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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'88 MAY -9 P8:04

Before the Atomic Safety and Licensing Appeal Board OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

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

Docket No. 50-322-OL-5  
(EP Exercise)

GOVERNMENTS' MOTION FOR LEAVE TO RESPOND  
TO NRC STAFF BRIEF IN RESPONSE TO  
LILCO APPEAL FROM LBP-88-2

On Monday, May 2, 1988, the Governments (Suffolk County, New York State, and the Town of Southampton) received the NRC Staff's brief<sup>1/</sup> in response to LILCO's appeal from the OL-5 Licensing Board's February 1, 1988 Initial Decision<sup>2/</sup> on the February 13, 1986 exercise of the LILCO Plan for Shoreham (the "Exercise"). For the reasons set forth below, the Governments seek leave to respond to certain matters raised in the Staff's Brief.

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<sup>1/</sup> NRC Staff Response to LILCO Appeal of the February 1, 1988 Initial Decision on the Emergency Plan Exercise, dated April 28, 1988 (hereafter, "Staff's Brief").

<sup>2/</sup> Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-88-2, NRC \_\_\_\_\_, slip op. (February 1, 1988) (hereafter, "LBP-88-2").

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In supporting the LILCO appeal of LBP-88-2,<sup>3/</sup> the Staff urges that the Appeal Board reverse the Licensing Board and find that there are no fundamental flaws in LILCO's Plan. See, e.g., Staff's Brief at 2. The Staff thus takes a position on appeal that differs dramatically<sup>4/</sup> from the position it took in its proposed findings filed September 11, 1987. See NRC Staff's Proposed Findings of Fact and Conclusions of Law on the February 13, 1986 Emergency Planning Exercise, Sept. 11, 1987 (hereafter, "Staff Findings"). Indeed, in its Findings, the Staff concluded that, with respect to three of the five contentions to which the LILCO appeal is addressed -- Contentions EX 40, 41 and 50 -- the evidence of record demonstrated that fundamental flaws existed in LILCO's Plan.<sup>5/</sup> The Staff concluded in September 1987 that deficiencies in LILCO's Plan revealed during the Shoreham Exercise "are significant to the overall ability of LERO to implement the LILCO Plan" and "preclude[d] a

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<sup>3/</sup> See LILCO Brief on Appeal from the February 1, 1988 Partial Initial Decision on Emergency Planning Exercise, dated March 7, 1988 (hereafter, "LILCO Brief").

<sup>4/</sup> The Staff is being less than straightforward when it states that its position has changed "in some respects." Staff's Brief at 2, n.2.

<sup>5/</sup> See Staff Findings at 49 (Contention EX 40: "In regard to the timely manning of the TCPs for a controlled evacuation, . . . LILCO did not demonstrate reasonable assurance that its Plan can and will be implemented in the event of an emergency"); id. at 83-84 (Contention EX 41: "'the exercise revealed . . . deficiencies which preclude a finding of reasonable assurance that protective measures can and will be taken, i.e., fundamental flaws in the plan' in regard to the removal of roadway impediments"); id. at 185-86 (Contention EX 50: "This deficiency in the training program requires us to find that there is not at this time reasonable assurance that adequate protective measures can and will be taken in the event of an emergency at Shoreham.").

finding of reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency, i.e., show[ed] a fundamental flaw in the [LILCO] Plan." Staff Findings at 187.

The Staff's abrupt about-face in April 1988 is "explained" by the issuance of the Commission's new emergency planning rule. 52 Fed. Reg. 42078 (Nov. 3, 1987); see Staff's Brief at 2, n.2. Nothing more is offered by the Staff to explain its shift in position. However, the Staff's new approach appears to be that, under the Commission's new rule, a deficiency revealed during the exercise of a utility plan can only rise to the level of a fundamental flaw if that deficiency is so pervasive and onerous in nature that it affirmatively impedes an unplanned, or ad hoc, governmental response to a radiological emergency. See, e.g., Staff's Brief at 14 ("the deficiency must preclude the taking of a range of adequate protective measures (even where state and local best efforts are exercised.)").

The Governments seek leave to respond on two matters. First, the Governments seek to demonstrate that since the Staff's new arguments were never presented to the Licensing Board, they should not be entertained by the Appeal Board. If granted leave to respond, it will be shown that although the Staff asserts that the position it takes on appeal is based upon the Commission's new rule -- which was promulgated following the filing of the Staff's Findings -- the real nexus between the Staff's position

and the fundamental flaw standard it argues for is the Commission's decision in CLI-86-13. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986). CLI-86-13 was decided long before the Staff's Findings were filed, however. Thus, there is no excuse for the Staff's failure to raise this issue before the Licensing Board.

Second, the Governments seek leave to respond to the substance of the Staff's argument that CLI-86-13 and the new rule somehow control the Exercise litigation and the Decision rendered by the Board below (LBP-88-2). The Governments have never had an opportunity to address this issue. LILCO did not argue this matter on appeal,<sup>6/</sup> and thus the Governments did not address it in their April 18 brief.<sup>7/</sup> And, since the Staff never even mentioned the issue in its Findings, the Governments had no way to anticipate that it might appear for the first time in the Staff's Brief.<sup>8/</sup>

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<sup>6/</sup> While LILCO mentions the Commission's new rule in passing, it does not argue, as does the Staff, that the rule somehow changes the fundamental flaw standard. See, e.g., LILCO Brief at 2.

<sup>7/</sup> See Governments' Brief in Opposition to LILCO Appeal from LBP-88-2, dated April 18, 1988.

<sup>8/</sup> The Staff took no appeal from LBP-88-2, nor did it ever indicate the dramatic change in position regarding the Decision below, prior to the filing of its Brief before this Board. Thus, for example, the Staff never sought reconsideration of LBP-88-2; similarly, between the time the new rule was adopted (October 29, 1987) and the issuance of LBP-88-2 on February 1, 1988, the Staff never indicated to the Licensing Board or parties that it believed the applicable standards had changed. If the Staff is now permitted to argue the merits of the fundamental flaw standard advocated in its Brief, the Governments will have been blind-sided in a way never intended by the Commission's Rules of  
(footnote continued)

In short, either the Staff's Brief should be rejected by this Board, or the Governments must be given the opportunity to respond to the new and heretofore unannounced approach taken by the Staff with respect to the fundamental flow standard governing litigation of exercise results. For the foregoing reasons, the Governments respectfully request that they be granted leave to respond to the Staff's Brief.

Respectfully submitted,

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(footnote continued from previous page)  
Practice. Pursuant to 10 CFR § 2.762, the Staff may file a responsive brief in support of or in opposition to an appeal to this Board. Here, however, the Staff's Brief, while styled a responsive brief, is in reality much more. The Staff has become an appellant, and should have filed its Brief pursuant to the provisions of Section 2.762(b), so as to provide the Governments a fair opportunity to respond.

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CERTIFICATE OF SERVICE

I hereby certify that copies of GOVERNMENTS' MOTION FOR LEAVE TO RESPOND TO NRC STAFF BRIEF IN RESPONSE TO LILCO APPEAL FROM LBP-88-2 have been served on the following this 5th day of May, 1988 by U.S. mail, first class.

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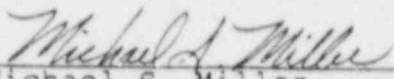
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