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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

Before the Atomic Safety and Licensing Board

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In the Matter of )  
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LONG ISLAND LIGHTING COMPANY )  
 )  
(Shoreham Nuclear Power Station, )  
Unit 1) )  
\_\_\_\_\_ )

Docket No. 50-322-OL-3  
(Emergency Planning)

SUFFOLK COUNTY, STATE OF NEW YORK AND TOWN OF  
SOUTHAMPTON OPPOSITION TO LILCO'S UNAUTHORIZED  
AND IMPERMISSIBLE "RESPONSE TO INTERVENORS'  
'RESPONSE' IN OPPOSITION TO LILCO'S SECOND  
MOTION FOR SUMMARY DISPOSITION OF THE EBS ISSUE"

I. Introduction

On July 27, 1988, LILCO filed a pleading entitled "Response to Intervenor's 'Response' in Opposition to LILCO's Second Motion for Summary Disposition of the EBS Issue" (hereafter, "LILCO's Response"). LILCO did not seek leave to file its Response. Rather, it simply alleged in a cover letter addressed to the Board that, in LILCO's view, it is entitled to respond to the Government's response opposing LILCO's Second Motion for Summary Disposition of the EBS Issue, dated June 20, 1988 (hereafter, "LILCO's Motion").<sup>1/</sup> For the reasons set forth below, the Gove-

<sup>1/</sup> See Suffolk County, State of New York and Town of Southampton Response in Opposition to LILCO's Second Motion for Summary Disposition of the EBS Issue, dated June 20, 1988.  
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rnments oppose any consideration by this Board of LILCO's Response, which should be disregarded and rejected in its entirety. Moreover, even if this Board does consider LILCO's Response, the Governments submit that LILCO's Motion must nonetheless be denied and the Governments given the opportunity to submit contentions and pursue discovery.

II. Under the Circumstances, the Board Lacks Authority to Permit LILCO to File a Response

On its face, Section 2.749(a) of the Commission's Rules of Practice bars any response by LILCO to the Governments' Response. It provides:

Any party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding . . . . Any other party may serve an answer supporting or opposing the motion, with or without affidavits, within twenty (20) days after service of the motion . . . . The opposing party may within ten days after service respond in writing to new facts and arguments presented in any statement filed in support of the motion. No further supporting statements or responses thereto shall be entertained.

(Emphasis added).

The use of the mandatory language "shall" seemingly permits no discretion for this Board even to consider whether to enter-

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Disposition of the EBS Issue, dated July 12, 1988 (hereafter, "Governments' Response").

tain LILCO's Response. Indeed, under the circumstances of this case, no other conclusion is possible. Without citing any authority, or even seeking leave to file its Response, LILCO proposes that the Board should ignore Section 2.749(a)'s express prohibition on the filing of a response or reply by a summary disposition movant. This Board is not empowered to do so, however.

Both the Board's April 22, 1987 Memorandum and Order (Ruling on Staff's Motion of April 8, 1987 to File Reply) (unpublished) (hereafter, "April 22 Order"), and its September 17, 1987 Memorandum and Order (Ruling on Applicant's Motions of March 20, 1987, for Summary Disposition of the Legal Authority Issues and of May 22, 1987, for Leave to File a Reply and Interpreting Rulings Made by the Commission in CLI-86-13 Involving the Remand of the Realism Issue and Its Effect on the Legal Authority Question),<sup>2/</sup> support the Governments' claim that LILCO is prohibited from filing its Response. The April 22 Order dealt only with the Staff's request to file its answer to a LILCO summary disposition motion out of time. In holding that it could consider such a request, the Board nonetheless concluded that even such a request must be supported by a showing of compelling need to justify a departure from the filing procedures expressly set forth in Section 2.749. In the Board's view, the Staff failed to demonstrate any compelling need. April 22 Order at 3-4.

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<sup>2/</sup> Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201 (1987) (hereafter, "September 17 Order").

Similarly, in its September 17 Order, the Board denied LILCO's request for leave to file a reply to the Governments' answer to the same summary disposition motion which the Staff had sought to answer. Although the Board implied that it could authorize leave to file such a reply, it found it unnecessary to reach this jurisdictional question. Instead, the Board ruled that as a threshold requirement, before it would even consider whether it could grant leave for filing a reply, the movant for summary disposition first has to establish that it has a compelling reason for lifting the prohibition in Section 2.749(a) against the filing of replies. In the Board's view, LILCO had not made the threshold showing; thus, a decision on the Board's jurisdiction to permit LILCO to file its reply was not necessary.<sup>3/</sup>

Here, LILCO has not even sought leave to file its July 27 Response. Instead, it has simply filed the additional pleading in support of its June 20 motion for summary disposition, and in opposition to the Governments' Response, with no explanation

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<sup>3/</sup> The Board explained its reasoning as follows:

The procedure previously employed by this Board, of requiring a movant to establish a compelling reason to lift the prohibition in § 2.749(a) against the filing of replies, before the Board decides whether it has the authority to do so, is a reasonable approach and we will continue to follow it here. The Board does not find, after considering the authorized filings of the parties, that the Applicant has made the threshold showing, so that we need make the decision on our jurisdiction to do so.

26 NRC at 204-05.

other than unilaterally declaring in its July 27 cover letter to the Board that, in LILCO's view, it is entitled to respond.<sup>4/</sup> Since LILCO has not provided the Board with a compelling reason for the need to file a reply, or even requested leave to do so by filing a motion with the Board, LILCO's Response must be summarily disregarded and rejected in its entirety. Section 2.749, and the prior rulings of this Board, require such a result.<sup>5/</sup>

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<sup>4/</sup> In its cover letter and on the first page of its Response, LILCO alleges that since the Governments' Response not only opposes LILCO's Motion, but also asks for affirmative relief -- that the Board grant summary disposition to the Governments or declare the existing WPLR contention moot and rule in the Governments favor as a matter of law -- it is entitled to respond. LILCO's cover letter further attempts to justify LILCO's unauthorized and impermissible Response by alleging that it is impossible to determine which of the arguments in the Governments' Response are intended to support only their opposition to LILCO's Motion; thus, LILCO claims that it must address "the whole of [the Governments'] paper."

These LILCO arguments are not only disingenuous in the extreme, but they also seriously mischaracterize the Governments' Response. It is only on a single page of that 42-page Response -- page 21 -- that the Governments seek affirmative relief, by asserting that they, not LILCO, are entitled to summary disposition or a declaration from this Board that the existing WPLR contention is moot, thereby requiring a ruling for the Governments as a matter of law. Thus, it is absurd for LILCO to assert, as it does on the first page of its Response, that it is only to the extent that the Governments' Response "goes beyond a proper response to LILCO's [M]otion" that LILCO responds. Quite obviously, LILCO's Response is far broader than this.

<sup>5/</sup> The Governments are submitting this Response because they believe that LILCO's Response was submitted without appropriate authority. If this Board properly rejects LILCO's Response in its entirety, it is unnecessary for the Board to consider the balance of this Response.

III. Even If the Board Considers LILCO's Response, LILCO's Motion Must Nonetheless Be Denied and the Governments Given the Opportunity to Submit Contentions and Pursue Discovery

Assuming, arguendo, that the Board decides to consider LILCO's Response, it must nonetheless be concluded that LILCO's Motion must be denied, and the Governments given the opportunity to submit contentions and pursue discovery of LILCO's latest EBS scheme. Simply put, LILCO's Response seriously misconstrues and misstates the facts underlying LILCO's Motion, and invites this Board to commit clear error.<sup>6/</sup>

A. Contrary to LILCO's Claims, the Governments Can and Should Be Granted Summary Disposition

The only portion of LILCO's Response which can even arguably be considered by the Board is the first two pages. There, LILCO argues that the Governments cannot be granted summary disposition on the existing contention, which addresses LILCO's WPLR EBS proposal. LILCO is wrong.

The Governments have previously argued why summary disposition in their favor would be entirely proper. See Governments' Response at 21. Little else need be said here. Clearly, however, LILCO is wrong in asserting that the Governments have not

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<sup>6/</sup> We will not repeat here arguments already made in response to LILCO's Motion, but rely instead on our July 12 Response. It bears repeating, however, that, in the Governments' view, LILCO's Response simply should not be considered by the Board. Rather, the Board should decide LILCO's Motion based only on those pleadings filed by the parties which are authorized and permitted by the Commission's regulations. LILCO's Response is not such a pleading.

"won" the WPLR issue. The EBS contention admitted by the Board focuses on the adequacy of WPLR to act as the primary, or lead station, of LILCO's proposed EBS network. WPLR, however, has informed LILCO that it is terminating its agreement to participate in LILCO's EBS network. Thus, summary disposition of the admitted contention in the Governments' favor is warranted and appropriate. Indeed, WPLR's refusal to participate in LILCO's proposed EBS makes out a prima facie case for the inadequacy of WPLR as LILCO's lead EBS station.

Based on LILCO's Response, however, it may not be appropriate to declare the existing contention moot, since LILCO still appears to rely on WPLR in some capacity. For example, LILCO represents in its Response that "[a]ny involvement by WPLR or the local Shoreham EBS would be in a last-resort, backup role." LILCO's Response at 5. Although the Governments did state in their July 12 Response that it may be appropriate to declare the admitted contention moot because of the uncertainty surrounding LILCO's reliance on WPLR, it also stated that "[i]f it turns out in discovery or in later modifications of LILCO's Plan, that WPLR is again being relied upon as a participant in LILCO's EBS, then the admitted contention can be resurrected." Governments' Response at 21. As it now appears that LILCO is again relying on WPLR, its adequacy is still at issue. Therefore, it appears that this Board should not declare the contention moot, but rather either grant summary disposition in favor of the Governments or establish a trial schedule so that the admitted contention can be



litigated. As explained below, however, trial on the adequacy of LILCO's proposed EBS could not be limited to WPLR's adequacy, but would also likely have to include aspects of LILCO's reliance on WCBS and the State EBS network to provide notification to the public in the event of a Shoreham emergency.

More appropriately, however, under the circumstances surrounding LILCO's many EBS proposals and attempts to satisfy the Commission's regulatory requirements, this Board should rule for the Governments as a matter of law on the existing WPLR contention, and thereafter close the evidentiary record in the Governments' favor. With respect to LILCO's latest proposal, LILCO should be required to petition this Board to move to reopen the record pursuant to Section 2.734. Otherwise, this Board faces the prospect of never-ending LILCO maneuvering, with changes made to LILCO's Plan at every twist and turn as LILCO attempts to convince this Board that it has an adequate and workable EBS proposal.

A few other comments concerning LILCO's claim that the Governments should not be granted summary disposition are necessary. First, LILCO's complaint about the Governments' failure to comply with the pleading requirements of Section 2.749(a) (LILCO's Response at 2) is absurd. LILCO clearly is in no position to complain about another party's failure to meet the requirements governing summary disposition. Further, LILCO's



argument, in essence, elevates form over substance, and should thus be ignored.

Second, LILCO's position regarding the Governments' failure to file for summary disposition within the deadline proposed in their June 20 Briefing Paper (LILCO's Response at 2 and n.2) is equally without merit. As LILCO acknowledges in its Response, the 10-day period suggested by the Governments was proposed to, but not adopted by, the Board. Instead, the Board merely agreed that the Governments could file for summary disposition. See Memorandum and Order (June 21, 1988). The Governments chose not to do so when LILCO, rather than filing a briefing paper of its own, as requested by the Board, sought summary disposition. In the Governments' view, responding to LILCO's Motion then took precedence over separately moving for summary disposition, especially since LILCO's Motion, on its own, demonstrated why summary disposition for the Governments on the existing WPLR contention was appropriate. In any event, it is nonsense to assert, as LILCO does (LILCO's Response at 3), that the Governments have now forfeited any right they once had to seek summary disposition. This may be indicative of LILCO's wishful thinking, but it is not supported by either the facts of this case, the Board's previous rulings, or the Commission's Rules of Practice.

B. LILCO's Response Is Inaccurate,  
Erroneous and Baseless

Even if this Board decides to consider LILCO's Response, it should be disregarded and accorded no weight. As discussed below, LILCO's Response is erroneous, baseless and, for the most part, a rehash of arguments previously made by LILCO. Furthermore, LILCO's Response, like its June 20 motion for summary disposition, is designed to disguise the fact that LILCO has introduced a radically different EBS proposal that is unclear, unreviewed and untested. This Board should deny this latest attempt by LILCO to foreclose any meaningful scrutiny of its new EBS proposal. See also Governments' Response at 4-5, 14-19.

LILCO, in its Response, asks this Board for two things, in addition to its previously-discussed request that the Board not grant summary disposition for the Governments on the existing EBS contention. First, LILCO alleges that this Board should grant LILCO's Motion because: (1) LILCO is not required to have agreements with stations that are allegedly participating in its EBS proposal (LILCO's Response at 3); (2) it must be presumed that "WCBS, like other stations, would broadcast emergency information if asked to do so in the event of an actual Shoreham emergency" (*id.* at 4); (3) LILCO's EBS proposal is clear and unambiguous (*id.* at 5); (4) the Governments' claim that LILCO's latest EBS proposal is "new and significantly different" is "nonsense in its purest form" (*id.* at 5-6); (5) the coverage of LILCO's EBS proposal is adequate and has not been controverted (*id.* at 6-8); and

(6) the Governments' failure to produce certain witnesses creates an adverse inference of their testimony to the Governments (id. at 8). Second, LILCO asks this Board to preclude the Governments from filing contentions and conducting discovery concerning LILCO's latest EBS proposal, because LILCO claims that the Governments have already conducted the necessary discovery and have failed to file any contentions. Id. at 8-9.

Neither of these LILCO requests warrants serious consideration by the Board. LILCO's allegation that summary disposition should be granted in its favor concerning its latest EBS proposal is specious. The Governments' Response to LILCO's Motion set forth numerous reasons as to why summary disposition for LILCO could not be granted. Rather than attempting to address the points and concerns raised by the Governments, LILCO's Response merely dismisses them with erroneous, unsupported and previously-made statements and arguments, or, worse yet, fails to respond to them at all. Moreover, LILCO's claim that the Governments are precluded from filing contentions and conducting discovery concerning LILCO's latest EBS proposal is baseless. Because LILCO is in the practice of introducing its new EBS proposals through summary disposition motions,<sup>7/</sup> and because there remains outstanding a contention concerning LILCO's previous EBS proposal, it has not been timely or appropriate for the Governments to submit contentions challenging the adequacy of LILCO's latest EBS scheme.

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<sup>7/</sup> See LILCO's Motion for Summary Disposition of the WALK Radio Issue, dated November 6, 1987; LILCO's Second Motion for Summary Disposition of the EBS Issue, dated June 20, 1988.

Further, discovery must await Board rulings on the admissibility of any such contentions filed.

In sum, LILCO's Response does not deserve serious attention. It is the product of an act of desperation, and it should accordingly be denied. Rather than proceed as LILCO suggests, the Board should grant summary disposition of the existing EBS contention in favor of the Governments (or, in the alternative, establish a trial schedule for the admitted EBS contention), deny LILCO's pending motion for summary disposition, and give the Governments an opportunity to submit contentions and conduct discovery concerning LILCO's latest EBS proposal.

C. LILCO's Motion for Summary Disposition Must Be Denied

LILCO claims that its summary disposition motion should be granted because the Governments' Response "does nothing to controvert LILCO's [M]otion." LILCO's Response at 3. To the contrary, however, it is LILCO's Response which "does nothing to controvert" the Governments' Response. Indeed, in many respects, LILCO's Response fails even to address issues raised by the Governments in their opposition to LILCO's Motion.

1. LILCO Is Required to have Agreements with the Stations It Claims Are Participating in Its EBS Proposal

LILCO first argues that its EBS proposal is not deficient simply because LILCO has failed to enter into agreements with the stations it claims are participating. Although conceding that it

does not have any written agreements to participate with WCBS, its new lead station, or other stations included in its proposed EBS network, LILCO alleges that "[n]o regulatory or guidance provision requires agreements," citing FEMA REP-10, "Guide for the Evaluation of Alert and Notification Systems for Nuclear Power Plants" (Nov. 1985), at E-2 (hereafter, "FEMA REP-10"). Moreover, according to LILCO, "[f]ederal guidance says only that the applicant should make available documentation showing the chosen radio station's ability to participate in the EBS." LILCO's Response at 3. Thus, in LILCO's view, written agreements with participating EBS stations are not required.

LILCO is wrong. FEMA REP-10 clearly requires an applicant to provide documentation concerning a radio station's participation in an emergency broadcast system. It is disingenuous and misleading for LILCO to argue that this does not mean that written agreements are required. As FEMA REP-10 calls for the production of documents concerning a radio station's participation, those documents necessarily include an agreement to participate. The plain meaning of FEMA REP-10 cannot be interpreted in any other way.

Moreover, LILCO has previously recognized this requirement by providing such documentation. LILCO has always obtained agreements in the past with radio stations that were participating in LILCO's various EBS proposals, and has made those agreements a part of the record. Now that LILCO cannot obtain agreements with

WCBS, WPLR and other stations, however, it argues that written agreements are not required. This Board should not tolerate the kind of transparent and self-serving approach advocated here by LILCO.

In addition, FEMA has recognized that written agreements of stations participating in emergency broadcast systems are required. In its final Regional Assistance Committee ("RAC") review of Revision 9 to LILCO's Plan, dated April 28, 1988 (hereafter, "RAC Review"), which was issued prior to WPLR's withdrawal from LILCO's proposed EBS, FEMA rated as inadequate the fact that the agreement then in effect between LILCO and WPLR did not explicitly state that WPLR was to act as the lead station. FEMA stated that "[t]his agreement must be reached to insure coordination of all radio stations designated as transmission sources of emergency broadcast messages " RAC Review at 26.<sup>8/</sup>

In sum, based on FEMA REP-10, LILCO's past practice and FEMA's RAC Review, it is clear that LILCO is required to provide documentation concerning the participation of the stations in its proposed EBS network. Such documentation must include written agreements with participating stations. As LILCO has failed to provide such documentation, its latest EBS proposal is inadequate and LILCO's Motion must fail.

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<sup>8/</sup> In its Response, LILCO acknowledges that in the absence of a national-level emergency, no participating EBS station is required to broadcast emergency information. LILCO's Response at 4. This is precisely why written agreements with participating stations are required.

2. It Cannot Be Presumed That WCBS or Any Other Station Will Participate in LILCO's EBS Proposal

LILCO next alleges, apparently in response to the fact that it does not have any agreements with WCBS or other stations to participate in its EBS proposal, that "[i]t must be presumed that WCBS, like other stations, would broadcast emergency information if asked to do so in the event of an actual Shoreham emergency." LILCO's Response at 4. LILCO, however, gives no basis for this presumption, arguing instead that Federal Communications Commission ("FCC") regulations do not require any EBS station to broadcast emergency information.<sup>9/</sup> As there is no indication that WCBS or other stations relied upon by LILCO would participate in LILCO's EBS proposal, and as WPLR and WALK Radio have specifically stated that they would not participate, there can be no presumption that these stations, or others, will participate. Instead, the question of the participation of the stations that LILCO is relying on in its EBS proposal, including WCBS, WALK and WPLR, must be resolved at trial.

LILCO's reliance on FCC regulations and the Suffolk County Resource Manual to support its claim that a presumption can be made that stations that LILCO has included in its EBS proposal will in fact participate is inexplicable. The FCC regulations and Suffolk County Resource Manual cited by LILCO do not discuss, nor

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<sup>9/</sup> LILCO also cites a Suffolk County Resource Manual in support of the notion that EBS stations are not required to broadcast emergency information. LILCO's Response at 4.



do they relate to, whether a presumption of participation can be drawn. Clearly, neither supports LILCO's erroneous presumption that WCBS and other stations would broadcast emergency information in the event of a radiological emergency at Shoreham.

In any event, if any presumption is to be drawn, it should be that WCBS will not participate in LILCO's EBS proposal. During a recent deposition, Douglas Crocker, LILCO's principal EBS witness, testified that LILCO has had discussions with WCBS and that he believes that LILCO asked WCBS to enter into a participation agreement. See Deposition of Douglas M. Crocker (June 13, 1988), at 20-21. As LILCO has no agreement with WCBS, the only presumption that logically can be drawn is that WCBS has refused to participate in LILCO's latest EBS scheme. Accordingly, questions remain concerning LILCO's EBS proposal and those questions require that LILCO's Motion must be denied.

3. LILCO's Latest EBS Proposal Remains  
Unclear and Ambiguous

LILCO further claims that its latest EBS proposal is not unclear and ambiguous. In support of this claim, LILCO cites the Governments' description of that proposal in its Response and the Governments' assertion in their June 20 Briefing Paper that no more discovery was needed. LILCO additionally alleges that its EBS proposal is clear because the Staff "seems to harbor no misunderstanding about LILCO's EBS plan." Moreover, LILCO alleges

that the Governments' concerns are not important because they only involve its backup EBS network. LILCO's Response at 5.

Rather than resolving one of the ambiguities of LILCO's EBS proposal, namely whether LILCO continues to rely on WPLR, LILCO's Response further muddles that question. As discussed in the Governments' Response, LILCO's Motion contains conflicting statements concerning whether LILCO is still relying on WPLR. See, e.g., Governments' Response at 16-19. LILCO's Response does not give a definitive answer to that question, stating only that "[a]ny involvement by WPLR or the local Shoreham EBS would be in a last-resort, backup role." See LILCO's Response at 5. LILCO does not explain what is meant by "any involvement".<sup>10/</sup>

Further, it is misleading and disingenuous for LILCO to claim that the Governments were able to clearly describe LILCO's EBS proposal in their July 12 Response and that the Governments claimed in their June 20 Briefing Paper that no more discovery was necessary. That Briefing Paper was submitted pursuant to this Board's bench Order of May 26, 1988, which was issued as a result of LILCO's inability to adequately describe the structure and operations of its new EBS proposal. See Tr. 20424-29. The Governments' Briefing Paper did not state that LILCO's EBS pro-

<sup>10/</sup> The fact that the Staff did not question the clarity of LILCO's EBS proposal in no way supports the notion that LILCO's EBS proposal is unambiguous. The Governments have made clear their views on the Staff's Response and will not repeat them here. See Response of the Governments to NRC Staff Response in Support of LILCO's Second Motion for Summary Disposition of the EBS Issue, dated July 27, 1988.

posal was clear, but rather recognized that the Governments' were only provided with a limited discovery period to ascertain the general outline of LILCO's new EBS proposal, so that they could advise the Board as to how to best proceed on the admitted EBS contention. In fact, the section that described the Governments' understanding as of June 20 of LILCO's EBS proposal began with "As best as it can be determined . . ." See Governments' Briefing Paper at 11. Thus, the statement in the Governments' Briefing Paper relied upon by LILCO has been taken out of context by LILCO; that statement related only to the discovery that was necessary to allow the Governments to give a summary description of LILCO's then existing EBS proposal. The discovery taken in that context -- only one deposition -- was nowhere as comprehensive as would be necessary to prepare for a trial on the merits.

In addition, it is pure folly for LILCO to claim that the Governments' Response evidences the clarity of LILCO's latest EBS proposal. In fact, the Governments' Response contained an extensive discussion of the ambiguity of LILCO's EBS proposal. See Governments' Response at 16-19. It is therefore plainly absurd for LILCO to claim that the Governments must believe that LILCO's EBS proposal is clear and unambiguous. LILCO should be required to clarify its EBS proposal, so that it is final and clear in all significant respects.

4. LILCO's Latest EBS Proposal Is Significantly New and Different

LILCO also alleges that its current EBS proposal is not significantly new and different. In support of this, LILCO claims that the WCBS-triggered EBS network is the same system that the State and Suffolk County rely upon to broadcast emergency information, and that therefore the Governments must be familiar with it. Moreover, LILCO maintains that its current proposal includes WALK Radio and certain other stations that were in LILCO's original EBS network, and that the adequacy of its initial EBS network was previously litigated and found acceptable. LILCO's Response at 5-6.

LILCO's assertions that the State and County rely on the WCBS-triggered EBS network, and that the adequacy of LILCO's initial EBS network was previously litigated and found acceptable, are baseless and clearly incorrect. First, at least Suffolk County does not rely on the WCBS-triggered EBS network to provide emergency information. See, e.g., Testimony of Richard Jones, a Suffolk County employee, in the so-called integrity of the proceedings hearings. Tr. 21,423. Second, contrary to LILCO's claim, the adequacy of its initial EBS network has not been previously litigated. Rather, as discussed in the Governments' Response at 20, the only EBS contention that was litigated during the 1983-84 Plan litigation was whether WALK's failure to broadcast on an AM frequency at night made WALK inadequate to serve as LILCO's lead EBS station. See EP Contention 20. Indeed, in the

PID, the Board specifically stated that "the range of the stations (WALK-AM and -FM) is not at issue in Contention 20." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 764 (1985). LILCO even concedes in its Response that Contention 20 involved simply whether WALK could broadcast at night. See LILCO's Response at n.6. Thus, LILCO's claims that Suffolk County relies on the WCBS-triggered EBS network and that the adequacy of LILCO's initial EBS network was previously litigated and found acceptable are clearly wrong, and should be disregarded by the Board.

5. The Coverage of LILCO's Proposed EBS Network Is Not Adequate and Has Been Controverted

LILCO next argues that the Governments, in their Response, have not controverted the coverage of LILCO's current EBS network. LILCO's Response at 6-8. LILCO gives several reasons why the adequacy of its EBS proposal has not been controverted. However, these reasons are confusing, misleading and incorrect.

In a very confusing and unclear manner, LILCO first states that the Governments' argument that the adequacy of WALK Radio's coverage was not resolved "seemingly contradicts" the Governments earlier efforts to include the coverage issue in the "earlier-admitted issues." LILCO's Response at 6. LILCO then states that, in any event, the Governments are precluded from litigating the coverage issue due to res judicata.

It is not clear to the Governments what LILCO is arguing here. If LILCO is arguing that the Governments are precluded from litigating the coverage issue because the coverage issue was not litigated in the proceeding involving WALK Radio, LILCO is wrong. In fact, since the 1983-84 Plan litigation, the Governments have submitted, and this Board has admitted, contentions concerning the adequacy of the coverage of LILCO's EBS network. As the coverage of LILCO's new EBS proposal has not been resolved, the Governments must be given an opportunity to submit contentions concerning the adequacy of that coverage. Moreover, LILCO's use of the term res judicata is misplaced and suggests that LILCO does not understand what that term means. Res judicata bars subsequent actions where there has been a final judgment involving the same claim, demand or cause of action. See Black's Law Dictionary. However, as there has not been a final judgment on the adequacy of LILCO's latest EBS proposal, or for that matter on the adequacy of any of LILCO's EBS proposals, the doctrine of res judicata cannot preclude the Governments from now litigating that issue.

LILCO also argues that alleged "Fact" no. 17 from its realism summary disposition motion applies in this proceeding, and establishes that WCBS provides "sufficient coverage" of the 10-mile Shoreham EPZ. See LILCO's Response at 7. The Governments have previously presented their arguments as to why alleged "Fact" no. 17 does not apply in this proceeding and those arguments, with one exception, will not be repeated here. See Governments' Response at 25-27. The one exception relates to LILCO's allegation that

the word "covers" in alleged "Fact" no. 17 really means "sufficient coverage." That claim is so ludicrous that the Governments feel compelled to respond.

Alleged "Fact" no. 17 states in full that "[t]he CPCS-1 (WCBS) has a fifty kw AM station that covers the entire Shoreham 10-mile EPZ." (Emphasis added). Obviously, therefore, alleged "Fact" no. 17 is completely silent as to the adequacy of that coverage. LILCO, however, gratuitously claims that the word "covers" really means "sufficient coverage." This expansive interpretation of the word "covers" is so absurd that LILCO does not even make it in the main body of its Response, but rather buries it in a footnote. See LILCO's Response at 7, n.8. The word "covers" means simply that and does not relate to, refer to, or concern whether that coverage is adequate. This Board cannot take LILCO's argument to the contrary seriously.

LILCO generally dismisses the Governments' other arguments concerning the inadequacy of the coverage of LILCO's latest EBS proposal, stating that the Governments' "remaining arguments questioning the coverage of the State EBS are similarly unpersuasive." LILCO's Response at 8. LILCO then gives examples as to why the Governments' other arguments are "unpersuasive." However, LILCO's examples are themselves "unpersuasive."

For example, even though LILCO's own radio engineers, Cohen and Dippell, have issued a report stating that FCC regulations



require a signal level of 2 mV/m to communities of 2500 or more persons, several of which are in the 10-mile Shoreham EPZ, and that WCBS' signal does not reach 2 mV/m in the EPZ, LILCO claims that "[t]his is insufficient information to dispute the adequacy of WCBS' established coverage." LILCO's Response at 8. Although LILCO never discloses what is WCBS' "established coverage" -- or where it was established -- the fact that LILCO's own radio engineers have issued a report questioning the adequacy of WCBS' coverage is sufficient, without more, to dispute the adequacy of that coverage. Therefore, the issue of WCBS' coverage clearly needs to be litigated.

Moreover, LILCO attempts to retreat from Cohen and Dippell's report by claiming that the report only addresses WCBS and "not the entire 30-plus station State EBS whose coverage has been previously established." LILCO's Response at 8. This claim is pure fantasy. Simply put, the coverage of the "entire 30-plus station State EBS" has never been litigated, nor even considered in any manner, by this Board.

Therefore, the issue of the adequacy of the coverage of LILCO's latest EBS proposal remains open. At a minimum, therefore, LILCO's Motion must be denied and the Governments given an opportunity to submit contentions and conduct discovery concerning this issue.

6. The Governments' Failure to Produce Certain Witnesses Does Not Create an Adverse Inference of Their Testimony

Finally, LILCO claims that the Governments' failure to produce certain witnesses for depositions creates an adverse inference of their testimony to the Governments. LILCO's Response at 8. This is simply a repeat of an argument previously made by LILCO. See LILCO's Motion at 8-9. Since LILCO does not here offer any new arguments, the Governments incorporate by reference their previous response to LILCO's claim. See Governments' Response at 29-30.

D. The Governments Should Be Given an Opportunity to File Contentions and Conduct Discovery

LILCO concludes its Response by asking the Board not to allow the Governments an opportunity to file contentions or conduct discovery. LILCO bases its requests on two reasons: first, that the Governments have already had an opportunity to conduct discovery; and, second, that the Governments have already had an opportunity to submit contentions, but have failed to do so. Both of these arguments are baseless; they amount to nothing more than one last attempt by LILCO to foreclose any meaningful scrutiny of its new EBS proposal.

1. The Governments Have Had Only a Limited Opportunity to Conduct Discovery

As discussed above, on May 26, during hearings before this Board, Judge Gleason raised the EBS issue and expressed his con-

fusion over LILCO's description of its latest EBS proposal. When counsel for LILCO was unable to explain adequately the proposal, the Board ordered that there be limited discovery with respect to LILCO's EBS proposal. According to Judge Gleason, the purpose of that discovery was "to provide an opportunity for parties to have discovery with respect to whatever it is you [LILCO] are proposing." Tr. 20,429. Based on that limited discovery, the parties were ordered to submit a briefing paper shortly thereafter concerning how best to proceed. In fact, the limited discovery involved the deposition of only one LILCO witness (Douglas Crocker), who generally described LILCO's EBS proposal at that time.

The limited discovery that was thereafter conducted was focused solely on trying to determine the general structure and operations of LILCO's new EBS proposal. Further discovery is now required, however. For example, once the Governments are given an opportunity to submit contentions, discovery tailored to those contentions will be necessary. Accordingly, it is misleading for LILCO to assert that discovery has already been conducted, and that no more discovery is necessary.

2. The Governments Should Be Given  
an Opportunity to Submit Contentions

LILCO concludes its Response by arguing that the Governments should not be given an opportunity to file contentions because "[o]ver two months have elapsed since LILCO made clear its re-

liance on WCBS and the State EBS" and that the Governments have failed to file any new contentions. LILCO's Response at 9. Like LILCO's attempt to eliminate discovery, this argument is baseless. In reality, it is an effort to bar the Governments from challenging and contesting LILCO's most recent EBS proposal. Accordingly, it must be denied.

To begin with, the Governments have not had "over two months" to submit contentions. In fact, counsel for LILCO has not even had sufficient detail concerning LILCO's EBS proposal for "over two months." As previously discussed, counsel for LILCO was unable even to explain the basic structure of LILCO's EBS proposal on May 26; thus, this Board ordered the parties to submit briefing papers on June 20 in an attempt to clarify LILCO's proposal. LILCO did not follow the Board's Order, however, but instead submitted its motion for summary disposition. Rather than being able to analyze LILCO's EBS proposal and formulating contentions, the Governments have therefore been required to spend time and resources responding to LILCO's Motion. Moreover, it must be kept in mind that since June 20, when the Governments' Briefing Paper was filed, the Governments have been awaiting a response from the Board with respect to their claim that contentions regarding LILCO's latest EBS scheme would be necessary to Board resolution of the dispute between LILCO and the Governments concerning the adequacy of LILCO's EBS.

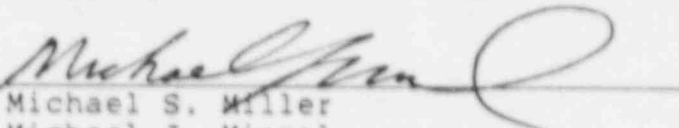
Moreover, it would not be proper or timely to submit new EBS contentions until the Board disposes of the contention presently at issue. As discussed above, it is the Governments' position that the Board should grant summary disposition of the admitted EBS contention in favor of the Governments; in the alternative, a trial schedule on the existing contention should be established. Thereafter, the Governments will be in a position to submit new contentions on LILCO's latest EBS proposal.

#### IV. Conclusion

For the reasons stated above, LILCO's Response should not be admitted for consideration by this Board. In the alternative, the Board should grant summary disposition of the admitted EBS contention in favor of the Governments (or, in the alternative, establish a trial schedule), deny LILCO's motion for summary disposition, and provide the Governments with an opportunity to submit contentions and pursue discovery.

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DOCKETED  
August 2, 1988

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION '88 AUG -4 P5:31

Before the Atomic Safety and Licensing Board  
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)

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY, STATE OF NEW YORK AND TOWN OF SOUTHAMPTON OPPOSITION TO LILCO'S UNAUTHORIZED AND IMPERMISSIBLE "RESPONSE TO INTERVENORS' 'RESPONSE' IN OPPOSITION TO LILCO'S SECOND MOTION FOR SUMMARY DISPOSITION OF THE EBS ISSUE" have been served on the following this 2nd day of August, 1988 by U.S. mail, first class, except as otherwise noted.

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