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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Appeal Board

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In the Matter of)	
)	
LONG ISLAND LIGHTING COMPANY)	Docket No. 50-322-OL-5
)	(EP Exercise)
(Shoreham Nuclear Power Station,)	
Unit 1))	

LILCO'S MOTION FOR LEAVE TO FILE REPLY BRIEF

On April 18, 1988, Intervenors New York State, Suffolk County, and the Town of Southampton filed their "Governments' Brief in Opposition to LILCO Appeal from LBP-88-2" (hereinafter "Intervenors' Brief"). The NRC Staff filed its "NRC Staff Response to LILCO Appeal of the February 1, 1988 Initial Decision on the Emergency Plan Exercise" on April 28, 1988 (hereinafter "Staff's Brief"). LILCO's reply to these briefs^{1/} is attached, and LILCO hereby asks leave to file it. LILCO believes there is good cause to file a reply, for the following reasons:

1. Intervenors, and to a lesser degree the Staff, mischaracterize the Board's decision and LILCO's arguments in support of this appeal;
2. Intervenors rely on evidence which was not the basis for the Licensing Board's decision;
3. Intervenors, and in some cases the Staff, misinterpret the law applicable to the issues on appeal; and
4. The issues raised by LILCO's appeal are of first impression, are essential to LILCO's license application, and therefore deserve to be fully articulated before the Appeal Board.

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^{1/} The NRC Staff's brief supports LILCO's bottom-line request that LBP-88-2 be vacated in those areas where the Board found fundamental flaws. Staff's Brief at 61. However, the Staff does not support all the arguments presented by LILCO in its March 14 Brief. Accordingly, LILCO seeks to reply to the Staff's Brief only in those areas where the Staff disagrees with LILCO's March 14 Brief.

1. Intervenors, and to a Lesser Degree the Staff, Mischaracterize the Board's Decision and LILCO's Arguments in Support of Its Appeal

Intervenors systematically mischaracterize the Licensing Board's decision and the evidence on which that decision is based. Intervenors, for example, suggest that the mobilization of Traffic Guides at the Patchogue Staging Area resulted in a "near deficiency" rating by FEMA, Intervenors' Brief at 41, when the Board concluded that "the mobilization of traffic guides from Patchogue was timely." LBP-88-2 at 84. At another place, intervenors claim that LILCO's testimony on the effect of the delay in staffing traffic control points was "discredited" and "explicitly rejected." Intervenors' Brief at 44. In fact, the transcript pages cited by Intervenors show nothing more than a colloquy among a LILCO witness and Judges Paris and Shon on the methodology used to calculate evacuation times.

Intervenors and the Staff also mischaracterize LILCO's arguments in support of its appeal. For example, on Contention EX 41 Intervenors mischaracterize LILCO's res judicata argument, claiming that LILCO would bar the Licensing Board from reviewing the adequacy of the communications scheme in the Plan. Intervenors' Brief at 23-25. In fact, LILCO argued that the Board was limited to review only of Plan areas affected by exercise events. The Staff mischaracterizes LILCO's position on Contention EX 40 by stating that the Board adopted LILCO's standard for assessing whether a fundamental flaw was revealed -- namely, whether mobilization was accomplished in time to achieve a "controlled" evacuation. Staff's Brief at 47. In fact, LILCO argued that the determination of whether a controlled evacuation would have been accomplished was only the first step in the Board's review process. If mobilization had been completed in one hour following the evacuation recommendation as is needed to assure a controlled evacuation under the LILCO Plan, then the Board's inquiry would have been at an end, since the Plan would have been executed exactly as designed. If there were delays in the mobilization of Traffic Guides, then LILCO argued that the Board needed to

determine whether those delays would have significantly extended evacuation times and hence had a significant effect on public health and safety.

2. Intervenors Rely on Evidence Which Was
Not the Basis for the Licensing Board's Decision

At numerous places throughout their brief, Intervenors misstate or overstate the evidence on which the Licensing Board relied in its decision. For example, Intervenors claim that in its decision on the adequacy of LERO's EBS messages, the Board relied on a variety of alleged problems including ones on which "the County's witnesses testified." Intervenors' Brief at 32-33. In fact, there is no evidence that the Board relied on alleged problems raised by Intervenors' witnesses. The Board's decision on the EBS message was based on only three "significant shortcomings" from which it erroneously concluded that a fundamental flaw existed.

3. Intervenors, and in Some Cases the Staff,
Misinterpret the Law Applicable to the Issues on Appeal

In its March 14 brief, LILCO shows that the Licensing Board adopted a definition of the term "fundamental flaw" that was more expansive than either Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), or the Commission's guidance in CLI-86-11. LILCO Brief at 10-20. The Board clearly broadened the test in application to include plan implementation on the day of the exercise as distinguished from just the plan itself.

Intervenors endorse the Board's application of the "fundamental flaw" test, arguing that implementation problems on the day of the exercise constitute fundamental flaws. Their argument ignores the predictive nature of emergency planning findings and disregards the Commission's view that the adequacy of a plan should not depend on "minor or ad hoc problems occurring on the exercise day." Union of Concerned Scientists, 735 F.2d at 1448. The attached reply brief demonstrates that Intervenors have misinterpreted the relevant case law on "fundamental flaw."

The Staff endorses the Board's use of post-exercise drill reports as an appropriate factual basis for drawing conclusions about the efficacy of the LERO training program. In so doing, the Staff misinterprets the jurisdiction conveyed to the Licensing Board in CLI-86-11 and, less directly, by Union of Concerned Scientists. The attached reply brief demonstrates that the Board committed reversible error in basing its decision on non-exercise material.

4. The Issue Raised by LILCO's Appeal Are of First Impression and Are Essential to LILCO's License Application

The Licensing Board's decision presents issues which are of first impression in several respects. The Board's decision is the first to review the exercise of a utility-sponsored plan, and is the first to issue in the absence of a "reasonable assurance" finding from FEMA. The decision necessarily involves defining the role of a Licensing Board in reviewing exercise results. In particular, it involves interpretation of the "fundamental flaw" standard and the effect of the concept of res judicata in NRC licensing proceedings.

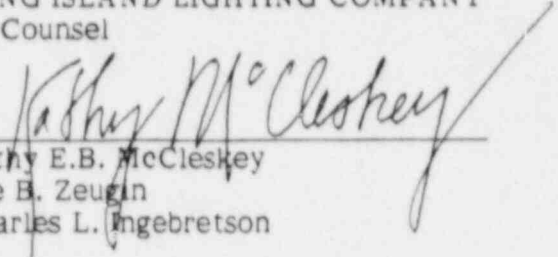
Additionally, the Board's decision on the exercise results is essential to LILCO's license application. With the exception of several discrete planning issues presently on remand before another Licensing Board, LILCO's Plan has been adjudged adequate. The Appeal Board's decision on the issues raised by the decision below will have a direct and immediate effect on the scope of issues potentially pending before the Licensing Board, and hence on whether a full power license issues for Shoreham.

Conclusion

For the reasons stated above, LILCO asks that the Appeal Board grant leave to file LILCO's reply brief, which is attached.

Respectfully submitted,

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