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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

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

**LILCO'S MOTION TO STRIKE TESTIMONY
OF DAVID T. HARTGEN AND ROBERT C. MILLSPAUGH**

LILCO hereby moves to strike portions of the "Direct Testimony of David T. Hartgen and Robert C. Millspaugh on Behalf of the State of New York Regarding LILCO's Reception Centers," dated April 13, 1987 (hereinafter "Hartgen"). The arguments for striking testimony are four:

1. The testimony seeks to litigate in detail the road network from 10 to 40 miles from the plant, something that is not contemplated by either the Commission's regulations or the statement of the admitted issues by the Appeal Board and Licensing Board.
2. The testimony is in part based on population projections for the future. The regulations do not require emergency planners to show present capacity for future populations.
3. The testimony seeks to reopen the already-litigated "shadow phenomenon" issue, as discussed in LILCO's Motion to Strike Testimony of Stephen Cole et al. of Apr. 18, 1987.
4. The testimony seeks to relitigate other already-litigated issues, such as the issue of road construction and its effect on evacuation, though this time outside the EPZ.

We will discuss each of these four points in general before addressing the precise parts of the testimony that should be stricken.

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**I. THE FOUR REASONS FOR
STRIKING PORTIONS OF
THE HARTGEN TESTIMONY**

A. Litigating the road network out to 40 miles

The principal reason for striking portions of the Hartgen testimony is that it seeks to impose evacuation time requirements not just for the 10-mile EPZ but for much larger area extending all the way to the reception centers.

Earlier in this proceeding the parties litigated in great detail the capacity of the road network inside the 10-mile EPZ. We litigated also the contention by the Intervenor that the 10-mile EPZ should be expanded. Finally, we litigated the hypothetical effect of the "shadow phenomenon" outside the EPZ on evacuation times out of the EPZ. The Hartgen testimony, by analyzing the road network and hypothetical "shadow phenomenon" effects all the way to the reception centers, attempts to relitigate these old issues over a 40-mile radius EPZ instead of a 10-mile one. This is contrary to the regulations.

It is contrary to the regulations not only because it seeks to create a de facto 40-mile "evacuation zone." It is also contrary to the regulations because it apparently seeks to impose evacuation time limits. There is a suggestion in the Intervenor's testimony that LILCO is required to show that people can reach the reception centers and be monitored within 12 hours. For example, on page 52 of the Hartgen-Millspaugh testimony the witnesses opine that evacuees "will not be able to reach the reception centers within anywhere near the Section J.12 12-hour time limits" See also Hartgen pp. 7, 15. Thus the Intervenor apparently seek to impose a maximum evacuation time for reaching the reception centers. This is more than the NRC requires for evacuating the EPZ itself; it is well established that there is no maximum evacuation time for leaving the EPZ. Cincinnati Gas & Elec. Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC 760, 770 (1983).

LILCO realizes that the Intervenor will argue that the postulated evacuation shadow phenomenon and its postulated effect out to 40 miles from the power plant have been put into issue by the following admitted issues:

- whether transportation and traffic problems might develop as a result of the [reception centers'] location and [their] distance from the plume EPZ
- whether the distance of the [reception centers] from the plume EPZ would increase exposure to radiation, causing an additional problem
- the adequacy of evacuation routes to the three LILCO facilities proposed as reception centers, including the effects of traffic congestion "on the way to and in the vicinity of" the facilities

Obviously phrases like "on the way to and in the vicinity of" can be interpreted two ways. Intervenor will argue they mean all the way from the EPZ boundary to the reception centers; LILCO disagrees. LILCO submits that the admitted issues must be interpreted in light of the regulations, in particular the regulation that requires a plume EPZ "about 10 miles . . . in radius." 10 C.F.R. § 50.47(c)(2) (1986). The Intervenor's testimony challenges that regulation.

On the other hand, LILCO recognizes that, in light of the Appeal Board's remand, it is necessary to litigate the approaches to the reception centers to determine their accessibility to evacuees -- whether the centers are "beyond the reach of the persons [they are] set up to serve." ALAB-832, 23 NRC at 161. But other subjects, such as the capacity of the road network between the EPZ and the approaches to the reception centers, are not properly within the admitted issues.

B. Future population

In several places the Hartgen testimony uses projections of future population or future traffic. Analyses that attempt to show that the present reception centers cannot handle future populations that are outside the scope of the admitted issues. Emergency planning is a continuing process. If future developments, such as growth in

population, increase emergency planning needs, that is a matter to be addressed in the future. It is not an obstacle to granting an operating license today.

C. Shadow phenomenon

In some places the Hartgen testimony seeks to relitigate the "shadow phenomenon" issue, namely the issue whether people will comply with emergency advisories. These portions of the testimony are inadmissible for the reasons stated in LILCO's Motion to Strike Testimony of Stephen Cole et al. (Apr. 18, 1987). Most of them are inadmissible for the additional reason that they simply parrot testimony of the County's behavioral witnesses; they are therefore "unduly repetitious" and not by themselves "reliable," in the words of 10 C.F.R. § 2.743(c).

D. Relitigating other already-litigated issues

In a few places the Hartgen testimony seeks to litigate again issues that were litigated in 1983-84, such as the effect of highway repairs on evacuation times. See PID, 21 NRC at 798. To some extent this new testimony duplicates or supplements arguments made by Intervenor witnesses in 1984. To the extent the material is new, it seeks to expand the issue of highway repairs to outside the 10-mile EPZ and is therefore a challenge to NRC regulations.

**II. SPECIFIC PARTS OF THE
HARTGEN TESTIMONY THAT
SHOULD BE STRICKEN**

Hartgen p.7

LILCO moves to strike the last paragraph on page 7, which talks about growth in population, growth in traffic, and future road repairs. As argued above, future growth is a matter for the continuing planning process to deal with. It is not a factor that may be used to block a present operating license. See 21 NRC at 798.

Hartgen p. 11

LILCO moves to strike nos. 1 and 2 of the "six separate aspects" listed on pages 11-12. (Numbers 1 and 2 are lines 8-14 on page 11, counting subhead "III" as line 1.) These discuss the road network between the EPZ and the approaches to the reception centers and are therefore outside the proper scope of the admitted issues.

Hartgen pp. 13-14

LILCO moves to strike the passage beginning "The LILCO Plan" on line 4 of page 13 and ending with "Hicksville" on line 4 of page 14. This passage seeks to reopen the already-litigated issue of whether people will follow emergency advisories and, more specifically, whether they will follow the routes used in KLD analyses. These issues should not be relitigated.

Hartgen p. 15

LILCO moves to strike the passage beginning "Neither LILCO" on line 8 of page 15 and ending with "toward the EPZ" in the last line on page 15. Again, this appears to raise the issue of congestion on, and the capacity of, the major routes between the EPZ and the approaches to the reception centers. It is outside the proper scope of the admitted issues.

Hartgen p. 17

LILCO moves to strike the first paragraph on page 17. This is behavioral testimony that is derivative of Dr. Johnson's testimony. It is therefore "unduly repetitious" and not in itself "reliable." Moreover, the last sentence, which says "There will be additional background traffic as workers return home to be with families," is another apparent attempt to expand the EPZ out to 40 miles, if Dr. Hartgen is talking about workers and families outside the EPZ. If he is talking about workers and their families who live in the EPZ, that issue has already been litigated.

LILCO also moves to strike the second paragraph on page 17, which extends through the top three lines on page 18, because it addresses future growth of population and traffic. As argued above, the present licensing decision should be based on present conditions. If conditions change in (for example) 20 years, the continuing planning process can take the change into account.

Hartgen p. 19

LILCO moves to strike Section D on page 19. This testimony is derivative of testimony by Dr. Cole and other behavioral scientists that is itself inadmissible as seeking to reopen the already-litigated "shadow phenomenon" issue. See LILCO's Motion to Strike Testimony of Stephen Cole et al. (Apr. 18, 1987). Thus the question on page 19 of the Hartgen testimony also attempts to reopen the "shadow phenomenon" issue of people's obedience to emergency information.

Hartgen p. 20

LILCO moves to strike the phrase "along the entire length of the evacuation routes" in lines 15-16 of page 20. Those portions of the State's testimony that seek to explore in detail the adequacy of roads between the EPZ boundary and the approaches to the reception centers are an attempt to expand the EPZ out to 40 miles and are therefore a challenge to the regulations.

Hartgen p. 22

LILCO moves to strike the sentence on page 22 beginning with "The delay" in lines 5-6 and ending with "procedure in general" on line 7. This testimony about driver frustration and "attitudes" appears to be another attempt to reopen the issue of driver hostility, already litigated in 1983-84.

Hartgen pp. 26-27

LILCO moves to strike page 26 and the first 6 lines on page 27. This effect of this testimony discusses the effect that road construction might have on evacuation.

For example:

It is therefore that Shoreham evacuees travelling to the reception centers would encounter at least some roadway construction, and would be delayed even further in reaching the reception centers.

Testimony at 26-27. The possible effects of road construction was litigated earlier in this proceeding. See PID, 24 NRC at 797-98. The attempt to litigate road construction outside the EPZ is another attempt to expand the EPZ out to 40 miles. And it is an attempt to litigate future events that are better left to the future planning and decisionmaking process.

Hartgen pp. 30-31

LILCO moves to strike the phrase "optimistically assume adherence to directed routing by evacuees" on page 30, lines 12-13 (counting subheads) on the ground that it seeks to reopen the issue of the public's compliance with emergency information (the already-litigated "shadow phenomenon" issue). LILCO moves to strike the phrase "optimistically assume that route capacity is capable of handling traffic between the EPZ and the sites" on page 30, lines 17-19, on the ground that it attempts to extend the traffic analysis, and therefore the de facto EPZ, out to about 40 miles. LILCO moves to strike the phrase "natural growth, evacuation shadow, traffic, or" on page 30, line 22, because it seeks to reopen the shadow phenomenon issue and to open the issue of future population growth. And LILCO moves to strike the phrase "and optimistically assume no drop in capacity as a result of road constructions" beginning in the last line on page 30; this once again seeks to relitigate the issue of road construction and to create a de facto EPZ out to 40 miles.

Hartgen p. 36

LILCO moves to strike the sentence at the bottom of page 36 beginning "The third number" and ending "LILCO had advised them to evacuate." This attempts to reopen the issue of the "shadow phenomenon," including the usefulness of opinion polls and the issue whether people would follow advisories.

Hartgen p. 37

LILCO moves to strike the passage at the top of page 37 (beginning "in addition" and ending with "(April 13, 1987)" on line 8 of page 37). This testimony, once again, attempts to reopen the issue of shadow phenomenon.

Hartgen p. 39

LILCO moves to strike the last four lines on page 39, which describe the two scenarios "DOT 4" and "DOT 5." By making extravagant assumptions about evacuation "shadow traffic," the testimony seeks to reopen the already-litigated "shadow phenomenon" issue.

Hartgen p. 41

LILCO moves to strike the second paragraph (that is, lines 7-14) on page 41 on the ground that it addresses scenarios DOT 4 and 5, which are attempts to relitigate the "shadow phenomenon" issue and to require detailed planning for a de facto EPZ of 40 miles.

Hartgen pp. 43-46

LILCO moves to strike the passage beginning with "DOT 4" in line 10 of page 43 and ending with the third line on page 46. As noted above, DOT 4 and 5 make extravagant assumptions about the evacuation "shadow" and therefore attempt to reopen that issue, though in a much more extreme fashion than has been tried before (that is, the

effect of the shadow on events outside the EPZ). Moreover, the scenario called "DOT 5B" makes assumption about growth "5 years in the future" and is therefore inadmissible as an attempt to litigate matters better left to the continuing planning process.

Hartgen p. 48-50

LILCO moves to strike the text (but not the footnoted material) on page 48 and the first 9 lines on page 49. LILCO also moves to strike the passage beginning "In both Scenarios 4 and 5" in line 21 on page 49 and including the first five lines on page 50. Once again, these passages discuss DOT 4 and 5 and are inadmissible for the reasons cited above.

Hartgen p. 52

LILCO moves to strike the three sentences on page 52 beginning on line 8 (counting the subhead as line 1) with "DOT 4" and ending on line 13 with "into Suffolk County." This passage addresses the unrealistic "shadow phenomenon" scenarios (DOT 4 and 5) discussed above and thus attempts to reopen the "shadow phenomenon" issues.

LILCO also moves to strike the last paragraph on page 52, which again seems to be talking about the "shadow phenomenon" scenarios.

Hartgen pp. 60-63

LILCO moves to strike the section "2. Monitoring" starting at line 5 on page 61 and ending at the bottom of page 63, because it appears to rely on DOT 4 and 5.

Hartgen p. 74

LILCO moves to strike the passage on page 74 of the testimony beginning with "As our analyses demonstrate" on line 5 (counting the subhead VI as the first line) and ending with "its Plan" on line 14. These three sentences are apparently based on earlier parts of testimony that attempt to reopen the shadow phenomenon issue and litigate in

detail congestion between the EPZ boundary and the approaches to the reception centers; it should therefore be stricken for the reasons already set out above.

Exhibits

LILCO moves to strike Exhibit 7, which is a list of construction projects that might affect Shoreham evacuation routes. This is an attempt to expand emergency planning beyond the EPZ and an attempt to relitigate the road construction issue that was litigated before. It is also an attempt to expand the requirement of evacuation time estimates and indeed to impose an evacuation time limit on roads far beyond the EPZ boundary.

LILCO moves to strike Exhibit 8 on the same grounds as Exhibit 7.

LILCO moves to strike Exhibits 18 through 21A, which address DOT 4 and 5, as improper attempts to reopen the already-litigated "shadow phenomenon" issue.

LILCO moves to strike Exhibit 21B as an improper attempt to litigate future growth in traffic.

LILCO moves to strike Exhibit 23 as based on DOT 4 and 5 and therefore as an effort to reopen the "shadow phenomenon" issue.

LILCO moves to strike Exhibit 24, which again involves DOT 4 and 5.

LILCO moves to strike Exhibit 27 because it appears to rely on scenarios DOT 4 and 5.

Respectfully submitted,


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I hereby certify that copies of LILCO'S MOTION TO STRIKE TESTIMONY OF DAVID T. HARTGEN AND ROBERT C. MILLSPAUGH 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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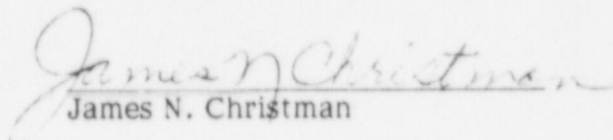
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