UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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| In the Matter of | ) | |
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| LONG ISLAND LIGHTING COMPANY | ) | Docket No. 50-322-OL-6 |
| | ) | (25% Power) |
| (Shoreham Nuclear Power Station, Unit 1) | ) | |
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## LILCO'S REPLY TO INTERVENORS' BRIEF ON 25% POWER

On April 1, 1988, Intervenors filed their brief in response to the Board's Order of February 26, 1988 regarding the "substantive relevance" of their remaining emergency planning contentions.[1/] As discussed in detail below, Intervenors have failed to demonstrate the substantive relevance of any emergency planning contention.

Despite having had LILCO's motion to operate at 25% power and all the technical documentation that supports that motion for one year, Intervenors make no effort in their brief to address the technical merits of that motion or to consider the risks involved in operating at 25% power in assessing the relevance of the remaining emergency planning contentions. Instead, Intervenors have constructed a "relevance" test that is inconsistent with the one articulated by this Board and have then applied that test to their own incorrect interpretation of the bases for LILCO's 25% power motion. Finally, Intervenors present several legal arguments that have previously been considered and rejected by this Board.

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1/ Governments' Brief in Response to February 26, 1988 Board Order (Apr. 1, 1988) (hereinafter "Intervenors' Brief").

In its April 1 brief, LILCO affirmatively demonstrated that the remaining emergency planning contentions are not substantively relevant to operation at 25% power.[2/] Those arguments will not be repeated here. Instead, the remainder of this reply will address the arguments presented in Intervenors' April 1 brief.

I. The Test for Deciding If Additional Hearings Are Required on Intervenors' Remaining Emergency Planning Contentions as They Relate to LILCO's 25% Power Motion Is "Substantive Relevance"

A fundamental disagreement between LILCO's and Intervenors' briefs centers on the test for "relevance" that should be applied to remaining emergency planning contentions in order to decide whether hearings are required on those contentions before LILCO's 25% power motion can be granted. The Board has stated in its Memorandum and Order of January 7, 1988,[3/] and again in its Order of February 26, 1988, that it will examine the remaining emergency planning contentions in light of a test of "substantive relevance" to 25% power operation: i.e., whether they relate to factors that make any difference in fact for the protection of the public in the event of an accident at 25% power.

The "substantive relevance" standard -- which includes elements of materiality as well as relevance strictly defined -- is a threshold test for relevance that pending issues must pass in order for further proceedings to be held under § 50.57(c). In the context of the 25% power motion, this means that the remaining emergency planning contentions must be considered in light of the lower risks and slower progress of accidents that could occur at 25% power. See LILCO Brief at 2.

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2/ LILCO's Brief on the "Substantive Relevance" of Remaining Emergency Planning Contentions to LILCO's Motion to Operate at 25% Power at 11-24 (Apr. 1, 1988) (hereinafter "LILCO Brief").

3/ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-1, 27 NRC 7, 14 (1988).

Intervenors wrongly advocate an interpretation that reads the word "substantive" out of the test for relevance.[4/] Intervenors ask the Board to ignore all facts relating to the lower risks and slower progress of accidents at 25% power and to look instead to whether any accidents at 25% power require an offsite emergency response. If any such accidents could occur, then Intervenors argue that their emergency planning contentions are relevant and must be heard before the 25% power motion can be granted.[5/]

Intervenors' interpretation is incorrect. First, as LILCO explained in its April 1 brief, emergency planning findings are different from other safety findings that Licensing Boards are asked to make in the extent to which they are inherently predictive. LILCO Brief at 11. The reasonable assurance finding required by § 50.47(a) (and in turn in this case by § 50.57(a)(3)) does not mean perfect assurance or zero risk. Id. Thus, one must consider the lower risk of operation at 25% power and the slower progress of postulated accidents at that power level to evaluate whether the remaining emergency planning contentions present issues of sufficient materiality to affect the Board's ability to make a reasonable assurance finding.

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4/ In support of their argument, Intervenors rely on a passage in the Board's January 7 Order stating that the "relevance" test for contentions expressed in § 50.57(c) would appear to be less rigorous than the "not significant" test of 50.47(c)(1). See Intervenors' Brief at 33 n.25 citing LBP-88-1, 27 NRC at 12. This statement does not create the simple test for relevance envisioned by Intervenors. Instead, the Board's statement merely stands for the proposition that the test of "relevance" is not the same as a merits decision on § 50.47(c)(1). Elsewhere, the Board has expressly adopted the "substantive relevance" test as a threshold for further consideration of the remaining emergency planning contentions. LBP-88-1, 27 NRC at 14.

5/ Following this construct, Intervenors argue that since LILCO has admitted some need for emergency planning at 25% power, then there is no need for the Board to look at the technical aspects of LILCO's 25% power motion. Intervenors have misstated LILCO's position. While LILCO's motion for 25% power operation does recognize the need for offsite emergency preparedness under some accident scenarios and does expressly state that LILCO will maintain its offsite emergency plan for the entire 10-mile EPZ during 25% power operation, those statements are not acknowledgments that the remaining emergency planning contentions are "substantively relevant" to operation at 25% power. Their substantive relevance can be judged only by assessing them in light of the lower risks and slower progress of postulated accidents at 25% power.

Second, Intervenors' interpretation would essentially read § 50.57(c) out of existence. The section was promulgated to allow an applicant to demonstrate that operation at a power level less than 100% power would not endanger public health and safety. See 36 Fed. Reg. 8861, 8862 (May 14, 1971). The factual rationale for this opportunity is clear: the risk of accidents is reduced at lower power levels because of the lower fission product inventory and the slower accident progression rates relative to 100% power operation. Under Intervenors' interpretation, the factual differences of operation at lower power levels would be irrelevant; if a contention was relevant to 100% operation then it would also be relevant at the lower power level (unless it could be excluded categorically on a strict test of relevance) and a hearing would have to be offered before low power operation could be authorized. See Intervenors' Brief at 1-2, 28. The flaw in Intervenors' argument is this: if § 50.57(c) is to effect its purpose of permitting low power operation while a full-power licensing proceeding is still ongoing, then pending full-power emergency planning contentions cannot automatically trigger a hearing right under § 50.57(c). Instead, a hearing is warranted only if issues exist that are material in fact to the activity to be authorized (i.e., operation at a lower power level). The Board recognized this materiality component when it asked parties to brief the "substantive relevance" of remaining contentions to operation of Shoreham at 25% power.

## II. The Decisions of the OL-5 Licensing Board Do Not Preclude a Reasonable Assurance Finding

Intervenors argue at length that recent decisions of the OL-5 Licensing Board legally preclude this Board from making the reasonable assurance finding required by § 50.57. Intervenors' Brief at 6-19. Intervenors read the OL-5 Board decisions as holding that the LILCO Plan is "inherently, fundamentally and pervasively flawed" and that the LERO training program is also fundamentally flawed. Intervenors' Brief at 7. Their argument is incorrect for a number of reasons.

First, Intervenors have mischaracterized the OL-5 Board's decision.[6/] As LILCO has noted in its April 1 Brief, the "fundamental flaws" identified by the OL-5 Licensing Board go, with one exception, to LERO's performance on the day of the exercise and not to inherent defects in the LILCO Plan itself. LILCO Brief at 24. The problems identified by the OL-5 Licensing Board do not indicate, as Intervenors suggest, that the LILCO Plan is "inherently, fundamentally and pervasively flawed."[7/]

Indeed, this Board recently rejected similar claims by Intervenors when it ruled on LILCO's motions for summary disposition on the realism contentions.[8/] There, Intervenors argued that the decisions of the OL-5 Licensing Board precluded this Board from finding that a response conducted in accordance with the LILCO Plan could ever be adequate. LBP-88-9 at 40. The Board rejected that claim stating:

> We cannot accord this chain of logic much weight. While our colleagues did indeed find that fundamental flaws in the plan were revealed by the exercise, they did not suggest that those flaws were uncorrectable. Quite the opposite: they specifically rejected the notion (there put forward by LILCO) that a fundamental flaw would perforce require a substantial effort to correct. We reason, therefore, that, while the present plan may be flawed, such flaws would present no bar to its use if they were corrected.

Id. (citations omitted). Similar logic requires the rejection of Intervenors' argument here.

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6/ In any event, the decision has been appealed to the Appeal Board. See LILCO's Brief on Appeal From the February 1, 1988 Partial Initial Decision on the Emergency Planning Exercise (Mar. 14, 1988).

7/ At other places, Intervenors have selectively quoted from the OL-5 Board decision to suggest a broader sweep for that decision. For example, on pages 13-14 of their brief, Intervenors suggest that the OL-5 Board rejected the entire communications scheme contained in the LILCO Plan. In fact, the OL-5 Board merely found that the Plan needed to be revised to permit lateral communications among field workers. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-2, 27 NRC ___ (slip op. at 53) (Feb. 1, 1988).

8/ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-9, 27 NRC ___ (Apr. 8, 1988).

Second, even if one were to accept Intervenors' self-serving interpretation of the OL-5 Board's decisions, the absence of a "reasonable assurance" finding from the OL-5 Board under § 50.47(a) concerning LERO's exercise performance is not dispositive for this proceeding. The OL-5 Board was given jurisdiction to judge LERO's preparedness during the Shoreham exercise against the level of preparedness required to make a reasonable assurance finding for operation at 100% power. As LILCO's initial 25% power motion and subsequent filings make clear, the risks of operation at 25% power are significantly less than those at 100% power. In addition, because of the slower progress of accidents at 25% power the time available for offsite response is much greater than at 100% power. LILCO Brief at 8-10. As a result, the level of preparedness that must be demonstrated in order to support a "reasonable assurance" finding at 25% power is different from that at 100% power. Accordingly, the OL-5 Board's decision does not even address the question of whether LERO has demonstrated the requisite level of preparedness for 25% power operation and, therefore, that decision does not have res judicata effect in this proceeding.

III. Appendix E to 10 CFR Part 50 Does Not Create a Set of Requirements That Are Independent of § 50.47(c)

Intervenors next argue that the Board is precluded from granting the 25% power motion because LILCO has not conducted a full participation exercise as is required by 10 CFR Part 50, Appendix E ¶ IV.F.1. Intervenors' Brief at 19-25. Intervenors' argument hinges on their claim that Appendix E establishes a set of emergency planning requirements that are independent of those in §§ 50.47(b) and (c). See id. at 22.

As LILCO has already discussed in its April 1 brief, the exercise requirement in Appendix E ¶ IV.F.1 is simply an amplification of the requirement in 10 CFR § 50.47(b)(14), which requires periodic drills and exercises. LILCO Brief at 23. In addition, the introductory language to Appendix E ¶ IV makes clear that while Appendix E

contains a list of items that needs to be included in emergency response plans, those plans will be evaluated against the standards of § 50.47(b). Indeed, in its recent decision on LILCO's motions for summary disposition on the legal authority contentions, this Board found that Appendix E "supplements" the standards of § 50.47. LBP-88-9 at 22-23. There is nothing in that opinion or other authority known to LILCO to support the argument that Appendix E creates a set of independent requirements for which non-compliance cannot be remedied under § 50.47(c)(1).

Intervenors also claim that LILCO has itself recognized the independent nature of the requirements of Appendix E by having previously filed a request for an exemption from the requirements of that provision under § 50.12(a). See Intervenors' Brief at 22-23. The short answer to Intervenors' claim is that the Commission's regulations provide an applicant a choice of avenues for obtaining an operating license. One path is to seek an exemption from given regulations under § 50.12(a); other paths are provided by §§ 50.47(c)(1) and 50.57(c). When LILCO decided to seek an exemption from the then one-year exercise requirement of Appendix E ¶ IV.F.1 in January 1987, it chose to do so under § 50.12(a). When it filed its motion to operate at 25% power three months later, LILCO chose to pursue another available course, filing under § 50.47(c)(1) and later, at the Commission's direction, under § 50.57(c).[9/] This Board has affirmed LILCO's right to seek to operate at 25% power under § 50.57(c) and has determined that no waiver of, or exemption from, the Commission's emergency planning regulations is needed in connection with the showing that any remaining deficiencies in emergency planning are "not significant for the plant in question" under 10 CFR § 50.47(c). LBP-88-1, 27 NRC at 11-12.

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9/ See LILCO's Request for Authorization to Increase Power to 25% and Motion for Expedited Commission Consideration (Apr. 14, 1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-87-4, 24 NRC 882 (1987) (permitting LILCO to refile its motion under 10 CFR § 50.57(c)); LILCO's Motion for Authorization to Increase Power to 25% (July 14, 1987).

Finally, Intervenors argue that the Commission's recent amendment of § 50.47(c)(1), which did not promulgate proposed language that would have specifically exempted non-compliance with Appendix E, evinces the Commission's recognition of the independent nature of the Appendix E requirements. See Intervenors' Brief at 23-25. This argument is identical to an argument earlier presented by Intervenors in response to a Board question, posed in the context of the remaining "realism" contentions, about the relationship between § 50.47(c)(1) and Appendix E. See LBP-88-9 at 11. There, the Board rejected Intervenors' argument, finding that § 50.47(c)(1) allowed for compensatory measures to remedy specific non-compliance with either § 50.47(b) or Appendix E. Id. at 22.

## IV. Intervenors Have Failed to Demonstrate That Their Pending Emergency Planning Contentions Are Substantively Relevant to LILCO's 25% Power Motion

Intervenors' discussion of the substantive relevance of individual emergency planning contentions is nothing more than a repackaging of the arguments discussed above. See Intervenors Brief at 25-34. In particular, Intervenors ignore the lower risk and slower progress of postulated accidents at 25% power and argue that because there is a potential need for offsite emergency response at 25% power, all of their emergency planning contentions are relevant. Id. at 28-34. In addition, Intervenors again argue that LILCO's failure to comply with all the requirements of Appendix E precludes the Board from granting LILCO's motion. Id. at 34.

While LILCO will not repeat the reasons why none of the remaining emergency planning contentions are substantively relevant to operation at 25% power,[10/] three points raised by Intervenors require brief mention. First, Intervenors continue to assert that LILCO lacks the legal authority to implement certain emergency response

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10/ These reasons are set out fully in LILCO's Brief at 11-24.

functions, as revealed in their restatement of contentions 1, 2, 4-8 and 10. Intervenors' Brief at 26-27. This is contrary to the Board's rulings that, under the revised emergency planning rule, Intervenors can no longer raise the lack of legal authority as a response against LILCO's Plan. See Confirmatory Memorandum and Order (Ruling on LILCO's Motions for Summary Disposition of Contentions 1, 2, 4, 5, 6, 7, 8 and 10, and Board Guidance on Issues for Litigation) at 4 (February 29, 1988); LBP-88-9, 27 NRC at ___ (slip op. at 24). Second, Intervenors include the availability and adequacy of reception centers in their list of outstanding contentions. See LILCO's Proposed Findings of Fact and Conclusions of Law on the Suitability of Reception Centers (Sept. 2, 1987). Intervenors' Brief at 27. As the Board is well aware, this issue has been fully litigated and proposed findings have been submitted to the Board. Intervenors have no right to an additional hearing opportunity on these issues.[11/] Third, Intervenors' characterization of the remaining EBS and hospital evacuation contentions overstates the scope of those contentions. Id. at 27-28. The EBS contention involves only the question of the physical coverage of the Shoreham EBS network. The only issue relating to the plans for the evacuation of the three hospitals in the Shoreham EPZ (all of which are near or just beyond the 10-mile boundary) involves the accuracy of the evacuation time estimates for those facilities.

V. The Board Should Proceed to Consider the Merits of LILCO's 25% Motion

LILCO has a right to have its 25% motion considered on the merits. LILCO respectfully suggests that the Board has sufficient material before it to undertake that process now.

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11/ Indeed, at 25% power the number of people who are likely to be advised to go to reception centers for monitoring and possible decontamination, or who will go there seeking shelter, is much smaller given the smaller zone of risk at 25% power. Thus, the three reception centers identified in the LILCO Plan are more than adequate to accommodate these evacuees. See Request for Authorization to Increase Power to 25% at 95-98 (Apr. 14, 1987) supra n.9.

Intervenors' claims that they require substantial time for review and discovery, as well as an opportunity to file additional contentions, concerning the technical merits of LILCO's motion following the publication of the Staff's Safety Evaluation Report (SER) on the motion cannot be accepted. Intervenors have had all of the technical documents that support LILCO's motion for one year.[12/] These are the same documents that the NRC Staff is reviewing in order to issue its SER. However, Intervenors have utterly failed to devote substantial effort to any review of these documents.[13/] Intervenors' failure to have conducted their own analysis is a problem of their own making. Intervenors are not a super-review body entitled to rest on their oars until all other parties have completed their work, and only then commence their own substantive efforts. In addition, Intervenors incorrectly assume that they are automatically entitled to further discovery, beyond the extensive documentation already provided, concerning the technical bases for LILCO's motion. See Intervenors' Brief at 4. Intervenors' right to discovery is contingent on the Board's concluding that some of Intervenors' contentions meet the threshold test of substantive relevance. Even then, Intervenors would still need to justify their failure to have requested additional information on technical materials that were filed and have been publicly available for one year. Finally,

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12/ Intervenors' consultants have also been provided all supporting technical information that has been requested by the Staff in its review of the technical application. In addition, Intervenors' representative, have been present at the two meetings that the Staff has had with LILCO on the 25% power application.

13/ In depositions conducted just today, April 21, two technical experts for Intervenors, Gregory Minor and Steven Sholly, were asked about the extent to which they had reviewed the technical materials provided by LILCO in support of its 25% power motion. Both acknowledged having had the materials since soon after their filing by LILCO. Mr. Sholly stated that he had spent "perhaps a day or two" reviewing LILCO's PRA, but his testimony disclosed an absence of review of the material in recent months. Similarly, Mr. Minor stated that he had "read through" the 25% motion in preparation for a meeting between LILCO and the NRC Staff in the summer of 1987, but gave no indication of any substantive review since. He also stated that if he were to file testimony (he is doing so on immateriality), he would have to review the PRA again.

pursuant to 10 CFR § 50.57(c), Intervenors would have a right to be heard only if any of their existing contentions were found by this Board to be relevant to the activity to be authorized; that section does not automatically afford an opportunity to file new contentions, as Intervenors assert. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 362 (1981); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant. Units 1 and 2), ALAB-728, 17 NRC 777, 801 n.72 (1983).

Similarly, the Staff's delay in completing its review of LILCO's 25% motion should not, by itself, prevent Board evaluation.[14/] As LILCO has pointed out in its motion, there is pressing need for additional power on Long Island. While the Board cannot rely on that need as an independent ground for granting LILCO's motion, it can consider that need in making its decisions to proceed with the consideration of LILCO's motion. LBP-88-1 at 15-16. Indeed, the Board has previously done just that when it advised the parties that consideration of LILCO's motion cannot be "deferred indefinitely" and that it could not be "long deferred on grounds of excessive burden or lack of resources." Id. at 15.

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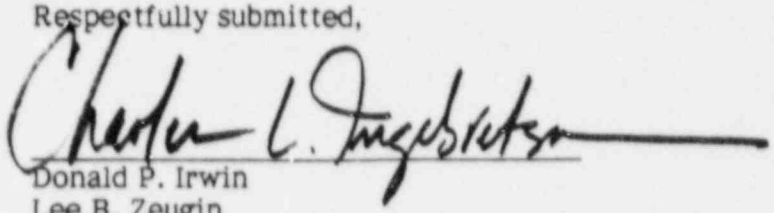
14/ Intervenors mischaracterize the Staff's schedule for completing its technical review of LILCO's motion. Intervenors' Brief at 3. While the Staff indicates that its entire review will not be completed until the early fall, it also states that its review of possible new safety issues raised by the motion and of the difference in the progression of accidents at 25% as compared with accidents at 100% will be completed in the late spring of this year. NRC Staff Response to Board Order on Relevance of Pending Emergency Planning Contentions to Operation at 25 Percent Power at 1-2 (Mar. 9, 1988).

VI. Conclusion

For the reasons stated above, LILCO asks that the Board proceed to consider the merits of its motion to increase power to 25% and to determine that none of Intervenors' contentions are substantively relevant to that motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO'S REPLY TO INTERVENORS' BRIEF ON 25% POWER were served this date upon the following by Federal Express as indicated by an asterisk, or by first-class mail, postage prepaid.

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