from the August decision, we still have before us a small portion of the applicant's appeal from the April decision. See ALAB-818, 22 NRC at 677-78.

result -- i.e., the party wishes that result altered in some material respect.[8] The intervenors not being in that position, their appeals must be dismissed.

It does not follow, however, that the intervenors were precluded from presenting to us their claims of Licensing Board error. To the contrary, they were free to put those claims forward in responding to the applicant's appeals from the partial initial decisions -- appeals that did seek a change in result. For it is equally established that a party prevailing on the trial level may defend its favorable result on any ground that is supported by the record. In this connection, it matters not that the precise claim(s) offered as a basis for affirmance may have been urged upon and rejected by the trial tribunal. Of crucial importance is simply that an adequate record foundation for the claim be present.[9]

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[8] See South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-694, 16 NRC 958 (1982), and cases there cited.

[9] See Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1597 n.3 (1984); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 789 (1979); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 202 (1978); Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975) (citing Jaffke v. Dunham, 352 U.S. 280 (1957) and California Bankers Assn. v. Shultz, 416 U.S. 21 (1974)).

Although intervenors' counsel should have been aware of the foregoing considerations, it nonetheless seems appropriate to treat their appellate assertions at this point as if those assertions had been offered in support of the Licensing Board result, instead of in the furtherance of an impermissible appeal from findings and rulings not affecting that result. But the question remains whether there is any warrant for our examination of the assertions at this juncture. We have, after all, already affirmed in ALAB-818 the outcome below on the precise ground assigned for it by the Licensing Board -- the applicant's lack of legal authority to carry out its emergency response plan. Consequently, at least so long as our conclusions in ALAB-818 remain undisturbed, there is no compelling necessity to search for possible alternative bases for affirmance.

For this reason, we ordinarily would be inclined to defer consideration of the intervenors' claims of error to await the completion of Commission review of ALAB-818. The Commission's election to defer its ALAB-818 review pending our appraisal of those claims, however, dissuades us from pursuit of such a course. True, the Commission undoubtedly made that election on the assumption that the claims were presented in the context of a viable appeal by the intervenors. Nonetheless, we have been given no cause to believe that the Commission's determination to defer review

of ALAB-818 hinged upon the validity of that assumption. In the absence of a contrary indication, we must presume instead that the Commission desires to have in hand our evaluation of the intervenors' arguments on the merits of the applicant's emergency response plan -- whether advanced by way of an appeal or otherwise -- before it decides whether the plan has insurmountable legal flaws.

We thus have undertaken to examine the intervenors' claims and will set forth our conclusions in Part II of this opinion. For their part, however, the applicant's appeals stand on a quite different footing before us. In common with the issues raised by the intervenors, the applicant's pending challenge to the April and August decisions is of no significance in the face of ALAB-818. Thus, there is no reason to decide that challenge in advance of Commission review of ALAB-818 unless the Commission has asked that we do so. We find no such request. To the contrary, as seen, the Commission deferral of its ALAB-818 review was cast exclusively in terms of our resolution of the "intervenors' pending appeal."[10]

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[10] While we need not speculate on the Commission's reason for drawing a distinction in this regard between the intervenors' and the applicant's appellate challenges, one possible explanation comes readily to mind. Were the intervenors to prevail on their appeals, the Commission might find it unnecessary to pass judgment on the legal

(Footnote Continued)

II.

In the course of denying the intervenors' motion for leave to submit a second 20-page brief in supplementation of the 100-page brief they had already tendered in support of their appeals, we observed:

> Appellate review is not intended to offer losing parties a forum for simply renewing claims presented to, but rejected by, the trial tribunal. To be sure, NRC licensing proceedings ordinarily involve lengthy evidentiary records and present numerous complicated and detailed technical issues for resolution. In recognition of that fact, the Commission, in contrast with many federal agencies, has provided two levels of appellate review, and appeal boards frequently examine in some depth a wide range of technical and legal matters. But that does not alter the fundamental purpose of appellate review. Proceedings on appeal are intended to focus on significant matters, not every colorable claim of error. We expect advocates to cull the issues and arguments to be pursued on appeal.[11]

A fresh examination of the content of the brief on file reconfirms our conviction that the intervenors made little, if any, effort to select the "most promising issues for review."[12] To the contrary, from all appearances, we have

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(Footnote Continued)
authority matter (at least at this time). On the other hand, an applicant victory on its remaining attacks upon the Licensing Board's decisions could have no such effect. Such success would avail the applicant nothing so long as ALAB-818 continued undisturbed.

[11] ALAB-827, 23 NRC 9, 11 (1986) (footnote omitted).

[12] See Jones v. Barnes, 463 U.S. 745, 752-53 (1983), cited in ALAB-827, 23 NRC at 11 n.6.

been favored with an uncritical rehearsal of virtually every claim -- large or small -- that was advanced to and rejected by the Licensing Board below.

Each claim has received our attention. But we see no reason to freight this opinion with a cataloguing of those that lack sufficient merit or significance (or both) to require further discussion. We thus confine ourselves to the relatively few substantial assertions of Licensing Board error that have been put forth by the intervenors.

Before turning to those assertions, some additional introductory observations are in order. A nuclear power facility may not be allowed to operate at levels above five percent of its rated power in the absence of an NRC finding of reasonable assurance that, in the event of a radiological emergency, adequate measures for the protection of the public health and safety can and will be taken both on and off the facility site.[13] The procedure for passing judgment on the acceptability of a facility's emergency response planning and the minimum content of such planning are set forth in 10 CFR 50.47 and Appendix E to 10 CFR Part 50.

Although the responsibility for making the ultimate reasonable assurance finding is entrusted to this agency, the Federal Emergency Management Agency (FEMA) plays a

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[13] 10 CFR 50.47(a)(1).

significant role in the appraisal of the adequacy of offsite emergency preparedness.[14] In 44 CFR Part 350, FEMA has established "policy and procedures" for its "review and approval . . . of State and local emergency plans and preparedness for coping with the offsite effects of radiological emergencies which may occur at commercial nuclear facilities."[15] In addition, FEMA has joined the NRC in issuing a set of guidelines for the development of radiological emergency response plans by the utility and concerned state and local governments.[16]

The emergency preparedness planning for a nuclear facility is focused to a large extent on assuring that prompt and effective actions can be taken to protect the public from exposure to released gases or other radioactive material.[17] The closest area surrounding the plant for which detailed planning efforts must be carried out is characterized as the "plume exposure pathway" emergency

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[14] See Memorandum of Understanding Between Federal Emergency Management Agency and Nuclear Regulatory Commission, 50 Fed. Reg. 15,485 (1985).

[15] 48 Fed. Reg. 44,332 (1983).

[16] See NUREG-0654 (FEMA-REP-1), Rev. 1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (November 1980).

[17] Id. at 10-12.

planning zone (plume EPZ).[18] The emergency plans must, among other things, allocate responsibility for making the crucial decisions as to the necessary specific protective measures in that area. Additionally, arrangements must be made for the communication of these decisions to the appropriate persons -- namely, the public within the plume EPZ and the individuals who are to play some role in the execution of the determined protective action. Still further, the plans must insure that the individuals who will participate in the emergency response (1) are adequate in number; (2) are familiar with their assignments; (3) have received any training that may be required; and (4) will have at their disposal any needed equipment.[19] Finally, to cover the possibility that evacuation from the plume EPZ will be necessary, the emergency plans must provide for the requisite transportation, as well as for the availability of facilities outside the zone for the reception, monitoring

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[18] 10 CFR 50.47(c)(2). Protective action planning must also be developed for the ingestion pathway EPZ (an area extending beyond the plume EPZ), where the ingestion of contaminated water and foods is the principal exposure. But these efforts are less extensive than those for the plume EPZ. See NUREG-0654 at 64.

[19] 10 CFR 50.47(b).

and, if necessary, decontamination and sheltering of evacuees.[20]

In reaching a decision on the emergency preparedness of an applicant, the Commission normally bases its conclusion on (1) a review of the FEMA findings and determinations respecting state and local emergency plans, and (2) the NRC staff assessment of the applicant's onsite emergency plans.[21] In this case, however, the State of New York and Suffolk County have refused to participate in emergency planning for the Shoreham facility. Thus, the applicant here must be able to provide, by itself, the necessary reasonable assurance that adequate protective measures both on and off the site can and will be taken in the event of a radiological emergency at Shoreham.[22]

A. Plume EPZ Size

1. In 10 CFR 50.47(c)(2), the Commission stipulated that, "[g]enerally, the plume exposure pathway EPZ . . . shall consist of an area about 10 miles . . . in radius." The foundation for this directive (which accordingly led to the establishment of a plume EPZ for Shoreham with an

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[20] NUREG-0654 at 61, 63-64.

[21] 10 CFR 50.47(a)(2).

[22] CLI-83-13, 17 NRC 741 (1983).

approximate 10-mile radius)[23] is a recommendation of a Nuclear Regulatory Commission-Environmental Protection Agency Task Force.[24] From its review of a spectrum of possible nuclear plant accidents, the Task Force concluded that a 10-mile radius for the plume EPZ is acceptable because, among other things, (1) projected doses from most accidents would not exceed Federal Protective Action Guide dose levels beyond that distance from the facility and (2) detailed planning within 10 miles would provide a substantial base for expansion of response efforts if this became necessary.[25] Notwithstanding these generic considerations, however, section 50.47(c)(2) goes on to direct that the "exact size and configuration" of the plume EPZ

> shall be determined in relation to local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries.

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[23] Cordaro et al., fol. Tr. 8536, at 10.

[24] See NUREG-0396 (EPA 520/1-78-016), "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants" (December 1978), at 24.

[25] Id. at 15-17. See also NUREG-0654 at 12. The concept of Protective Action Guide dose levels was included in emergency response planning to assist in deciding at what radiation hazard levels protective actions would be initiated. NUREG-0396 at 3.

Pointing to this direction, in July 1983 the intervenors submitted Contention 22, which asserted essentially that the proposed 10-mile plume EPZ surrounding Shoreham should be enlarged.[26] Relying on the intervenors' own Shoreham-specific accident consequence analysis, Contention 22.A maintained that an EPZ up to 20 miles in radius was necessary in order to enable planning and preparations for protective actions in areas where doses were predicted to exceed the Federal Protective Action Guide levels. Contention 22.B claimed a need for emergency response planning beyond the 10-mile EPZ because of, among others, the following asserted local conditions: (1) in the summer, transients add substantially to the population of Eastern Long Island and many of them are dependent upon the limited available public modes of transportation; and (2) the Suffolk County road network, containing but two east-west arteries, is heavily congested at all times and is inadequate to accommodate the additional seasonal population. In Contention 22.C, the intervenors referred to the "evacuation shadow" phenomenon -- here, the voluntary decision of persons located outside a 10-mile EPZ in the

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[26] Memorandum Regarding Revised Emergency Planning Contentions (July 26, 1983) at 36-47. With its preamble and four subparts, this contention is approximately 11 pages in length.

event of an accident to move still farther away from the facility. According to the intervenors, such movement would impede the evacuation of persons within a 10-mile radius of the facility to more distant points. For this reason, the intervenors insisted, the detailed emergency planning effort should extend beyond 10 miles. Finally, Contention 22.D proposed the expansion of the EPZ to encompass certain jurisdictional boundaries.

After considering the opposition of the applicant and the staff to Contentions 22.A, B, and C, the Licensing Board denied their admission on the basis that the intervenors were challenging the portion of section 50.47(c) that referred specifically to a 10-mile radius for the plume EPZ.[27] In the Board's view, the 10-mile provision was adopted as a generic rule for planning purposes in order to preclude case-by-case litigation of the size of the plume EPZ. As Contention 22 suggested the establishment of a 20-mile EPZ, the Board also relied on a Licensing Board decision in another case, rejecting a proposed contention that asserted the need for a plume EPZ with a 20-mile radius based on a site-specific study.[28] With respect to the local

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[27] Special Prehearing Conference Order (August 19, 1983) at 8-12.

[28] Southern California Edison Co. (San Onofre Nuclear
(Footnote Continued)

conditions specified in Contention 22.B and the evacuation shadow phenomenon, in later rejecting the intervenors' challenge to its ruling the Board pointed out that those matters also had been raised in other admitted contentions.[29]

Without objection, however, the Licensing Board admitted Contention 22.D, regarding jurisdictional boundaries. Following its review of the evidence presented on this contention, the Board required in its April decision that the plume EPZ boundary be expanded to a certain extent and that several schools be included in the zone.[30] In all other respects, the Board found that the boundaries of the plume EPZ were in compliance with the Commission's regulations.[31]

2. Before us, the intervenors charge that the Licensing Board both mischaracterized Contention 22 and failed to apply section 50.47(c)(2) properly. We are told that the thrust of the contention is that the applicant had

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(Footnote Continued)
Generating Station, Units 2 and 3), LBP-82-39, 15 NRC 1163, 1177 (1982), aff'd, ALAB-717, 17 NRC 346 (1983), aff'd sub nom. Carstens v. NRC, 742 F.2d 1546 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 2675 (1985).

[29] Order Ruling on Objections to Special Prehearing Conference Order (September 30, 1983) at 3-4.

[30] LBP-85-12, 21 NRC at 701-706.

[31] Id. at 707.

fixed the boundaries of its proposed plume EPZ without considering local conditions of the stripe explicitly listed in section 50.47(c)(2).[32] The intervenors also insist that the section allows the consideration of other local factors.

a. Turning first to Contention 22.A, we agree with the Licensing Board that section 50.47(c)(2) does not countenance the intervenors' endeavor to create a plume EPZ with a radius that might extend as much as 20 miles from the facility. To be sure, the section allows for adjustments in the boundaries of the basic 10-mile EPZ to accommodate local conditions. But increasing the area of the EPZ fourfold would scarcely be a mere adjustment. Further, as earlier noted, the 10-mile radius figure contained in the section is based upon the NRC-EPA Task Force analyses covering a broad spectrum of possible accidents. As its report makes clear, the analyses were intended to remove the need for site-specific calculations, such as those on which the intervenors base their claim in Contention 22.A that the EPZ should be drastically expanded.[33]

In rejecting a similarly-based attempt to impose a 20-mile plume EPZ on the San Onofre facility in California,

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[32] See supra p. 14.

[33] NUREG-0396 at 15-17, 24 and III-7 through III-8.

a licensing board aptly observed that "it would make little sense to attempt to replicate [the Task Force] studies at reactor sites around the country."[34] We endorsed this result in Diablo Canyon. Confronted with California's attempt to obtain the NRC's agreement to conform its approved EPZ to the state-prescribed zone (which, at least in one direction, had a 20-mile radius), we stated:

> Although the regulations provide that the exact size and configuration of a particular EPZ is to be determined with reference to site-specific factors, the wholesale enlargement of the Commission-prescribed EPZs by the State cannot preclude a licensing decision based upon the requirements of the NRC regulations. As the Licensing Board concluded in considering the same type of expanded state EPZs in [San Onofre], the Commission's regulations "clearly allow leeway for a mile or two in either direction, based on local factors. But [section 50.47] . . . clearly precludes a plume EPZ radius of, say, 20 or more miles." The same Board then correctly determined that a party seeking to impose such a radical departure from the Commission's prescribed EPZs should seek an exception to the rule pursuant to 10 C.F.R. 2.758.[35]

b. We come to a different conclusion, however, with regard to Contentions 22.B and C. In sharp contrast to Contention 22.A, these contentions do not appear to seek

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[34] San Onofre, supra note 28, 15 NRC at 1182.

[35] Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 831 (1984) (footnotes omitted).

anything more than that to which section 50.47(c)(2) entitles intervenors: a determination of the "exact size and configuration" of the EPZ based upon, inter alia, local conditions.[36] Thus, it cannot be said that the contentions amounted to an impermissible attack upon a Commission regulation.[37]

Nor is there substance to the other basis upon which Contentions 22.B and C were rejected. Apparently, the Board assumed that it is not permissible to allow an intervenor to present two contentions that, although having different ultimate objectives, rely in whole or in part on the same alleged facts for their bases. But neither precedent nor common sense calls for any such limitation. To be sure, evidence need be adduced but a single time on any alleged

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[36] With respect to Contention 22.C, the evacuation shadow phenomenon can be considered to be a local condition within the meaning of section 50.47(c)(2) only insofar as the voluntary evacuation of individuals outside the plume EPZ from areas immediately adjacent to its outer boundary might affect the evacuation of persons from the EPZ.

[37] One local factor asserted by the intervenors is that the emergency response would be provided by the utility alone, rather than a government organization. Because a utility may have less extensive resources for response expansion than a government organization, we consider such a utility-alone response to be a local factor that may be litigated in accordance with section 50.47(c)(2). As with any local factor, the need for minor adjustments to the plume EPZ may be argued on the basis of a utility-alone response, but an attempt to press for significant expansion of that EPZ would require an exception to the regulation.

fact (e.g., traffic congestion in a given area), no matter how many contentions might rest upon the purported existence of that fact. But, once the fact is established, there is no good reason why it cannot serve more than one purpose -- i.e., to buttress multiple claims.

In this instance, the intervenors endeavored to invoke certain local conditions to support two distinct lines of argument: (1) that, as a general proposition, the applicant's emergency plan is inadequate,[38] and (2) that, in any event, the boundaries of the plume EPZ must be altered. The effect of the Board's action on the several contentions that advanced these theses was to permit the intervenors to seek an invalidation of the plan because of local conditions but not an alteration of the proposed EPZ boundaries.[39] To repeat, inasmuch as section 50.47(c)(2) entitled the intervenors to insist that the "exact size and configuration" of the EPZ be determined with local

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[38] E.g., Contentions 16, 23, 59, 61, 65 and 97. See LBP-85-12, 21 NRC at 968-69, 972-74, 1001, 1003-4, 1005-10, 1027-28.

[39] As counsel for both the applicant and the staff acknowledged at oral argument, any attempt by intervenors to urge such an alteration based upon the adduced evidence on local conditions (other than those relied upon in Contention 22.D) would have been opposed by reason of the rejection of Contentions 22.B and C. App. Tr. 55-56, 76-77.

conditions in mind, it follows that the Board's error in excluding Contentions 22.B and C was prejudicial.[40]

Accordingly, we are directing the Licensing Board to admit Contentions 22.B and C and to provide the intervenors with the opportunity to supplement the existing evidence on local conditions with such further evidence (if any) as might be directly relevant to the question whether the boundaries of the proposed plume EPZ should be further adjusted.[41] Once the record is closed on those two contentions, the Board is to make its findings and conclusions on the merits.

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[40] For proceedings in which intervenors were allowed to press for adjustments to the proposed plume EPZ based upon local conditions, see, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-84-37, 20 NRC 933, 979, 988-89 (1984), aff'd, ALAB-813, 22 NRC 59 (1985) (an admitted contention asserted, in part, that the flow of evacuees from the then-present plume EPZ through a high population area indicated a need for expansion); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-85-14, 21 NRC 1219, 1236 (1985) (an admitted contention asserted that either the plume EPZ should be expanded to include certain areas lying just outside the EPZ or traffic controls be provided because traffic congestion in those areas would impede the evacuation of the plume EPZ). (An appeal is pending from the Limerick decision, but the admission of the contention in question is not an issue.)

[41] The Licensing Board should determine whether any additional discovery is justified.

We wish to reemphasize that section 50.47(c)(2) allows the consideration only of minor adjustments (such as a mile or two) in the plume EPZ radius. Thus, the Board should exclude any offered evidence that concerns conditions at some distance from the facility.

B. Role Conflict

In the event of an emergency at the Shoreham facility, hundreds of individuals may be needed to assist in providing protective actions for the public. More specifically, the applicant's emergency plan would be implemented by the Local Emergency Response Organization (LERO), which is composed primarily (if not exclusively) of applicant employees and contractors, working with support organizations such as the American Red Cross, the U.S. Department of Energy, and local ambulance companies.[42] This organization acts, in part, as a substitute for Suffolk County and the State of New York in performing emergency response functions. In addition to the individuals who are members of LERO or its supporting organizations, an emergency response will involve persons who do not have such an affiliation, e.g., teachers, school bus drivers, and some health care personnel.[43]

At the hearing below, the intervenors asserted that many individuals will experience a conflict between the discharge of their emergency duties and the fulfillment of perceived family obligations and that, as a consequence,

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[42] LILCO Exh. 79 (Chapter 2).

[43] Babb et al., fol. Tr. 11,140, at 78; LILCO Exh. 79 at 5.1-6.

many of them will not promptly carry out their specific responsibilities. Although agreeing that some role conflict will occur, in its April decision the Licensing Board concluded that a sufficient number of the individuals will perform their duties in a timely fashion.[44]

Before us, the intervenors challenge that conclusion. In this connection, they focus primarily upon two categories of individuals who will have some role to play in the event of an emergency: teachers and school bus drivers.

1. School teachers are among those individuals who are not members of the applicant's Local Emergency Response Organization, but are relied upon to perform essentially their usual duties in the event of a Shoreham emergency. Were an accident to occur during school hours, the applicant might well advise the schools in the plume EPZ to implement an early dismissal of students.[45] Teachers would be relied upon for assistance in supervising and coordinating that dismissal. If, instead, sheltering in the school were called for, the teachers would be needed to supervise the students until the instruction to release them was received.

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[44] LBP-85-12, 21 NRC at 679.

[45] Cordaro et al., fol. Tr. 9154, Vol. II, at 33-35.

Suffolk County presented testimony of five school administrative officials to the effect that a significant number of teachers and administrative personnel would abandon their duties during an emergency.[46] In addition, the County attempted to present the testimony of a panel of teachers to the same general effect. The applicant filed a motion to strike the latter testimony as unreliable and irrelevant.[47] The Licensing Board granted the motion. Among other things, the Board concluded that, given the testimony of the school officials, the teachers' testimony was both irrelevant and cumulative.[48]

The written testimony of the school officials asserted that any protective action, such as early dismissal, evacuation or sheltering, would require at least a full complement of school personnel. Based on a general knowledge of teachers and their family obligations, the school officials considered the potential for role conflict to be a serious problem in providing for protective actions

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[46] Petrilak, fol. Tr. 3087 (Direct Testimony), at 4-5; Jeffers and Rossi, fol. Tr. 3087 (Direct Testimony), Attachment 1; Muto and Smith, fol. Tr. 3087 (Direct Testimony), at 3-4.

[47] LILCO's Motion to Strike or for Discovery and Rebuttal on the Testimony on Behalf of Suffolk County Regarding Emergency Planning Contention 25.D (November 28, 1983).

[48] Tr. 790-91.

at schools. Similarly, the proffered testimony of the panel of teachers maintained that family obligations could cause many teachers to abandon their students in the event of a Shoreham emergency. The teachers, however, were testifying directly from the perspective of those individuals who might experience a conflict between their professional responsibilities and family obligations.

We conclude that, in the circumstances, the Licensing Board erred in excluding the proffered testimony of the teachers. True, in some respects the teachers' testimony was cumulative to that of the school officials.[49] But it provided perhaps a more authoritative indication of the potential for role conflict among teachers than did that of the school officials. Nevertheless, the Board's error was not prejudicial for, even considering the additional views of the teachers, the outcome on the issue is not altered.

Whether the potential for teacher role conflict fatally flaws the applicant's emergency response plan hinges upon whether such significant job abandonment might occur as to result in an insufficient number of teachers being available

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[49] The proffered testimony of the teachers discussed a survey of teachers concerning role conflict that was not part of the prefiled testimony of the school officials. This survey, however, was extensively discussed during cross-examination of the school officials, so any error in its rejection by the Licensing Board was harmless. See, e.g., Tr. 3091-100, 3170-74, 3190.

to supervise early dismissal, evacuation or sheltering activities. The teachers' proffered testimony did not provide firm evidence on this question. While opining that some of their colleagues would likely abandon their posts,[50] the teachers did not discuss the minimum number needed to allow for proper supervision of the students. For example, they did not address the possible placement of students in larger groups, which would reduce the complement of teachers necessary for supervision.

In this connection, neither the included nor the excluded testimony on teacher role conflict stood in the way of the Licensing Board's reliance upon the testimony of the Chief of FEMA's Natural and Technological Hazards Division. He stated that, based on his 15 years of experience in emergency operations, "[t]he history of disaster response has consistently shown that . . . teachers . . . more than meet [their] responsibilities when faced with emergency situations."[51] This observation was supported by a school official who testified that, in his experience, while some individual teachers were affected by role conflict, teachers

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[50] Apparently, no teacher was prepared to state that he or she would follow such a course.

[51] McIntire, fol. Tr. 2086, at 5. See LBP-85-12, 21 NRC at 677.

as a group met their responsibilities during emergencies.[52] In sum, even if some job abandonment were to occur (as the proffered testimony of the panel of teachers hypothesized), the totality of the evidence put before the Board precluded a finding that the remaining teachers would be unable to provide adequate supervision of students during an emergency at Shoreham.[53]

2. Students attending schools in the plume EPZ are transported in buses owned and operated by either a bus company under contract to provide such services or (in a few instances) by the school district itself.[54] In the event of an emergency at Shoreham, the applicant will rely on these schools to implement any early dismissal using those

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[52] Tr. 3185-87.

[53] An applicant witness testified that certain individuals who perform duties during a Shoreham emergency but are not members of LERO (such as teachers) will be provided information regarding the worker tracking system and the special relocation center for their families. Tr. 904-06. See LILCO's Proposed Findings of Fact and Conclusions of Law on Offsite Emergency Planning (October 5, 1984) at 34 n.44; see Cordaro et al., fol. Tr. 831, at 21-24. We assume that the applicant will fulfill its commitment to make arrangements for teachers, and other school personnel needed during a Shoreham emergency, to participate in the worker tracking system and special relocation center, where they so desire.

[54] Cordaro et al., fol. Tr. 9154, Vol. II, at 61-62.

resources.[55] If immediate evacuation is directed, the bus drivers will be expected to take the students to the appropriate reception center.[56]

The applicant does not have any agreements with the school bus companies to ensure that the bus drivers will respond during a radiological emergency.[57] Further, a survey of school bus drivers in the Shoreham EPZ indicated that significant role conflict might occur.[58] While the applicant points to the fact that the bus companies are

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[55] Id. at 33-35. Only in the case of the evacuation of nursery schools will the applicant assume transportation responsibility. Id. at 52, 83-85.

[56] Id. at 51-52. In contrast to the contemplated arrangements for the evacuation of the general public (see infra pp. 40-43), the reception centers for student evacuees will most likely be schools outside the plume EPZ. Ibid.

[57] This matter was raised below as Contention 24.M. See LBP-85-12, 21 NRC at 978. A FEMA witness testified that the lack of agreements to ensure the availability of school bus drivers was a deficiency in the emergency plan. Tr. 12,432-34. Despite the lack of agreements, however, the Licensing Board concluded that the emergency plan provided reasonable assurance that an adequate number of school bus drivers will be available. 21 NRC at 858-59.

The applicant's emergency plan indicates that training will be offered to school bus drivers but it is not mandatory. LILCO Exh. EP-79 at 5.1-6. Applicant witnesses testified that training had not been provided to the drivers. Babb et al., fol. Tr. 11,140, at 79-80. See LBP-85-12, 21 NRC at 753-55, 859.

[58] Cole, fol. Tr. 1216, at 7. Some of the surveyed drivers are bus company employees; others are in the employ of a school district. Id. at 3.

required by their contracts to have ordinarily available 10 to 15 percent more drivers than are actually needed to transport the students, no evidence was presented to establish that that surplus would likely compensate for any abandonment caused by role conflict of the dimensions suggested by the driver survey.[59]

In addition to that survey, the intervenors sought to introduce testimony on the results of a survey of Suffolk County volunteer firemen on the subject of role conflict.[60] The staff objected to its admission on the basis that it was irrelevant because (1) the emergency response plan under consideration does not rely on firemen, and (2) the survey did not include members of the fire department closest to Shoreham.[61] The Licensing Board concurred with the objection and, at the hearing, also struck those portions of the testimony of County witnesses Kai T. Erikson and James H. Johnson that dealt with the results of the survey.[62]

We agree with the intervenors that the Board erred in excluding the testimony related to the survey of volunteer

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[59] Cordaro et al., fol. Tr. 9154, Vol. II, at 59.

[60] See Cole, fol. Tr. 1216, at 12-16.

[61] NRC Staff Motion to Strike Certain Prefiled Testimony of Suffolk County (November 28, 1983) at 2.

[62] See Erikson and Johnson, fol. Tr. 1455, at 24-26, 28, 30.

firemen. While the applicant does not rely on volunteer firemen to implement protective actions in the event of a Shoreham emergency, that fact alone was insufficient to deny admission of the testimony.[63] In our view, the results of a survey as to the potential for role conflict among firemen, if they had been part of the emergency response, would provide insight into the likely course of conduct of school bus drivers.[64]

Stated in its simplest terms, if a trained professional emergency worker such as a fireman would put family obligations ahead of the discharge of any Shoreham emergency duties that might be assigned to him or her, it is a fair inference that an individual not in such a line of endeavor would encounter at least as great role conflict.[65] It is

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[63] We do not consider the other basis presented by the staff for exclusion of the testimony (i.e., the survey did not include the fire department closest to Shoreham) to be any more persuasive.

[64] We do not view the firemen survey as applicable to the members of the applicant's Local Emergency Response Organization. In contrast to the firemen, the LERO personnel have undergone considerable training with regard to their required duties and responsibilities in the event of a radiological emergency. See LBP-85-12, 21 NRC at 745-56.

[65] Some non-LERO individuals, such as teachers and health care personnel, would merely continue during an emergency in essentially their usual functions at their current location. The potential for role conflict causing job abandonment among these individuals is quite distinct

(Footnote Continued)

thus unsurprising that, in the consideration of emergency planning in Zimmer, we found that surveys of volunteer life squadsmen and firemen concerning the role conflict they would encounter raised "a serious question as to whether bus drivers could be depended upon to carry out their responsibilities" in the event of an accident at that plant. We further determined there that those surveys precluded, on the evidence of record, a finding that the school bus drivers would respond promptly.[66]

On the record now before us, we similarly cannot make a finding that a sufficient number of school bus drivers can be relied upon to perform their duties if an accident occurred at Shoreham. Therefore, we are remanding this matter to the Licensing Board for further exploration. All parties will be free to adduce additional evidence on the

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(Footnote Continued)
from that potential for individuals who must respond to an emergency. Thus, we do not consider the firemen survey to provide any significant information on role conflict among those non-LERO individuals, such as teachers and health care personnel, who essentially continue to perform their regular duties during a Shoreham emergency.

[66] Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC 760, 772 (1983). It is true that volunteer life squadsmen and firemen were included in the Zimmer emergency response plans. See Zimmer, LBP-82-47, 15 NRC 1538, 1596-98 (1982). But that fact played no part in our determination that the surveys of those individuals were pertinent to the question of the likely response of the bus drivers to a radiological emergency. Indeed, we did not even mention it.

issue; at minimum, the Licensing Board is to accept the testimony related to the survey of volunteer firemen. Upon review of the evidence presented at the reopened hearing, the Licensing Board should reconsider its prior findings and conclusions regarding the potential for role conflict among school bus drivers.[67]

C. Emergency Planning for Hospitals

Two hospitals, and possibly a third as well, are within the plume EPZ and, thus, must be included in the emergency response plan.[68] On that score, the Licensing Board concluded in its April decision that it was enough that the plan listed several hospitals outside the EPZ to which evacuees from those hospitals might be sent.[69] The Board

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[67] In their brief, the intervenors point to an asserted failure on the part of the Licensing Board to address the potential for role conflict among health care personnel. Our review of the record reveals no clear evidence that such personnel would abandon their duties in sufficient numbers as to make the care of individuals in hospitals and nursing/adult homes inadequate.

[68] At one point in its April decision, the Licensing Board stated that "[t]here are three hospitals in the vicinity of the plant; two just inside the EPZ boundary and one just outside it." LBP-85-12, 21 NRC at 829. At a later point, however, the Board referred to testimony of an applicant witness with regard to the "three hospitals in the EPZ," which the Board opined would be "among the last facilities to be evacuated in any event." Id. at 844-45. On the remand (see infra p. 40), the Board should clarify this matter.

[69] Id. at 839-40.

also determined that, if a need for such evacuation arose, arrangements for the transportation and relocation of patients could be made while the emergency was in progress.[70]

Several bases were assigned for these holdings. As the Board saw it, there is little likelihood that patients will be evacuated from the hospitals within the EPZ because: (1) those hospitals are close to the edge of the EPZ; (2) the hospitals are so constructed as to be particularly suitable for the sheltering of patients in the event of a radiological emergency; and (3) substantial health risks attend upon the movement of patients from one hospital to another.[71] With respect to the sufficiency of the mere listing of possible reception hospitals located outside of the EPZ, the Board observed that those hospitals were on notice that they might be called upon for assistance, but none of them could predict in advance what facilities they might be able to provide to transferred patients.[72] Because of these considerations -- in addition to the improbability that evacuation would be decreed -- the Board found no need

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[70] Id. at 840, 844-45.

[71] Id. at 829.

[72] Id. at 840.

for letters of agreement between the within-EPZ hospitals and potential reception hospitals.[73]

In the case of nursing/adult homes,[74] however, the Board took an entirely different tack. Without explicitly setting forth its rationale for differentiating between that type of facility and a hospital, the Board criticized the emergency response plan because it neither identified more than a few reception centers for the residents of nursing/adult homes nor indicated the existence of letters of agreement between the within-EPZ facilities and such centers.[75] The Board directed that these deficiencies be cured prior to full-power operation of Shoreham.[76] No similar direction was needed with respect to the arrangements for the transportation of the nursing/adult home residents to facilities outside the EPZ. For, in contrast to the situation with the hospitals, the plan sets forth the number of vehicles required and the arrangements

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[73] Ibid.

[74] An "adult" home presumably is a facility for elderly persons.

[75] Ibid.

[76] Ibid.

made for securing them in a timely fashion, should the need arise.[77]

Before us, the intervenors challenge the Licensing Board's acceptance of the portions of the plan concerned with hospital evacuation. In their view, the Board had no legitimate basis for treating the hospitals differently from the other special facilities for the care of the infirm and aged. We agree.

Assuming, without deciding, that the probability of a hospital evacuation is as low as the Licensing Board believed, it does not follow that the emergency response plan need not concern itself with how such an evacuation would be carried out if it should be directed. To the contrary, as we recently observed in a related context:

> The Commission's emergency planning regulations are premised on the assumption that a serious accident might occur and that evacuation of the EPZ might well be necessary. . . . The adequacy of a given emergency plan therefore must be adjudged with this underlying assumption in mind. As a corollary, a possible deficiency in an emergency plan cannot properly be disregarded because of the low probability that action pursuant to the plan will ever be necessary. Thus, the Licensing Board majority gave undue weight to the fact that evacuation of [a hospital within the EPZ] is remote.[78]

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[77] Id. at 828-29. See also LILCO Exhs. EP-1, Appendix A at IV-175 through IV-180 and EP-79, Appendix A at IV-173 through IV-178.

[78] Philadelphia Electric Co. (Limerick Generating

(Footnote Continued)

We find no occasion to reconsider that general proposition here. Moreover, we are satisfied that the Commission's regulations and the guidance contained in NUREG-0654 provide sufficient reason for treating hospital patients in the same manner as the residents of nursing/adult homes insofar as planning for evacuation and relocation is concerned.[79]

First of all, although 10 CFR 50.47 does not itself address the matter, NUREG-0654 defines (at 4-2) the term "special facility" to include "institutions such as hospitals and nursing homes." And there is not the slightest suggestion anywhere in that document that, as a

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(Footnote Continued)
Station, Units 1 and 2), ALAB-819, 22 NRC 681, 713 (1985), review declined, CLI-86-05, 23 NRC ___ (March 20, 1986). In this connection, we cited Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 533 (1983), rev'd in part on other grounds, GUARD v. NRC, 753 F.2d 1144 (D.C. Cir. 1985).

[79] Quite apart from the matter of regulatory requirements and guidance, as earlier noted the Licensing Board did not explain why it was drawing a distinction between hospitals and nursing/adult homes. Nor is a factual basis for such a distinction readily apparent. To begin with, in common with the hospitals, six of the ten nursing/adult homes lie on the outer reaches of the EPZ. Attachment 1 to LILCO's Testimony on Contentions 24.J, N, 72.C, D and 96.B (Planning for Special Facilities), fol. Tr. 9017. Second, it is not unlikely that the evacuation of a significant number of the residents of the homes might pose a sufficient health risk to them that such a step would be avoided if at all possible. Third, the Licensing Board has not referred to any evidence bearing upon the sheltering capability of the homes.

class, hospital patients are not entitled to the benefits of precisely the same emergency planning as are those individuals confined to nursing/adult homes.

With respect to the necessity that the emergency response plan concern itself with the transportation of hospital patients to reception hospitals outside of the EPZ, the regulations do come into play and counter any thesis that such transportation requires no pre-planning but can be left to ad hoc resolution once the emergency has occurred.[80] Specifically, in connection with its emergency plan, an operating license applicant must provide "an analysis of the time required to evacuate and for taking other protective actions for various sectors and distances within the plume exposure pathway EPZ for transient and permanent populations."[81] Such an analysis cannot be made for the hospitals without an awareness of the extent of the transportation that might be required to remove the patients from the EPZ, as well as an understanding of how and when the evacuation would be accomplished. Yet the proposal to deal with transportation requirements only after the need arises supplies no insight on either score.

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[80] Cf. Guard v. NRC, supra note 78.

[81] 10 CFR Part 50, Appendix E, Section IV.

Further, NUREG-0654 contains several criteria for the evacuation of special facilities. The criteria set forth in Section II.J. indicate that the emergency planning for special facilities such as hospitals shall include:

> II.J.10.d. Means for protecting those persons whose mobility may be impaired due to such factors as institutional or other confinement;
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> * * * * *
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> II.J.10.l. Time estimates for evacuation of various sectors and distances based on a dynamic analysis (time-motion study under various conditions) for the plume exposure pathway emergency planning zone . . . ; and
>
> II.J.10.m. The bases for the choice of recommended protective actions from the plume exposure pathway during emergency conditions. This shall include expected local protection afforded in residential units or other shelter for direct and inhalation exposure, as well as evacuation time estimates.[82]

The ad hoc evacuation does not provide a foundation for ascertaining evacuation time estimates in conformity with these criteria.

In sum, the Licensing Board should have required the applicant to fulfill the same planning obligations with regard to possible hospital evacuation as the Board imposed

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[82] NUREG-0654 at 61, 63-64 (footnote omitted).

in connection with the nursing/adult homes. We therefore remand and direct the Board to rectify this error.

D. Nassau Coliseum

As earlier noted, emergency response planning must make provision for the care of persons removed from the plume EPZ should circumstances necessitate evacuation measures. Initially, the applicant's emergency plan designated for this purpose five facilities located in Suffolk County -- three to serve as primary "relocation" centers and two as backup facilities. Each was to provide radiological monitoring and decontamination services, as well as emergency sheltering.[83]

In their Contention 24.0, the intervenors asserted that one of the primary designated centers -- Suffolk County Community College -- was not available for use for that purpose and that, as a consequence, the occupants of a significant portion of the plume EPZ would be left without a place to turn to in the event evacuation became necessary. Another contention (No. 74) alleged that, contrary to NUREG-0654, Section II.J.10.h, two of the primary centers

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[83] LILCO Exh. EP-1 at 4.2-1, 4.2-3.

were within three miles of the plume EPZ boundary.[84] A third contention (No. 75) maintained that:

> The LILCO Plan provides no estimates of the number of evacuees who may require shelter in a relocation center, and the Plan fails to demonstrate that each such facility has adequate space, toilet and shower facilities, food and food preparation areas, drinking water, sleeping accommodations and other necessary facilities. Accordingly, there is no assurance that the relocation centers designated by LILCO will be sufficient in capacity to provide necessary services for the number of evacuees that will require them. Thus, LILCO fails to comply with NUREG-0654 §§ II.J.10.g and J.12.

Before a hearing could be held on these allegations, however, the applicant revised its plan to eliminate the use of the five facilities it had previously designated. In addition, it made several other significant changes in the plan. Instead of all-purpose facilities, the revised plan contemplated that some facilities would be reception centers and others would be shelters. All evacuees from the plume EPZ would be directed initially to a reception center for registration, monitoring, and possible decontamination. If necessary, an evacuee would then be transferred to one of the shelters.[85]

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[84] Section II.J.10.h. provides that a relocation center must be at least five miles, and preferably 10 miles, beyond the boundaries of the plume EPZ.

[85] Cordaro et al., fol. Tr. 14,707, at 15-16 and at Attachment 1; see Tr. 14,781-85, 14,801-02, 14,809.

By the time the hearing began on the relocation center issues in August 1984, the applicant had designated some 50 facilities, all located within Nassau County, as shelters.[86] But there was no designated facility that was to serve as a reception center. The applicant explained that negotiations were still being conducted for the possible use of two facilities in Nassau County for such purpose. It was reluctant to name them at that point, however, for fear that outside pressures might lead to withdrawal of the facilities if their identity became known before completion of negotiations.[87] The hearing ended with the Board declaring a "void" in the record on this matter.[88]

Two months later, the applicant notified the Board and the parties of the completion of negotiations for the use of the Nassau Veterans Memorial Coliseum, located some 33 miles from the closest boundary of the plume EPZ, as a reception center.[89] In the applicant's view, this development merely confirmed commitments on the applicant's part that were

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[86] Cordaro et al., fol. Tr. 14,707, at Attachment 1; Tr. 14,780, 14,784.

[87] Tr. 14,793, 14,796-97.

[88] Tr. 14,806-07, 15,713.

[89] Letter from Kathy E.B. McCleskey to Licensing Board (October 30, 1984). This and earlier developments placing all shelters in Nassau County rendered the intervenors' Contention 74 moot.

already reflected in the record and thus it could be taken into account without a reopening of the evidentiary record. The Licensing Board, however, disagreed and, on January 4, 1985, ruled that "identification of the Nassau Coliseum as a relocation center is not merely a confirmatory item, considering the state of this record."[90] A week later, the applicant moved to reopen the record, submitting with the motion its proffered evidence on the Nassau Coliseum.[91] Over the intervenors' opposition based upon asserted untimeliness, the Board granted the motion and set a schedule for responses to the evidence submitted by the applicant.[92]

Following a hearing on whether the Nassau Coliseum was "functionally adequate" to accommodate the number of evacuees that might be expected to show up in the event of a radiological emergency, in its August decision the Licensing Board found the applicant's "overall procedures for processing evacuees at the Coliseum to be conceptually

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[90] Tr. 15,739-40.

[91] LILCO's Motion to Reopen Record (January 11, 1985).

[92] Memorandum and Order Granting LILCO's Motion to Reopen Record (January 28, 1985).

adequate."[93] Before us, the intervenors attack this finding on a variety of grounds. For the reasons now discussed, we conclude that some of the intervenors' claims are meritorious and others are not.

1. The intervenors maintain that the applicant's motion to reopen the record to receive evidence on the use of the Nassau Coliseum should have been denied as untimely because it was not filed until January 11, 1985 -- approximately five months after the applicant formed its intent to employ the Coliseum. We disagree.

Licensing boards are vested with broad discretion in the conduct of the proceedings before them. Thus, so long as they have a rational foundation, board determinations on such questions as the timeliness of motions are not likely candidates for reversal.

In concluding that the reopening motion here was timely filed, the Licensing Board found that the applicant could not be certain of the availability of the Coliseum as a reception center until final arrangements were completed.[94] That did not occur until October 24, 1984. A few days later, the applicant informed the Licensing Board and the

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[93] LBP-85-31, 22 NRC at 417-19. The Board found, however, a few correctable defects in the plan.

[94] January 28, 1985 Memorandum and Order at 6.

parties of that fact and of its view that the record need not be reopened in order to take cognizance of it.[95] Inasmuch as it was not until January 4, 1985, that the Licensing Board made its disagreement with this view clearly known,[96] the January 11 filing of the reopening motion certainly did not involve an unreasonable delay.[97]

2. Three days after the Licensing Board granted the motion to reopen, the intervenors requested information from the applicant, the staff, and FEMA relating to the applicant's proposed use of the Nassau Coliseum as a

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[95] See supra pp. 42-43.

[96] Tr. 15,739-40.

[97] Nor do we find merit in the intervenors' charge that the Licensing Board applied a double standard in passing upon timeliness questions. The assigned basis for that charge is the Licensing Board's treatment of the intervenors' prior motion seeking the admission of new contentions dealing with certain issues assertedly presented by a strike by applicant's employees. That motion, filed 27 days after the strike occurred, had been denied as untimely. The intervenors have not established a similarity of relevant factors in the two situations. It is also noteworthy that, at oral argument, their counsel explicitly disclaimed any suggestion that the Licensing Board was biased against her clients. App. Tr. 15.

No more substantial is the intervenors' complaint that, in granting the reopening motion, the Licensing Board unfairly gave the applicant a fourth attempt at establishing the viability of the evacuation portion of its emergency response plan. See Consolidated Edison Co. of New York (Indian Point, Unit No. 2), CLI-83-16, 17 NRC 1006, 1014 (1983).

reception center. The sought information pertained to the arrangements made for the use of the Coliseum for reception center purposes; the physical layout of the facility; and the schedule for sporting and other events.[98]

The applicant objected to the request. Following a telephone conference, the Board upheld the objection and announced that the reopened proceeding was an "expedited" one that did not allow for discovery.[99] The intervenors' motion for reconsideration was denied on the ground that no good cause for the requested discovery had been shown "at this late stage of the proceeding."[100]

In challenging that ruling, the intervenors stress that it improperly required them to present direct testimony and to prepare for cross-examination on the applicant's proposed use of the Coliseum without the benefit of any discovery. We agree.

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[98] See letters appended to LILCO's Opposition to Suffolk County Discovery Requests Concerning Use of Nassau Coliseum as a Reception Center, Motion For Protective Order and Request for Expedited Board Ruling (February 1, 1985).

[99] Tr. 15,803. This bench ruling was memorialized that same day by the Board's February 5, 1985 ruling on LILCO's Motion For A Protective Order (unpublished).

[100] Memorandum and Order (Ruling on Motion For Reconsideration of Board's February 5, 1985, Protective Order) (unpublished) (February 12, 1985) at 5. The Board pointed to the provision in 10 CFR 2.740(b)(1) to the effect that "no discovery shall be had after the beginning of the

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Although some aspects of the reception center issue had been litigated earlier, the proposed use of the Nassau Coliseum did not surface until after the record was closed. Once the Coliseum's identity became known, as a matter of simple fairness the intervenors were entitled to be accorded the opportunity to discover any information that might bear upon the suitability of that facility for the applicant's intended use. Moreover, although there may have been a need for an expeditious hearing as declared by the Board, there was no indication that the requested discovery would cause a delay in the hearing schedule established by the Board. In the circumstances, good cause plainly existed for permitting discovery and, thus, the Licensing Board abused its discretion in not so finding.

3. In response to the affidavit of the applicant's witness Elaine D. Robinson on the use of the Coliseum as a reception center, the staff (jointly with FEMA) and the intervenors submitted the proposed testimony of their respective witnesses. Upon considering the proposed testimony of all the parties, the Board declared:

> [A]n oral hearing is needed to resolve the contested issue in Contention 24.0 as to whether the designated relocation center, the Coliseum, is

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(Footnote Continued)
prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer upon good cause shown."

> itself functionally adequate to serve as a relocation center for the anticipated general evacuees. The number of general evacuees that can be expected to use a relocation center has already been litigated and that subject will not be reheard. The Board will only consider evidence that goes primarily and directly to the question of whether the Coliseum is adequate for use as a relocation center. Collateral matters will not be heard.[101]

The Board went on to accept the proposed testimony of the four staff witnesses (FEMA officials). It rejected, however, all or substantially all of the proposed testimony of the intervenors' seven witnesses as either relating to issues that had already been litigated or as not relevant on the issue in the reopened proceeding.[102]

Except with respect to the testimony of Mr. Campo, which dealt entirely with the subject of sheltering, we conclude that the Licensing Board erred in its rulings on the intervenors' proffered testimony. The error stemmed from the Board's unjustifiably narrow interpretation of the issue to be heard at the reopened hearing: whether the Nassau Coliseum "is itself functionally adequate to serve as a relocation center for the anticipated general

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[101] Memorandum and Order (Reopening of the Record) (unpublished) (May 6, 1985) at 4.

[102] Id. at 5-7. These witnesses were: Leon Campo, Dr. James H. Johnson, Jr., Dr. Edward P. Radford, Richard Roberts, Charles E. Kilduff, Langdon Marsh, and Sarah J. Meyland.

evacuees."[103] The Licensing Board construed the question as relating only to the capability of the Coliseum's physical facilities to allow successful conduct of the necessary monitoring and decontamination of evacuees who arrive there. It did not deem it to include, as well, consideration of either the Coliseum's accessibility to evacuees from and around the plume EPZ, or other factors that could likewise affect its utility as a reception center. But, manifestly, a reception center that is beyond the reach of the persons it is set up to serve cannot fulfill its intended purpose, no matter how well the facility might be designed and equipped.

In short, especially given the concerns expressed by the intervenors from the very outset,[104] the Board should

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[103] Id. at 4.

[104] Although the relocation center contentions were cast in terms of the lack of agreement evidencing permission for use of designated facilities as relocation centers, the intervenors' essential concern was whether those facilities were adequate to fulfill their purpose if actually called upon to do so. This intent is manifest, for example, in Contention 24.0. It states in part:

> Suffolk County Community College is an entity of the Suffolk County Government. LILCO has no agreement with Suffolk County to use Suffolk County Community College as a relocation center. . . . Therefore, there is no relocation center designated for a significant portion of the anticipated evacuees. Thus, the proposed evacuation of

(Footnote Continued)

have taken the issue before it to be whether there were any factors -- including the location of the Coliseum relative to the various portions of the EPZ -- that might make that facility unsuitable to serve as the sole reception center for EPZ evacuees. On remand, the Board is to revisit the Coliseum issue in the context of that broader scope. And, in doing so, it is to admit the previously rejected testimony of all of the witnesses for the intervenors other than that of Mr. Campo (whose testimony, once again, did not deal with the Coliseum but, rather, with already fully litigated issues concerned with designated shelters).[105]

(Footnote Continued)
zones A-E, H-J cannot and will not be implemented.

The same thought is inherent in Contention 75, which asserts that "there is no assurance that the relocation centers designated by LILCO will be sufficient in capacity to provide necessary services for the number of evacuees that will require them." See supra p. 41.

[105] The testimony of Messrs. Roberts and Kilduff is concerned with transportation and traffic problems that might develop as a result of the Coliseum's location and its distance from the plume EPZ. Clearly, this is relevant to the question of the accessibility of the Coliseum to evacuees. Dr. Johnson's testimony deals with the evacuation shadow phenomenon. See supra pp. 15-16. While that matter has already been extensively litigated, it was not done in the context of the Coliseum and any problems its location vis-a-vis the Shoreham facility might create. Mr. Marsh's testimony addresses whether the proposed use of the Coliseum is precluded by state law. This question goes to the availability of the Coliseum for reception center purposes and is, therefore, relevant. Ms. Meyland's testimony deals
(Footnote Continued)

Moreover, the Board is to provide the intervenors with the opportunity for discovery that was improperly denied to them and is to allow the introduction by any party of such additional evidence as may be germane to the Coliseum issue as delineated above.

For the foregoing reasons, on those issues raised by the intervenors' appeals, the Licensing Board's April 17 and August 26, 1985 partial initial decisions are affirmed in part and remanded in part for further proceedings in conformity with this decision.[106] Given this result, the Commission may wish to consider whether it should proceed now with its review of ALAB-818. Should it decide to do so, it might further conclude that the proceedings on the remand should be held in abeyance to await the outcome of the ALAB-818 review. Accordingly, the Licensing Board shall

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(Footnote Continued)
with possible health and safety problems that use of the Coliseum for reception center purposes might cause to the area water supply. This testimony focuses upon the availability of the Coliseum as a reception center and is clearly relevant. Dr. Radford's testimony is concerned with the matter of exposure to radiation and any additional problem that the Coliseum's distance from the EPZ may cause. This testimony likewise is relevant to the question whether the Coliseum is suitable to serve as a reception center.

[106] As indicated in Part I. the appeals themselves are dismissed.

take no action in furtherance of the remand unless and until so instructed by the Commission.

Review of the still pending issues raised by the applicant's appeals from the April and August partial initial decisions will continue to be deferred to await either (1) completion of Commission review of ALAB-818, or (2) further Commission instructions to this Board.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board