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LILCO, May 5, 1988

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'88 MAY -9 P8:36

Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY  
DOCKETING SERVICE  
BRANCH

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

**LILCO'S RESPONSE TO STATE OF NEW YORK MOTION FOR  
EXTENSION OF TIME TO FILE TESTIMONY ON IMMATERIALITY ISSUE**

On the afternoon of May 3, the State of New York by telecopier filed State of New York Motion for Extension of Time to File Testimony on Immateriality Issue (May 3, 1988) ("Intervenors' Motion"). Intervenors request a one-week extension of time in which to file testimony on the immateriality issue.<sup>1/</sup> LILCO opposes the motion.

**I. Background**

On March 7, 1988, the discovery period began in the "best efforts" remand proceeding. On March 15, Intervenors filed their first set of interrogatories,<sup>2/</sup> in which Intervenors requested only the identities, on a contention-by-contention basis, of LILCO's witnesses.

<sup>1/</sup> Testimony in the "best efforts" remand proceeding, of which the "immateriality" issue is a part, is due to be filed this Friday, May 6.

<sup>2/</sup> Suffolk County's First Set of Interrogatories and Requests for Production of Documents Regarding Contentions 1-2, 4-8 and 10 to Long Island Lighting Company (March 15, 1988).

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On April 9, over a month after the discovery period began, Intervenors for the first time inquired of LILCO whether it intended to pursue its "immateriality" argument in the remand proceeding.<sup>3/</sup> Intervenors also for the first time requested that LILCO "[p]rovide all documents, including computer inputs and outputs, concerning the revised Rev. 5 evacuation time estimates."<sup>4/</sup>

LILCO responded to Intervenors' April 9 Interrogatories on April 22, within the time limit prescribed by the regulations.<sup>5/</sup> In response to Intervenors' request for documents, LILCO stated that such documents would be made "available for inspection the week of April 25, 1988."<sup>6/</sup> This was done because it was impractical, given the massive volume of the computer input and output generated in the calculation of the Rev. 5 evacuation time estimates, to copy all the documents that were responsive to Intervenors' document request. Producing documents for inspection, rather than providing copies, is clearly contemplated under 10 C.F.R. § 2.741(a)(1). In fact, this method of production was the method agreed to by the parties during the earlier planning litigation in 1983-84, when large volumes of documents relating to LILCO's Revision 3 evacuation time estimates were requested by Intervenors.

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<sup>3/</sup> Suffolk County's Second Set of Interrogatories and Requests for Production of Documents Regarding Contentions 1-2, 4-8 and 10 to the Long Island Lighting Company (April 9, 1988)("Intervenors' April 9 Interrogatories").

<sup>4/</sup> Intervenors' April 9 Interrogatories at 3.

<sup>5/</sup> Under 10 C.F.R. § 2.740b, LILCO's answers to Intervenors' April 9 Interrogatories would have been due on April 25. LILCO's prescribed time limit was in fact cut short by the Board's oral ruling during the April 11 conference call that answers to all interrogatories were due on April 22. In granting Intervenors' request for additional time to answer LILCO's interrogatories, the Board's ruling had the effect of reducing LILCO's time to answer Intervenors' April 9 interrogatories.

<sup>6/</sup> LILCO's Responses and Objections to Suffolk County's Second Set of Interrogatories and Requests for Production of Documents Regarding Contentions 1-2, 4-8, and 10 to the Long Island Lighting Company (April 22, 1988) at 7.

LILCO served its answers on Intervenor on April 22, by Federal Express for Saturday delivery, April 23. As of the morning of Wednesday, April 27, 1988, LILCO had not received any word from Intervenor about when during the week of April 25 they wished to inspect the Rev. 5 documents. Counsel for LILCO therefore telephoned counsel for the State of New York on April 27 to inquire as to when Intervenor intended to conduct the examination.

During that phone conversation, counsel for LILCO informed counsel for the State that the documents could be made available as early as the following day, April 28. Counsel for the State, however, requested that arrangements instead be made for the following Monday, May 2. While LILCO agreed to this request, at no time did LILCO agree that postponement of the document inspection to the following week would constitute good cause to extend the May 6 filing deadline. A copy of the letter confirming the phone conversations between counsel for LILCO and counsel for the State on April 27 is enclosed as Attachment 1 to this Response.

Counsel for the State and the State's traffic expert, Dr. Hartgen, conducted their inspection as scheduled, beginning at approximately noon on May 2. At the end of their inspection that afternoon, Intervenor requested copies of approximately 50 pages from the computer printouts which Intervenor had examined.

Because of the time required to reproduce that many pages of oversized computer printouts, LILCO employees were unable to complete the copying in time to meet Monday night's Federal Express deadline.<sup>7/</sup> The copied pages were therefore sent the

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<sup>7/</sup> Accordingly, Intervenor's assertion that "LILCO . . . could have copied and sent the requested documents to the State of New York for delivery [on May 3], as LILCO had originally promised on Monday, May 2, 1988," Intervenor's Motion at 8, is not true. Moreover, while a LILCO employee may have indicated to Intervenor on Monday, May 2, that LILCO would attempt to reproduce and mail the requested pages for delivery on May 3, at no point did counsel for LILCO "promise" that the copies would be sent to Intervenor by that date.

following day for delivery on Wednesday, May 4. LILCO has since learned that, for reasons that are uncertain, the package was returned to LILCO undelivered on the morning of May 4. After verifying with Intervenor's the proper mailing address, LILCO again sent the package to Intervenor's, for delivery on May 5.

## II. Argument

Intervenor's alleged "dilemma"<sup>8/</sup> is solely the consequence of their own dilatoriness in requesting production of the "immateriality" documents, and Intervenor's have no one but themselves to blame for their predicament. Having waited until the week that their testimony is due to begin analyzing data and preparing their case, Intervenor's are in no position to argue now that they need more time<sup>9/</sup>

Intervenor's offer no reason, nor can they, why they could not have made their request for documents prior to April 9. Discovery on the "best efforts" and immateriality issues had begun over a month earlier. Moreover, as early as February 1, 1988, in response to LILCO's Motion for Summary Disposition on the "immateriality" issue,<sup>10/</sup> Intervenor's traffic expert, Dr. Hartgen, in his affidavit accompanying Intervenor's Opposition, stated, in part, that:

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<sup>8/</sup> Intervenor's Motion at 6.

<sup>9/</sup> Moreover, the difficulties which Intervenor's have experienced in obtaining the reproduced pages, while unfortunate, do not justify an extension of the filing deadline. Delays and misdirection of mail is not unprecedented, and Intervenor's, by waiting until the last minute to request and to examine the Rev. 5 documents, assumed the risk that they might not get the reproduced materials as quickly as they would have liked. LILCO further notes that the 30 day production period allowed to it under 10 C.F.R. § 2.741(d) does not even expire until May 9, 1988. This fact underscores the untimeliness of Intervenor's April 9 document request.

<sup>10/</sup> Opposition of Suffolk County, the State of New York and the Town of Southampton to LILCO's Motion for Summary Disposition of Contentions 1, 2 and 9 -- Immateriality (Feb. 1, 1988) ("Intervenor's Opposition").

A sound analysis of the evacuation time estimates discussed in LILCO's Motion and Mr. Lieberman's affidavit would require, at a minimum, the following information:

- a. The computer inputs and outputs from which the revised evacuation time estimates were derived.

Affidavit of David T. Hartgen, Ph.D., P.E. Concerning Immateriality (Feb. 1, 1988) ¶4.

Despite their own expert's need, professed as early as February 1, 1988, to examine the Rev. 5 documents, Intervenors apparently took no steps to arrange for the inspection of those documents prior to the filing of their April 9 Interrogatories. This was evidenced during the deposition of Dr. Hartgen on April 22, 1988:

Q. [by Mr. Irwin] Okay.

A. I think that is one of the areas we will look into when we have the materials from LILCO. We are very much dependent here, of course, on LILCO's response since we don't have the computer printouts or any of the support materials.

Q. I take it you yourself have never urged that these materials be requested prior to the time they were, in fact, requested?

A. I urged counsel to see if he could get hold of them. That is the basis of the affidavit, that I can't see what changes have been made in the model, so I can't be sure if Mr. Lieberman's conclusions are accurate.

Q. And that implicit request to obtain data was communicated by you, you feel at the time you prepared your affidavit?

A. In the process of preparing the affidavit, I prepared a list of things I felt I would need at a minimum, and I listed those in Item 4.

Hartgen deposition at 50-51.<sup>11/</sup> Intervenors' failure to anticipate that they might find their examination of the Rev. 5 documents to be lengthy or tedious plainly does not justify their request to be excused from the May 6 filing deadline, particularly in light of the advance notice given Intervenors by their own traffic expert of the importance of those documents .

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<sup>11/</sup> The pertinent pages of the Hartgen deposition are enclosed as Attachment 2 to this Response.

Moreover, not only do Intervenors fail to point out how they themselves have waited until the last minute to request production of the "immateriality" documents, but they make several statements in support of their motion that are inaccurate or otherwise misleading. For instance, Intervenors state that:

In light of the very large number of documents which LILCO was requiring the State to sort through, and in order to expedite the document inspection generally, counsel for the State of New York asked LILCO's counsel to have all of the documents labeled and to have someone familiar with the documents in attendance so that specific types of documents could be located and inspected without undue search time. LILCO's counsel stated that the documents would be labeled, but declined the latter request.

Intervenors' Motion at 5. Intervenors do not mention, however, that during the April 27 phone conversation counsel for LILCO indicated that in the interest of facilitating Intervenors' examination, LILCO was willing to assist Intervenors in attempting to identify in advance those portions of the Rev. 5 documents which Dr. Hartgen was specifically interested in examining. Given the technical nature of the documents involved, and to avoid any misunderstanding that might inadvertently limit Dr. Hartgen's examination, counsel for LILCO requested that counsel for the State provide precise guidance in writing as to which portions of the Rev. 5 documents Dr. Hartgen wished to examine.<sup>12/</sup> Counsel for the State, citing the additional workload that providing this initial guidance in advance would entail for Intervenors, declined to accept LILCO's offer.

In addition, Intervenors' characterization of the manner in which LILCO produced the documents for inspection on May 2 is misleading. As Intervenors describe it:

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<sup>12/</sup> Earlier, in his deposition on April 20, 1988, LILCO's witness Mr. Lieberman had also advised the State and County that "I think it might be useful if your request [for documents] were more specific." He explained that there were many documents to be produced. Deposition transcript at 174-75.

Twenty boxes, each full of computer printouts, were placed on a row of tables. While the boxes were numbered 1-20 and a box key listed the contents, the list was vague, and, quite often pointed the reader to multiple boxes.

Intervenors' Motion at 5. In fact, the documents were provided to Intervenors in precisely the same fashion in which they are routinely organized and stored at KLD Associates, LILCO's traffic consultant. The allegedly "vague" box key list was the same index which KLD Associates itself uses during the course of its day-to-day business to locate specific documents relating to the Rev. 5 evacuation time estimates.

As Intervenors are aware, LILCO was under no obligation under the regulations to actively assist Intervenors in identifying and analyzing documents which Intervenors themselves chose to examine in their entirety.<sup>13/</sup> If it is true, as Intervenors allege, that "much time was spent searching for documents in boxes and then perusing thousands of pages of computer printout rather than analyzing them," Intervenors' Motion at 5, then this speaks more to lack of proficiency on the part of Intervenors and their traffic expert than it does to any unwillingness on the part of LILCO to facilitate the discovery process.

In short, it is evident from the foregoing that Intervenors' statement that "LILCO has chosen to make those documents available for inspection only days before Dr. Hartgen's testimony is due"<sup>14/</sup> is misleading in the extreme. Nor is it true that "LILCO . . . has chosen to respond to the Governments' discovery request in a way that makes it unfairly difficult to incorporate the necessary documentation into the State of New York's testimony." Intervenors' Motion at 7. Intervenors, not LILCO, chose to wait over a month during the discovery period before making their request for

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<sup>13/</sup> Nor is LILCO aware of any requirement that it should have provided during the inspection "someone familiar with the documents," Intervenors' Motion at 5, to assist Intervenors.

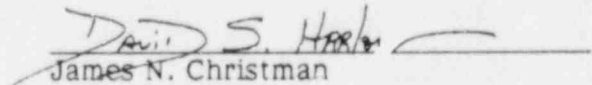
<sup>14/</sup> Intervenors' Motion at 6.

documents. Intervenors, not LILCO, chose to wait until this week, rather than the week of April 25, to inspect those documents. Intervenors, not LILCO, should have to suffer the consequences.

Conclusion

For the above reasons, LILCO hereby asks that the Intervenors' Motion be denied and that Intervenors be required to file their testimony on the immateriality issue as scheduled, on May 6, 1988.

Respectfully submitted,

  
James N. Christman  
David S. Harlow  
Counsel for Long Island Lighting Company

Hunton & Williams  
707 East Main Street  
P.O. Box 1535  
Richmond, Virginia 23212

DATED: May 5, 1988



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FILE NO.

DIRECT DIAL NO. 804-788-7243

April 27, 1988

BY TELECOPY

Richard J. Zahnleuter, Esq.  
Deputy Special Counsel to the  
Governor of the State of New York  
Executive Chamber  
Room 229  
Capitol Building  
Albany, New York 12224

"Immateriality" Discovery Documents

Dear Rick:

This is to confirm our telephone conversations today regarding the production of documents responsive to Suffolk County Interrogatory No. 11 (April 9, 1988), specifically, the "computer inputs and outputs" generated in the calculation of the evacuation time estimates for Revision 5 of the LILCO Plan. This morning I informed you that arrangements had been made for the production of these documents and that these documents would be available to the State of New York for inspection beginning on Thursday, April 28, 1988.

As I indicated, the sheer volume of the documents makes copying them all impractical, and that therefore, LILCO is making these documents available for inspection in accordance with 10 C.F.R. § 2.741. If during the course of its inspection the State identifies specific portions of the documents which it wishes to have reproduced, these portions can be marked and copies made. If the State chooses to have large portions of these documents reproduced, the cost of the copying will be borne by the State.

You requested, and LILCO agreed, to make the documents available on Monday, May 2, 1988. As per our agreement, LILCO will make these documents available for inspection at the J. W. Dye Training Center, 131 Hoffman Lane, Central Islip, New York, 11722 in Room 208-305. A monitor from LILCO will be provided. A "tentative" starting time of 11:00 a.m. was agreed upon.

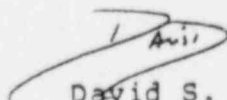
HUNTON & WILLIAMS

Richard J. Zahnleuter, Esq.  
April 27, 1988  
Page 2

You stated that it was the State's position that it would not be precluded from extending the examination beyond May 2 if necessary, but that it was the State's "intention" to complete the examination on May 2. At this time, LILCO does not agree that an extension beyond May 2 is warranted but agrees to consider such a request from the State if and when such request is made.

Finally, it is LILCO's understanding that by producing these documents to the State of New York for inspection, LILCO will satisfy any obligation to produce these same documents to Suffolk County, as requested by Suffolk County Interrogatory No. 11.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "David S. Harlow", written over a horizontal line.

David S. Harlow

cc: Christopher M. McMurray, Esq.

# TRANSCRIPT OF PROCEEDINGS

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE  
ATOMIC SAFETY AND LICENSING BOARD

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

DEPOSITION OF DAVID HARTGEN

Albany, New York

Friday, April 22, 1988

ACE-FEDERAL REPORTERS, INC.

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1 so you can't comment on whether they are valid or not?

2 A I cannot at this point. It did concern me that  
3 what were apparently small changes to both the network and  
4 the structure of just one zone, Zone Q, would have such a  
5 large effect on these numbers.

6 In my experience as a traffic analyst, usually  
7 changes to networks and zones would have to be larger than  
8 just one zone, or just a hand full of highway sections to  
9 produce changes that are as large as these.

10 Q But you have not looked yourself at the  
11 relationship of Zone Q to an overall evacuation flow at this  
12 point to enable you to draw any conclusions as to whether or  
13 not Zone Q is a typical zone, or perhaps an anomaly zone  
14 which might have a greater impact?

15 A No, not yet.

16 Q Okay.

17 A I think that is one of the areas we will look  
18 into when we have the materials from LILCO. We are very  
19 much dependent here, of course, on LILCO's response since we  
20 don't have the computer printouts or any of the support  
21 materials.

22 Q I take it you yourself have never urged that

p/gw

1 these materials be requested prior to the time they were, in  
2 fact, requested?

3 A I urged counsel to see if he could get hold of  
4 them. That is the basis of the affidavit, that I can't see  
5 what changes have been made in the model, so I can't be sure  
6 if Mr. Lieberman's conclusions are accurate.

7 Q And that implicit request to obtain data was  
8 communicated by you, you feel, at the time you prepared your  
9 affidavit?

10 A In the process of preparing the affidavit, I  
11 prepared a list of things I felt I would need at a minimum,  
12 and I listed those in Item 4.

13 Q Let me come back once again to the sentence we  
14 were discussing just a few minutes ago, which begins with  
15 the word, "further," and contrasts the zero percent  
16 non-compliance controlled scenario, with the 50 percent  
17 non-compliance uncontrolled scenario.

18 As I recall your answer, you are not asserting  
19 that it is -- the proper presumptive comparison is between a  
20 zero percent non-compliance controlled scenario, and 50  
21 percent non-compliance as a base case. This is just simply  
22 an illustration of the range of variation that is present in

LILCO, May 5, 1988

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CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO'S RESPONSE TO STATE OF NEW YORK MOTION FOR EXTENSION OF TIME TO FILE TESTIMONY ON IMMATERIALITY ISSUE were served this date upon the following by telecopier as indicated by one asterisk, by Federal Express as indicated by two asterisks, or by first-class mail, postage prepaid.

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DATED: May 5, 1988

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