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April 30, 1987 ^{DOCKETED}
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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)

RESPONSE OF THE STATE OF NEW YORK TO THE LILCO
MOTION TO STRIKE TESTIMONY OF PAPILE ET AL.

The State of New York hereby opposes the LILCO Motion To Strike Testimony Of Papile Et Al., dated April 18, 1987 ("Motion to Strike").

DISCUSSION

LILCO seeks to strike four portions of the Direct Testimony of James D. Papile, James C. Baranski and Lawrence B. Czech on Behalf of New York State Regarding LILCO's Reception Centers (the "REPG" Testimony). Those portions are:

- 1) A paragraph stating that it is probable that some persons will seek monitoring even though they are not advised to do so (p. 9);

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- 2) A collection of passages which LILCO challenges as "legal conclusions" (pp. 8, 11, 12-14);
- 3) Section III.3 concerning LILCO's recordkeeping procedures (pp. 22-23); and
- 4) A paragraph stating that LILCO's procedure calling for seriously contaminated individuals to drive themselves to the hospital is ill-conceived (p. 30).

The four portions of the REPG Testimony at issue are treated separately below.

A. Voluntary Monitoring (p. 9)

The first portion of the testimony which LILCO seeks to strike is a paragraph in the middle of page 9 of the REPG Testimony in which the panel members offer their expert opinion that in the event of a radiological emergency at Shoreham, some individuals will seek monitoring even though they are not advised to do so. LILCO argues that this testimony concerns the "evacuation shadow phenomenon" which was previously litigated in the earlier emergency planning proceeding. Motion to Strike at 1. LILCO, however, mischaracterizes the testimony in question.

The REPG Testimony does not address the "evacuation shadow phenomenon" at all. Rather, the testimony pertains to monitoring-seeking behavior, a different behavior from the evacuation shadow phenomenon. LILCO now seeks to strike the REPG Testimony by defining the two behaviors so as to merge them into

one. This LILCO device, however, is directly contrary to the evidence. The two behaviors are simply not the same. Indeed, LILCO's own testimony concedes that the evacuation shadow phenomenon and monitoring-seeking behavior are two different types of behavior. See LILCO Testimony at 12-13 (Dr. Mileti).^{1/} The latter has never before been litigated in this proceeding.

Likewise, LILCO's own counsel has stated on the record in the OL-5 proceeding that the two behaviors are distinct:

^{1/} See also LILCO's direct testimony in the OL-5 proceeding where Dr. Mileti testifies in greater detail that "shadow evacuation" and "monitoring shadow" are different behaviors:

Q. Are "shadow evacuation" and "monitoring shadow" different?

A. [Mileti] Yes. Shadow evacuation and monitoring shadow are not the same behavior. Shadow evacuation, like any form of evacuation, is largely a pre-impact phenomenon from the viewpoint of the person engaging in the behavior. Shadow evacuation theoretically occurs when people who are "safe" and who are not advised to evacuate perceive that they are not safe; they evacuate voluntarily to avoid the risk that they believe jeopardizes their safety.

Monitoring shadow implies different characteristics than shadow evacuation. Monitoring shadow is largely a post-impact phenomenon from the viewpoint of the person engaging in the behavior. Monitoring shadow could theoretically occur and be linked to shadow evacuation only if people who are "safe" and not advised to evacuate do in fact evacuate, and later conclude that their evacuation was unsuccessful in its attempt to avoid radiation exposure.

LILCO's Testimony on Contention Ex 38 (ENC Operations) and Ex 39 (Rumor Control), Docket No. 50-322-OL-5 (EP Exercise) at 86.

Ms. McClesky: In terms of the monitoring shadow issue, it is different from evacuation shadow in that evacuation shadow involves getting people to flee a risk, and monitoring shadow involves getting them to come after an accident to take protective action for themselves, and there's a difference, and our witnesses are happy to talk about that at length.

Transcript of 0L-5 Proceeding at 3181 (emphasis added).

The REPG witnesses' testimony addresses one of the most basic issues in this proceeding -- how many people are likely to arrive at LILCO's reception centers. As demonstrated by its Motion to Strike, LILCO would have everyone assume that this estimate can be made without considering at all whether some people will want to be monitored even though not advised to do so and why this may occur. This approach makes no sense. All factors contributing to the number of arrivals must be considered if the Board is to be able to determine the adequacy of LILCO's reception centers.

Indeed, the testimony at issue is relevant and material to at least four of the issues within the scope of the reopened hearing:

- 1) The adequacy of LILCO's planning basis;
- 2) The amount of time which will be required to implement the proposed monitoring procedures;

- 3) The adequacy of LILCO's staffing scheme; and
- 4) Traffic congestion issues.

The number of individuals voluntarily seeking monitoring will directly affect LILCO's ability to monitor all EPZ evacuees within the 12-hour limitation of NUREG 0654 Section J.12 and is germane to the adequacy of LILCO's monitoring procedures and their effectiveness in protecting the public health and safety.

In addition, LILCO addresses the issue of whether people will seek monitoring although not advised to do so in its own testimony, and dismisses the problem as insignificant. LILCO Testimony at 18-22. Thus, LILCO itself raises the issue in its own testimony while trying to strike the State's testimony on the same issue. This hypocritical posture should be rejected by this Board.

In light of the clear relevance of the testimony and LILCO's discussion of the same behavior in its own testimony, and because the behavior at issue has not been litigated previously, LILCO's Motion to Strike must be denied.

B. The Purported "Legal Conclusions" (pp. 8, 11, 12-14)

LILCO objects to three passages as improper legal conclusions. With respect to the first two passages at pages 8 and 11 of the REPG Testimony, LILCO argues that they should be stricken because the testimony at issue offers the panel's expert opinion on the proper interpretation of NUREG 0654 Section J.12. Specifically, LILCO asserts that the witnesses' testimony is not based on their experience, but is based only on a "plain meaning" interpretation. This argument is nonsense.

In fact, a fair reading of the testimony in question demonstrates without any question that it is based on the panel's experience as emergency planners and on their familiarity with FEMA's normal mode of operation. REPG Testimony at 8. Indeed, the witnesses specifically state that they are offering their interpretation of Section J.12 in light of their status "as emergency planners." Id. Furthermore, the witnesses testify that their interpretation is "consistent with comments we received from FEMA personnel in the past to the effect that compliance with Section J.12 requires planning and resources for monitoring 100% of the EPZ population." Id. at 8; see id. at 14-15 (FEMA's normal procedures for providing emergency planners with guidance). Finally, the panel states that its interpretation of the requirements of Section J.12 is the "prudent approach for emergency planners to take." Id. at 10.

Thus, LILCO is simply misstating the facts when it asserts that the REPG panel's testimony on Section J.12 is based only on a "plain meaning" reading of the provision, divorced from the witnesses' experience.

LILCO concedes that it has been the general practice in this proceeding for expert witnesses to offer legal conclusions. In fact, the LILCO Testimony offers legal conclusions about Section J.12. See, e.g., LILCO Testimony at 11-12 (Daverio). In light of this fact, and the fact that the REPG witnesses' testimony is based on their experience as emergency planners, LILCO's Motion to Strike the passages at issue at pages 8 and 11 must be denied.

Likewise, LILCO's objection to the testimony presented at pages 12-14 of the REPG Testimony is meritless. The emergency planners are entitled to consult legal as well as factual material in connection with forming and rendering their expert opinion. LILCO is unable to cite -- nor is the State of New York aware of -- any regulation of the NRC which precludes experts from consulting and referring to legal opinions and administrative rulings in connection with rendering an expert opinion.

C. Section III.3 (pp. 22-23)

LILCO next seeks to strike Section III.3 of the REPG Testimony which discusses the inadequacy of LILCO's recordkeeping procedures. LILCO argues that: (1) recordkeeping is not an issue admitted by the Board; and (2) there is no regulatory basis for the recordkeeping requirements suggested in the testimony. LILCO errs on both accounts.

First, recordkeeping is part and parcel of LILCO's monitoring procedures, the adequacy of which is without question an issue in the hearing. In fact, LILCO includes recordkeeping procedures in its monitoring OPIPs. See Attachment R to LILCO Testimony (OPIP 3.9.2). Does LILCO seriously suggest that monitoring procedures should not include keeping adequate records of who was monitored? Such a narrow interpretation of what monitoring procedures entail is merely a LILCO device to exclude evidence of deficiencies in its procedures.

Second, the integral relation between recordkeeping and monitoring procedures refutes LILCO's contention that there is no regulatory basis for the testimony at issue. Again, LILCO views its monitoring obligations too narrowly. The NUREG 0654 Section J.12 requirement that there be adequate monitoring, an issue admitted in this proceeding by this Board, must be read to include a requirement that adequate records of such monitoring be

kept. The monitoring procedures are necessarily inadequate without a rigorous and effective system of recordkeeping. LILCO also appears to take the position that it may include an inadequate procedure in its Plan and avoid scrutiny of that procedure by claiming that there is no explicit requirement for such a procedure. This callous approach to emergency planning should be rejected by this Board.

LILCO's argument against admission of the testimony at issue is weakened even further by the fact that LILCO addresses its recordkeeping procedures in its own testimony and declares the procedures to be sufficient. LILCO Testimony at 47. Once again, LILCO attempts to have it both ways -- to submit its own testimony on an issue and exclude the State's. LILCO's improper efforts must be rejected.

D. Contaminated Persons (p. 30)

LILCO's final objection challenges testimony by the REPG witnesses concerning the transportation to hospitals of individuals who cannot be decontaminated at the reception centers. LILCO asserts two grounds for striking the testimony: (1) that transportation to hospitals is not among the issues admitted by the Board; and (2) that there is no regulatory basis

for the suggestion that "transportation to the hospital be provided even for people with their own cars." Motion to Strike at 3.

First, LILCO's provisions for transportation to a hospital of individuals who cannot be decontaminated at reception centers are directly relevant to the issue of whether the LILCO reception center scheme can be implemented in a way to protect public health and safety. Memorandum and Order (Rulings on LILCO Motion to Reopen Record and Remand of Coliseum Issue) (Dec. 11, 1986), at 18-19. There is a great risk posed to public health and safety in placing individuals behind the wheel who must negotiate adverse road conditions while simultaneously dealing with the twin discoveries that: (1) they have been exposed to radiation; and (2) the contamination is severe enough to require immediate hospitalization. Such individuals can only constitute a further public danger on the roads.

Second, LILCO's argument that there is no regulatory basis for the REPG witnesses' concerns is wrong. The NRC's regulations require the development of an emergency response plan that offers reasonable assurance that adequate protective measures can and will be taken in an emergency and, specifically that a range of protective actions be developed for the public. 10 C.F.R. §§ 50.47(a)(1), 50.47(b)(10). The NRC's regulations also require that adequate measures be taken to provide medical services for

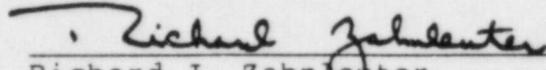
contaminated injured persons. 10 C.F.R. § 50.47(b)(12). LILCO has proposed a procedure to be followed at its reception centers which will not protect those to whom it will be applied. Accordingly, it is directly contrary to the cited regulations.

In any event, even if there are no specific regulatory provisions addressing the REPG witnesses' concerns, LILCO has proposed a procedure in its Plan which is inherently dangerous. LILCO cannot adopt such an inappropriate procedure and then argue cavalierly that testimony criticizing that procedure is improper because it is not addressed specifically by a particular regulation.

CONCLUSION

For the foregoing reasons, the proffered testimony of the State's REPG witnesses is admissible and the LILCO Motion to Strike should be denied.

Respectfully submitted,



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