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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL-3 (Emergency Planning)

GOVERNMENTS' REPLY TO NRC STAFF'S APRIL 28 REQUEST THAT THE GOVERNMENTS BE HELD IN DEFAULT

This is the Governments' (Suffolk County, the State of New York, and the Town of Southampton) reply to the "NRC Staff Response to Intervenors' Objections to Portions of February 29 and April 8 Realism Orders and Offer of Proof" (April 28, 1988) (hereafter, "Staff Response"). The Staff seeks a ruling holding the Governments "in default." The Staff's request must be denied.

In some respects the Staff Response echoes arguments made by LILCO in its April 22 response to the Governments' April 13 Objection and Offer of Proof.1/ The Governments addressed LILCO's arguments in their Response to LILCO's April 22 Request for Dismissal of the Legal Authority Contentions (May 2, 1988)

1/ See LILCO's Response to Governments' Objection to Portions of February 29 and April 8 Orders in the Realism Remand and Offer of Proof, April 22, 1988.

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(hereafter, "Governments' May 2 Response"). Rather than repeat here the points made in the Governments' May 2 Response, where appropriate the Governments merely reference that Response.

1. The Staff's request for a ruling that the Governments are "in default" is premised solely upon the proffered testimony submitted by the Governments.2/ The Staff Response is based upon gross mischaracterizations of that testimony.

a. Like LILCO, the Staff makes the unfounded allegation that the Governments have "refused" to "specify" their intended response to a Shoreham emergency, to "set forth their projected response effort," or to "make an affirmative showing of their best efforts response." See, e.g., Staff Resp. at 4. This characterization of the Governments' testimony is wrong. See Governments' May 2 Response at 2-5, which sets forth the facts.

b. The Staff asserts:

> The purpose for [sic] Intervenors' refusal to make an affirmative showing of their best efforts response is that they seek 'to put the matter before the courts.'

Staff Resp. at 4, referring to the proffered testimony of Suffolk County Executive Halpin. This assertion is wrong.

2/ Thus, unlike LILCO, the Staff does not make unfounded assertions about the Governments' responses to discovery requests which, as the Governments demonstrated in their May 2 Response, are wholly without merit in any event. LILCO's subsequent motion regarding discovery (Supplement to LILCO's Response to Governments' April 13 Objections and Motion in the Alternative to Compel Discovery, May 2, 1988) will be responded to in a subsequent filing.

County Executive Halpin never stated that the County's decision not to adopt or implement a plan for responding to a Shoreham emergency, or its determination that an ad hoc best efforts response would not follow the LILCO Plan, were made for the purpose of putting "the matter before the courts." Mr. Halpin does explain in his testimony, however, the bases of the County's determinations and decisions (which have been upheld by the Courts) and why he is unable to provide details beyond those stated in his testimony concerning an ad hoc best efforts response. The Staff ignores that portion of Mr. Halpin's testimony.

What apparently gave rise to the Staff's inaccurate quotation was a statement in Mr. Halpin's testimony which was part of his response to the following question:

> You have stated that Suffolk County will have no plan for an accident at Shoreham and that you would not follow LILCO's plan. What if the NRC were to license Shoreham anyway?

Mr. Halpin responded as follows:

> I do not believe that the NRC would license Shoreham to operate in the face of the lawful and rational determinations of Suffolk County. If the NRC nevertheless were to take such action, Suffolk County would maintain its position and put the matter before the courts. The County has acted in good faith and solely in the interests of its citizens. We will not back-down from our convictions and our duty as elected government officials.
>
> Moreover, it is unproductive to engage in make-believe by pretending how the County would act under the hypothetical circumstances of an ac-

> cident at Shoreham after that plant were somehow licensed by the NRC. For reasons stated above and the attached affidavit, we would never follow LILCO's plan or coordinate in any way with LILCO. Nor do I know what resources would be available. It is my judgment that if there were a serious emergency, many of our employees would necessarily look after their families as a first and perhaps only priority. Also, County personnel have had no training or preparation to carry out any kind of a purported "response" to a Shoreham emergency. The County's position is that it would not be possible to safely evacuate or otherwise protect the public in the event of a nuclear accident at Shoreham. It is thus baseless fantasy to try to speculate about what might hypothetically be done.3/

The Governments' cannot make up facts; and their refusal to make up facts -- their refusal to be untruthful -- is no "obstruction." The Governments lawfully exercised their police powers in deciding not to adopt a plan for responding to a Shoreham emergency and in rejecting LILCO's plan. Without a plan of their own, the Governments cannot describe or specify how, when, or with what reasons they would respond to a Shoreham emergency. This Board cannot ignore such truthful testimony.

c. The Staff asserts that the "purpose" of the Governments' proffered testimony "would be (1) to establish LILCO's lack of authority to implement is [sic] plan and (2) the [Governments'] lack of authority to permit or authorize LILCO employees to perform their functions under the plan." Staff Resp. at 7. Then the Staff argues that such showings "would be

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3/ Direct Testimony of Patrick G. Halpin on Behalf of Suffolk County Concerning Contentions 1-2, 4-8, and 10 (April 13, 1988) (hereafter, "Halpin Testimony") at 7-8.

inconsistent with the inquiry under the Commission's rule, that is the nature of a state or local governments' best efforts response." Id. (emphasis added). Again, this Staff assertion ignores the actual contents of the Governments' proffered testimony.

There can be no dispute that the Governments' testimony directly addresses "the nature of the State and local governments' best efforts response" to a Shoreham emergency. That is the stated purpose of the proffered testimony,[4] and that, in fact, is what the testimony does. For example, Mr. Halpin states that Suffolk County does not have a plan for responding to a Shoreham accident, and he explains why that is. He states, further, that certain LILCO assertions and assumptions about the intended response of the County are wrong (e.g., that the County would follow the LILCO plan or work with LILCO personnel in responding to a Shoreham accident, and that County officials would give LILCO permission to take offsite actions during a Shoreham emergency) and he explains why the County's best efforts response would not include such actions (thereby demonstrating that those premises of the LILCO plan are wrong). Mr. Halpin also explains that no County personnel have operational familiarity with the LILCO plan.[5]

Similarly, Commissioner Axelrod states that the State of New York has no plan for responding to a Shoreham accident and has

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[4] See, e.g., Halpin Testimony at 1-2.

[5] See Halpin Testimony at 7.

conducted no site-specific training or other activities to prepare for such a response, and that, contrary to LILCO's assertions, New York State personnel would neither follow LILCO's plan nor work with LILCO's emergency response personnel in the event of a Shoreham accident.6/

What could be more "consistent with the inquiry under the Commission's rule, that is the "nature of a state or local governments' best efforts response," than the testimony and sworn statements of the highest officials of those Governments describing the nature of that response? And, what could be more relevant to an inquiry concerning the adequacy and implementability of the LILCO plan (the alleged subject of this remand proceeding) than evidence which demonstrates that fundamental premises of that plan are incorrect, and that the plan cannot and will not be implemented because it is illegal?

2. Like LILCO, the Staff makes the unfounded accusation that the Governments are somehow "obstruct[ing] the Board's inquiry into the adequacy of the LILCO plan," and "obstruct[ing] the NRC's licensing process." Staff Resp. at 4-6. The Staff, like LILCO, has no basis for these accusations, which are contradicted by the facts, and ignore established federal court precedent. See Governments' May 2 Response at 6-12.

3. The Staff attempts to defend the Board's interpretation of the permissive "may" in the new rule. See Staff Resp. at 5-6.

6/ See Direct Testimony of David Axelrod on Behalf of the State of New York (April 13, 1988).

The Governments demonstrated that this Board ruling is clear error in their April 13 Objection and Offer of Proof (see page 21 and filings cited there).

4. The Staff argues that the Governments should be barred from conducting cross examination of LILCO's proffered prima facie case, notwithstanding the fact that LILCO's "case" is merely an "outline."7/ Staff Resp. at 7. The Staff appears to base this position on its belief that "without evidence that another plan would, in fact be relied upon, the Board would be entitled to find in LILCO's favor if it determined LILCO's prima facie showing is adequate," and the incredible assertion that "LILCO's Plan has been found to generally meet the regulatory planning standards." Id.

a. The suggestion that this Board could lawfully preclude the Governments from challenging the adequacy of LILCO's so-called prima facie case, or from further developing their own case by means of cross examination, is directly contrary to established NRC precedent and fundamental principles of due process. See Governments' May 2 Response at 12-13, 18. The Staff provides absolutely no factual or legal basis for the assertion that the Governments "should not be permitted" to conduct cross examination of LILCO's prima facie case.

7/ See LILCO's Designation of Record and Prima Facie Case on the Legal Authority Issues (Contentions 1-2, 4-8, and 10), April 1, 1988 at 1 ("this pleading is intended to be an outline of LILCO's case, to be further developed, as necessary, by written testimony . . . .").

b. The suggestion that the Board could lawfully "find" that LILCO's yet-to-be-filed prima facie case "is adequate" without having allowed the Governments to challenge that case, is similarly without basis. Such a "finding" would be a clear violation of the Governments' due process right to a hearing guaranteed by the U.S. Constitution, the Atomic Energy Act, and the NRC's regulations. See also Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985). It would also violate the Board's own acknowledgement that the Governments "are entitled to challenge the adequacy of the LILCO plan . . . ."8/

c. The Staff's assertion that "LILCO's Plan has been found to generally meet the regulatory planning standards," citing the PID and the CPID (Staff Resp. at 7), is incredible for several reasons. First, the Staff ignores the fact that the two cited decisions found that LILCO's Plan does not meet regulatory standards. Second, the Staff ignores the fact that portions of those decisions which found that certain planning standards had been met were reversed. Third, the Staff ignores the fact that the OL-5 Board found the LILCO Plan fundamentally flawed, and held that the plan cannot form the basis of the reasonable assurance finding required by the regulations.

8/ Memorandum (Extension of Board's Ruling and Opinion on LILCO Summary Disposition Motions of [sic] Legal Authority (Realism) Contentions and Guidance to Parties on New Rule 10 C.F.R. § 50.47(c)(1), LBP-88-9 (April 8, 1988) at 24.

5. The Staff's untimeliness" argument is without basis. See Staff. Resp. at 6-7.

a. The regulatory provision relied upon by the Staff, 10 CFR § 2.771, has nothing to do with the current matter. Section 2.771 concerns petitions for reconsideration "of a final decision . . . ." 10 CFR § 2.771(a). Neither the February 29 nor the April 8 Order is a "final decision" under Section 2.771.

b. The Governments have been timely in the extreme. They filed their Objection and Offer of Proof on April 13, only five days (three business days) after the Board had issued its detailed rationale for its rulings. And not only did the Government detail reasons for their Objections, they also went the extra step of filing their testimony 23 days early (April 13 rather than May 6).

6. Finally, the Staff's bald assertion that the Governments "are now in default in this proceeding" (Staff Resp. at 8) is a complete non-sequitur. The Staff states no basis or justification for this accusation. Similarly, the Staff provides no basis or explanation for its bald assertion that the Governments "are subject to appropriate sanctions for failure to comply with Board Orders." Staff Resp. at 8. In fact, as set forth in detail in the Governments' May 2 Response, the Governments have acted in full compliance with the NRC's Rules of Practice, have participated fully and in good faith in this proceeding, and they intend to continue to do so unless barred by the Board. In light of the Governments' efforts to date, and their right to continue

to participate in this proceeding, the Staff's suggestion that the Governments should be held "in default" based on the contents of their proffered testimony must be summarily rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of GOVERNMENTS' REPLY TO NRC STAFF'S REQUEST THAT THE GOVERNMENTS BE HELD IN DEFAULT have been served on the following this 6th day of May, 1988 by U.S. mail, first class, except as otherwise noted.

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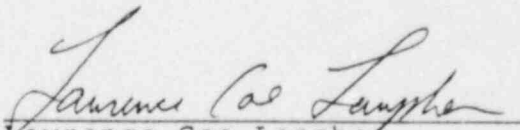

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