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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

OFFICE OF SECRETARY
EXECUTIVE & SERVICE
BRANCH

In the Matter of } Docket No. 50-322-OL-3
LONG ISLAND LIGHTING COMPANY } (Emergency Planning)
(Shoreham Nuclear Power Station, } (ASLBP No. 86-535-04-OLR)
Unit 1) } March 11, 1988

MEMORANDUM AND ORDER
(DENYING IN PART AND GRANTING IN PART LILCO'S MOTION
FOR SUMMARY DISPOSITION OF CONTENTIONS 1, 2, AND 9..IMMATERIALITY)

On December 18, 1987 LILCO filed "LILCO's Motion For Summary Disposition of Contentions 1, 2, and 9 - Immateriality. The motion was filed as part of a large number of separate motions concerning Contentions 1-2 and 4-10, the so called legal authority contentions. LILCO claims in its motion that no triable issue of material fact exists with respect to Contentions 1, 2, and 9 and that it is entitled to summary disposition as a matter of law. Its motion is based on portions of the Board's Partial Initial Decision, on the existing evidentiary record, on CLI-86-13, and on prior revisions of the Shoreham Radiological Emergency Response Plan.

Intervenors responded in opposition to the motion on February 1, 1988 claiming that LILCO's motion is only the latest version of

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immateriality motions that have been rejected by this Board in the past. The motion they claim must fail for the same reasons that past ones did.

The NRC Staff responded in support of the motion on February 2, 1988 claiming that comparable protective measures can be taken in an emergency whether or not LILCO has legal authority to perform the tasks specified in Contentions 1 and 2. As to Contention 9 the Staff asserts that the Board found in the Partial Initial Decision that fuel distribution in an emergency would have only incremental benefit in an evacuation and that LILCO's legal authority to implement this aspect of its plan is also immaterial.

Intervenors responded in opposition to the Staff position on February 18, 1988.

LILCO'S POSITION

Contentions 1 and 2 allege that LILCO lacks legal authority to direct traffic or take other traffic control actions in a radiological emergency. LILCO relies in part on the extensive legal background surrounding the litigation of these contentions for its assertion that it is entitled to summary disposition. It claims that NRC regulations do not require traffic control and do not specify acceptable evacuation times. Rather they require evacuation time estimates for use by decision makers in an emergency. In previous decisions the Board rejected LILCO's arguments in finding that an uncontrolled evacuation would unacceptably reduce the range of available protective options in an emergency. The Appeal Board affirmed and subsequently the Commission reversed and remanded. CLI-86-13, 24 NRC 22, 32 (1986). The Commission

clarified a number of key interpretations in its order remanding the issues to us. It observed that its emergency planning regulations were intended to be flexible and that they did not have fixed criteria. Rather they attempt to achieve reasonable and feasible dose reductions under the circumstances. It also raised factual questions for this case concerning the shortcomings of the LILCO plan in terms of possible lesser dose savings and protective actions foreclosed assuming a best effort State and County response using the LILCO plan. LILCO cites the new rule on emergency planning and its preamble to show that a precise measure of dose reduction is not required and that emergency plans are to be evaluated on their own merits. Thus says LILCO the Board need only determine whether an uncontrolled evacuation will achieve reasonable dose reduction under the circumstances of the Shoreham EPZ.

LILCO also relies on previous Board findings in which we accepted the validity of the traffic model LILCO's contractor had used for evacuation time estimates. Based on results from that model the Board accepted that the difference between a controlled and uncontrolled evacuation of the Shoreham EPZ was 95 minutes. LILCO asserts that subsequent to the close of the record it performed further analyses with more precise considerations which showed that the estimated time difference between a controlled and uncontrolled evacuation has diminished to 35 minutes. This is about the same magnitude as the error or uncertainty in the analysis that we had previously accepted and therefore LILCO claims that traffic control is not a material element for the emergency plan at Shoreham and it does not have a significant effect on dose reduction.

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LILCO requests summary disposition of Contention 9 which challenges its legal authority to distribute fuel during an emergency on the grounds that the existing record demonstrates that its authority to do so is immaterial to dose reduction in an emergency.

INTERVENORS' POSITION

Intervenors oppose summary disposition of all three contentions for four basic reasons. First they say the motion relies in part on new data that they have not analyzed and that have not been subject to scrutiny in a hearing; second, LILCO's view that it is acceptable that there be no plan provision to implement traffic control or assist cars out of fuel is contrary to regulation, NRC case precedent, Board rulings in this case and good emergency planning principles. Third, Intervenors assert that LILCO has highlighted only data favorable to itself, and finally there are genuine issues of fact in dispute which precludes summary disposition.

NRC STAFF POSITION

The NRC Staff supports LILCO's motion for all three contentions. It relies on the existing record for support of its view that LILCO's legal authority to perform the tasks set out in Contentions 1 and 2 is immaterial in this proceeding. First it says no regulation requires that there be guidance or control of the roadways in an evacuation; it is a factual issue whether such control is needed to protect the public, and it is to be seen whether protective measures that are generally comparable to what might be accomplished with Government cooperation can

be provided without it. The existing record shows that comparable protection is afforded the public whether or not LILCO has authority to control traffic according to the Staff. This is because we found only a small time difference between controlled and uncontrolled evacuation time estimates in our previous decision; we found low sensitivity of evacuation time estimates to deviations from guidance; the estimates of evacuation times are not precise but in fact have considerable margins of uncertainty. The Staff emphasizes that regulatory guidance does not specify acceptable evacuation times but simply requires that they be estimated and that an uncontrolled evacuation is not the same as an unplanned evacuation since other elements of guidance to the public remain in place in LILCO's plan. The Staff concludes that these are facts of record that are not in dispute and that failure to implement the actions specified in these contentions is immaterial because generally comparable protection of the public is afforded whether or not LILCO has legal authority to take the actions specified in the contentions.

The Staff supports summary disposition of Contention 9 based on the Board's findings in the Partial Initial Decision where we rejected Contentions 65.D and 66.F dealing with road blockages and fuel disbursement on the merits. 21 NRC at 797-798, 816. The Board found that no regulation requires fuel disbursement in an emergency, that the number of vehicles involved in road blockages would be modest, that reasonable means of mitigation for road blockage exists, and that fuel distribution would provide only an incremental enhancement of the

evacuation. The Staff concludes that failure to implement the activities provided for under Contention 9 would have minimal impact on evacuation times.

DECISION

All parties rely heavily on the existing record in this case to support or oppose summary disposition of Contentions 1, 2, and 9. Our own review of our Partial Initial Decision shows that traffic control issues were litigated extensively in this proceeding without a hint that any party thought traffic control to be immaterial to successful evacuation of the Shoreham EPZ. LILCO prevailed over Intervenors' challenges on traffic control issues on a theory of adequacy supported by factual evidence that showed that its plan for traffic control was technically feasible and implementable in a Shoreham emergency. An operating license was denied because at the time of the decision LILCO lacked legal authority to implement the plan it had submitted.

On review of our rejection of a previous immateriality argument on traffic control the Appeal Board stated:

. . . the Commission has construed its emergency planning regulations to require 'provisions for evacuating the public in times of radiological emergencies.' . . . the Commission's emergency planning scheme contemplates that emergency evacuation procedures be developed . . . LILCO included traffic control as part of its proposed evacuation procedures. . . . We believe that such inclusion was proper.

ALAB-818, 22 NRC 651, 677 (1985).

Intervenors claim that the matter is res judicata and the Board must reject LILCO's claim of immateriality. LILCO's claim of new shorter time estimates does nothing to change the previous ruling that provisions or procedures for emergency evacuation be in place. It is a

distortion of a requirement for evacuation time estimates to use them to justify the failure to provide traffic control and in any event traffic control has a number of important functions such as detection of bottlenecks and congestion, directing traffic away from the accident and easing flow in adverse weather conditions according to Intervenors.

Intervenors assert a number of material facts they claim remain in dispute. They dispute the validity of LILCO's traffic analysis which shows that the evacuation time difference between controlled and uncontrolled evacuation traffic has diminished, and they claim there has not been an adequate opportunity to review the underlying basis for that change. It is disputed whether the new time difference, even if true, is immaterial to the question of dose reduction. Assertedly there might be inconsistencies between the new analysis and the old, such as the appearance of new time sensitivity to public non-compliance with assigned routes and to the effects of road blocks from accidents. Moreover there may be counter intuitive results in the new analysis because time estimates diminished when previously unconsidered traffic was added to the road network.

Both Staff and Applicant argue that traffic control is not a regulatory requirement and the Staff suggests that the need for control is a matter for factual proof. The Board agrees that traffic control is not an explicit requirement of the regulations. Nevertheless Intervenors assert that NUREG-0654 discusses traffic control extensively, FEMA evaluates exercises that includes traffic control, traffic control may have other justifications than reduction of evacuation time in an emergency, the Appeal Board has ruled that

provisions for traffic control are proper in this case, and there may be unexplained inconsistencies in LILCO's new analytical results. These assertions are sufficient to conclude that there are material facts in dispute on whether traffic control is immaterial to emergency planning for Shoreham. While we take no position on the truth of Intervenors' allegations we conclude that they have alleged enough to defeat the motion for summary disposition on Contentions 1 and 2.

We agree with Staff however that the matter of materiality of traffic control is open to factual inquiry. It is not res judicata or collaterally estopped in this case. We therefore deny the motion with respect to Contentions 1 and 2 and set the matter for hearing where LILCO may pursue resolution on grounds of immateriality if it wishes.

We do not accept Intervenors' statement of material facts as the issues to be resolved in hearing however. We have previously observed with disfavor Intervenors' practice of submitting questions or statements of their perception of unresolved issues in the guise of material facts in their response to motions for summary disposition. In this case however we found enough from their affidavits to establish that there are material facts in dispute. If LILCO chooses to pursue an immateriality argument for resolution of these contentions then according to our previous guidance for future hearings we expect LILCO to establish a *prima facie* case for immateriality of traffic control based on the existing record, regulations, prior Board rulings and new data in its possession. Intervenors will then have the burden of going forward to show with particularity why traffic issues cannot be treated as immaterial in the specific circumstances of the Shoreham EPZ. At a

minimum we expect the parties to address the technical reliability of new time estimates that LILCO may present, possible bases for requiring traffic control other than shortening evacuation times, options for protective action that may be foreclosed by a finding of immateriality, and qualitative assessment of the comparability of dose reductions afforded by controlled and uncontrolled evacuations.

Contention 9 stands on a different footing from Contentions 1 and 2 because the action it specifies constitutes a single narrow component of a comprehensive emergency plan. In previous litigation we found LILCO's plan for supplying fuel to motorists along roadsides to be technically adequate. We also found that according to FEMA this provision of the plan is an "extra", that the provision is not required by regulation and that if implemented it could provide incremental enhancement of an evacuation. This provision however was submitted by LILCO itself as one of the component provisions for an integrated emergency response that it perceived was needed to comply with the general requirements of section 50.47(b). Therefore in our decision that resolved fuel distribution contentions in LILCO's favor on the basis of adequacy we saw neither need nor record support for additional findings on the question of materiality. We denied separately LILCO's first motion for summary disposition on grounds of immateriality in the same Partial Initial Decision because there were material facts in dispute.

Subsequently, however, the Commission stated its intention that emergency planning regulations should be applied flexibly and that we should examine the shortcomings of the LILCO plan in terms of possible lesser dose savings and protective actions foreclosed assuming a best

effort State and County response using the LILCO plan as the source of basic emergency planning information and options. 24 NRC 22 (1986), CLI 86-13. On September 17, 1987 we denied LILCO's renewed motion for summary disposition of the legal contentions as a group observing that LILCO's plan for distributing fuel was a safety feature in LILCO's overall plan. LILCO's motion was based on the guidance found in CLI-86-13 and a new theory that its plan that had been found to be technically adequate in most respects, together with an assumed best efforts Government response, was adequate to protect public health and safety in an emergency. Our denial of LILCO's motion, however, was grounded on an unwillingness to assume without factual inquiry that Government best efforts in an emergency would be adequate and that there were no facts in the existing record concerning the dimensions of the expected Government response under the best effort assumption.

Events again intervened to alter the decisional guidance when the revised rule under section 50.47 (c)(1) became effective on December 3, 1987. In the statement accompanying the new rule the Commission asserted that a utility plan could be accepted if it met a test of adequacy under 50.47(b) with due allowance for Government non-participation, even though it might not achieve as much protection of the public as a plan having full Government cooperation. We consider LILCO's motion grounded on an immateriality theory for the first time under the new rule.

Intervenors oppose summary disposition of Contention 9 with the claim that the issue of fuel disbursement must now be revisited because LILCO's new time estimates allegedly show some sensitivity to accidents

and road blockages. However, the claim is contrary to the record and cannot be considered because our approval of LILCO's plan in this regard was not grounded on estimates derived from traffic models. We found that vehicles out of fuel would not be a factor affecting the evacuation because the number of vehicles affected is modest relative to total evacuating traffic, and reasonable means of mitigation for cars out of fuel exist (in addition to resupplying them with fuel). 21 NRC 644 (1985), 797.

Intervenors have not produced any factual evidence suggesting that there would be any lessening of dose saving if this feature of the plan were not implemented. Nor have they produced any reason for believing that this feature of the plan is foreclosed from implementation under the best efforts assumption. We need not inquire further into the expected performance of the Governments in an emergency with respect to this provision, because LILCO's independent capability to implement fuel distribution has been found to be sufficient without Government participation, and we would reject any suggestion that Governments would intervene at the height of an emergency to prevent it.

The Board is generally skeptical of a theory that isolated components of a complex integrated emergency plan can properly be chipped away incrementally with motions based on assertions of immateriality. Such practice may risk the error of evaluating emergency plans in the context of the contingent probability that they will have to be implemented which is contrary to Commission policy. Viewing the record against that background which is most favorable to the opponents in this instance however, the Board concludes that, with

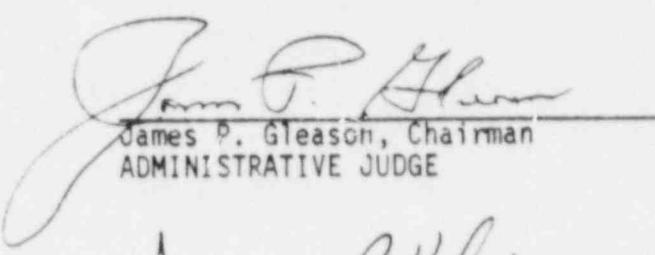
respect to Contention 9, Intervenors have not controverted any material facts with respect to LILCO's motion for summary disposition. There being no material facts in dispute on Contention 9 summary disposition is warranted and is hereby granted.

ORDER

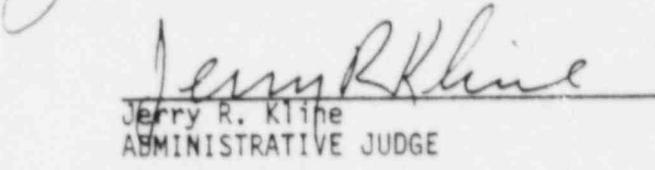
In consideration of all the foregoing it is hereby
ORDERED

1. LILCO's motion for summary disposition of Contentions 1 and 2 on grounds of immateriality is denied.
2. LILCO's motion for summary disposition of Contention 9 on grounds of immateriality is granted.

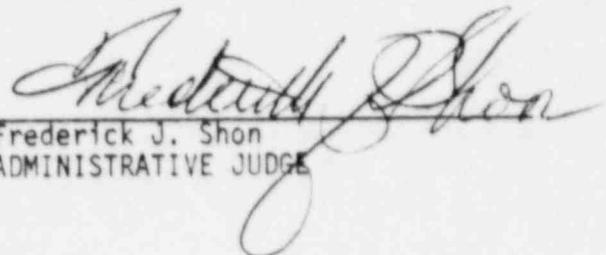
THE ATOMIC SAFETY AND
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James P. Gleason, Chairman

ADMINISTRATIVE JUDGE


Jerry R. Kline

ADMINISTRATIVE JUDGE


Frederick J. Shon

ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 11th day of March, 1988.