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April 21, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	
LONG ISLAND LIGHTING COMPANY	Docket No. 50-322-OL-6 (25% Power)
(Shoreham Nuclear Power Station, Unit 1)	

GOVERNMENTS' RESPONSE TO LILCO'S BRIEF ON THE RELEVANCE OF PENDING CONTENTIONS TO LILCO'S 25% POWER MOTION

Pursuant to the Board's Order of February 26, 1988, Suffolk County, the State of New York and the Town of Southampton (the "Governments") submit this response to LILCO's Brief on the "Substantive Relevance" of Remaining Emergency Planning Contentions to LILCO's Motion to Operate at 25% Power (April 1, 1988) (the "LILCO Brief").

I. INTRODUCTION

On April 1, 1988, the Governments submitted a brief[1/] which addressed the impact of the outstanding emergency planning issues in this case on LILCO's request for a license to operate Shoreham

1/ Governments' Brief in Response to February 26, 1986 Board Order (April 1, 1988) (hereafter, "Governments' Initial Brief").

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at 25% of rated power.2/ As directed by the Board's February 26 Order, the Governments' Initial Brief demonstrates that it is not necessary to consider LILCO's technical assertions or 25% power Probabilistic Risk Assessment ("PRA") to determine that LILCO's Request must be denied. Specifically, the Governments show that the pending emergency planning issues, including the OL-5 Board's two decisions adverse to LILCO and the OL-3 remand issues, are relevant to LILCO's proposed 25% power operation and preclude the reasonable assurance finding required for the issuance of a license under Section 50.57.

The LILCO Brief also purports to respond to the Board's February 26 Order requesting briefs on "the impact of pending emergency contentions on a reasonable assurance finding authorized by 10 C.F.R. 50.57(c)." Yet, instead of addressing the issue identified by the Board -- that is, the relevance of the pending contentions on the findings required to grant LILCO's Request -- LILCO's Brief in effect admits the relevance of the pending contentions and then goes on to address their merits. In other words, LILCO concedes that the pending contentions must be addressed before a reasonable assurance finding can in fact be made; but, it argues, based on its 25% power PRA and other technical assertions, analyses and assumptions, the contentions should be decided in LILCO's favor and the reasonable assurance finding can be made.

2/ See LILCO's "Request for Authorization to Increase Power to 25%," dated April 14, 1987 (hereafter, "LILCO's Request" or "Request").

LILCO's approach violates the Board's Orders of January 7[3] and February 26, ignores LILCO's own pleadings, and mischaracterizes the record. In particular, LILCO ignores the following facts: (1) the adequacy of the LILCO Plan and the capabilities and effectiveness of LERO, which are at issue in the pending contentions and which the OL-5 Board has found to be fundamentally flawed, are a basic premise of LILCO's 25% power Request; (2) the technical bases for the 25% power Request are not yet ripe for analysis; and (3) the admitted relevance of the pending emergency planning contentions requires denial of LILCO's Request and the termination of this proceeding.

The flaws in LILCO's position may be summarized as follows. First, LILCO attempts to analyze the issues presented by its 25% power Request as if the adequacy of the LILCO Plan and the effectiveness of LERO were not at issue. LILCO's effort to evade these two issues is understandable, for the OL-5 Licensing Board clearly held that both LILCO's Plan and its LERO organization are fundamentally flawed.[4] This Board cannot countenance LILCO's effort to avoid the consequences of the OL-5 Board's res judicata ruling. It is a fundamental premise of LILCO's Request that the LILCO Plan is adequate and that LERO is capable of effectively implementing that Plan. The OL-5 Board's holding establishes

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

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

that this premise is wrong, and that no reasonable assurance finding can be made based on the LILCO Plan or LILCO's LERO organization. Accordingly, LILCO's 25% power Request must be denied.

The second basic flaw in LILCO's Brief is its complete reliance on technical analysis. LILCO's reliance on its technical analysis is premature and contrary to the Board's Orders. In addressing the impact of the LILCO Request on the pending contentions, the Board clearly stated that it was "certain to us now that the examination of this question cannot be accomplished without some opportunity for the Government to review both LILCO's original request and the Staff's analysis thereof."5/ When LILCO submitted its Brief on April 1, 1988, LILCO knew that the Staff's analysis had not been completed and that it would not be completed in the near future.6/ Knowing the explicit Board guidelines and that a resolution of technical issues was not possible, LILCO nevertheless proceeded to base its entire Brief on its technical assertions, analyses and assumptions.

In fact, LILCO even went beyond its PRA and attempted to support its Brief by a further technical analysis alluded to in the Affidavit of Edward J. Youngling (March 31, 1988) ("Youngling

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5/ January 7 Order at 11 (emphasis added).

6/ Indeed, on March 9, 1988, the Staff informed all parties that it "will not be able to file a brief substantively addressing the Board's question by April 1, 1988," because the Staff's response to the Board's February 26 inquiry "is projected to be completed in the early fall of this year." 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).

Affidavit"). As established by the Affidavit of Gregory C. Minor and Steven C. Sholly attached to this Brief ("Minor/Sholly Affidavit"), the Youngling Affidavit goes beyond the 25% power PRA by discussing an entirely new technical analysis. There is no way to assess the validity, relevance or impact of the Youngling Affidavit or the new LILCO analyses discussed therein without first obtaining the substantial additional information and data necessary to understand and evaluate the correctness of the underlying technical analyses, judgments, assessments and conclusions. See Minor/Sholly Affidavit at ¶¶6-8.

Finally, LILCO's Brief is flawed because it acknowledges the actual relevance of the pending emergency planning issues to its proposed 25% power operation, but nonetheless argues that its 25% power Request should be granted. In fact, according to the Board's Orders, if the pending emergency planning issues are relevant to that Request, the Request must be denied. See, e.g., January 7 Order at 15.

II. LILCO'S 25% POWER REQUEST IS PREMISED ON THE ADEQUACY OF LILCO'S PLAN AND THE CAPABILITY OF LERO TO IMPLEMENT IT EFFECTIVELY

LILCO's Brief focuses completely on the technical bases of LILCO's 25% power Request. LILCO's exclusive emphasis on its technical arguments is seriously misleading, however, for the LILCO 25% power Request is based on two factors: (1) a 25% power limitation; and (2) an adequate Plan and an effective LERO. LILCO's reliance on the existence of an allegedly adequate plan

and an organization allegedly capable of implementing it is significant because that reliance, in light of the pending emergency planning issues and res judicata decisions, is dispositive of the the Board's inquiry under its February 26 Order.

As the Governments demonstrated in their Initial Brief, from the very start of this litigation, LILCO has premised its proposal to operate Shoreham at 25% power on the alleged existence of an adequate Plan and an effective LERO.[7] For example, in its initial 25% Power Request filed with the Commission, LILCO expressly stated:

> This request shows conclusively that LILCO's commitment to maintain Shoreham's 10 mile EPZ, its potent and tested Local Emergency Response Organization (LERO) and the existing, already litigated Local Offsite Radiological Energy Response Plan give reasonable assurance that adequate protective measures can and will be taken in the event of an accident at 25% power.

LILCO Motion for Expedited Commission Consideration (April 14, 1987) at 2 (emphasis added). LILCO's Request and subsequent pleadings are replete with instances where LILCO recognizes that if a reasonable assurance finding is to be made (which is necessary to grant its Request), an adequate Plan and an adequate LERO are necessary. Many such instances are cited in the Governments' Initial Brief.

Moreover, as also noted in the Governments' Initial Brief, the LILCO Request itself concedes that the emergency response functions challenged by the pending contentions would or could be

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7/ See Governments' Initial Brief at 6-11.

necessary to respond to an emergency at 25% power. See, e.g., Governments' Initial Brief at 26-34. LILCO's failure even to address these fundamental concessions is significant. As the Governments demonstrated in their Initial Brief, the OL-5 Board's holding that the LILCO Plan and LERO are fundamentally flawed, require that LILCO's Request be denied.

III. LILCO'S TECHNICAL ARGUMENTS ARE PREMATURE AND MUST BE DISREGARDED

Having ignored its acknowledged reliance upon the existence of an adequate Plan and capable LERO, the LILCO Brief relies exclusively on the technical aspect of the LILCO Request. Not only are LILCO's technical arguments an insufficient basis for approval of the Report, but LILCO's technical arguments must be rejected at this stage because they are premature. In addition, LILCO's Brief injects into the proceeding new technical information and issues which the other parties and the Board are in no position to address.

A. The Board's Orders Preclude Consideration of LILCO's Technical Analyses Prior to Completion of the Staff SER and Opportunity for Discovery and Analysis by the Governments

LILCO bases its entire Brief on the validity of its 25% Power PRA and the new technical analyses and conclusions referenced in the Youngling Affidavit. Thus, LILCO repeats its argument that risks are reduced at 25% power (LILCO Brief at 5-8), and that operation at 25% power provides long periods of time

between an onsite initiating event and an offsite release (LILCO Brief at 8-11). Moreover, LILCO's analysis of the specific pending contentions is also premised completely on its technical arguments and analyses. For example, as to the pending traffic control contention, LILCO contends that "given the extended time between the initiating event and the release of radiation for accidents at 25% power, the necessary mobilization and coordination could be easily accomplished." (LILCO Brief at 14).8/ The purported increase in response time to a 25% power accident is also used to support an argument that, at 25% power, there is enough time for appropriate protective action recommendations to be made (LILCO Brief at 16); and that sufficient time is available to activate the New York State EBS (LILCO Brief at 21). Similarly, LILCO contends that the reduced area of evacuation for a 25% power accident means that fewer tow trucks would be required than at full power (LILCO Brief at 15); access control coordination would be easier (LILCO Brief at 19); and hospitals would not need to be evacuated (LILCO Brief at 20).

LILCO's total reliance on its technical arguments and analyses does not comport with the logic or language of the Board's Orders governing this proceeding. As the Governments explained in their Initial Brief, the Board has stated several times that

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8/ With regard to traffic control, LILCO also uses its technical analysis as a basis for arguing that at 25% power, the traffic measures to be implemented will be reduced because ". . . given the generally smaller offsite consequences of accidents at 25% power, any protective action recommendations advising evacuation are likely to be for areas smaller than the entire 10-mile Shoreham EPZ . . . ." LILCO Brief at 14.

development of the technical issues in this case must await the completion and publication of the Staff's Safety Evaluation of such issues. See Governments' Initial Brief at 2-5. Indeed, the Board stated that "in order to focus the inquiry," statements by the Governments of "the ways in which their present contentions are relevant to the proposed operations,""would necessarily await the publication of the Staff Safety Evaluation and a reasonable period for review by the Government's experts." January 7 Order at 11 (emphasis added).9/

LILCO's Brief ignores the procedures established by the Board, in addition to failing to address the threshold issue of whether pending contentions are relevant. When LILCO submitted its Brief, it knew the that Staff's evaluation of LILCO's technical analysis was not yet completed, and would not be done in the near future. On March 9, 1988, the Staff informed all parties and the Board that its work would not be completed until

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9/ As noted, the Board also stated that:

> It is certain to us now that the examination of this question cannot be accomplished without some opportunity for the Governments to review LILCO's original request and the Staff's analysis.

January 7 Order at 11. Similarly, the Board's Order of February 26 stated:

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

February 26 Order at 2.

"the early fall of this year."10/ Under the terms of the Board's Orders, then, the inquiry on LILCO's Request cannot yet be focused on LILCO's technical arguments; the Governments are not expected to address such arguments absent the Staff's evaluation; and an opportunity for discovery, review and analyses of the LILCO Request and the Staff's SER. LILCO's approach, relying exclusively on its technical arguments, is thus procedurally invalid and must be rejected.

The Governments emphasize that they do not in any way concede the validity of the LILCO 25% power PRA or of LILCO's technical analyses and arguments which are based on it. As demonstrated in the Governments' Initial Brief, however, it is not necessary to address such technical issues in order to respond to the Board's February 26 inquiry and to conclude that LILCO's Request must be denied. Nevertheless, under the procedure directed by the Board, and assuming that the Board did not deny the Request as it should in light of the relevance of the pending contentions, the Governments will have an opportunity to address the merits of the technical analysis after the Staff's evaluation has been completed and reviewed, there has been an opportunity for discovery, and the Governments have filed contentions addressing the technical issues presented by LILCO's Request.11/

10/ Staff Response.

11/ LILCO itself has recognized that the appropriate procedure to resolve the technical issues is for the Government to file contentions on those issues. See LILCO's Reply Brief on 25% Power Questions, Nov. 16, 1987, at 6-7; Governments' Initial Brief at 6, n.4.

B. The Youngling Affidavit and the Analysis on which it is Premised Cannot be Considered

Not only does LILCO rely upon its 25% power PRA in its Brief, but it goes beyond that PRA and submits an additional technical analysis through the Youngling Affidavit. The Youngling Affidavit states that the following analyses were performed:

> Analyses were performed in which the representative severe accident sequence was selected for each plant damage state and corresponding release category on the basis of its frequency contribution, severity of radiological release and time of release. The selection of the representative severe accidents sequence was based on the results of the 25% power PRA and an engineering assessment of the applicability of the chosen sequence to the release category and plant damage state.

Youngling Affidavit, ¶ 6 (emphasis added). Based on this analysis, LILCO purportedly classifies percentages of accidents according to the amount of time required to proceed from an initiating event to offsite radiation releases. LILCO then analyzes such classifications and draws conclusions in an attempt to buttress LILCO's argument that the Board should find for LILCO on the merits of the pending contentions.

The Board cannot accept or rely upon the Youngling Affidavit, or the analyses discussed therein. It is clear from the face of the affidavit that Mr. Youngling, and LILCO in relying upon Mr. Youngling's conclusions, have gone far beyond the PRA in asserting new technical arguments and conclusions.

For example, the Affidavit refers to the "selection" of "representative" severe accident sequences based on "an engineering assessment," as part of the bases for the conclusions drawn by Mr. Youngling and relied upon by LILCO. Youngling Affidavit at ¶ 6. Obviously, no one can assess the validity of Mr. Youngling's analyses or conclusions without first knowing and evaluating the validity of the criteria he used in his "selection" and the bases of his "engineering assessment." These are not disclosed in the Affidavit. Thus, for the reasons already articulated by the Board with respect to LILCO's original technical arguments, neither the Governments, nor this Board, are in a position to conduct a focused inquiry about this brand new LILCO technical analyses.

The impossibility of assessing the validity of the Youngling Affidavit is documented by the Minor/Sholly Affidavit attached hereto. The Minor/Sholly Affidavit establishes that the analyses and conclusions set forth in the Youngling Affidavit go beyond the 25% power PRA and reach results by taking raw data and making several "undocumented analytical and judgmental manipulations . . . ." Minor/Sholly Affidavit at ¶ 4. In addition, the Minor/Sholly Affidavit demonstrates that Mr. Youngling's analysis appears to misapply PRA methodology. See Minor/Sholly Affidavit at ¶7. Accordingly, it is clear that no meaningful assessment or discussion of the merits, validity, or relevance of Youngling's analyses or conclusions is possible without first obtaining significant additional information as to the criteria for selec-

tion, the bases and methods of data manipulation, and the bases for Mr. Youngling's engineering assessments. Minor/Sholly Affidavit at ¶¶ 6-8.12/

IV. THE PENDING CONTENTIONS ARE RELEVANT

LILCO asserts that the pending contentions are not relevant to its proposed 25% power operation. As a general matter, this argument cannot be taken seriously for two reasons. First, it ignores the fact that the Plan and the capabilities of LERO to implement it, upon which LILCO's proposed 25% operation are premised, are the subject of the pending contentions. Second, it ignores the fact that LILCO itself has conceded that the response functions addressed in the pending contentions could or would be required in the event of an accident at 25% power. Governments' Initial Brief at 31-33. Furthermore, LILCO's arguments concerning specific issues must also be rejected.

A. The Exercise Issues

Not surprisingly, LILCO attempts to minimize what it groups together as "the exercise issues." LILCO Brief at 21-22. In reality, as set forth in the Governments' Initial Brief, there are two distinct exercise-related issues, each of which requires the denial of LILCO's 25% Power Request. First, there is the OL-5 Board's holding that the 1986 Shoreham Exercise disclosed

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12/ The Minor/Sholly Affidavit sets forth a minimum of 11 categories of information which would be required before one could assess the validity of Mr. Youngling's analyses and conclusions, and even these categories are likely only the beginning. Minor/Sholly Affidavit at ¶ 6.

fundamental flaws in the LILCO Plan and in LERO's abilities which preclude a reasonable assurance finding. The second and separate issue is the clear regulatory requirement that a full participation exercise be conducted before there can be approval of 25% power operation. 10 CFR Part 50, Appendix E, Section IV.F.1.

LILCO simply skirts these two issues by baldly asserting that "at 25% power, exercise results are plainly not material to a decision on LILCO's motion." LILCO Brief at 23. This statement is wrong, for the reasons set forth at length in the Governments' Initial Brief (at 6-24).

1. The OL-5 Board's Decision Establishes that LILCO's Plan and LERO are Fundamentally Flawed

LILCO initially attempts to discount the results of the Exercise proceeding by stating that "the fundamental flaws identified by the OL-5 Licensing Board go, with one exception, to LERO's performance on the date of the exercise and not to defects in the Plan itself." LILCO Brief at 24. This is a gross mischaracterization of the OL-5 Board's decision, as the Governments' Initial Brief, and a review of LBP-88-2 make clear. In fact, contrary to LILCO's self-serving assertions, the OL-5 Board held that the LILCO Plan and LERO were fundamentally flawed. Moreover, the Board defined a fundamental flaw not as a problem which speaks to performance on the day of the exercise; but rather, as a problem that is "pervasive as opposed to a minor

or ad hoc problem." LBP-88-2 at 10.[13]/ Given the OL-5 Board's findings which are binding on this Board, LILCO's 25% Power Request must be denied. This Board cannot make a finding that there is reasonable assurance that the public health and safety will be protected.

2. LILCO has Failed to Comply with Appendix E

By its express terms, Appendix E plainly requires a full participation exercise for a license authorizing "operation above 5% of rated power." 10 C.F.R. Part 50 Appendix E, Section IV.F.1. LILCO claims it should be exempt from this requirement because the Board's January 7, 1988 Order operated as an exemption. LILCO Brief at 22. The Board made no such ruling, and indeed could not, as demonstrated in the Governments' Initial Brief at 22-25, for Section 50.47(c)(1) only exempts compliance with the requirements in subpart (b) of Section 50.47.[14]/ In fact, as noted in the Government's Initial Brief, LILCO itself previously has sought relief from Appendix E compliance under § 50.12(a) not § 50.47(c)(1).[15]/ Moreover, the recent amendment

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13/ The Government's Initial Brief contains numerous examples of the fundamental flaws identified by the OL-5 Board. See Governments' Initial Brief at 11-18.

14/ LILCO footnotes the Commission's Statement of Considerations for its 1985 amendment to 10 C.F.R. §50.12(a), 50 Fed Reg. 50,764 (1985), as somehow supporting the Board's conclusion. LILCO Brief at 22, n.34. Not only is LILCO's characterization of the Board's Order wrong, LILCO does not articulate how this cite supports any conclusion relevant to this proceeding.

15/ Government's Initial Brief at 22-23. And, in the Shearon Harris and Perry cases, relief from Appendix E compliance was granted under Section 50.12, not under Section 50.47(c)(1). Id.

to § 50.47(c)(1) explicitly states that subpart (c)(1) addresses only noncompliance with subpart (b).

LILCO also asserts that the Appendix E exercise requirements are simply an amplification of the requirements in 10 C.F.R. §50.47(b)(14). LILCO Brief at 23. LILCO supports this assertion with no authority or analysis. This failure is not surprising in light of the fact that the exercise requirements of Appendix E are separate and distinct requirements which define the scope of the exercise, its nature and its timing. LILCO itself has recognized the separate nature of the Appendix E exercise requirements by seeking an exemption from those requirements under § 50.12(a), and not attempting to rely on § 50.47(c)(1).16/ Moreover, the Courts have recognized Appendix E as a complete and separate source of requirements which are material to the licensing decision. Union of Concerned Scientists v. U.S. Nuclear Reg. Commission, 735 F.2d 1437 (D.C. Cir. 1984,), cert. denied, 469 U.S. 1132 (1985).17/

16/ Goverments Initial Brief, at 22-23.

17/ The Board's Order of April 9, 1988 states that:

> the new rule provides that due allowance is required to be given where non-participation of state or local authorities makes compliance with 10 C.F.R. 50.47(b) unfeasible and since Appendix E supplements those standards, due allowance for compensatory measures is directed to be made for the requirements of Appendix E also.

Memorandum (Extension of Board's Ruling and Opinion of LILCO Summary Disposition Motions of Legal Authority) (April 18, 1988) at 22. While the Governments disagree with the Board's interpretation, we note that this statement is of no relevance here. The statement only addresses the situation where a non-
(footnote continued)

B. Remand Contentions

In its Brief, LILCO addresses the relevant pending contentions by arguing that the Board should rule for LILCO on the merits of those contentions. Thus, for example, LILCO argues that: the "traffic control plan can be easily accomplished," (LILCO Brief at 14); "tow trucks will provide a large excess of removal capacity" (LILCO Brief at 15); "government officials will notify the public to take appropriate actions if so recommended by LILCO" (LILCO Brief at 15); hospitals will not need to be evacuated (LILCO Brief at 20); and the Governments will utilize the State EBS System (LILCO Brief at 21). These arguments do not address whether the remand contentions are relevant. Rather, LILCO is arguing why it should prevail on the merits. These contentions are being vigorously contested before the Board at this very time. Neither LILCO nor this Board can predict the outcome of that litigation, but there can be no dispute that these contentions are relevant to LILCO's proposed 25% power operation. See Governments' Initial Brief at 28-34. Indeed, the Board has recognized that "the 'relevance test' for contentions expressed in 50.57(c) is much less rigorous than the 'not

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(footnote continued from previous page)
compliance is alleged to be a result of government non-participation. LILCO's failure in the exercise proceeding did not result from government non-participation.

significant' test of 50.47(c)." January 7 Order at 7 (emphasis added). Given this standard, the relevance of the pending contentions cannot be gainsaid.

The reason LILCO resorts to a bootstrap argument on the OL-3 pending contentions is clear. LILCO's Request is plainly premised on the existence and adequacy of its Plan and the ability of LERO to implement that Plan, regardless of the size of the area or the number of citizens involved in the emergency response. Moreover, as is fully set forth in the Governments' Initial Brief, the LILCO Request acknowledges that many particular aspects of the Plan and LERO will be implicated if there were an accident at 25% power.18/

LILCO's Brief never comes to grips with these facts and the resulting undeniable relevance of the oustanding emergency planning issues.

V. CONCLUSION

For the foregoing reasons and those set forth in the Governments' Initial Brief, LILCO's Request must be denied.

Respectfully submitted,

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18/ Governments' Initial Brief at 30-32.

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