

assertions or even its 25% power PRA to determine that LILCO's Request must be denied. The Governments show that the pending emergency planning issues, including the OL-5 Board's two decisions adverse to LILCO (LBP-87-32 and LBP-88-2) (discussed in Sections II and III below) and the OL-3 remand issues (discussed in Section IV below) not only are relevant to LILCO's proposed 25% power operation, but also preclude the reasonable assurance findings required for license issuance under Section 50.57.

Not only is it unnecessary to do so, but the Governments cannot and therefore do not address in this brief the technical and PRA-related issues raised by LILCO's Request. The Governments, like the Staff, cannot address such technical issues at this time for two reasons.^{2/}

First, as the Board acknowledged, the technical issues raised by LILCO's request cannot be addressed "without some opportunity for the Governments to review both LILCO's original request and the Staff's analysis thereof."^{3/} In the January 7 Order, the Board stated that "in order to focus the inquiry," statements by the Governments of "the ways in which any of their present contentions are relevant to the proposed operation," "would necessarily await the publication of the Staff Safety

^{2/} Therefore, if the Board were to conclude that a review of LILCO's technical analyses is required to determine whether pending contentions are relevant to the proposed 25% power operation, such a determination cannot be made at this stage of this proceeding.

^{3/} Memorandum and Order (In Re: LILCO's Request for Authorization to Operate at 25% of Full Power) (January 7, 1988) (hereafter, "January 7 Order"), at 11 (emphasis added).

Evaluation and a reasonable period for review by the Governments' experts."^{4/} The Board reiterated the point in its February 26 Order:

If the Staff's technical review of the Applicant's motion is not completed or made available in a timely manner, the parties will be afforded an additional opportunity to respond to such review.

Finally, in the January 7 Order, the Board stated that a schedule for reviews, submissions, and comments would be set at some future time "by the proposed new Board, Special Master, Alternate Board Member or Technical Interrogator with due regard to the equities involved."^{5/}

To the Governments' knowledge, the Staff has not completed its technical review of LILCO's Request. The Staff's Safety Evaluation relating to that Request has not been published or made available to the Governments. Indeed, on March 9, 1988, the Staff announced that it "will not be able to file a brief substantively addressing the Board's question by April 1, 1988," because its work on responding to the Board's February 26 inquiry "is projected to be completed in the early fall of this year."^{6/} Neither the Board nor the Alternate Board Member has yet set any

^{4/} Id. (emphasis added).

^{5/} January 7 Order at 11.

^{6/} See NRC Staff Response to Board Order on Relevance of Pending Emergency Planning Contentions to Operation 25 Percent Power [sic], March 9, 1988 (hereafter, "Staff Response") (emphasis added).

schedule for reviews, discovery, or submissions on the technical issues raised by LILCO's Request.^{7/}

Given (a) the Staff's position and projected schedule for completion of its review, and (b) the lack of a schedule for discovery and related activities, the Governments have not been able to undertake the review and analyses which the Board recognized are the necessary prerequisites to technical statements by the Governments of "the ways in which any of their present contentions are relevant to the proposed operation."^{8/}

Second, even if the Staff review had been available and the Governments had, in the absence of a Board order, begun discovery related to LILCO's Request, the Governments and their experts could not have gotten very far along in any analysis or review in the short time between the Board's February 26 Order and April 1. The length of time required by the Staff for its review of LILCO's Request evidences the magnitude and complexity of the task at hand.

^{7/} This is understandable, since the setting of such a schedule must await completion of the Staff's review of LILCO's Request.

^{8/} January 7 Order at 11. Only after they have completed such review and analyses will the Governments be in a position to submit contentions concerning the technical issues presented by LILCO's Request. LILCO itself has recognized that if its technical analyses become the subject of this proceeding, the appropriate procedure would be for the Governments to file contentions on the technical issues. See LILCO's Reply Brief on 25 $\frac{3}{4}$ Power Questions, Nov. 16, 1987 at 6-7. In its November 16 Brief, LILCO argued that contentions should have been filed prior to that time. In its January 7 Order, however, the Board rejected that position, recognizing that the Governments cannot be expected to file contentions on such issues until after the Staff's Safety Evaluation has been completed and reviewed by the Governments' experts.

The Staff began its review in 1987 (when LILCO's Request was first filed) and pursued it for roughly two months in 1987. In the January 7 Order, the Board directed the Staff to resume its review. Nevertheless, it will still take the Staff until early fall of 1988 to complete its analyses. See Staff Response. The Governments will require at least that much time to review and analyze both the LILCO Request and the Staff's analyses, if not more, particularly since the Governments (a) will not have readily available to them the breadth of technical expertise which is readily available to the Staff, and (b) cannot even determine what additional technical consultants should be retained until after they have received the Staff's evaluation.

For these reasons, the Governments -- like the Staff -- are unable at this time to address the technical issues raised by LILCO's Request. As noted, however, it is not necessary to address those technical issues in order to respond fully and dispositively to the Board's February 26 inquiry. The Governments demonstrate below that given the stated bases of LILCO's Request, the law of this case, concessions made by LILCO itself, and the issues raised by the pending emergency planning contentions, this Board cannot make the reasonable assurance and regulatory compliance findings which it held are required under Section 50.57.^{9/} Accordingly, LILCO's Request must be denied.

^{9/} See January 7 Order at 9; February 26 Order.

II. THE OL-5 LICENSING BOARD HAS CATEGORICALLY REJECTED ONE OF THE TWO BASES FOR LILCO'S 25% POWER REQUEST; IT IS RES JUDICATA THAT THE LILCO PLAN AND LERO CANNOT FORM THE BASIS OF A REASONABLE ASSURANCE FINDING

A. Introduction

LILCO's 25% power Request proceeds under 10 CFR § 50.47(c)(1). The Request is premised upon two alleged bases (referred to by LILCO as "interim compensating measures") which, according to LILCO, justify the issuance of a 25% power license despite its non-compliance with the emergency planning regulations. The two bases for LILCO's Request are: (1) implementation of the allegedly adequate LILCO Plan by the allegedly well trained and high capable LERO organization; and (2) a 25% power limitation. Request at 4, 11.

As already noted, in this brief the Governments are not able to address the second of these proposed measures; however, the Governments demonstrate in this section that it is not necessary to do so. In a decision which is binding upon this Board, the OL-5 Licensing Board has definitively rejected the first of LILCO's two bases for the 25% power Request.

LILCO's first basis for its Request has two interrelated components. The first component is the existence, alleged adequacy, and regulatory compliance of the LILCO Plan. Indeed, LILCO states in its Request that the Licensing Board had concluded that the LILCO Plan "complies in most respects with the pertinent regulations." Request at 16. The second component is the existence of a "well-organized and well-trained Local Emer-

gency Response Organization (LERO)," which is capable of effectively implementing that Plan. See Request at 4, 16.

In a February 1, 1988 Initial Decision on the results of the 1986 Shoreham Exercise, however, the Frye Licensing Board categorically held that these key premises of LILCO's 25% power Request, which together comprise one of LILCO's two proposed bases for that Request, are wrong.^{10/} The Frye Board held that LILCO's Plan is inherently, fundamentally and pervasively flawed, and that the LERO training program is inadequate, ineffective, and fundamentally flawed. Accordingly, the Board held that it could not find reasonable assurance that adequate protective measures to protect the public can and will be taken in the event of a Shoreham emergency based on the LILCO Plan and LERO personnel.

The Frye Board's ruling is res judicata on the question presented by this Board's February 26 Order.^{11/} That ruling precludes this Board from making the reasonable assurance finding required under Section 50.57.

^{10/} See Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), LBP-88-2 (February 1, 1988), slip op. (hereafter, "LBP-88-2").

^{11/} The fact that LILCO has appealed LBP-88-2 has no effect on the validity and effectiveness of the decision. Unless or until that decision is stayed or reversed, LBP-88-2 is the law of this case and is binding upon this Board.

B. LILCO's Proposed 25% Power Operation is Fundamentally Premised on the Adequacy of the LILCO Plan and the Ability of LERO to Implement it Adequately and Effectively

There can be no dispute that LILCO's Request for a 25% power license under 10 CFR § 50.47(c)(1) is fundamentally premised upon the adequacy and regulatory compliance of the LILCO Plan, and upon the training and alleged capabilities of LERO personnel to implement that Plan effectively. This LILCO position is evident from even a cursory review of LILCO's Request. For example, in the Request LILCO makes the following assertions, among others, in explaining why its Plan and LERO support the issuance of a 25% power license:

LILCO has developed an offsite radiological emergency plan to satisfy, inter alia, the requirements of 10 C.F.R. §§ 50.47(b) and (c)(2). A response organization, LERO, has been put in place and fully trained to implement this Plan. These measures, following extensive litigation and appellate review, have been found, with few exceptions, to satisfy the Commission's regulations.

Request at 11. Similarly, LILCO alleges that:

[The LILCO Plan] provides for realistic and effective response at the local level to any radiological incident, even absent County or New York State participation in the planning effort.

Id. at 13-14. And, with specific reference to LERO, LILCO asserts as follows:

To implement the Plan, LILCO established LERO.
. . . [Members of LERO] have been highly

trained and drilled to enable them to carry out the various roles and responsibilities outlined in the Plan. Implementing procedures are in place delineating all response activities at the local level in reaction to any incident at the plant, regardless of severity. The Plan provides for its continued maintenance and for rigorous training of LERO personnel in the tasks necessary to implement the Plan.

Id. at 14.

In addition, LILCO premises its 25% power Request on several specific provisions of the LILCO Plan, and several specific functions and actions, which allegedly could and would be implemented or performed, effectively, by LERO personnel in the event of a Shoreham emergency. For example, in the Request, LILCO asserts:

[Under the LILCO Plan] LERO develops protective action recommendations that will minimize potential dose to the public. These recommendations are promptly transmitted to the public via a system that includes 89 sirens located throughout the EPZ, and Emergency Broadcast System and tone alert radios

Id. at 14-15. With respect to evacuation, LILCO alleges:

If protective action recommendations include evacuation of all or a portion of the 10-mile EPZ, extensive resources are committed. LERO can put in place 165 traffic guides to assist the flow of traffic according to predetermined strategies

Id. at 15. In addition, according to LILCO:

Three hundred thirty-three . . . [LERO-driven] buses [would] run routes throughout the EPZ to evacuate those residents who do not have their own method of transportation. . . . In case of

a highway accident or other impediment to evacuation traffic, LERO has trained LERO route spotters to locate the problem and road crews to remove the impediment.

Id. On the subject of communicating emergency information to the public, LILCO asserts that:

To keep the public informed of the emergency status, Shoreham and LERO operate an Emergency News Center with facilities for hundreds of media and related personnel. This Center has direct lines to the LERO Emergency Operations Center so that the latest information can be provided to the public.

Id. at 16.

LILCO's conclusions are particularly revealing. It asserts that:

LERO, using the Plan, is capable of providing adequate personnel and equipment to assure the health and safety of the public.

(id. (emphasis added)), and that:

[T]he extensive litigation to date plainly shows that the Plan, implemented by LERO, gives reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at Shoreham

Id. at 17-18 (emphasis added).

Not only does LILCO's initial 25% power Request rely upon the LILCO Plan and LERO as one of two fundamental premises for the Request, but LILCO's subsequent filings have reiterated that reliance. For example, on November 6, 1987, LILCO stated:

LILCO argues that operation at 25% power coupled with the emergency plan submitted and staffed by LILCO, will provide adequate protection of public health and safety.^{12/}

Similarly, on November 16, 1987, LILCO stated:

In LILCO's original motion for approval to operate at 25%, two actions are described which, "[t]aken together with the present licensing status of Shoreham, . . . permit the requisite finding to be made . . . authorizing operation at power levels up to 25%." Request at 10. These "compensating actions" are the existence of a LILCO-sponsored emergency plan and the operation of the plant at 25% power. LILCO's motion clearly proposes that these actions be "taken together" to demonstrate the necessary interim compensating action. It is therefore irrelevant to LILCO's Motion to discuss whether operation at 25%, standing alone, is sufficient to constitute an interim compensation action.^{13/}

It is therefore clear beyond any question that a fundamental basis of LILCO's Request is the alleged adequacy of the LILCO Plan and the alleged capabilities of LERO to implement it. As discussed below, the Frye Board's decision rejected in its entirety this basis of the LILCO Request.

C. The Frye Board Rejected LILCO's Premises

The Frye Board found every one of the LILCO assertions quoted above to be meritless. In light of the Frye Board's factual findings and legal conclusions, made following a lengthy

^{12/} LILCO's Brief on 25% Power Questions (Nov. 6, 1987) at 8 (emphasis added).

^{13/} LILCO's Reply Brief on 25% Power Questions (Nov. 16, 1987) at 11 (ellipses in original; emphasis added).

and detailed evidentiary hearing, this Board clearly cannot make the reasonable assurance finding required by 10 CFR § 50.57 with respect to LILCO's 25% power Request, premised as it is upon the alleged adequacy of the LILCO Plan and of LERO.

The Frye Board found several "fundamental flaws" in LILCO's Plan and in LERO's ability to implement it, based upon the LILCO and LERO demonstrations and performances during the 1986 Exercise. The Board defined a "fundamental flaw" as a "condition[] in which there is a lack of reasonable assurance that the public can be protected" (which it described as "a situation which the Commission is chartered to prevent"). LBP-88-2 at 9. Thus, the Board found the "threshold test" of a fundamental flaw to be: If the Exercise had been a real emergency, would the alleged "flaw" have substantially affected the health and safety of the public? LBP-88-2 at 8, 10. In addition, the Board found that to be a fundamental flaw, "the failure demonstrated by the exercise must be pervasive as opposed to a minor or ad hoc problem." LBP-88-2 at 10.

Given the Frye Board's definition of a fundamental flaw, the fact that the Board found several such flaws in the LILCO Plan prohibits this Board from making the reasonable assurance finding required to grant LILCO's 25% power Request. We describe below some of the fundamental flaws identified by the Frye Board; it is clear that they directly impact -- by flatly rejecting -- the claims about the LILCO Plan and the abilities of LERO upon which LILCO's 25% power Request is premised.

The Frye Board concluded, in general, that there are several fundamental flaws in the LILCO Plan:

Although we found flaws related to prompt dispatch of Traffic Guides and training, the great bulk of these flaws relate to communications. Breakdowns in communications occurred within LERO as well as between LERO/LILCO on the one hand and the public and media on the other. Errors occurred not only with respect to procedures, but also with respect to the substance of the information transmitted. Confusing and conflicting information was furnished to the public, and erroneous information to the media. It is clear that much needs to be accomplished if these problems are to be overcome.

LBP-88-2 at 3-4.

In discussing the communications-related flaws revealed by LILCO's attempted but inadequate response to a roadway impediment, the Board held:

these inadequacies demonstrate a fundamental flaw. Further, the fundamental flaw involved is . . . a flaw in the Plan itself, revealed in the implementation but not simply engendered by it.

Id. at 50. The Frye Board reversed the qualified approval that the OL-3 Board had previously given to the communications scheme in LILCO's Plan (in 1985), stating as follows:

[The OL-3] Board gave the Plan its qualified approval, an approval based on inherent assumptions that traffic guides need only carry out preplanned actions, that "problem-solving" would not be required, and that ad hoc responses were not called for. Clearly the Exercise, with its accompanying free-play messages, indicated that a response to an emergency-within-an-emergency was in fact a natural requirement for an adequate plan. In short,

the OL-3 Board's approval was based on an assumption which the exercise proved untenable. And, as that Board clearly implied, if one accepts the "free-play" conditions of the exercise (and in deference to FEMA's standard practice we do) the communication system in LILCO's plan is fundamentally flawed in that it inherently hampers response to unexpected events.

Id. at 52-53. The Board found further:

[W]hatever steps LILCO took during the six months following the exercise to fix the problems noted by FEMA . . . the fixes did not succeed in curing the fundamental flaw in the Plan, viz. the deficient communication structure and procedures.

It may be difficult for LILCO to cure this fundamental flaw because of the training and experience of the personnel used to implement the Plan. As emergency workers, LILCO personnel are amateurs; this fact may be the root cause of the communication problems. . . . [I]t is questionable whether utility personnel can ever achieve the level of performance that professional emergency workers, such as the police, display.

Id. at 63.

In discussing the LILCO Plan's provisions for traffic assistance during an evacuation, the Board found:

Clearly, large numbers of [Traffic Control Posts] were not staffed until well after traffic congestion would have occurred. Consequently, a controlled evacuation would probably not have been achieved. We agree with FEMA that a deficiency should be assessed, and conclude that LERO's performance demonstrates a fundamental flaw.

Id. at 86.

The Board also found fundamental flaws in the LILCO Plan and in LERO's demonstrated abilities with respect to providing emergency information and protective action recommendations to the public and to the media. Thus, the Board held that "confusing and conflicting information was promulgated during the Exercise." Id. at 170. In addition to concluding that such finding "brings the [1985] PID's conclusion that an excess evacuation could occur, into play [because] . . . a controlled evacuation, which is required by the Plan, probably could not be achieved," the Board also held as follows:

Aside from the requirement that a controlled evacuation be achieved, we have concluded that the weaknesses in the public information program demonstrate a fundamental flaw in LERO's capability to communicate emergency information and protective action recommendations to the public.

Id. at 170-71, and n.48 (emphasis added).

Finally, the Board found the LILCO Plan's training program for LERO personnel to be fundamentally flawed. The Board found that the LERO training had been inadequate and ineffective, and it found seriously deficient the performance of LERO personnel in attempting to implement the LILCO Plan and otherwise respond to the emergency simulated during the Exercise.

For example, the Board stated that in addition to the fundamental plan flaw arising out of the "vertical communications chain called for by the Plan," "LERO personnel were not ade-

quately trained in emergency decision-making and communication."

Id. at 180. The Board held:

We conclude that the training of LERO personnel in responding to unanticipated and unrehearsed events, in communicating information about such events, in analyzing the kind of equipment needed to respond to serious roadway accidents, and in the development of alternative actions when actions called for by the Plan do not or will not work effectively, has been inadequate. We have already found that the communication problem constitutes a fundamental flaw in the Plan; this flaw resulted in part from the long chain of communication and in part from inadequate training. We believe that LILCO must significantly expand and improve its training program in communications before there can be reasonable assurance that adequate protective measures can and will be taken in the event of a Shoreham emergency.

Id. at 183-84. The Board concluded as follows:

[T]he training program as conducted before and since the Exercise has failed to teach LERO personnel how to communicate emergency information effectively.

Because the consequences of poor communication during the Exercise resulted in a finding of a Deficiency by FEMA and a Fundamental Flaw by us, and because we agree with Suffolk's witnesses that timely and accurate communications provide the backbone of a successful emergency response, we conclude that LILCO's training program is fundamentally flawed in the area of communications.

Id. at 216-17.

Similarly, with respect to the ability of LERO personnel to implement the LILCO Plan, the Board found:

[T]he proportion of LERO workers observed failing to follow the Plan or procedures was

disturbingly great. These failures occurred frequently enough to suggest that there is, indeed, a pervasive problem in training LERO workers to follow the Plan. We conclude, therefore, that . . . LILCO's training program has not adequately trained LERO personnel to follow the LILCO Plan and procedures.

Id. at 194.14/

With respect to the ability of LERO workers to deal with unanticipated events that would arise during an emergency, the Board found that:

LERO workers are not adequately trained to use independent and good judgment in response to unanticipated events. LILCO itself admits that its training program is interded to teach LERO workers to implement the Plan and not to make ad hoc decisions during an emergency. We are convinced, however, that situations would arise during a radiological emergency at SNPS that could be dealt with effectively only if the emergency workers are able to make good, independent judgments and ad hoc decisions.

Id. at 224.

14/ The Board provided the following illustration:

To illustrate the point, FEMA observed eight bus drivers for the general population, of which three either got lost or missed part of their route. Tr. 8547-48. Thus approximately 37 percent of the sample of eight failed to carry out their function properly. If the eight observed by FEMA were truly a representative sample of the total of 333 general population bus drivers who were mobilized during the Exercise, then one might expect 37 percent of 333 bus drivers, or approximately 125, to fail to carry out their function properly.

LBP-88-2 at 194, n.50.

The Board's overall conclusion with respect to the fundamental flaws in LILCO's LERO training program was the following:

Deficiencies in the following areas, which are significant to the ability of LERO to implement the LILCO Plan, were found during the Exercise and were not demonstrated to have been compensated for or corrected:

- (1) training for, and execution of internal communications within the LERO command structure and between that structure and field personnel in response to unexpected events;
- (2) basic knowledge of Traffic Guides and Bus Drivers of their assigned functions; and
- (3) training for timely and prompt response of Traffic Guides, Bus Drivers, Route Spotters, and Road Crews in the performance of their emergency tasks.

These deficiencies in LILCO's training program preclude a finding of reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at SNPS and therefore constitute a fundamental flaw in the Plan.

Id. at 250-51 (emphasis added).

- D. The Frye Board's Decision Precludes this Board from Finding Reasonable Assurance as Required under Section 50.57

In its January 7 Order, this Board held that the 25% power license sought by LILCO "can issue only if its issuance, the operation of the facility, and the activities authorized will all give reasonable assurance of the protection of health and safety and compliance with the regulations." January 7 Order at 9.

Similarly, in its February 26 Order, the Board again focused on the reasonable assurance finding required by Section 50.57 in seeking briefs on the impact of emergency planning issues on that required finding. The Frye Board's February 1 Initial Decision is res judicata on that subject.

LILCO's 25% power Request is fundamentally premised upon the alleged adequacy of the LILCO Plan and the alleged ability of LERO to properly and effectively implement that Plan. The Frye Board's findings (1) that the Plan is fundamentally flawed, (2) that LERO is not capable of implementing it, and (3) that each one of the many flaws in the Plan precludes a reasonable assurance finding, are controlling and binding on this Board.

This "outstanding" emergency planning issue -- that LILCO's Plan and its LERO organization are fundamentally flawed -- requires the denial of LILCO's 25% power Request. This Board cannot make the required Section 50.57 finding of reasonable assurance that the public health and safety will be adequately protected.

III. LILCO'S FAILURE TO COMPLY WITH THE APPENDIX E EXERCISE REQUIREMENTS PRECLUDES THE REGULATORY COMPLIANCE FINDING REQUIRED UNDER SECTION 50.57

This Board is also precluded from making the regulatory compliance finding required under Section 50.57, because LILCO has failed to comply with the full participation exercise requirements of 10 CFR Part 50, Appendix E, § IV.F.

A. Appendix E Requires a Full Participation Exercise Prior to Issuance of Any License to Operate Above 5% Power

Appendix E is explicit in requiring a full participation exercise prior to the issuance of any license to operate above 5% power:

A full participation^{4/} exercise which tests as much of the licensee, State and local emergency plans as is reasonably achievable without mandatory public participation shall be conducted for each site at which a power reactor is located for which the first operating license for that site is issued after July 13, 1982. This exercise shall be conducted within two years before the issuance of the first operating license for full power (one authorizing operation above 5% of rated power) of the first reactor. . . .^{15/}

By the plain terms of Appendix E, no 25% power license can be issued to LILCO unless there has been a full participation exercise conducted within two years before the license is issued.

^{15/} 10 CFR Part 50, Appendix E, Section IV.F.1 (emphasis added). Footnote 4 states:

"Full participation" when used in conjunction with emergency preparedness exercises for a particular site means appropriate offsite local and State authorities and licensee personnel physically and actively take part in testing their integrated capability to adequately assess and respond to an accident at a commercial nuclear power plant. "Full participation" includes testing the major observable portions of the onsite and offsite emergency plans and mobilization of State, local and licensee personnel and other resources in sufficient numbers to verify the capability to respond to the accident scenario.

B. LILCO Has Not Complied with the Appendix E
Exercise Requirement

The Shoreham Exercise conducted in February, 1986 clearly does not satisfy this Appendix E requirement. First, it took place more than two years ago, and therefore cannot qualify as the full participation exercise required by Appendix E. Second, in its December 7, 1987 Partial Initial Decision (LBP-87-32), the Frye Board held that LILCO's 1986 Exercise failed to comply with the full participation exercise requirement in 10 CFR Part 50, Appendix E.^{16/}

Under the express terms of Appendix E, this Board cannot issue LILCO a license to operate Shoreham at up to 25% power unless and until LILCO conducts a full participation exercise which fully complies with Appendix E. Accordingly, the Board must deny LILCO's 25% power Request because it cannot make the regulatory compliance finding required by Section 50.57.

^{16/} See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-32 (December 7, 1987) (hereafter, "LBP-87-32"). The fact that LILCO has appealed LBP-87-32 has no effect on the validity and effectiveness of the decision. Unless or until that decision is stayed or reversed, LBP-87-32 is the law of this case and is binding upon this Board.

The Frye Board's decision in LBP-87-32 was based on the failure to test certain essential emergency planning functions during the 1986 exercise; it was not based on the lack of participation by New York State and Suffolk County. Accordingly, the November, 1987 amendment adding a new paragraph 6 to Section IV.F of Appendix E -- which eliminated the requirement for governmental participation in exercises if the "applicant has identified those governments as refusing to participate further in emergency planning activities, pursuant to 10 CFR 50.47(c)(1)" -- is irrelevant, and has no impact on the validity and binding nature of the Frye Board's decision.

C. Section 50.47(c)(1) Provides No Means for Avoiding Compliance with Appendix E

LILCO's 25% power Request proceeds under 10 CFR § 50.47(c)(1). By its terms, that section provides a mechanism for obtaining a license in the absence of full compliance with the requirements of subpart (b) of Section 50.47. Section 50.47(c)(1) does not excuse a failure to comply with the separate requirements of Part 50, Appendix E. Accordingly, Section 50.47(c)(1) provides no avenue to obtain an exemption from the requirement of such compliance prior to issuance of a license to operate above 5% power.

LILCO itself has recognized that Section 50.47(c)(1) provides no basis for relief from compliance with Appendix E requirements. In early 1987, LILCO feared that its 1986 Exercise would not enable it to comply with Appendix E because more than one year would pass between the Exercise and a licensing decision.^{17/} Therefore, LILCO filed, pursuant to 10 CFR § 50.12(a), a request for an exemption from the one year from license issuance exercise requirement in Appendix E.^{18/}

LILCO's acknowledgement that the appropriate avenue to obtain relief from Appendix E non-compliance is by way of an exemption under Section 50.12 is not surprising. In the Shearon

^{17/} In early 1987, Appendix E, § IV.F.1 required the full participation exercise to occur within one year of licensing. In May 1987 the regulation was changed to include the present two year requirement. 52 Fed. Reg. 16,823 (1987).

^{18/} See Licensee's Request for Exemption from 10 C.F.R. Part 50, Appendix E (Jan. 22, 1987).

Harris case, the Commission considered relief from Appendix E non-compliance under Section 50.12.19/ Similarly, in the Perry proceeding, Appendix E non-compliance was also considered under Section 50.12.20/ These decisions merely emphasize what the regulations already make clear: Section 50.47(c)(1) is not the proper avenue for seeking an exemption from compliance with Appendix E.21/

Furthermore, in recently amending Section 50.47(c)(1) and Appendix E, the Commission reiterated four times its intention to have subpart (c)(1) address only non-compliance with the requirements in subpart (b):

- "Failure to meet the applicable standards set forth in paragraph (b) of this section may result in the Commission declining to issue an operating license"
- "Where an applicant . . . asserts that its inability to demonstrate compliance with the requirements of paragraph (b) of this section results wholly or substantially from the decision of state and/or local governments not to participate"

19/ See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-86-24, 24 NRC 769 (1986).

20/ See Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), Docket No. 50-440, Exemption (Nov. 6, 1986).

21/ This Board's January 7 ruling that LILCO could pursue its 25% power Request under Section 50.47(c)(1) without seeking an exemption never addressed the issue of LILCO's non-compliance with Appendix E. See January 7 Order at 6. That ruling merely decided that LILCO could attempt to comply with the requirements of Section 50.47(c)(1) using technical risk arguments. It is clear from Section 50.47(c)(1) itself and the precedents cited in the text that Section 50.47(c)(1) cannot be used to attempt to get around Appendix E non-compliance. Section 50.12 is the proper course.

- "(i) The applicant's inability to comply with the requirements of paragraph (b) of this section is wholly or substantially the result of non-participation"
- "In addressing the circumstance where applicant's inability to comply with the requirements of paragraph (b) of this section is wholly or substantially the result of non-participation"

52 Fed. Reg. 42085-86 (November 3, 1987) (emphasis added).

Nowhere is it suggested, in the rule text or elsewhere, that the Commission intended the amended subpart (c)(1) to deal with non-compliance with any requirements other than those in subpart (b) of Section 50.47.

Moreover, a comparison of the new rule as proposed for public comment with the rule as adopted provides further evidence that the Commission decided to limit the applicability of the amended subpart (c)(1) to non-compliance with subpart (b) and to exclude non-compliance with the requirements of Appendix E.

As originally proposed, the Section 50.47 amendment was to consist of a new subpart (e) to read, in pertinent part, as follows:

(e) The Commission may issue a full power operating license for a facility notwithstanding non-compliance with other requirements of this section and 10 CFR Part 50 Appendix E is [sic] non-compliance arises substantially from a lack of participation in emergency planning by a State or local government, and if the applicant demonstrates to the Commission's satisfaction that

52 Fed. Reg. 6981 (March 6, 1987) (emphasis added). Prior to adoption of the final version of the amendment, however, the Commission obviously decided to abandon the broad provision (covering Appendix E and all of Section 50.47) that it had originally proposed. Instead, the Commission decided to maintain the original structure of subpart (c)(1) by having its new version of that subpart apply only to non-compliance with provisions of subpart (b) of Section 50.47, just as it always had. Thus, the Commission removed from the adopted version of the amendment references to "other requirements" of Section 50.47 and to Appendix E, except for the addition of the new paragraph 6 to Appendix E, Section IV.F. See 52 Fed. Reg. 42,086 (November 3, 1987).

This additional "outstanding" emergency planning issue -- LILCO's non-compliance with the full participation exercise requirement of Appendix E -- precludes the reasonable assurance of regulatory compliance finding which, under Section 50.57, is a prerequisite to the granting of LILCO's 25% power Request.

IV. PENDING EMERGENCY PLANNING CONTENTIONS ARE RELEVANT TO, AND PRECLUDE, A REASONABLE ASSURANCE FINDING UNDER SECTION 50.57

In addition to the two dispositive reasons already discussed which require the denial of LILCO's 25% power Request, the Governments' pending emergency planning contentions are directly relevant to LILCO's proposed 25% power operation of Shoreham. The existence of these outstanding contentions also precludes the reasonable assurance finding required under Section 50.57.

A. The Pending Contentions

For ease of reference, the Governments list below the emergency planning contentions which remain outstanding and preclude the reasonable assurance finding required for issuance of a 25% power license.

Legal Authority Contentions 1, 2, 4-8 and 10:

LILCO lacks the legal authority to implement the following emergency response functions set forth in the LILCO Plan, and there is no reasonable assurance that LILCO's Plan, even with the "best efforts" of the State and County governments, could or would be implemented or would satisfy the regulatory requirements concerning the following functions:

Contention 1 -- directing traffic, establishing prescribed evacuation routes, and implementing an evacuation;

Contention 2 -- blocking roadways, establishing one-way roads, and implementing an evacuation;

Contention 4 -- removing road obstructions and towing vehicles in implementing an evacuation;

Contention 5 -- activating sirens, activating an EBS, and directing the broadcast and determining the content of EBS messages;

Contention 6 -- deciding upon and making decisions and official recommendations to the public on appropriate protective actions to protect public health and safety, and exercising command and control, and managing and coordinating, the entire emergency response;

Contention 7 -- determining, informing the public, and implementing protective action recommendations for the 50-mile ingestion pathway EPZ;

Contention 8 -- initiation, command and control, and implementation of short-term and long-term recovery and reentry processes;

Contention 10 -- establishing and maintaining EPZ perimeter and access control, access control to evacuated areas, and traffic control in areas around relocation centers.

EBS Contention

LILCO's new provisions for radio transmission of EBS messages and other emergency information, and for activation of tone alert radios and receivers installed at secondary EBS stations, are inadequate and the LILCO Plan fails to comply with 10 CFR §§ 50.47(a)(1), (b)(5) and (b)(6), 10 CFR Part 50, Appendix E, §§ IV.D.2 and 3, and NUREG 0654 §§ II.E.5 and E.6 and Appendix 3.

Role Conflict and Proposed Protective Actions for School Children -- Contention 25.C

LILCO cannot implement the proposed protective actions of early dismissal and evacuation of school children, as set forth in the LILCO Plan, safely, effectively, or in compliance with regulatory requirements, because a substantial number of the school bus drivers, who LILCO assumes will implement such early dismissals and evacuations, will attend to the safety of their own families and therefore will not be available to implement LILCO's proposed protective actions for school children.

Reception Centers and Monitoring and Decontamination of Evacuees

LILCO's proposed reception centers are unavailable and inadequate for their intended purpose; LILCO's proposed procedures for directing evacuees to reception centers cannot be safely or effectively implemented and they fail to comply with regulatory requirements; LILCO's proposed procedures for providing radiological monitoring and decontamination to evacuees are inadequate, unworkable and fail to comply with regulatory requirements.

Evacuation of Hospital Patients

LILCO's proposed ad hoc evacuation of hospital patients is inadequate, unworkable, and fails to comply with regulatory requirements.

B. The Outstanding Contentions are Relevant to LILCO's 25% Power Operation Proposal

Even a cursory review of LILCO's 25% power Request and the pending contentions reveals that those contentions raise issues which are directly relevant to LILCO's proposed operation of Shoreham at 25% power. Three reasons make this conclusion unavoidable, even without an analysis of the validity of LILCO's technical allegations about the nature and risks of its proposed 25% power operation.

First, LILCO's Request is plainly premised upon the existence and adequacy of its Plan and the ability of its LERO organization to implement that Plan, regardless of the size of the area, or the number of Suffolk County citizens which might ultimately be involved in an actual emergency response. For this reason, the contentions -- which allege that the Plan fails to provide reasonable assurance that adequate protective measures can and will be taken, that the Plan cannot be implemented, and that the Plan fails to comply with the regulations -- are clearly relevant. We discuss this in Section (1) below.

Second, in its Request LILCO acknowledges that in an emergency at 25% power, most if not all the functions and LILCO Plan provisions at issue in the pending contentions would or could be necessary. We discuss this in Section (2) below.

Third, most of the pending contentions allege non-compliance with 10 CFR Part 50, Appendix E. As noted above, Section 50.47(c)(1), upon which LILCO's 25% power Request is based, provides no avenue for avoiding compliance with the requirements of Appendix E. Accordingly, the pending contentions which allege non-compliance with Appendix E are directly relevant to the reasonable assurance of regulatory compliance finding required under Section 50.57. This Board cannot make such a finding until those contentions have been resolved.

(1) The Pending Contentions are Relevant Because They Raise Issues about the LILCO Plan which is the Premise of the LILCO Request

As demonstrated in Section II above, LILCO's 25% power Request is fundamentally premised on the alleged adequacy and regulatory compliance of the LILCO Plan for the entire 10-mile EPZ, and on the alleged ability of LERO to implement that Plan for that entire area.^{22/} For this reason alone, this Board may

^{22/} Although LILCO does argue that planning for the entire 10-mile EPZ is conservative for 25% power operation (see, e.g., Request at 87-88), LILCO nonetheless asserts in its Request that it "does not seek to reduce the EPZ" for its operations at 25% power, that it does not intend "to reduce the degree of emergency planning now in place during 25% power operation," and that it "proposes no reduction in the EPZ, to the Plan or to LERO." Request at 84, 87. LILCO repeated these assertions in November 1987. See LILCO's Reply Brief on 25% Power Questions, Nov. 16, 1987 at 10. As explained in Section I above, the Governments are not yet in a position to address the substance or technical merits of LILCO's assertion that no preparedness would be necessary throughout most of the 10-mile EPZ. Significantly, however, the Commission has already reached the generic conclusion that planning for a 10-mile area is required for any operation above 5% power. See, e.g., 10 CFR § 50.47, and discussion of 10 CFR Part 50, Appendix E, § IV.F.1 above. See also note 24 below.

not grant LILCO's 25% power request until the pending contentions have been resolved. Because those contentions allege that LILCO's Plan (1) does not provide reasonable assurance that adequate protective measures can and will be taken, and (2) does not comply with regulatory requirements, this Board is precluded from making the reasonable assurance findings required under Section 50.57.

(2) LILCO Acknowledges that the Functions Challenged in the Pending Contentions Would or Could Be Necessary to Respond to an Emergency at 25% Power

Throughout its Request, LILCO asserts that at 25% power an emergency response would probably be unnecessary except within a one or two mile radius of the plant. See, e.g., Request at 87-88, 97.^{23/} Nevertheless, LILCO is forced to concede the obvious: in a Shoreham emergency, even at 25% power and even assuming arguendo the risk reductions asserted by LILCO, all the basic elements of an emergency response would or could still be required. And, this is true even if it is assumed that such a response would be necessary for an area smaller than the 10-mile EPZ, or for less than the entire EPZ population.^{24/}

^{23/} The Governments will submit contentions and evidence, as appropriate, to contest this assertion after they have had an opportunity to conduct the necessary discovery and analyses of the technical merits of LILCO's Request and the Staff's review of the Request.

^{24/} The Governments emphasize that they do not agree that any lessening in offsite preparedness during 25% power operation would be consistent with the NRC's regulations. To the contrary, the NRC has emphasized that even if an emergency were to cause no significant offsite consequences (i.e., even if the most far-
(footnote continued)

Specifically, LILCO acknowledges that at least the following elements of an emergency response -- which are set forth in the LILCO Plan and are the subject of the Governments' pending contentions -- could or would be required in the event of a Shoreham emergency at 25% power:

- notification by LILCO of the State and County (Request at 91);
- a decision to alert the public (id. at 93);
- a decision whether to activate the 89 sirens installed in the EPZ (id. at 92, 93);
- a decision to activate an EBS system, and the broadcasting of emergency information and protective action recommendations over that system (id. at 92-93);
- decisions on whether, when, and how to advise the public to shelter or to evacuate (id. at 93);

(footnote continued from previous page)
reaching of the assertions in LILCO's Request were accepted), there must still be assurance that there is offsite preparedness and an implementable plan:

The [TMI] accident also showed clearly that onsite conditions and actions, even if they do not cause significant offsite radiological consequences, will affect the way the various State and local entities react to protect the public from any dangers associated with the accident. In order to discharge effectively its statutory responsibilities, the Commission must know that proper means and procedures are in place to assess the course of an accident and its potential severity, that NRC and other appropriate authorities and the public will be notified promptly, and that adequate protective actions in response to actual or anticipated conditions can and will be taken.

45 Fed. Reg. 55,403 (August 19, 1980) (emphasis added). This Commission statement further underscores the relevance of the Governments' pending contentions to LILCO's 25% power Request.

- an evacuation of the 20,000 people located in the five zones (A-E) located within two miles of the plant (id. at 88, 96);
- mobilization of 53 LERO traffic guides to "guide" traffic, man traffic control posts, block roadways, erect barriers on roadways, and remove obstructions on roadways (id. at 91-92);
- evacuation of six schools located within two miles of the plant, by means of 33 buses (id. at 100);
- evacuation of the transit-dependent population within two miles of the plant by means of 36 LERO-driven buses (id. at 102);
- access control by LERO traffic guides (id. at 94);
- activation and staffing of reception centers (id. at 96-97);
- direction of up to 20,000 people in zones A-E to LILCO's proposed Roslyn reception center, and possibly some to the proposed Hicksville or Bellmore centers (id. at 96);
- traffic control associated with evacuation travel and arrival of evacuees at reception centers (id. at 97); and
- activation of congregate care centers for roughly 4000 evacuees from zones A-E (id. at 98).

A comparison of the functions conceded by LILCO to be potentially necessary to respond to a 25% power emergency, with the functions which are the subject of the pending emergency planning contentions, makes manifest the relevance of those contentions to LILCO's proposed 25% power operation.

Moreover, LILCO's concession is not surprising. Common sense and logic dictate the conclusion that in any radiological

emergency: the public will need to be alerted; there will have to be some communication of emergency information; and some decisions will have to be made about whether protective actions are necessary and if so, which ones. Similarly, if any evacuation is recommended, there will need to be traffic control, access control, provision for school children and others without their own means of transportation, assistance for evacuees (such as monitoring, decontamination, and shelter advice), and decisions about recovery and reentry.

It may be an interesting exercise to engage in technical debates about the actual number or location of the people for whom protective action decisions would have to be considered or made, or about how many people would actually have to be evacuated, in the event of an emergency assuming a power level of 25%. However, there is no need to engage in such debates in order to determine whether the outstanding contentions are relevant to LILCO's proposed operation of Shoreham. There is simply no basis for suggesting that even at 25% power, the most fundamental decision-making and communication functions addressed in the pending contentions would not come into play, or that some amount of the protective and evacuation-related activities addressed in those pending contentions could not also be required. Clearly,

^{25/} As the Board itself acknowledged, "the 'relevance test' for contentions expressed in 50.57(c) is much less rigorous than the 'not significant' test of 50.47(c)." January 7 Order at 7 (emphasis added).

the pending emergency planning contentions are relevant to LILCO's proposed 25% power operation.25/

(3) The Non-Compliance with Appendix E Alleged in the Pending Contentions Is Relevant to the Findings Required to Issue a 25% Power License

Finally, a review of the Governments' pending contentions reveals that most of them allege that LILCO's Plan fails to comply with requirements of Part 50 Appendix E. As discussed in Section III above, Section 50.47(c)(1) provides no exemption from compliance with Appendix E, and no mechanism for arguing that such non-compliance is "insignificant" or excused. This Board held in its January 7 Order, however, that Section 50.57 requires a finding of reasonable assurance of regulatory compliance prior to issuance of a 25% power license. The Board cannot make such a finding, with respect to compliance with Appendix E, prior to resolution of the pending contentions. For this additional reason, then, the pending contentions are relevant to LILCO's 25% power Request. In fact, their existence requires the denial of the LILCO Request.

V. CONCLUSION

For the foregoing reasons, this Board must find that the reasonable assurance findings required by Section 50.57 cannot be made with respect to LILCO's 25% power Request, and accordingly, that Request must be denied.

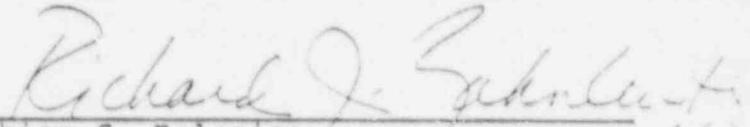
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