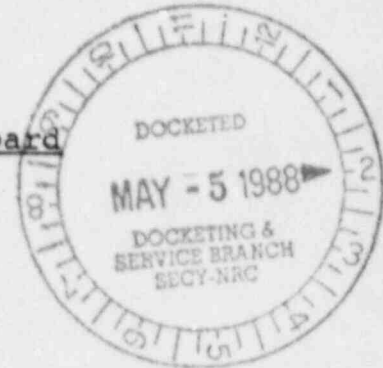


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May 2, 1988

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' RESPONSE TO LILCO'S APRIL 22 REQUEST
FOR DISMISSAL OF THE LEGAL AUTHORITY CONTENTIONS

This is the Governments' (the State of New York, Suffolk County, and the Town of Southampton) reply to "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) (hereafter, "LILCO's Response"), in which LILCO seeks the dismissal of Contentions EP 1-2, 4-8, and 10 (hereafter, the "Legal Authority Contentions"). For the reasons stated below, LILCO's request must be denied.

INTRODUCTION

LILCO's Response is based upon mischaracterizations and unfounded premises. Once those characterizations and premises are revealed for the fiction they are, LILCO's argument falls apart.

-- LILCO asserts that the Governments "refuse to specify"

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the details of their ad hoc response to a Shoreham emergency (LILCO Resp. at 2). In fact, what the Governments refuse to do is to manufacture plans or facts which do not exist. The Governments' proffered testimony sets forth as much specification and as many details as are known to the Governments about the nature of their "best efforts" response to a Shoreham emergency.

-- LILCO asserts that the Governments have "deliberately failed to present a positive case for [the Board's] analysis and evaluation" (LILCO Resp. at 2). In fact, the Governments submitted their intended testimony for "the Boards' analysis" weeks before the filing deadline. LILCO may not agree with the Government's "case" as presented in the proffered testimony, but it cannot honestly be suggested that the Governments have not presented it.

-- LILCO asserts that the Governments have "failed to take issue with LILCO's prima facie case." (LILCO Resp. at 2) In fact, the Governments' proffered testimony not only takes issue with LILCO's so-called "prima facie" case, but it demonstrates that the basic premises of LILCO's case are false. In addition, the Governments will further demonstrate the insufficiency of LILCO's prima facie case through cross examination at the appropriate time.

-- LILCO asserts that the Governments have "refus[ed] to cooperate with the Board's factfinding process" (LILCO Resp. at 2). In fact, the Governments have submitted full and truthful testimony which sets forth the facts that are relevant and

material to the matters at issue in this proceeding -- i.e., whether LILCO's Plan can and will be implemented in a Shoreham emergency, and the nature of a "presumed" Government response to a Shoreham emergency. They have also made 12 individuals available for depositions and have responded to all discovery requests. Again, LILCO may not like the facts presented by the Governments, but it cannot honestly be suggested that the Governments have not participated fully in the "factfinding process."

We elaborate below on the false premises which provide the sole bases for LILCO's Response.

LILCO'S FALSE PREMISES

1. The bulk of LILCO's Response is based on the false premise that the Governments are affirmatively concealing either an existing plan for responding to a Shoreham emergency, or known facts about how the Governments would respond in the event of such an emergency.^{1/} There is absolutely no basis for this accusation. Indeed, it is tantamount to calling the Governor of New York, the Suffolk County Executive, and the Chairman of the

^{1/} For example, LILCO asserts that the Governments have "refus[ed] to present evidence," (LILCO Resp. at 5) and have "refus[ed] to reveal the facts," (id. at 6), that the Governments are "concealing from the Board what they would do in an emergency," (id. at 10), that the Governments "will not be forthcoming with the facts," (id. at 11), that the Governments "decline to tell the NRC what they would do in an emergency," (id. at 14), that the Governments have "refus[ed] to present the facts," (id. at 19), and that the Governments "are not serious about engaging the facts" (id., at 22).

New York State Disaster Preparedness Commission liars.

LILCO itself ignores the truth. The fact is that the Governments have no plan for responding to a Shoreham emergency. That fact is undisputed. Since the Governments have no such plan, the Governments cannot state what resources would be available or would be used to respond to a Shoreham emergency, how they would be used, or how long such a hypothetical response might take. Such data could be presented, if at all, only if the Governments had a plan detailing their response.

Thus, in their proffered testimony the Governments have simply told the truth: they have no plan, they would not implement LILCO's Plan for many detailed and specific reasons, and they cannot speculate on what they would do as part of an ad hoc response to a Shoreham emergency. There is no basis for LILCO's accusation that such truthful testimony represents an attempt "to conceal facts."

Indeed, the deposition testimony of the Governments' witnesses makes this plain. For example, Dr. Axelrod testified as follows:

Q. Dr. Axelrod, what resources would be available to you in the event that you were notified of an emergency at the Shoreham Nuclear Power Plant and the governor ordered you to respond to protect public health and safety?

. . .

A. Without a site-specific plan and the identification of the specific resources that would be allocated with respect to time, place, event that involve the coordination of all governments, I would not be in a position

to respond as to the nature or kind of resources that could or would be made available in a hypothetical situation.

Q. And, I assume that that means also you would be unable to identify the time factors that would be needed to employ those resources?

A. Without any additional information to the extent of the hypothetical, I certainly would not be able to identify the time frame in which any response might take place without knowing what the nature of that response would be or what resources could be mobilized to respond.

Deposition of David Axelrod (April 22, 1988), Tr. 96-97

(counsel's objections omitted). Later, Dr. Axelrod stated:

Q. Can you tell me what the response would be if there were an accident at the Shoreham Nuclear Power Plant?

A. Without the existence of a plan, without the existence of a clear situation, the question is totally hypothetical. And, I do not know what we would do under any given set of circumstances nor how we would respond, since any response would be predicated upon governmental activities and the coordination of governmental activities for which there is no basis at the present time.

Id., Tr. 101-102.

Dr. Axelrod's testimony makes clear that the Governments' witnesses have been direct, forthcoming, and truthful. The Governments lawfully exercised their police powers in deciding not to adopt a plan for responding to a Shoreham emergency. Without a plan, they cannot describe or specify how, when, or with what resources they would respond to a such an emergency.

2. LILCO's Response is also based on the false premise that the Governments are somehow preventing the NRC from reviewing LILCO's Plan.^{2/} Nothing could be further from the truth.

The NRC has been reviewing the LILCO Plan for years, and apparently intends to continue to do so despite its own Licensing Board findings that LILCO's Plan cannot lawfully be implemented and that it is fundamentally flawed. It is no secret that the Governments believe that the review process is doomed to failure because any honest forum must continue to find that the LILCO Plan fails to meet the NRC's regulatory requirements. Nonetheless, it cannot be suggested that the Governments are "obstructing" the NRC's review of that Plan.

To the contrary, the Governments have attempted to assist such review. They have done so in full compliance with the NRC's Rules of Practice and in a manner fully consistent with the Commission's intent, expressed in the new rule, that decisions on

^{2/} For example, LILCO cites decisions referring to the NRC's authority to review a utility's plan (e.g., CLI-83-13, 17 NRC 741, 743 (NRC "is obligated to consider a utility plan . . .") (emphasis added), and Long Island Lighting Co. v. County of Suffolk, 628 F. Supp. 654, 664 (referring to "the NRC's ability to evaluate a utility's RERP") (emphasis added), and then asserts:

The short of the matter is that the state and local governments have a right to participate in the NRC's decisionmaking process; they do not have a right to obstruct or veto it. By concealing from the Board what they would do in an emergency . . . the [Governments] are impermissibly obstructing the factfinding process

LILCO Resp. at 10 (emphasis in original).

evidence presented in each individual case.^{3/} Thus, the Governments have submitted:

-- the Legal Authority Contentions, among others, which highlight the fundamental flaws, inadequacies, and regulatory non-compliances embodied in the LILCO Plan;

-- testimony containing facts and evidence in support of those contentions, which demonstrate that the LILCO Plan is based on false assumptions and is otherwise deficient and unworkable, and therefore cannot provide the reasonable assurance required by the regulations; and,

-- facts and evidence detailing, to the best of the Governments' ability, the nature of a "best efforts" response by the Governments to a Shoreham emergency.

It is no doubt true that the facts and evidence submitted by the Governments preclude the NRC from reaching the conclusion that the LILCO Plan can and will be implemented or that the LILCO Plan provides reasonable assurance that the public can and will be protected, as desired by LILCO. But, the fact that the Governments' proffered evidence will result in a finding unfavorable to the applicant is a far cry from the baseless

^{3/} See, e.g., 52 Fed. Reg. 42081 ("Whether a utility could succeed in making [the] showing [required by the new rule] would depend on the record developed in a specific adjudication . . ."); 42082 (under the new rule judgments and evaluations, and uncertainties therein, are to be "addressed in the case-by-case adjudications on individual fact-specific situations"); 42082 ("under the particular facts of an individual case it may be impossible for the NRC to conclude that a utility plan is adequate, as defined in this rule"); 42084 (under the new rule, NRC will "take into account the probable response of state and local authorities, to be determined on a case-by-case basis").

accusation that the Governments are "obstructing" the NRC's review of the LILCO Plan.

3. LILCO's Response is based on the false premise that the Governments' decision not to adopt or implement an emergency plan for responding to a Shoreham emergency is improper or illegal, or the equally false corollary that the NRC can compel the Governments to adopt or to implement such a plan. For example, LILCO cites this Board's order interpreting the new rule as prohibiting "any state or local government [from] successfully demonstrat[ing] a continuing non-participatory role," as placing "a responsibility on state and local governments to produce, in good faith, some adequate and feasible response plan that they will rely on," and as requiring the Governments "to come forward with positive statements of their plans" See LILCO Resp. at 6, quoting LBP-88-9 (April 8, 1988) at 20-21, 24-25 (emphasis added); LILCO Resp. at 23-24. LILCO also asserts that the Governments' decision not to adopt or implement a plan for responding to a Shoreham emergency improperly "obstructs" the NRC's review process.

These LILCO arguments, and the cited assertions of this Board, have been made, considered, and convincingly rejected by a United States District Court and Court of Appeals. Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, 604 F. Supp. 1084 (S.D.N.Y. 1985), aff'd, 813 F.2d 570 (2d Cir. 1987) ("Citizens"). This Board is bound by those Courts' decisions.

In Citizens, just as here, LILCO argued that the refusal of Suffolk County to adopt or implement a Shoreham emergency plan was an unlawful interference with the NRC's authority over nuclear safety matters. The Court squarely rejected the argument. The Court held that the decision of Suffolk County not to adopt or implement a plan for responding to a Shoreham emergency was rational, lawful, an appropriate exercise of that government's authority, and not preempted by the Atomic Energy Act or other federal law.

The Court held that the NRC's authority to make nuclear safety determinations neither obligates state and local governments to cooperate in helping a utility to obtain a license for a nuclear power plant, nor invalidates decisions to withhold such cooperation:

It is not disputed that defendants oppose Shoreham's operation. There are, however, some channels available in which defendants may express their opposition without impermissibly regulating nuclear safety.

* * *

Congress was well aware of the possibility that local governments might refuse to cooperate in furnishing [an emergency plan]... The Senate debate on this point indicates that the Senate was aware that a local government could refuse to participate in emergency planning. The Senate did not, however, adopt an amendment to require local government participation. Presumably, the Senators were motivated at least partly by a reluctance to create "a fundamental shift in the federal system ... [that] would give some authority to the Federal Government which has never before been obtained by the Federal

Government in this area."^{4/}

The Court of Appeals affirmed: "Suffolk has not affirmatively prevented LILCO from pursuing its license. Suffolk simply has refused to cooperate."^{5/}

The Citizens courts held, further, that the County's decision not to adopt or implement a plan to respond to a Shoreham emergency was a valid and rational exercise of the County's governmental power, permissibly directed toward the objective of protecting the County's citizens.^{6/} Finally, in a ruling directly pertinent to LILCO's arguments and this Board's assertions, the Citizens Court stated:

LILCO further argues that if the County were truly interested in the health and safety of its residents, then it would try to develop an emergency evacuation plan. The County, however, through its elected legislators, has taken the position that a satisfactory evacuation plan cannot be fashioned and that it can best provide for the health and safety of its residents by refusing to cooperate with LILCO in an attempt to convince the NRC otherwise. This court may not second guess the wisdom of that decision. . . . [T]he County has not acted without a rational connection to a legitimate interest^{7/}

^{4/} 604 F. Supp. at 1094-95 (quoting statement of Sen. Hart, 125 Cong. Rec. S. 9476 (daily ed.) July 16, 1979) (emphasis added).

^{5/} 813 F.2d at 571.

^{6/} In addition, the New York Court of Appeals has squarely held that local governments have no obligation under New York law to adopt emergency response plans: "[T]he preparation of county plans is optional, not mandatory." Prospect v. Cohalan 482 N.E.2d 1209, 1210 (N.Y. 1985).

^{7/} 604 F. Supp at 1098 (emphasis added).

The Citizens case definitively disposes of LILCO's argument, and this Board's apparent belief, that the Governments' decisions not to adopt or implement an emergency plan are preempted or improper. Citizens also makes clear that there is no justification for applying the new rule's presumption in this case, particularly since it is directly contradicted by facts and sworn statements known to this Board.^{8/}

It is obvious that the Governments' decisions have not prevented LILCO from submitting its plan for the NRC's review and attempting to obtain a license without the cooperation or participation of the Governments. Moreover, the NRC's review is ongoing and the Governments have indicated their intention to participate in the proceeding concerning that review, as they are entitled to do under the regulations and the Atomic Energy Act. But, to the extent that the Governments' lack of a plan makes it difficult or impossible for LILCO to satisfy the reasonable assurance standard mandated by the regulations, LILCO must bear the consequences of its choice to proceed alone. Facts and evidence necessary to support a finding permitting the issuance

^{8/} The decision in Long Island Lighting Co. v. County of Suffolk, 628 F. Supp. 654 (E.D.N.Y. 1986) cited by LILCO is not to the contrary. In fact, the Court in that case expressly stated that it was "not acting inconsistently with the prior decision of this Court in Citizens" Id. at 666. The Court further stated that "states and localities are not required to develop emergency evacuation plans and a refusal to do so can be based on any reason or no reason." Id. Indeed, in another opinion cited by LILCO, this Licensing Board, when chaired by Judge Brenner, recognized that the Board "do[es] not possess the jurisdiction necessary to "requir[e] the County to adopt or implement an emergency plan for Shoreham." See LILCO Resp. at 9, n.1, quoting LBP-83-22, 17 NRC 608, 643.

of a license cannot be created by false presumptions or otherwise manufactured at LILCO's behest.

4. LILCO's Response is based on the false premise that the Governments have not challenged or rebutted LILCO's so-called "prima facie" case, or that they do not intend to do so.^{9/} This is nonsense.

Clearly, the Governments' proffered testimony challenges LILCO's "case" by demonstrating that its fundamental premises are simply wrong, both as a matter of fact and as a matter of law. Similarly, it cannot be suggested that the Governments have not or will not submit evidence to support their contentions; the proffered testimony fully supports the Legal Authority Contentions, both as originally admitted and as recently rewritten by this Board. It also directly addresses the issues to be determined under the new rule, including the nature and adequacy of a "best efforts" governmental response in a particular case.

Finally, as this Board itself acknowledged, the Governments "are entitled to challenge the adequacy of the LILCO plan supplemented by a best effort response from the

^{9/} See, e.g., LILCO Resp. at 2 (Governments have "failed to take issue with LILCO's prima facie case"); 10 (Governments are "failing to prosecute their claims"); 14 ("LILCO's prima facie case is un rebutted"); 15 (Governments "have in essence refused to prosecute their claims"); 22 (Governments "have not contested the accuracy of LILCO's Affidavits").

governments^{10/} The Governments will do so by means of cross examination in addition to their submission of the direct testimony already proffered.^{11/}

5. LILCO's Response is based on a gross mischaracterization of the law concerning the legal authority issues presented by LILCO's Plan and the relevance of those issues in this proceeding. See LILCO Resp. at 20-23.

This Board must summarily reject LILCO's arrogant and baseless assertion that the unanimous ruling by five New York State judges -- that the State and County cannot lawfully delegate their police power authority to a private corporation as assumed in the LILCO Plan -- "is a sham" (LILCO Resp. at 20). LILCO's revisionist interpretation of Cuomo v. LILCO and of this Board's and the Appeal Board's unreversed holdings interpreting and applying Cuomo v. LILCO are pure fantasy.

The facts are:

-- Cuomo v. LILCO held:

^{10/} 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.

^{11/} See, e.g., Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 356 (1978) ("we long ago held that the Commission's rules do not 'preclude an intervenor from building its case defensively, on the basis of cross-examination') (emphasis in original), quoting Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, 504-05 (1973). Accord, Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 389 (1974); and see Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1018-19 (1973).

[A]ny attempted delegation of police power to LILCO would amount to an unlawful delegation of governmental powers (See 20 N.Y. Jur. 2d "Constitutional Law" § 183). A governmental unit can not bargain away its police power to a private party or organization Governmental functions and responsibilities cannot be surrendered by contract where police power, public safety and welfare are involved ^{12/}

-- This Licensing Board held three times that Cuomo v. LILCO prohibited the LILCO Plan's premise that the Governments would give LILCO personnel "permission" or "authorization" to perform the functions identified in the Legal Authority Contentions.^{13/}

-- The Appeal Board affirmed that decision and the Commission has not reversed it.^{14/} Moreover, when chaired by Judge Margulies, this Board recognized the dispositive fact in this proceeding: the Governments believe that it would be unlawful for them to authorize LILCO personnel to perform police power functions. For that reason, among others set forth in the Governments' proffered testimony, the Governments would not provide LILCO or its personnel with the

^{12/} Cuomo v. LILCO, No. 84-4615, slip op. at 12-13 (N.Y. Sup. Ct. Feb. 20, 1985) (citations omitted), aff'd, 511 N.Y.S.2d 867 (App. Div. 1986), rev'd for lack of justiciability, 71 N.Y.2d 349 (N.Y. 1988).

^{13/} Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644 (1985); Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, 26 NRC 201 (1987); Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), LBP-87-29, 26 NRC 302 (1987).

^{14/} See LBP-87-26, 26 NRC at 215; LBP-87-29, 26 NRC at 309; Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), ALAB-818, 22 NRC 651 (1985); Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 30 (1986).

permission, authorization, or authority which is the underlying premise of the LILCO Plan.

LILCO's self-serving attempt to justify this Board's unexplained reversal of position on the legal authority issues with the bald assertion that "the Board, of course, has not reversed itself but rather has attempted to correct the Intervenors' own erroneous perception of the Board's earlier rulings on this matter" (LILCO Resp. at 21) is, quite simply, preposterous. See the Governments' Objections and Offer of Proof (April 13, 1988) at 30-45.

6. LILCO's Response is premised on inaccurate speculation about the Governments' responses to discovery requests, and a misleading discussion about irrelevant events that occurred in 1982 and 1983.

First, while acknowledging its lack of basis,^{15/} LILCO nonetheless makes unsupported accusations that the Governments are "obstructing" discovery and "refusing to cooperate with the discovery process." LILCO Resp. at 11. Once again, the facts document precisely the opposite.

The Governments have provided 12 County and State employees for deposition by LILCO, including the Suffolk County Executive,

^{15/} For example, LILCO stated that the subject of the Governments' response to discovery in this remand proceeding "cannot be fully discussed here and will most likely have to be briefed next week" (LILCO Resp. at 11), and that yet to be held depositions and not-yet-received interrogatory answers "may provide" evidence to support LILCO's accusations (id. at 12).

the Chairman of the New York State Disaster Preparedness Commission, and 10 individuals who have not even been designated as Government witnesses. Every witness has answered questions posed truthfully and to the best of his ability. There is absolutely no basis for the implication in LILCO's Response that any witness' honest inability to respond to particular questions posed by LILCO's counsel constitutes "a refusal to provide information" or a refusal to cooperate with discovery." See, e.g., LILCO Resp. at 12. Neither the Governments nor their officials or personnel will manufacture facts or information when they do not exist. See discussion at pages 4-5 above.^{16/}

Second, LILCO's longwinded dissertation about events related to Phase I is inapposite and irrelevant, as well as inaccurate. It is not necessary to engage in pointless re-arguments about what happened in 1982, however. Regardless of whose interpretation of those events is adopted, the facts here are completely different and in no way analogous to anything which occurred during the Phase I litigation.

The fact is that in this proceeding the Governments have scrupulously followed the NRC's rules and the Board's orders. The Governments have:

^{16/} LILCO's speculation about the Governments' responses to LILCO interrogatories is similarly baseless. The Governments have responded truthfully, and noted objections where appropriate. LILCO's dissatisfaction with the substance of the Governments' responses does not justify baseless accusations that the Governments have not "cooperated," been forthcoming, or complied with the NRC's Rules of Practice. See LILCO Resp. at 11-12.

-- submitted contentions which were admitted for litigation;
-- participated in discovery despite the difficulties and drain on resources presented by LILCO's irrelevant inquiries and demands, the short schedule, and the heavy demands of other pending NRC litigation;

-- submitted and responded to motions and objections as necessary and appropriate; and,

-- not only filed testimony to support their contentions, but submitted it early, for the convenience of the Board and other parties and in order to focus the issues.

The Governments have fully participated in this proceeding and intend to continue to do so, unless barred by the Board. The Governments' actions have been a lawful and appropriate pursuit of their rights under the Atomic Energy Act and the NRC's regulations. There is absolutely no basis for this Board to impose any sanctions whatsoever on the Governments, be it declaring them in "default," dismissing contentions, or prohibiting the Governments from conducting cross-examination. LILCO has suggested no such basis because there is none.

7. One final comment on LILCO's Response is necessary. For all LILCO's rhetoric, LILCO never provides any legitimate explanation, much less justification, for its apparent belief that dismissing the Governments' Legal Authority Contentions would be a lawful, proper, appropriate, or even logical response to the Governments' April 13 Objections.

Even if this Board were to refuse to accept the Governments' proffered testimony, there remains absolutely no basis for dismissing admitted contentions which directly address the matters at issue in this proceeding. The Governments have the right to challenge the sufficiency of LILCO's so-called "prima facie" case, by establishing the truth of their admitted contentions and by establishing the lack of basis for LILCO's assumptions and assertions. Indeed, if LILCO's prima facie case is shown to be deficient, by means of cross examination or otherwise, then the burden of going forward will never even shift to the Governments, according to the Board's February 29 Order.

Furthermore, the Governments have the undisputed right to use cross examination as a means both to challenge LILCO's evidence and to submit their own evidence in addition to that contained in their prefiled testimony.^{17/} That right remains intact, even if the Board were to rule, erroneously, that it would not "accept" the Governments' proffered testimony.

CONCLUSION

For the foregoing reasons, the Board must deny LILCO's request that the Legal Authority Contentions be dismissed.

^{17/} See authorities cited in note 11 above.

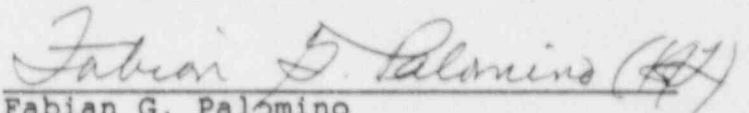
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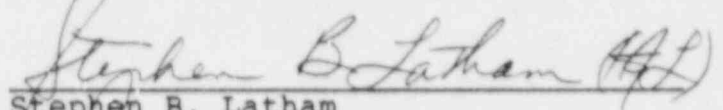
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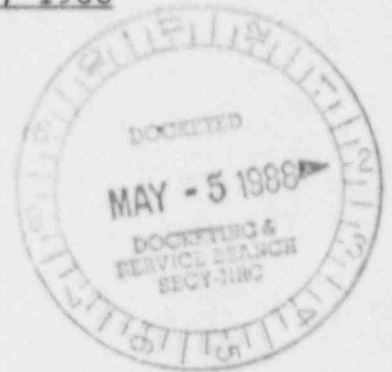
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board



In the Matter of)
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Docket No. 50-322-OL-3
(Emergency Planning)

CERTIFICATE OF SERVICE

I hereby certify that copies of GOVERNMENTS' RESPONSE TO LILCO'S APRIL 22 REQUEST FOR DISMISSAL OF THE LEGAL AUTHORITY CONTENTIONS have been served on the following this 2nd day of May, 1988 by U.S. mail, first class, except as otherwise noted.

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* By Hand (May 3, 1988)
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