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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

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Docket No. 50-322-0L-5
(EP Exercise)

STAFF REPLY TO JUNE 27, 1988 APPEAL BOARD ORDER

Mitzi A. Young
Counsel for NRC Staff

July 11, 1988

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In an Order dated June 27, 1988, the Appeal Board requested the parties' views on whether, in light of the June 1988 exercise of the Shoreham emergency plan, the partial initial decisions concerning the February 1986 exercise ^{1/} should be vacated and the related appeals dismissed as moot. Order at 3. The Staff hereby provides its response.

The Staff does not take a position on whether the licensing of Shoreham should proceed based on the results of the June 1988 exercise or on the basis of the February 1986 as confirmed, and/or rectified, by the 1988 exercise. In either case, resolution of the fundamental legal issues on appeal is essential. In a Memorandum of May 25, 1988 (at 1), this Board stated that it would review matters involving the scope of the

^{1/} LBP-87-32, 26 NRC 479 (1987); LBP-88-2, 27 NRC 85 (1988). These proceedings were conducted in response to the Commission's direction in CLI-86-11, 23 NRC 577, 579 (1986), that an exercise hearing be conducted to consider evidence offered to show a fundamental flaw in the LILCO emergency plan. The Commission defined fundamental flaws as "any deficiencies [revealed by an exercise] which would preclude a finding of reasonable assurance that protective measures can and will be taken." Id. at 581.

Shoreham emergency planning exercise, although the appeal was technically moot, because the disposition of the appeal "may well be relevant" to future conduct. Similarly, here we believe the Appeal Board should continue its review of the appeals stemming from the 1986 exercise as the matters are relevant to future conduct and the standards to be applied in judging the 1988 exercise.

The two decisions on appeal raise fundamental questions regarding the appropriate legal standard to be applied in evaluating the scope of an exercise and the appropriate definition of a fundamental flaw. These legal issues are at the heart of any evaluation of emergency plans and an authoritative decision by the Appeal Board which illuminates these questions will have a pervasive effect on this and other emergency planning litigation.

In LBP-87-32, the Licensing Board found that the scope of exercise of the Shoreham offsite plan was too limited and therefore failed to meet the requirements of 10 C.F.R. Part 50, Appendix E, §IV.F.1. 26 NRC at 501-502. Even though NRC and FEMA guidance documents suggested the contrary, the Board found that initial exercises under section IV.F.1. are required to be more comprehensive in scope than subsequent exercises. Id. at 488-89. Based upon the language in section IV.F.1 providing for an initial exercise "which tests as much of the licensee, State and local emergency plan, as is reasonably achievable without mandatory public participation," the Board reasoned that scope of an exercise of an emergency plan is adequate only if it tests all portions of the plan which were "reasonably achievable." Id. at 485, 492, 497-99, 501. Therefore the scope of the exercise was inadequate because it excluded testing of

four planning areas which could have been "reasonably achieved." Id. at 501-02. The Board never addressed, however, the crucial question of whether the scope of the exercise was so fundamentally flawed so as to prevent a reasonable assurance finding under 10 C.F.R. § 50.47. Although the Appeal Board's May 25, 1988 Memorandum provides guidance on the proper scope of an exercise, such guidance was in the form of "tentative conclusions" to be followed by the Appeal Board's opinion on the merits. It is not clear what the status of such guidance would be if the Appeal Board's opinion on the merits were not issued.

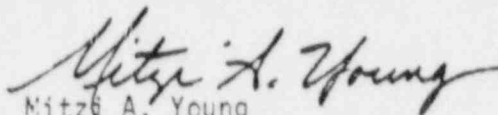
In LBP-88-2, the Board reasoned that minor or ad hoc problems did not constitute fundamental flaws, but a FEMA deficiency is equivalent to a fundamental flaw. 27 NRC at 92-93. Thus, the Board found that each deficiency identified by FEMA was a fundamental flaw.

There is little doubt that litigation of the 1988 exercise will again center on issues of adequate scope and on what constitutes "a fundamental flaw." Thus resolution of the basic legal issues of the proper scope of the exercise to satisfy the requirements of the Commission's regulations and of the legal characteristics of "a fundamental flaw" is required to evaluate the results of either the 1986 or 1988 exercise. If no contentions are filed concerning the 1988 exercise and there is no controversy concerning the adequacy of the 1988 exercise, questions raised in connection with the 1986 exercise would indeed be moot. The litigious history of this case, however, makes that possibility highly unlikely.

The proper interpretation of the fundamental flaw standard and the required scope of an initial exercise are issues which warrant appellate interpretation since they will impact this and other emergency planning

litigation. The Appeal Board should decide these issues now so that any controversy surrounding the Shoreham exercise, whether in February 1986 or June 1988, will be evaluated according to a proper interpretation of the relevant legal standards.

Respectfully submitted,


Mitzel A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 11th day of July, 1988

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CERTIFICATE OF SERVICE

I hereby certify that copies of "STAFF REPLY TO JUNE 27, 1988 APPEAL BOARD ORDER" in the above-captioned proceeding were served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, on July 11, 1988 and that corrected copies of that document have been served this 28th day of July 1988.

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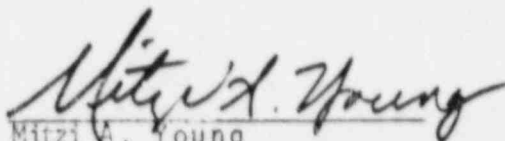
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