UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

LILCO'S REPLY TO INTERVENORS' AND NRC STAFF'S OPPOSITION TO LILCO'S APPEAL FROM LBP-88-2

HUNTON & WILLIAMS
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I. INTRODUCTION

LILCO files this brief in response to the "Governments' Brief in Opposition to LILCO Appeal from LBP-88-2," dated April 18, 1988 (hereinafter Intervenors' Brief), and "NRC Staff Response to LILCO Appeal of the February 1, 1988 Initial Decision on the Emergency Plan Exercise," dated April 28, 1988 (hereinafter Staff's Brief). Intervenors oppose all of LILCO's objections to the Board's findings of "fundamental flaws" in communications, mobilization of Traffic Guides, and training. The Staff's brief supports LILCO's ultimate conclusion that the Board's decision should be vacated in those areas where the Board found fundamental flaws in the LILCO Plan. However, the Staff opposes a number of LILCO's objections including the use of post-exercise drill materials, the res judicata effect of prior emergency planning decisions and the correctness of admission of Contention EX 50 dealing with LILCO's training program.

Intervenors' appeal brief spends a great deal of time repeating the Board's 263-page decision on the exercise. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-2, 27 NRC ___ (February 1, 1988). In doing so, Intervenors mischaracterize in some respects the Board's decision and LILCO's arguments in support of this appeal, rely upon evidence which was not the basis for the Board's decision, and misinterpret the law on which the Licensing Board's decision is based. The Staff, while agreeing with LILCO's ultimate conclusion, nevertheless misapplies applicable law or misinterprets LILCO's arguments in disagreeing with portions of LILCO's brief. This brief addresses, issue by issue, the "fundamental flaw" standard and the four contention groups (EX 38 and 39, EX 40, EX 41, and EX 50) discussed in the Intervenors' and Staff's briefs. For the reasons stated below, their arguments should be rejected on appeal.

II. THE "FUNDAMENTAL FLAW" STANDARD

There are strong disagreements among the parties about what "fundamental flaw" means in the context of a licensing board's review of exercise results. Indeed, each party has offered a different definition of the term.[1/] The definition adopted by the Licensing Board does not match any party's definition and even that "definition" changes throughout the Board's opinion. The conclusion to be drawn from this controversy may be that it is difficult, if not impossible, to precisely define the term "fundamental flaw." Rather, it may be more productive to inquire: what is a Licensing Board supposed to be about in its review of exercise results? Each party, relying upon the Union of Concerned Scientists,[2/] Shearon Harris[3/] and CLI-86-11[4/] decisions, comes to a different conclusion.

Intervenors and the Licensing Board determined, incorrectly, that the Licensing Board's role in exercise review was a de novo review of the LILCO Plan in light of the actions of individuals on the day of the exercise in implementing the Plan. Coupled with evidence from post-exercise activities, the Licensing Board found "fundamental flaws" in communications, timely mobilization of Traffic Guides and training. LILCO submits that Intervenors and the Licensing Board have not properly distinguished between a determination of whether the Plan is implementable as a basic matter versus whether the Plan was implemented properly on the day of the exercise. The first inquiry is the proper one for the Licensing Board; the second is not.

1/ The Staff has, in fact, advocated two different definitions.

2/ Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985).

3/ Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-85-49, 22 NRC 899 (1985).

4/ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577 (1986).

Intervenors wrongly characterize LILCO's view of the decisions in Union of Concerned Scientists, Shearon Harris, and CLI-86-11 as "compel[ling] a conclusion that issues of plan implementation are virtually per se non-litigable in an exercise context." Intervenors' Brief at 4. In so doing, they play semantic games with the word "implement." There is no question but that a "reasonable assurance" finding under 10 CFR § 50.47(a) sheds light upon the implementability of an emergency plan, and Intervenors note that "information about plan implementability is the essential contribution of an exercise." Intervenors' Brief at 5 (emphasis in original, quotation and citation omitted). LILCO has never asserted otherwise. But what Intervenors have done throughout this litigation is to confuse plan implementability with implementation on the day of an exercise. Rather than asking whether LERO's actions during the exercise pointed up serious flaws in the implementability of the written LILCO Plan and procedures, Intervenors have consistently urged the Licensing Board to base its decision on whether individual LERO workers implemented the Plan accurately on the day of the exercise. At Intervenors' urging, the Licensing Board answered the wrong question in LBP-88-2.

LILCO relies upon the language in CLI-86-11 that exercise review "is restricted to determining if the exercise revealed any deficiencies which preclude a finding of reasonable assurance that protective measures can and will be taken, i.e., fundamental flaws in the plan." 23 NRC at 581. Intervenors dismiss this language, claiming that "[t]he implementability issue was not presented squarely in CLI-86-11" and accusing LILCO of ignoring the "reasonable assurance" language in the decision. Intervenors' Brief at 7. But it is the Intervenors who ignore the "reasonable assurance" language, not LILCO. Exercise review is limited to implementability flaws in the plan as revealed by the exercise activities. What Intervenors identified in their contentions, and the Board identified as "fundamental flaws" in its decision, are implementation

problems on the day of the exercise by individuals, not implementability problems in the plan as shown by the response of the organization on the day of the exercise.

Intervenors make much of the language in the Commission's decision in Shearon Harris, that "[e]ven though the results of the May 1985 exercise show some problems, they do not show a flaw in planning or implementation that would require another exercise prior to issuance to a full power license." Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-86-24, 24 NRC 769, 777 (1986) (emphasis added); see Intervenors' Brief at 7-8. This language is consistent with the earlier Shearon Harris licensing board decision, relied upon by LILCO, Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-85-49, 22 NRC 899, 911 (1985). In the latter case, however, implementability of the plan, not the implementation on the day of the exercise, was considered. For example, the implementability of the plan was deemed not to be affected even though no EBS messages went out on the day of the exercise, resulting in poor implementation of the plan by individuals that day.

This implementability/implementation distinction is pointed up by consideration of the exercise activities upon which the Licensing Board based its findings of fundamental flaws.[5/] The Licensing Board relied upon the activities of the Evacuation Route Coordinator, for example, on the day of the exercise to determine that his performance in part constituted a "communications flaw" in the plan. His individual performance also contributed heavily to a finding of a fundamental flaw in "training." But individual's performance on the day of the exercise does not prove an overall implementability problem with a Plan involving 2000-odd persons in over 100 job titles. There is no

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5/ The Licensing Board improperly coupled its consideration of activities on the day of the exercise with an assessment of post-exercise drill reports in making its fundamental flaw findings. LILCO challenges the Licensing Board's reliance on those drill reports, as discussed below in the contention by contention response to Intervenors' appeal brief.

provision in the Plan to be changed because of the Evacuation Route Coordinator's difficulties on the day of the exercise. Rather, his performance goes to the implementation of the Plan on the day of the exercise. One might reasonably conclude that he needs more training. But his performance does not suggest that the training program needs to be revamped. It is that basic distinction which the Intervenors, and the Licensing Board, failed to recognize.

The distinction is supported by case law and regulatory requirements. The Union of Concerned Scientists decision, discussed in some detail in LILCO's brief in chief, recognized the role that exercises play in the NRC licensing determination, coming as they do at the final stage of emergency planning review.[6/] Properly, the NRC is concerned only secondarily with the level of preparedness on a particular day of an exercise.[7/]

6/ Intervenors disingenuously suggest that, in Union of Concerned Scientists, the D.C. Circuit disapproved the NRC's position that emergency planning exercises are relevant to the licensing decision only to the extent they reveal fundamental flaws in emergency plans. Intervenors' Brief at 10-11. Nothing could be further from the truth. The court held that the NRC could limit the exercise hearing to "issues -- not already litigated -- that it considers material to its decision." Union of Concerned Scientists, 735 F.2d at 1448. Specifically, the court found that

> section 189(a)'s hearing requirement does not unduly limit the Commission's wide discretion to structure its licensing hearings in the interests of speed and efficiency. For example, the Commission argues throughout its brief that the exercise is only relevant to its licensing decision to the extent it indicates that emergency preparedness plans are fundamentally flawed, and is not relevant as to minor or ad hoc problems occurring on the exercise day. Today, we in no way restrict the Commission's authority to adopt this as a substantive licensing standard.

Id. (emphasis added) (footnote omitted). The court's comment that the Commission might still have to defend that standard is nothing but an acknowledgement that, like any administrative agency's decision, the NRC's hearing standard could be challenged in court.

7/ An exercise provides only a snapshot of the level of preparedness on the day of an exercise. As the Commission has recognized the level of emergency preparedness can vary throughout the term of a license. 46 Fed. Reg. 61,135 col. 1 (December 5, 1981). Thus, the Commission has stated that no special significance should be attached to the actual state of preparedness just prior to license issuance. Id.

That is why 10 CFR § 50.54(s)(2)(ii) gives licensees four months to correct problems that reduce their state of emergency preparedness below the "reasonable assurance" level; after that time, if the deficiency is still not corrected, the Commission can (but need not) order the plant to be shut down or take other appropriate enforcement action.[8/] In the meanwhile, the plant is required to bring its level of preparedness up to par. But no suggestion is made that such a deficient state of preparedness necessarily connotes a flaw in the implementability of its plan. Here the issues that the Licensing Board has focused on are not implementability issues but level-of-preparedness issues. Shoreham's license should be conditioned upon bringing the level of preparedness up to par on those issues, subject to Staff confirmation.[9/]

Finally, Intervenors take issue with LILCO's argument that the Licensing Board should have analyzed as a threshold matter whether the actions it characterized as "fundamental flaws" would have had a significant impact on public health and safety. Intervenors argue that "[n]othing in CLI-86-11 imposes" a requirement that a health and safety inquiry be made. Intervenors' Brief at 17-18. Protection of the public health and safety in nuclear matters is the province of the Nuclear Regulatory Commission, and offsite emergency preparedness is nothing more than a subset of health-and-safety jurisdiction. It goes without saying that issues that do not impact the public health and safety are not within the Licensing Board's province. Intervenors, while fond of talismanic incantations of the "reasonable assurance standard" in their arguments on the

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8/ In footnote 10 to their brief, Staff Brief at 17 n.10, the Staff suggests without elaboration that a different "reasonable assurance" finding for emergency preparedness may apply to operating plants than to NTOLs. Nothing in the regulations suggests a different health and safety standard.

9/ While Intervenors attack LILCO's three-part test for a fundamental flaw, saying it goes far beyond the definition allowed in CLI-86-11, LILCO submits that its definition provides a framework for considering whether an exercise reveals problems in plan implementability. The definition urged by Intervenors sheds no light upon that inquiry.

exercise litigation, seem to have forgotten what there is supposed to be reasonable assurance of.

III. "FUNDAMENTAL FLAWS" FOUND BY THE BOARD

A. Traffic Impediments (EX 41)

In discussing LERO's response to two hypothetical roadway impediments during the February 13 exercise, Intervenors make three arguments in reply to LILCO's reasons for reversal of that portion of the Licensing Board's opinion.[10/] Intervenors' Brief at 20-28. They argue that:

> (1) The Licensing Board had ample factual bases for its conclusions that fundamental flaws existed in both the lateral and vertical communication structures in the LILCO Plan and that those conclusions were not inconsistent with the doctrine of res judicata;
>
> (2) The Board's finding of a fundamental flaw with regard to LILCO's response to the two traffic impediments was based on the failures of multiple players, but even if based solely on the performance of one player, was sufficient justification for finding a fundamental flaw; and

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10/ LILCO has argued on Contention EX 41 that:

> (1) The Board's finding of a fundamental flaw in the LILCO Plan, because the Plan does not permit lateral communications among field workers, is unrelated to exercise events and is legally in error because the Board failed to accord res judicata effect to the prior emergency planning decision;
>
> (2) The Board erred in finding a fundamental flaw in the LILCO Plan based solely on problems resulting from the performance of a single exercise participant; and
>
> (3) The Board's finding of a fundamental flaw was, in part, improperly based on events in post-exercise training drills.

Intervenors include a fourth argument in their discussion of Contention EX 41 which concerns the all-encompassing "communications" fundamental flaw found by the Licensing Board. This "fundamental flaw," which includes numerous events unrelated to LILCO's response to the two roadway impediments, was discussed in LILCO's March 14 Brief at pages 50-61. The other communication problems that comprise this "fundamental flaw" are discussed in the section on Contentions EX 38 and 39 below.

(3) The Licensing Board did not base its fundamental flaw finding on evidence from post-exercise drill reports.

As detailed below, these arguments are without merit.

Intervenors begin by arguing that the fundamental flaw found in the LILCO Plan's communication scheme involved lateral as well as vertical communications. Intervenors' Brief at 22-25. Intervenors argue that the LILCO Plan is flawed primarily because of the vertical communications structure. The simple response to Intervenors' argument is that the Board did not find a fundamental flaw in the vertical structure of communications in the LILCO Plan.[11/] Indeed, Intervenors' "vertical" argument is devoid of specific references to the Board's decision, and Judge Frye's dissent establishes that the majority's "fundamental flaw" finding was based on the absence of lateral communication capability among field workers, not on the Plan's vertical communications scheme. Judge Frye dissented because he could not find "support in the record for the conclusion that the exercise demonstrated that the communications structure set up by the plan is itself flawed." LPB-88-2 at 254. He added:

> While I can readily agree that the plan's vertical communications system is less desirable than a system which permits both lateral and vertical communications, I cannot conclude that the exercise demonstrated that the plan is fundamentally flawed because of its failure to provide for [lateral communications].

Id. at 255.

As a result of this misreading of the Board's decision, Intervenors then proceed to mischaracterize LILCO's res judicata argument.[12/] See Intervenors' Brief at 22-25.

11/ As LILCO noted in its March 14 Brief, the majority mentions in the training section (Contention EX 50) of LBP-88-2 that it found a fundamental flaw in the vertical communications chain of the LILCO Plan. LILCO Brief at 40 n.29. This single reference is contrary to the express language of the Board's decision on Contention EX 41.

12/ The doctrines of collateral estoppel and res judicata apply in NRC proceedings. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 212-13, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974).

Intervenors portray LILCO's argument as an attempt to bar the Licensing Board from having inquired at all into the adequacy of the communications structure in the LILCO Plan. But what LILCO argued is that the Board should have inquired into the adequacy of the LILCO Plan only in those areas where exercise events provided a factual basis for making that assessment. In the case of the impediments, the restrictions on lateral communications among field workers, on which the Board based its findings, had demonstrably no effect on the adequacy of LERO's response. As a result, the majority below improperly reversed the prior OL-3 Board decision, not on the basis of exercise facts but on their disagreement with that decision. In doing so, the Board exceeded its mandate to review exercise results for "fundamental flaws" in the Plan. See LILCO Brief at 40-42.

Next, Intervenors attempt to argue that the Board's finding of a "fundamental flaw" in lateral communications is supported by evidence from Suffolk County police witnesses. Intervenors' Brief at 25. The "evidence" cited by Intervenors merely repeats evidence presented in the planning litigation advocating decisionmaking in the field rather than at a centralized location during a radiological emergency. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 729-30 (1985). The OL-3 Board properly rejected that testimony. Id. at 734-37. Exercise events shed no new light on this planning dispute, and the cited testimony does not include exercise-specific facts.

Intervenors attempt, in two ways, to refute LILCO's claim that the Board based its fundamental flaw on the performance failures of a single individual responding to the impediments. Intervenors' Brief at 25-26. First, they argue that even if the problems with the response to the impediments resulted solely from the actions of the Evacuation Route Coordinator, the LILCO Plan is fundamentally flawed because it depends so heavily on the performance of a single individual. Id. This argument ignores

considerable testimony that was presented by LILCO, LILCO Test. Cont. EX 41, ff. Tr. 272, at 20-22, and accepted by the Board, LBP-88-2 at 48, that it was FEMA's handling of the impediments, not LERO's organizational structure, that prevented use of available, alternate means of verifying the existence of the impediments. Both accidents would have been almost immediately identified by LERO workers had they actually occurred. LILCO Test. Cont. EX 41, ff. Tr. 272, at 21. Those workers would have reported the accident to persons other than the Evacuation Route Coordinator. Thus, the Intervenors' assertion is unsupportable.

Alternatively, Intervenors argue that many LERO personnel, not merely a single individual, committed errors in responding to the impediments. Intervenors' Brief at 26. The record and the Board's conclusion do not support this thesis. The three inadequacies specifically identified by the Board as the bases for its fundamental flaw finding, LBP-88-2 at 48-50, all involve the actions of the Evacuation Route Coordinator.

Finally, Intervenors contend that the Licensing Board did not rely on post-exercise drill reports as a basis for its fundamental flaw finding on LERO's response to the impediments. Intervenors' Brief at 27-28, 64. The Board's opinion demonstrates otherwise. In the very paragraph in which the Board first finds a fundamental flaw in the LILCO Plan as a result of LERO's response to the two impediments, the Board includes a detailed discussion of post-exercise drill reports. See LBP-88-2 at 50-51. In addition, almost five pages of the Board's decision on Contention EX 41 are devoted to a discussion of the same post-Exercise drill reports. There can be no doubt that the Board improperly relied, at least in part, on these drill reports as a basis for its "fundamental flaw" determination.

B. Public Information (EX 38, 39, and 22.F)

In addressing the public information contentions, Intervenors overstate the evidence that the Board relied on in finding fundamental flaws in the LILCO Plan, downplay the Board's obligation to find significant health and safety effects as a prerequisite to finding fundamental flaws, and attempt to avoid the res judicata effects of previous litigation on the LERO EBS messages.[13/] Their arguments should be rejected.

First, Intervenors assert that a "basic fallacy" exists in LILCO's Brief on the public information issues, namely, "LILCO's assertion that the Board had to find that each problem, considered in isolation, had to affect the public health and safety." Intervenors' Brief at 36. Intervenors argue that "[t]his simply is not the test," and that the Board understandably felt no obligation "to intone this tautology ritualistically at every turn." Id. Intervenors mischaracterize LILCO's position and misstate the actual test.

LILCO never argued for ritualistic intonation, but instead for a considered judgment of the effect of any alleged problems on public health and safety, and a finding that any problems with the LILCO Plan serious enough to be considered "fundamental flaws" be such as to have significant deleterious effects. LILCO Brief at 27, 66. It is not evident from the Board's decision that it made that inquiry into materialty. If it

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13/ LILCO has argued on Contentions EX 38, 39, and 22.F that:

> (1) The Board erred in admitting Contention EX 39 (Rumor Control) because the alleged factual bases, even if accepted as true, did not establish the requisite effect on public health and safety to constitute a "fundamental flaw;"
>
> (2) The Board found fundamental flaws in the public information area without considering the public health and safety consequences of the identified exercise problems; and
>
> (3) The Board's decision was partly based on a criticism of prescripted EBS messages that were reviewed and accepted in the prior planning proceeding.

LILCO Brief at vii, 20-21, 27-36, 44.

had, the few problems in press conferences, EBS messages, and copying capability that occurred on the exercise day would not have properly been characterized as "fundamental flaws." See LILCO Brief at 31-36.

Second, Intervenors accuse LILCO of omitting "much of the evidence the Board relied on" and then using the remaining evidence to argue that the Board's decision lacks basis and articulation.[14/] Intervenors' Brief at 29. LILCO disagrees; the public information problems were in fact few. See LILCO Brief at 27; LBP-88-2 at 157-58, 167-68.[15/] Intervenors assert that "[t]he Board had before it, and relied on, far more than this." Intervenors' Brief at 29. It is true that the Board "had before it" much more, because the Intervenors alleged a plethora of public information problems. But is not true (at least it is not apparent) that the Board relied on problems other than those cited by LILCO. Indeed, Intervenors exaggerate the number of problems actually relied upon by including shortcomings that the Board expressly found were not significant.

14/ Intervenors' brief on the public information issues points up just how unclear and unenlightening LBP-88-2 is. While LILCO believes that it is unclear how many "fundamental flaws" the Board found in the public information area, LILCO Brief at 27, the Intervenors assert that the PID clearly identifies three, Intervenors' Brief at 28. And whereas LILCO believes that only four unrelated and relatively inconsequential shortcomings formed the basis of the Board's fundamental flaw findings, LILCO Brief at 27, Intervenors assert that the Board relied on numerous others, Intervenors' Brief at 29. Disagreement over the number of fundamental flaws found and the scope of the evidence relied upon are not particularly noteworthy in and of themselves, since the Appeal Board can decide such matters for itself. However, such disagreement does show that the Board's decision is sufficiently imprecise and unhelpful to permit widely divergent views of what was and was not determined, and why. See also LILCO Brief at 63-69.

15/ LILCO accurately summarized the public information problems as follows: (1) failure to furnish timely copies of EBS messages to the media at the ENC and to Rumor Control; (2) failure of the LERO Spokesperson to answer one question on the details of the impediments, to mention sheltering of cows as part of a summary of current protective actions, and to correct two misstatements by Dr. Brill, a Brookhaven National Laboratory scientist; and (3) three inconsistencies in the wording of EBS messages. LILCO Brief at 27, 35.

For example, Intervenors overstate the number of inconsistencies that the Board found in LERO's EBS messages. Intervenors cite three problems "which were conceded by LILCO," numerous additional problems that were alleged by Intervenors' witnesses, and then the three problems that the Board found "significant." Intervenors' Brief at 32-33. Intervenors imply that all of these alleged EBS problems were relied upon by the Board in finding a "fundamental flaw." But the plain fact is that, notwithstanding Intervenors' argument, the Board found only three "significant" shortcomings in the EBS messages, and somehow judged them to be "an integral part of the fundamental flaw found under Contentions EX-38 and EX-39." LBP-88-2 at 167-68. The Board did not characterize other alleged problems as significant.

Finally, Intervenors argue that they were not precluded by the doctrine of res judicata from litigating further the prescripted EBS messages even though the virtually identical messages had been litigated in the planning hearings. Intervenors' Brief at 37-38. Intervenors assert that when the EBS messages were litigated previously, they did not know the context in which the messages would be disseminated, or that LERO "would fail to explain" the language contained in the messages. Id. They say that "the problems in the prescripted EBS messages were not focused until actual implementation during the Exercise demonstrated which messages would be used, in which order, and in conjunction with what other information." Id. at 37.

The language of the EBS messages was litigated and approved by the Licensing Board in the prior planning litigation. LBP-85-12, 21 NRC at 698 (Board found that Intervenors' criticisms of the EBS messages were "bald, unsupported assertions," and that Intervenors had failed to meet their burden of going forward with them). Intervenors' subsequently proclaimed inability to anticipate certain contingencies has nothing to do with the language in the EBS messages. Their arguments here that the previous litigation should not be deemed final are nothing but feeble excuses to avoid the effects of their previous inability to demonstrate flaws in the EBS messages.

C. Mobilization of Traffic Guides (EX 40)

Intervenors' defense of the Licensing Boards' decision on Contention EX 40 -- the mobilization of Traffic Guides during the Exercise -- mischaracterizes the factual record, the Board's decision based on that record and LILCO's arguments in this appeal.[16/] See Intervenors' Brief at 38-45. Intervenors begin by inaccurately describing the Board's decision in two important respects. See Intervenors' Brief at 38-41. First, Intervenors imply that the record demonstrates that LERO failed to mobilize its traffic guides in a timely manner at all three staging areas. In particular, Intervenors suggest that the mobilization of Traffic Guides at the Patchogue staging area resulted in a "near deficiency" rating by FEMA. Id. at 41. This is simply wrong; the Board clearly concluded, contrary to Intervenors' suggestion, that "the mobilization of Traffic Guides from Patchogue was timely." LBP-88-2 at 84. This conclusion is important because it does not follow logically that the LILCO Plan is fundamentally flawed when an entire complement of Traffic Guides at one staging area successfully implemented that Plan. Rather, it is more appropriate to conclude that more practice is needed to improve mobilization times at the other two staging areas.

Second, Intervenors cite two isolated manning levels at a misleading time, see Intervenors' Brief at 40 and n.43, to give the impression that LERO totally failed to achieve a timely mobilization of its Traffic Guides during the February 13, 1986

16/ LILCO has argued on Contention EX 40 that:

> (1) The Board's finding of a "fundamental flaw" ignored proffered testimony on the significance of delays in the mobilization of LERO Traffic Guides on public health and safety; and
>
> (2) The Board incorrectly based its "fundamental flaw" decision on non-exercise-related testimony that was considered and rejected during the prior planning litigation.

LILCO Brief at vi, 23-27, 42-43.

exercise. In so doing, Intervenors have mischaracterized the spectrum of time over which mobilization was accomplished by selecting a single arbitrary point in time of their own choosing.[17/] An accurate presentation of the mobilization times of LERO Traffic Guides is contained on pages 73-76 of LBP-88-2.

Having created an improper impression of the bases for the Board's decision, Intervenors then attempt to refute LILCO's criticisms of that decision by, in part, mischaracterizing LILCO's arguments. LILCO's primary dispute with the Licensing Board's disposition of Contention EX 40 centers on the test the Board used to decide whether a fundamental flaw in the LILCO Plan was revealed by the actual mobilization of LERO Traffic Guides. LILCO Brief at 23-27. LILCO has argued that the Licensing Board based its "fundamental flaw" decision not on considerations of public health and safety as mandated by the Commission in CLI-86-11 but on a rigid, time-based test under which all, or virtually all, traffic control posts must be manned within an hour of the evacuation order in order for a fundamental flaw not to be found.[18/] Id. at 25-26.

Intervenors do not dispute that the Board's fundamental flaw finding was based on a rigid, time-based test. See Intervenors' Brief at 43, 45 n.52. Indeed, they endorse that test. Id. Intervenors go even further and attempt to defend the Board's decision by contending (1) that LILCO's entire argument is premised on a single sentence from

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17/ As the Board noted in LBP-88-2, the difference of a few minutes can make a substantial difference in the number of Traffic Guides mobilized. LBP-88-2 at 72-73 n.18. The Board did not consider a specific moment in time to be significant in considering the timeliness of the mobilization of Traffic Guides. Id.

18/ On this point, the Staff has mischaracterized LILCO's arguments in the exercise proceeding. The Staff states that the Board accepted LILCO's test for a "fundamental flaw" -- whether mobilization was accomplished in one hour so as to achieve a controlled evacuation. Staff's Brief at 47, 50. In fact, LILCO proposed the one-hour test as a threshold test. If Traffic Guides had been mobilized within the one-hour criterion then the Board's inquiry would have ended since the Plan would have been implemented exactly as designed. If the standard was not met, then the Board still needed to consider additional evidence to decide whether the delay would have affected public health and safety.

LBP-88-2 that LILCO has allegedly taken out of context, id. at 41-42, (2) that the Board made public health and safety findings on Contention EX 40, id. at 42-43, (3) that Board's decision not to consider evidence it had requested on the increase in total population dose that would have resulted from the delays in the mobilization of LERO Traffic Guides was correct, id. at 43-44, and (4) that LILCO's argument that 19 minutes would have been added to the total evacuation times as a result of delays in the mobilization of Traffic Guides "is without merit," id. at 44-45. None of these claims is correct.

First, LILCO did not take the statement regarding the Board's refusal to consider the significance of the delay in the mobilization of LERO Traffic Guides on public health and safety out of context. See Intervenors' Brief at 41 citing LBP-88-2 at 85. A review of the Board's brief, four-page "Discussion" of the merits of Contention EX 40, LBP-88-2 at 84-88, reveals that the Board did not consider the public health and safety evidence presented by LILCO, but instead looked only to see whether a time-based criterion showed a "controlled" evacuation would have been achieved.

Second, Intervenors base their claim that the Board considered public health and safety on the Board's statement that it agreed with FEMA that the mobilization delays were a "deficiency." Intervenors' Brief at 42. Since a FEMA "deficiency" is defined in terms of public health and safety, Intervenors reason that the Board must have conducted a proper inquiry into this essential issue. The bare use of the word "deficiency" in the Board's opinion hardly indicates a legally proper consideration of health and safety effects.

Third, Intervenors argue that the Board's failure to consider evidence that the Board itself requested on the change in total population dose that would have resulted from the delay in the mobilization of LERO Traffic Guides was harmless error. Intervenors' Brief at 44. Intervenors base this argument on their assertion that they would

have offered evidence that would have refuted LILCO's calculations which showed no change in total population dose. Intervenors' argument misses the point. The Board was under an obligation to consider relevant evidence in reaching its decision; by failing to consider obviously relevant evidence it committed legal error.[19/]

Fourth, contrary to Intervenors' claims, see Intervenors' Brief at 44, the Licensing Board did not "discredit" and "explicitly reject" LILCO's testimony that the delay in the staffing of traffic control points would only have added 19 minutes to the total evacuation time. The transcript pages cited by Intervenors (Tr. 1994-2012) contain a colloquy among LILCO witness Lieberman and Judges Paris and Shon concerning the methodology used by Mr. Lieberman to calculate the extension in total evacuation times. That discussion does not evidence a "discrediting" or "rejection" of Mr. Lieberman's analysis, nor does LBP-88-2. Intervenors also claim that the Board rejected LILCO's 19-minute delay testimony on the basis of Suffolk County's testimony. Intervenors' Brief at 44. Interestingly, the testimony cited by Intervenors in support of this argument is the same "background" testimony which in the next two paragraphs of their brief Intervenors claim played no role in the Board's decision. See Intervenors' Brief at 45. Intervenors cannot have it both ways.

Intervenors have failed to demonstrate that LILCO's arguments on Contention EX 40 lack merit. Therefore, it must be concluded that the Board committed multiple legal errors in deciding Contention EX 40 and should be reversed.

19/ Previously in the Shoreham proceeding, the Staff moved to strike testimony that included the results of polls of volunteer firemen, taken on behalf of Suffolk County, on the issue of role conflict. The Licensing Board granted the motion, but this Board reversed remanding the role conflict issue for further evidentiary proceedings including consideration of the stricken testimony. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 153-54 (1986).

D. Training (EX 50)

In their appeal brief, Intervenors have done little more than paraphrase the Board's own discussion of the training issues, bolstering their summaries of the Board's discussions by simplifying LILCO's objections to it and mischaracterizing the depth of the Licensing Board's decision. In doing so, they paint LILCO as a myopic entity incapable of understanding what all other parties have seen clearly: that exercise events proved the LILCO training program to be inadequate. That conclusion is not supported by the record.

1. Licensing Board Jurisdiction

In opposing LILCO's appeal, Intervenors support the Board's review of the LILCO training program against regulatory standards. Intervenors argue that the Licensing Board left open the adequacy of the training program in its emergency planning decision. But the adequacy of the training program is not any different from the adequacy of any of the other aspects of emergency planning for Shoreham that were considered in LBP-83-2. All issues of emergency planning were subject to the exercise determination; if exercise results had pointed to systemic problems in the Plan, the issue was litigable. The Board improperly conferred jurisdiction upon itself to look at any training matter it wished, without first making the determination that the exercise activities shed light on a systemic problem in the training program. The Licensing Board clearly exceeded its jurisdiction in reviewing the entire training program against regulatory standards, rather than scrutinizing the exercise to determine de novo whether it revealed patterns of behavior that suggested a problem with the training program itself and a consequent inability to protect public health and safety.

Moreover, contrary to Intervenors' assertions, LILCO is not the only party to suggest that the Licensing Board was not charged to re-review the entire LILCO training program; the Staff agreed in its findings that that would amount to relitigation

of planning issues resolved in the PID, Staff Proposed Findings at 147, see also Staff Brief at 51, and the approach was rejected by Judge Frye in his dissent. LBP-88-2 at 257. While Judge Frye accepted the "ultimate conclusion" on Contention EX 50, id. at 258, he characterized the majority's analysis as having "reviewed the training program for adequacy" and he rejected that review. See LBP-88-2 at 257-258. Thus, there exists more than just LILCO's support for the view that the Board's scope of review went beyond its mandate.

2. Standard of Review

Intervenors make much of the Licensing Board's statement in the PID that it had in fact rejected any standard of "perfect performance" on the day of the exercise as the training standard. In fact, the Licensing Board adopted the Intervenors' approach by looking at the performance of individuals, rather than of the organization as a whole, in determining whether fundamental flaws existed in the training program. Intervenors sum up their view in this fashion: "[i]n other words, the proof of the training program is in the Exercise performance." Intervenors' Brief at 53. Intervenors also cite to the characterization of problems identified by FEMA in its Post-Exercise Assessment as "training" to support its view that there is a fundamental flaw in the training program. Intervenors' Brief at 55, see FEMA Exh. EX 5 at 73.[20/] Each of these characterizations misses the mark, as shown below.

The exercise performance that Intervenors chose to focus on in its contentions, in the litigation, and in its appeal brief is the performance of individuals, not of the LERO organization. Intervenors' Brief at 63. But it is the overall performance of the organization, not isolated performances of individuals, that sheds light on the efficacy

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20/ Intervenors cite the Staff's conclusion as well, that "the LERO training program was not equal to the task, at least on the day of the exercise." Intervenors' Brief at 55, see Staff Findings at 176. In its brief on appeal, the Staff concludes that no fundamental flaws in the training program were revealed by the Exercise.

of a training program. The Board erred in accepting a standard that looked at individual performance, as urged by Intervenors, rather than at organizational performance, as urged by LILCO. Intervenors thus are content to list specific instances of allegedly poor individual performance, without tying them in any way to a structural problem in the training program itself.

3. Supporting Evidence

Intervenors assert that the Licensing Board's decision was well-supported. They point to the fact that the Board devoted "over 80 pages to detailing its findings and conclusions concerning the efficacy of LILCO's training program," Intervenors' Brief at 45, see LBP-88-2 at 172-253. They state that the Board considered "20 other examples of LILCO personnel failing to follow their procedures or evidencing a lack of basic knowledge of the Plan" taken from the FEMA report, to conclude that the training program was ineffective. They add that the Board "listed 10 other examples from the Exercise" to demonstrate communications problems, and "set forth 11 other examples of poor judgment drawn from incidents during the Exercise" to find that LILCO personnel were not effectively trained to exercise independent or good judgment. See Intervenors' Brief at 47-49, LBP-88-2 at 185-189, 195-98, 206-211, and 220-222. All of the examples relied upon by Intervenors are a result of the Licensing Board reiterating Intervenors' own contentions, which listed various individual activities in response, rather than any analysis or conclusions by the Board.

A careful review of LBP-88-2 reveals that the main thrust of the Board's consideration rests on the Evacuation Route Coordinator's response to the traffic impediments, which is given as the main example for concluding in Contention EX 50.A that LERO could not respond to unrehearsed and unanticipated situations; in 50.B that the training program had not instructed personnel to follow and implement the LILCO Plan and procedures; in 50.C that the LERO program had not taught personnel to

communicate necessary and sufficient data and information; and in 50.E that the LERO training program had not trained personnel to exercise independent or good judgment. Thus, the single mistake of one individual during the exercise has been transformed into an assertedly systemic pattern of problems in communications, training, exercise of good judgment, and an inability to respond to unrehearsed and unanticipated situations. How many fundamental flaws in a plan can a single individual's single mistake support?

It would do to look at the Board's list of unrelated behavior that Intervenors refer to, but do not describe, to support the Board's decision on training. They include such activities as: excessive route alerting times, delayed dispatch of personnel, excessive time in monitoring personnel, and failures to update status boards (Contention 50.B, LBP-88-2 at 185-86); no success in contacting FAA to direct air traffic, mistakes in reporting of dose projection as 7000 meters rather than 700 meters that was corrected in five minutes, and failure to contact the Long Island Railroad to direct trains (50.C, LBP-88-2 at 196-98); delayed operating of ENC until 8:25 because not all staff were present, and delayed press briefings after EBS messages had been broadcast (50.E, LBP-88-2 at 220-22); and Traffic Guides at two traffic control points who did not know dose authorization units, Traffic Guides at two traffic control points who did not fully understand the chain of command for excess exposure, and two of the eight Traffic Guides observed by FEMA who did not fully understand the difference between low-range and mid-range direct reading dosimeters (50.H, LBP-88-2 at 237-38). This can hardly be said to be viewed as overwhelming evidence of a problem in the Plan, and Intervenors do not bother even to list them in their appeal brief.

4. Post-Exercise Drill Reports

While Intervenors assert that "the proof of the training program is in the exercise performance," even a cursory review of the training section of the Licensing Board's opinion reveals an emphasis on post-exercise drill reports. These drill reports cannot be used to support findings of flaws in the training program because of their very nature. They are part of the training program. LILCO training drills are not tests in the way the exercise is a test. They are drills to expose problems that require further attention. They are used as training tools. They are instructive for that purpose. But they are not similar in kind to an exercise report, and comparing them to exercise results is truly mixing apples and oranges. The Licensing Board rejected LILCO's argument about the drill reports and inappropriately allowed them into evidence.[21/] Allowing the Licensing Board to rely upon the drill reports to bolster findings of inadequacies in a plan following an exercise is not probative of the skills tested in the exercise. It also will chill the ability to train and as a policy matter should be rejected.[22/]

Intervenors argued strenuously for admission of drill reports and they support in their appeal brief the Licensing Board's reliance upon them. Intervenors need the drill reports. Their allegations in Contention EX 50, and the Licensing Board's findings alone

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21/ Intervenors argue in their appeal brief that LILCO did not object to the admittance of drill reports into the proceeding and that therefore their objection has not been preserved on appeal. They are flatly wrong. LILCO objected repeatedly to the use of drill reports for any purpose other than to show that the "fixes" proposed by LILCO to remedy identified "deficiencies" and "areas requiring corrective actions" were effective. Tr. 5669-70, 5811; see also LILCO Brief at 47.

22/ In supporting the Board's use of post-exercise drill reports in its brief on appeal, the Staff does not address the fact that drills are different in kind from FEMA-graded exercises. See Staff Brief at 55-57. In addition, the Staff's attempt to analogize QA/QC audits to training drills is inapt. QA/QC audits are formal review proceedings. By comparison, training drills are, in large part, educational activities. The proper analogy to a later QA/QC audit is a FEMA-graded remedial exercise. No such exercise has been held at Shoreham.

without those drill reports, do not support a finding of systemic problems in the training program. It is only when exercise activities are inappropriately coupled with the drill reports that one can even begin to make an argument of a pattern. Thus, at the same time that Intervenors suggest that the Licensing Board's decisions were really based on the exercise activities and not the drill reports, they argue strenuously that the drill reports were properly admitted. If one looks at the Licensing Board's discussion of training, it is clear that the drill reports pervade the Board's decision. The Board stated at the outset that the standard it would use in reviewing the training program was a look at the regulations, a look at systemic problems or defects, by noting the performance of individuals at the exercise, and through the post-exercise drills. LBP-88-2 at 179. Reliance on drill reports at all was improper; reliance on them to the extent done by the Licensing Board in LBP-88-2 led to a prejudicial and incorrect result.

5. LERO as Amateurs

Intervenors argue that "[t]he Board did not impugn the credentials of LERO members." Intervenors' Brief at 60. The Board's unwarranted aspersion of LERO workers as amateurs, which pervades the decision, was clearly pejorative, resulting in a conclusion that LERO may very well be untrainable. Intervenors' attempt to gloss the Board's statements as innocuous is simply wrong.

Intervenors also argue that "if LILCO had evidence that LERO is composed solely or even in large part, of those LILCO field workers who allegedly faced 'life-threatening situations' daily, and that the skills they have developed in these situations are transferable to implementing LILCO's Plan, LILCO was free to present it." Intervenors' Brief at 60-61. LILCO did so during the planning phase of this proceeding. The issue of the nature of the training program generally or of the LERO organization was no longer in dispute. It is only because the Licensing Board took those issues upon itself

to revisit during the training portion of their decision that the question of the nature of the LERO organization reappeared.

In addition, LILCO did offer evidence in the Exercise litigation about the performance of other organizations (presumably the Board would have considered these to be "professionals" because they involved exercises where governments, not utility workers, responded) and the Board refused to allow it, deeming it irrelevant. LILCO Brief at 62-63; LILCO Findings at 188-89. The purpose of that evidence was to show that the LERO response was in line with responses by other offsite emergency organizations for other power plants. This was information that might have borne on the Board's determination that LERO was made up of "amateurs."

Despite Intervenors' protestations, it is clear from the Licensing Board's decision that any activity that was less than perfect performance on the day of the exercise was put into the hopper of a "fundamental flaw" in training. This convenient niche relieved Intervenors and the Board from articulating precisely what problem, if any, existed with the training program, and how it was connected to the behavior observed on the day of the exercise. The Board seemed incapable of distinguishing between areas where individual performance on the day of the exercise may suggest that additional training for isolated individuals might be fruitful, and general training deficiencies resulting in a pattern of untrained emergency workers.

IV. CONCLUSION

For these reasons, the Appeal Board should reject Intervenors' arguments in their brief on appeal from LBP-88-2, and reverse the Licensing Board's decision in that opinion.

Respectfully submitted,

Kathy E.B. McCleskey
Lee B. Zeugin
Scott D. Matchett

HUNTON & WILLIAMS
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212
(804) 788-8200

DATED: May 6, 1988

LILCO, May 6, 1988

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO'S MOTION FOR LEAVE TO FILE REPLY BRIEF and LILCO'S REPLY TO INTERVENORS' AND NRC STAFF'S OPPOSITION TO LILCO'S APPEAL FROM LBP-88-2 were served this date upon the following by Federal Express, as indicated by an asterisk, or by first-class mail, postage prepaid.

Christine N. Kohl, Chairman *
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Fifth Floor (North Tower)
East-West Towers
4350 East-West Highway
Bethesda MD 20814

Alan S. Rosenthal *
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Fifth Floor (North Tower)
East-West Towers
4350 East-West Highway
Bethesda, MD 20814

Dr. W. Reed Johnson *
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
115 Falcon Drive, Colthurst
Charlottesville, VA 22901

Lando W. Zech, Jr., Chairman
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, DC 20555

Commissioner Thomas M. Roberts
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, DC 20555

Commissioner Frederick M. Bernthal
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, DC 20555

Commissioner Kenneth M. Carr
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, DC 20555

Commissioner Kenneth C. Rogers
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, DC 20555

James P. Gleason, Chairman
Atomic Safety and Licensing Board
513 Gilmoure Drive
Silver Spring, Maryland 20901

Dr. Jerry R. Kline
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
East-West Towers, Rm. 427
4350 East-West Hwy.
Bethesda, MD 20814

Mr. Frederick J. Shon
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
East-West Towers, Rm. 430
4350 East-West Hwy.
Bethesda, MD 20814

Secretary of the Commission
Attention Docketing and Service
Section
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20553

Adjudicatory File
Atomic Safety and Licensing
Board Panel Docket
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edwin J. Reis, Esq. *
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

Herbert H. Brown, Esq. *
Lawrence Coe Lanpher, Esq.
Karla J. Letsche, Esq.
Kirkpatrick & Lockhart
South Lobby - 9th Floor
1800 M Street, N.W.
Washington, D.C. 20036-5891

Fabian G. Palomino, Esq. *
Richard J. Zahnleuter, Esq.
Special Counsel to the Governor
Executive Chamber
Room 229
State Capitol
Albany, New York 12224

Alfred L. Nardelli, Esq.
Assistant Attorney General
120 Broadway
Room 3-118
New York, New York 10271

George W. Watson, Esq. *
William R. Cumming, Esq.
Federal Emergency Management
Agency
500 C Street, S.W., Room 840
Washington, D.C. 20472

Mr. Jay Dunkleberger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Stephen B. Latham, Esq. *
Twomey, Latham & Shea
33 West Second Street
P.O. Box 298
Riverhead, New York 11901

Mr. Philip McIntire
Federal Emergency Management
Agency
26 Federal Plaza
New York, New York 10278

Jonathan D. Feinberg, Esq.
New York State Department of
Public Service, Staff Counsel
Three Rockefeller Plaza
Albany, New York 12223

Ms. Nora Bredes
Executive Coordinator
Shoreham Opponents' Coalition
195 East Main Street
Smithtown, New York 11787

Evan A. Davis, Esq.
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

E. Thomas Boyle, Esq.
Suffolk County Attorney
Building 158 North County Complex
Veterans Memorial Highway
Hauppauge, New York 11788

Dr. Monroe Schneider
North Shore Committee
P.O. Box 231
Wading River, NY 11792

Kathy E.B. McCleskey

HUNTON & WILLIAMS
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

DATED: May 6, 1988