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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)
)
LONG ISLAND LIGHTING COMPANY)
)
(Shoreham Nuclear Power Station,)
Unit 1))
_____)

Docket No. 50-322-OL-3
(Emergency Planning)

GOVERNMENTS' RESPONSE TO "LILCO'S MOTION TO STRIKE
INTERVENORS' UNAUTHORIZED REPLY TO NRC STAFF'S
RESPONSE TO LILCO'S HOSPITAL SUMMARY DISPOSITION MOTION"

On December 18, 1987, LILCO moved for summary disposition on the remanded hospital evacuation issue.^{1/} On January 15, 1988, the NRC Staff^{2/} and the Governments (Suffolk County, the State of New York, and the Town of Southampton)^{3/} filed responses to LILCO's December 18 Motion. The Staff supported LILCO's summary disposition Motion; its pleading was 17 pages, including an affidavit from the Staff's traffic consultant, Thomas Urbanik.

^{1/} LILCO's Motion for Summary Disposition of the Hospital Evacuation Issue, Dec. 18, 1987.

^{2/} NRC Staff Response to LILCO's Motion for Summary Disposition of the Hospital Evacuation Issue, Jan. 15, 1988.

^{3/} Suffolk County, State of New York, and Town of Southampton Response to LILCO's Motion for Summary Disposition of the Hospital Evacuation Issue, Jan. 15, 1988.

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In view of the Staff's support for LILCO and the facts and arguments contained in the Staff's pleading, the Governments on February 1 filed a Reply to the Staff, as permitted under 10 CFR § 2.749(a).^{4/}

On February 8, 1988, LILCO filed a "Motion to Strike Intervenor's Unauthorized Reply to NRC Staff's Response to LILCO's Hospital Summary Disposition Motion" (hereafter the "Strike Motion"). LILCO's Strike Motion is entirely without merit. For reasons discussed below, the Board must reject the Strike Motion.

First, LILCO alleges that the Governments' Reply does not respond to new facts or arguments in the Staff's January 15 filing and thus is not an authorized Section 2.749(a) filing. That is untrue. The NRC Staff proffered new facts (for instance, the Staff submitted the new Urbanick affidavit which purported to constitute a review of LILCO's evacuation time estimates) as well as many new arguments (such as the Staff's interpretation of how a Section 50.47(c)(1) finding is made). The Staff also provided new arguments regarding its view of the scope of the remand (see discussion by Staff on the issues of letters of agreement, transportation requirements, and time estimates) and the Staff's view

^{4/} Reply of Suffolk County, the State of New York, and the Town of Southampton to the NRC Staff Response in Support of LILCO's Motion for Summary Disposition of the Hospital Evacuation Issue, Feb. 1, 1988 ("Governments' Reply").

regarding whether particular items are amenable to Staff delegation.

The fact that the Staff's new arguments and alleged facts pertain to matters asserted by LILCO in its December 18 Motion is irrelevant. Indeed, the Staff's filing responded to LILCO's; therefore, they necessarily are related. And, since the Governments' response addressed the Staff's filing, elementary logic dictates that the Governments' response related to LILCO's Motion. If the Governments' response had not, it would have been irrelevant to the issues at hand. The point is not whether the Staff's or Governments' response relates to the issues addressed by LILCO, but whether it relates to the new arguments and alleged facts put forth by the Staff. On this count, the Governments' response does so, and it is clearly what is contemplated by Section 2.749(a). Unless given an opportunity now to respond to the Staff's new arguments, the Governments would be left with a LILCO ally -- the NRC Staff -- making wholly unrebutted arguments in support of LILCO's December 18 Motion. Due process and Section 2.749(a) do not permit the proponents or supporters of a motion to make such factual and legal arguments without the opponents having an opportunity for rebuttal.

The Governments' Reply is not "a reclaiming of arguments previously made" (LILCO Motion at 1), but, instead, is focused on specific issues. For example, the Governments submitted

Mr. Hartgen's affidavit, which responded to the new facts contained in Mr. Urbanik's affidavit. LILCO's Strike Motion does not even mention the Urbanik and Hartgen affidavits. This is a deliberate and misleading exclusion.^{5/}

Second, LILCO urges that the Governments' Reply be disregarded because it is an "attack" on the Staff. LILCO's characterization is false. The Governments' Reply contains no "attack"; it contains facts and fair argument based on those facts. The facts, as documented in the Lanpher Affidavit, demonstrate that the NRC Staff has shed objectivity in this proceeding and has allied itself with LILCO as a matter of Staff policy and commitment. Thus, even if there were confirmatory items related to hospital evacuation which might normally be left to the Staff -- and there are none here -- in the circumstances of this case,

^{5/} LILCO's Strike Motion is premised primarily on the Governments' statement (Reply at 2) that the Staff's January 15 filing did not offer much new in the way of facts or argument. LILCO Strike Motion at 1, 3. Two comments are in order. First, the Governments' statement does not mean that under Section 2.749(a), the Governments have no right to reply to that which is new. To the contrary, the Governments clearly have a right to make such a reply to the new material proffered by the Staff, which is what the Governments did on February 1. Second, the Board should not be misled by LILCO. The Governments stated that "[t]he Staff's Response offers little in the way of new facts or argument." Governments' Reply at 2 (emphasis added). LILCO takes this statement and asserts "Intervenors admit that the Staff's Response . . . contains no new facts or arguments." LILCO Strike Motion at 3 (emphasis added). LILCO has simply twisted and misstated the Governments' words. The Governments did not say that the Staff had made "no" new arguments or factual assertions, but rather that there was little that was new. It was for that reason that the Governments' February 1 Reply was only about one-half the length of the Governments' January 15 filing.

no such delegation would be appropriate. This does not constitute an "attack" on the Staff. It constitutes the harsh reality of what has happened in the proceeding, and asks the Board to recognize the inevitable impact of this on the issues in controversy. LILCO's self-serving letter to Mr. Lanpher that is attached to LILCO's Strike Motion does not alter the facts: the Staff openly is committed to the success of LILCO's application for an operating license; it held a secret meeting with LILCO at which it confirmed its allegiance to LILCO; it allowed LILCO to lobby the Staff for that allegiance; and it consciously excluded the Governments from the meeting. The Staff's relationship to LILCO, therefore, precludes the Staff from being able to exercise objectively any decisionmaking function concerning LILCO or Shoreham.

The alliance of LILCO and the Staff is highlighted by LILCO's Strike Motion. If the Governments' February 1 Reply had constituted an "attack" on the Staff, it would presumably have been the Staff, not LILCO, that would have objected. But here, LILCO -- acting in loco parentis to the Staff -- makes the protest. The collegiality between the Staff and LILCO is not that of the commonplace relationship among litigants who share the same side of an issue. It is a unity of pledge and purpose that negates even the semblance of Staff objectivity in this case.

Third, LILCO gratuitously chooses to discuss the Governments' letter of February 5 to the Board and to mischaracterize the letter. This letter is irrelevant to whether the Governments' February 1 Reply was authorized under 10 CFR § 2.749(a). The letter pointed out that it is important, in view of the many filings being made by the parties, that the Board not overlook the parties' rights to file responsive pleadings under the schedules set forth in the NRC's rules. The Board's February 1 Order^{6/} appeared to the Governments to have been issued without consideration of that fact. Surely, it is not inappropriate for a party to apprise the Board of concerns the party has for its rights under law. It is of particular importance to the Governments that the Board refrain from ruling on any matter prior to receiving from the Governments any pleadings which the Governments have a right to submit and to be considered by the Board.

Respectfully submitted,

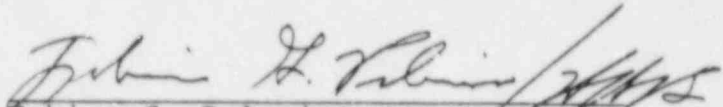
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^{6/} Memorandum and Order (Ruling on Applicant's Motion of December 8 [sic], 1987 for Summary Disposition of the Hospital Evacuation Issue), Feb. 1, 1988.



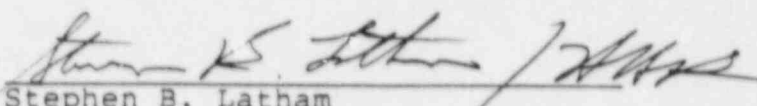
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