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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF RESPONSE TO LILCO'S RENEWED OPPOSITION TO INTERVENORS' PROPOSED CONTENTION ON MEDICAL SERVICES FOR CONTAMINATED INJURED INDIVIDUALS AND SUGGESTION OF MOOTNESS

Lisa B. Clark
Counsel for NRC Staff

August 16, 1988

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I. INTRODUCTION

On February 25, 1987, Intervenors filed before the Commission a motion for admission of a contention regarding the provision of medical services for contaminated injured individuals in the event of a radiological emergency at Shoreham. Motion of Suffolk County, the State of New York and the Town of Southhampton To Admit New Contention ("Intervenors Motion"). On July 28, 1988, LILCO filed a renewed opposition to Intervenors Motion. LILCO's Renewed Opposition to Intervenors' Proposed Contention on Emergency Medical Services for Contaminated Injured Individuals and Suggestion of Mootness. ("LILCO's

Renewed Opposition"). [1] For the reasons stated below, the NRC Staff also opposes admission of the contention. [2]

II. BACKGROUND

The history relating to Intervenors' filing of the original motion to admit a new contention on February 25, 1987 was previously addressed in the NRC Staff response to that motion. [3] In short, the Licensing Board twice rejected Intervenors' attempts to gain admission of a contention alleging inadequate arrangements for the provision of medical services in compliance with 10 C.F.R. § 50.47(b)(12). The contention was rejected by the Licensing Board in 1982. LBP-82-75, 16 NRC 986, 999 (1982). The record on the adequacy of LILCO's offsite emergency plan was closed on August 29, 1984. See LBP-85-12, 21 NRC 644, 651 (1985). On February 25, 1985, Intervenors again proffered before the Licensing Board a contention alleging noncompliance with section 50.47(b)(12). This contention was rejected by the Licensing Board on grounds the issue was before the Commission for rulemaking. That action was not disturbed on appeal. ALAB-832, 23 NRC 135, 143, 162 (1986).

1/ Applicants' filing was not necessary as this matter was already before the Commission. On the other hand the LILCO Renewed Opposition brings to the Commission's attention new information on Medical Services in Revision 9 to its plan, and FEMA's review of that Revision. See pp. 7-8, infra.

2/ On August 15, 1988, the Staff requested and was granted a one-day extension for the filing of its response due to the malfunction of wordprocessing equipment.

3/ NRC Staff Response in Opposition to Motion to Admit a New Contention, dated March 17, 1987 ("Staff Response"), at 1-5.

Subsequent to the issuance of ALAB-832 in March 1986, the Commission published a Statement of Policy on Emergency Planning Standard 10 CFR 50.47(b)(12), 51 Fed. Reg. 32904 (September 17, 1986), directing the NRC Staff and FEMA to develop detailed guidance on medical services. This guidance was published as Guidance Memorandum (GM) MS-1, Medical Services on November 13, 1986 and it provided that emergency response plans should reflect the provisions contained therein within nine months from the effective date of the GM, i.e., August 1987.

The medical services contention in Intervenors' Motion was proffered after issuance of Guidance Memorandum MS-1, but was filed before the date for compliance with the guidance set forth in the memorandum. The proposed contention merely alleged that LILCO had not fulfilled any of the four acceptance criteria in MS-1 and was not accompanied by any supporting affidavit or evidence showing that compliance would not be possible. See Intervenors Motion.

In January 1988, LILCO filed Revision 9 of the Plan and Revision 10 was filed in May 1988. Although these revisions addressed each of the criteria set forth in MS-1, Intervenors did not amend their proffered contention and have not offered an adequate basis for the allegation that LILCO will not comply with the guidance in MS-1.

III. DISCUSSION

A. Intervenors Seek to Reopen a Closed Evidentiary Record and Not Merely to File a New Contention

Section 2.734(a) of the Commission's Rules of Practice (10 C.F.R. § 2.734(a)) provides that: "A motion to reopen a closed record to

consider additional evidence will not be granted unless the following criteria are satisfied." 4/ As shown in the Staff's earlier response, Intervenors' Motion did not address the criteria set out in the Regulation for reopening a closed record. Staff Response at 5-6. Nor have Intervenors sought to remedy this defect in the seventeen months since their original filing. See Suffolk County, State of New York and Town of Southhampton Response to LILCO's Renewed Opposition to the Governments' Proposed Contention on Emergency Medical Services for Contaminated Injured Individuals and Suggestion of Mootness, August 9, 1988 ("Intervenors Response"). Intervenors claim that they do not have to meet the strictures of the test, because the record was not closed prior to the original filing of their contention. See Intervenors Response at 15-16. However, the record on the LILCO emergency plan was closed on August 29, 1984 (LBP-85-12, 21 NRC at 651), and the subject contention was submitted

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4/ 10 C.F.R. § 2.734(a) provides:

> A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:
>
> (1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
> (2) The motion must address a significant safety or environmental issue;
> (3) The motion must demonstrate that a materially different result would have been likely had a newly proffered evidence been considered initially.
>
> In addition, the motion must be supported by affidavits setting forth the factual bases for the claims in § 2.734(a) and, in the case of a motion to reopen related to a new contention, must also satisfy the requirements for a late-filed contention. 10 C.F.R. § 2.734(b),(d).

on February 25, 1987. Intervenors themselves recognized this fact by filing their motion before the Commission and citing the Licensing Board's "Memorandum and Order Rejecting Intervenors' Motion to Reopen Record Due to Lack of Jurisdiction," November 5, 1986. Intervenors Motion at 1, n.1. Further, Intervenors' response to LILCO's renewed opposition to the medical services contention states that "the PID was issued issued long before MS-1 and long before the Governments' proffer of the proposed contention at issue here." Intervenors Response at 15.

In spite of this statement, Intervenors assert that their original motion is not subject to the mandatory standards set forth in 10 C.F.R. § 2.734 for reopening a closed record, but that it is only subject to the standards for late-filed contentions set forth in 10 C.F.R. § 2.714. Id. at 15, 16. However, they fail to provide any reasoned basis for this claim, and cite no authority for this proposition. See id. Intervenors are wrong. 5/

The Licensing Board currently hearing remanded contentions on the offsite emergency response plan for Shoreham has long ceased to have jurisdiction over new contentions arising out of the Plan. In ALAB-832, the Appeal Board rejected Intervenors' appeal from the dismissal of their contention on compliance with 10 C.F.R. § 50.47(b)(12). Although the Commission determined to review ALAB-832, the issues within the scope of

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5/ Intervenors also argue (Intervenors Response at 8, 10-11) that the LILCO motion seeks to dispose of the contention by summary disposition. However, as the contention has not been admitted, it is obvious that the criteria of 10 C.F.R. § 2.749 have no application here. Rather, the proper standards are those in 10 C.F.R. § 2.734 for reopening a record.

that review did not include compliance with 10 C.F.R. § 50.47(b)(12). 6/ Where the Commission elects not to review an Appeal Board decision, the Board's decision is the agency's final action. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261 (1979); see also, Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321 (1983). Thus, the record would have to be reopened for the subject contention to be considered.

B. Intervenors Have Not Satisfied the Criteria in 10 C.F.R. § 2.734(a)

As indicated, a motion to reopen a closed evidentiary record will not be granted unless: (1) it is timely, (2) it addresses a significant safety or environmental issue, and (3) it demonstrates that a materially different result would be or would have been likely had the new evidence been considered. 7/ It is well settled that the proponent of such a motion to reopen a record has a heavy burden to bear. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 180 (1983); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986).

1. The Motion Is Not Timely As Required By 10 C.F.R. § 2.734(a)(1)

6/ Order, September 19, 1986 (unpublished).

7/ 10 C.F.R. § 2.734(a) (set forth in note 4 above); see also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-486; 8 NRC 9, 21 (1978), Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 n.4 (1982).

As the Staff has previously stated, Intervenors' request for reopening the record was untimely. Staff Response at 6. Not only was Intervenors' motion untimely filed in February 1987, it continues to suffer from this defect. Intervenors since May 1988 have had both Revisions 9 and 10 to the Plan and the April 28, 1988 FEMA Regional Assistance Committee (RAC) Review of Revision 9 ("RAC Review") which assessed the arrangements for contaminated injured individuals as adequate. Yet Intervenors have remained silent and have not attempted to make the required showing that the issue sought to be raised could not have been raised earlier. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), aff'd sub. nom., San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C.Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986).

2. The Motion Does Not Address a Significant Safety Issue As Required By 10 C.F.R. § 2.734(a)(2)

Intervenors Motion does not raise a significant safety issue. The proffered contention merely restates the provisions of MS-1 and alleges that the LILCO Plan fails to comply with the criteria set forth in the guidance memorandum. However, since the original filing of the contention, the LILCO Plan has been revised and reviewed by the Federal Emergency Management Agency (FEMA) and found adequate as to the arrangements for contaminated injured individuals. See LILCO Renewed Opposition, Attachment B. Pursuant to 10 C.F.R. § 50.47(a)(2), the NRC bases its review of off-site emergency preparedness plans on FEMA's findings which constitute a rebuttable presumption on the adequacy of the emergency plans. The FEMA Regional RAC review rated each element set forth in the acceptance criteria of MS-1 (as reiterated in the

contention) as adequate. Thus, it appears that the plan meets the acceptance criteria of MS-1. 8/

Although Intervenors have alleged various inadequacies in LILCO's arrangements for contaminated injured individuals (Intervenors' Response at 10-15), they have not provided the required supporting affidavits. In 1986, 10 C.F.R. § 2.734 was added to the regulations, 51 Fed. Reg. 19539 (May 30, 1986). Under subsection (b) thereof, a motion to reopen a record "must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim. . . ." Intervenors did not supply such affidavits in the motion of February 25, 1987 or in their most recent response of August 9, 1988. 9/ Accordingly, there is no factual or technical basis on which to find that a "significant safety or environmental issue" exists which would "demonstrate that a materially different result would be or would have been likely." See 10 C.F.R. § 2.734(a)(2) and (3).

In order to reopen the record, the movant has the burden of establishing that the available information meets the standards for reopening, i.e., that a significant safety issue has been timely raised. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1) CLI-85-7, 21 NRC 1104 (1985). Simply submitting a new contention or

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8/ Intervenors at 14 of their response seek to fault LILCO for relying on FEMA's positive findings on its review of Revision 9 to the LILCO Plan on the ground that there is a Revision 10 to the Plan. Intervenors point to no meaningful change between Revision 9 and Revision 10 which raises a significant safety issue or would lead to a different result in this proceeding. See 10 C.F.R. § 2.734(a).

9/ Failure to provide such an affidavit is reason alone to deny the motion under 10 C.F.R. § 2.734(b).

making unsupported allegations does not meet the heavy burden placed on movants attempting to reopen a record. Waterford, ALAB-753, supra. 10/

Hence, the issue raised by the Intervenors in the contention does not raise a significant safety issue which would warrant reopening of the record.

3. The Motion Fails To Show a Materially Different Result Would Have Been Likely as Required by 10 C.F.R. § 2.734(a)(3)

Finally, Intervenors have failed to show that a materially different result would have been likely had the new evidence been considered initially. In fact, no supporting affidavit was filed with the motion initially, and Intervenors have not come forward with any since their

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10/ Intervenors seek to raise several matters which are not relevant to the issue of whether the proffered contention dealing with LILCO's emergency plan provisions on contaminated injured individuals is adequate. See Intervenors Response at 11-13. Issues relevant to the 1988 emergency response planning exercise are not germane to whether the subject contention on the adequacy of emergency plan provisions should be considered. See id. at 11-12. FEMA has not yet issued its report on that exercise and the Licensing Board has not yet provided an opportunity for filing contentions on that exercise. The proffered contention deals with the LILCO plan and not this recent exercise.

Intervenors next discuss the results of the earlier 1986 Shoreham emergency planning exercise. Intervenors Response at 12. However, no nexus is shown between that exercise and supposedly inadequate plan provisions for the treatment of contaminated injured individuals. Intervenors point to no fault shown in the exercise, or in litigation of the exercise, that dealt with the treatment of contaminated injured individuals.

Intervenors also seek to raise an issue regarding the training, cooperation and preparedness of County personnel. See Intervenors Response at 12-13. These matters are not germane to the proffered contention, but are rather the subject of the "realism" proceeding. See CLI-86-13, 24 NRC 22 (1986).

receipt of Revisions 9 and 10 of the Plan. 11/ Hence, there continues to be no showing that a different result would have been reached in the proceeding. 12/

11/ The new material in support of a motion to reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 C.F.R. § 2.714(b) for admissible contentions. Diablo Canyon, ALAB-775, supra, 19 NRC at 1366. This information must be in affidavit form. 10 C.F.R. § 2.734(b). The supporting information must be more than mere allegations, it must be tantamount to evidence which would materially affect the previous decision. Since motions to reopen must be supported by evidence, it is not improper, as Intervenors argue (see Intervenors' Response at 8-10), to address the merits of the contention in response to a motion to reopen. See Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 109 (1983).

12/ Nor does the motion satisfy the requirement in 2.734(d) regarding the need to meet the standards for the admission of late-filed contentions in 10 C.F.R. § 2.714(a)(1). See also Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982), citing, Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133 n. 1 (1986). As set out in the Staff's initial response (Staff Response at 8-11), the following five factors in 10 C.F.R. § 2.714(a)(1) must be weighed in determining whether to admit a late filed contention: (i) good cause for failure to file on time; (ii) the availability of other means to protect petitioner's interest; (iii) the extent to which the petitioners could aid in developing the record; (iv) the extent to which petitioner's interests may be represented by other parties; and (v) whether the petition will broaden the issues or delay the proceeding. The petition is untimely and there is no good cause for late filing. See Staff Response at 8; also page 7 above. Second, there are other means to protect petitioner's interests. If intervenors have an interest in the adequacy of medical services and training, they could cooperate in planning and training. See Staff Response at 9. Third, the addition of the subject contention would both broaden the issues and delay the proceeding. See Staff Response at 10-11. Hence, 10 C.F.R. § 2.734(d) forecloses the record from being reopened as 10 C.F.R. § 2.714(a)(1) prevents the contention from being admitted.

IV. CONCLUSION

The Intervenors' motion to admit a new contention involving the treatment of contaminated injured individuals does not meet the standards of 10 C.F.R. § 2.734(a) required for reopening a record, and should be denied.

Respectfully submitted,

Lisa Clark

Lisa B. Clark
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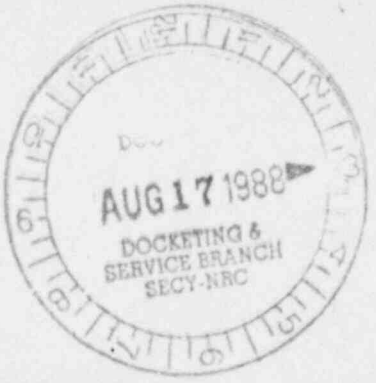
Dated at Rockville, Maryland
this 16th day of August, 1988



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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO LILCO'S RENEWED OPPOSITION TO INTERVENORS' PROPOSED CONTENTION ON MEDICAL SERVICES FOR CONTAMINATED INJURED INDIVIDUALS AND SUGGESTION OF MOOTNESS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 16th day of August, 1988.

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