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May 16, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

GOVERNMENTS' BRIEF IN RESPONSE TO NRC STAFF BRIEF SUPPORTING LILCO'S APPEAL FROM LBP-88-2

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The Governments (Suffolk County, the State of New York, and the Town of Southampton) file this brief, pursuant to the Board's Order of May 9, 1988, to respond to a new argument which was raised for the first time in the "NRC Staff Response to LILCO Appeal of the February 1, 1988 Initial Decision on the Emergency Plan Exercise" (April 28, 1988) (hereafter, "Staff Brief"). The Staff's new argument is that the Commission's 1986 decision in CLI-86-13[1/] controls the Exercise Decision. This argument is not only new and part of a complete reversal of position by the Staff, it is wholly without merit. Accordingly, the Appeal Board should reject the argument in its entirety.[2/]

1/ Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986) ("CLI-86-13").

2/ The Governments received LILCO's Motion for Leave to (continued...)

I. The Staff's Sudden Reversal of Position

The Staff Brief represents a complete reversal of the NRC Staff's position concerning the results of the 1986 Shoreham Exercise and the legal ramifications of those results.

Before the Licensing Board, the Staff argued that the Exercise results and the evidence presented at the Exercise hearing established the existence of three fundamental flaws in the LILCO Plan.[3] In the recent Staff Brief, the Staff asserts

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2/(...continued)
File Reply Brief, with the Reply Brief attached, after they had filed their motion for leave to respond to the Staff's Brief and the Board granted that Motion. The Governments do not address in this brief the matters discussed in the LILCO Reply Brief. Those matters are for the most part covered in the Governments' Brief in Opposition to LILCO Appeal from LBP-88-2 (April 18, 1988) (hereafter, "Governments' Initial Brief"). The Governments will address LILCO's Reply further in oral argument, if desired by the Appeal Board.

3/ The Staff's September 11, 1987 "Proposed Findings of Fact and Conclusions of Law on the February 13, 1986 Emergency Planning Exercise," (hereafter, "Staff Findings") stated the Staff's proposed Board conclusion as follows:

> 1. Deficiencies were found in the following areas:
>
> a. training for, and execution of internal communications within the command structure of LERO and between that structure and field personnel in response to unexpected events;
>
> b. basic knowledge of Bus Drivers and Traffic Guides of their assigned functions; and
>
> c. timely response of Traffic Guides, Bus Drivers, Route Spotters, and Road Crews in the performance of their emergency tasks.

(continued...)

that every Board finding of a fundamental flaw should be reversed.4/

Before the Licensing Board, the Staff argued that the Board should find, based on the Exercise results, that the LILCO Plan precludes a finding of reasonable assurance that adequate protective measures can and will be taken. In the recent Staff Brief, the Staff asserts that the Board's conclusion that no

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3/(...continued)

2. These deficiencies are significant to the overall ability of LERO to implement the LILCO Plan and were not demonstrated to have been compensated for or corrected.

3. These deficincies preclude a finding of reasonable assurance that adequate protecive measures can and will be taken in the event of a radiological emergency, i.e., show a fundamental flaw in the Plan.

Staff Findings at 186-87.

4/ Compare Staff Findings at 186-87 (see n.3 above) with Staff Brief at 1-2, 61 ("the Board found flaws as to (1) communications within the . . . EOC, among field workers and at the . . . ENC, (2) timely staffing of traffic control posts, and (3) training in communications, traffic guide and bus driver functions, and prompt response of field personnel . . .. The Appeal Board should reverse the Licensing Board's findings of fundamental flaws and find . . . that the record shows that there are no fundamental flaws").

reasonable assurance finding can be made is error.5/

Before the Licensing Board, the Staff argued that FEMA's exercise findings constitute a rebuttable presumption. In the recent Staff Brief, the Staff asserts that they do not.6/

Before the Licensing Board, the Staff urged that a "fundamental flaw" is a deficiency which precludes a finding of reasonable assurance that protective measures can and will be taken. In the recent Staff Brief, the Staff argues that CLI-86-13 changed the definition of a fundamental flaw and the reasonable assurance regulatory standard for licensing.7/

II. The Asserted Basis for the Staff's Reversal of Position

The Staff provides only one basis for its abrupt about-face on every major aspect of the merits of the Exercise proceeding.

5/ Compare Staff Findings at 2 ("the Exercise reveal[ed] deficiencies in LERO's ability to implement portions of the LILCO Plan which preclude our finding . . . that there is reasonable assurance that adequate protective measures can and will be taken in the event of an emergency at Shoreham") and 187 (see n.3 above) with Staff Brief at 61 (Board decision should "be vacated . . . . The Board's erroneous findings were the result of the Board . . . applying an impropoer standard for finding fundamental flaws in the Plan").

6/ Compare Staff Findings at 7-8 ("FEMA's findings in regard to an off-site emergency plan 'constitute a rebuttable presumption on questions of adequacy and implementation capability' of the plan") with Staff Brief at 15 ("FEMA's findings of deficiencies need not be accorded presumptive weight . . . ").

7/ Compare Staff Findings at 6, 187 with Staff Brief at 11-16 (see Section III below).

See Staff Br. 2, n.2. That purported basis is a convoluted argument to the following effect: the Commission's new emergency planning rule retroactively transformed the Commission's CLI-86-13 decision, remanding the "Legal Authority Contentions" (Contentions 1-10) for additional hearings, into a re-definition of a "fundamental flaw" revealed in an exercise of an emergency plan and of the Section 50.47(a)(1) reasonable assurance standard.

III. The Staff's New Argument

The Staff asserts that "[t]he reason for the Staff's departure from its position below is the issuance of the Commission's new emergency planning rule which amplified and clarified the Commission's decision in CLI-86-13 . . . ," (Staff Br. 2, n.2), and that "[t]he Board failed . . . to adopt the clarification of the fundamental flaw standard set forth in CLI-86-13 as amplified by the Realism Rule." Staff Br. 11.

Citing some of the questions which the Commission indicated must be answered in the remand proceeding on LILCO's realism defense to the Legal Authority Contentions (to determine the adequacy of a "best efforts" governmental response), the Staff asserts that those realism questions are an "enunciation of what constitutes 'adequate protective measures'" as required by Section 50.47(a)(1). Staff Br. 12. While acknowledging that these questions were "defined within the context of the realism

proceeding," and that they are being heard by the OL-3 Board in the proceeding on Contentions 1-10 (Staff Br. 12, 48, 49), the Staff nonetheless asserts (without any stated bases or analysis) that "the rationale is equally applicable to an analysis of whether there is a fundamental flaw in an emergency plan." Staff Br. 12. Then, the Staff "applies," "as pertinent to the exercise," six of the realism-specific questions identified in CLI-86-13, and concludes that

> the adequacy of LILCO's exercise of the Plan was to be judged by assessing those scenarios where (1) delay might be a factor in alerting the public and making decisions and recommendations on protective actions (including recovery and reentry) and (2) where evacuation might be eliminated as a viable protective action.

Staff Br. 13. The Staff thus argues that "the Board applied the incorrect definition of a fundamental flaw to the problems identified in the exercise," because the Board did not find that the deficiencies revealed in the Exercise would "eliminate evacuation as a viable option," or preclude a "range" of protective actions, or "delay" timely alerting of the public or protective action decisions or recommendations. See, e.g., Staff Br. 2, n.2, 13-14, 20, 26, 27, 35, 40-41, 48, 49, 51, 52.

Finally, the Staff alleges, without explanation, that

> In light of the Realism Rule, . . . FEMA's findings of deficiencies need not be accorded presumptive weight because those findings do not address the fundamental flaw standard of CLI-86-11 and CLI-86-13 (i.e., the impact of delay on decisions concerning protective actions and whether evacuation remains viable).

Staff Br. 15-16. And, it alleges that

> a FEMA deficiency is not equivalent to a fundamental flaw . . . because the FEMA evaluation of the exercise did not go so far as considering whether the delays associated with the deficiencies would adversely impact the decisions and recommendations for protective measures and the viability of evacuation as required by CLI-86-13 and 10 C.F.R. § 50.47.

Staff Br. 17.

Nowhere in the Brief does the Staff attempt or purport to explain, much less justify, the naked suggestion that the NRC's new emergency planning rule somehow created this new interpretation of CLI-86-13 as defining what constitutes a fundamental flaw revealed in an exercise. Thus, while the new rule is the nominal excuse for the Staff's abrupt change in position and its novel re-interpretation of CLI-86-13, the Staff nowhere identifies, much less explains, any connection between the new rule and the Staff's new reading of CLI-86-13 to change the fundamental flaw standard applicable to exercise reviews. Notwithstanding the Staff's occasional reference to the new rule when citing CLI-86-13, the Staff's new argument clearly is based solely on its revisionist misreading of CLI-86-13.

IV. The Staff's Argument Must be Summarily Rejected Because It Was Never Raised Below

There is no need for this Board even to try to make sense out of the Staff's new argument. Instead, the Board can, and should, reject the argument summarily because it was never raised

by the Staff below. The Staff had innumerable opportunities to do so.

As noted, while the Staff mentions the new rule in its Brief, the actual basis of the Staff's new argument is not that rule, but the NRC's decision in CLI-86-13. CLI-86-13 was decided on July 24, 1986. The Governments filed their contentions relating to the Exercise on August 1, 1986. The Staff filed a Response to the Governments' Contentions on August 15 (see Section V.C below) which addressed, among other things, "specific standards applicable to Shoreham exercise contentions," and set forth the Staff's view of the fundamental flaw standard.8/ In that filing the Staff never made the CLI-86-13 argument raised in the recent Staff Brief.

The Board's October 3, 1986 Prehearing Conference Order (Ruling on Contentions and Establishing Discovery Schedule) (hereafter, "October 3 Order"), which is included in the Appendix filed with the Governments' Initial Brief, set forth the Board's view of the fundamental flaw standard. The Staff filed no objections to that Order. The Governments did, however. On November 10, 1986, the Staff filed a "Response to Suffolk County, State of New York and Town of Southampton Objections to Prehearing Conference Order." In that filing the Staff never made the CLI-86-13 argument raised in the recent Staff Brief.

8/ NRC Staff Response to Proposed Emergency Planning Contentions Relating to the February 13, 1986 Exercise (Filed by Suffolk County, The State of New York and the Town of Southampton) (August 15, 1986) at 6-8.

On October 27, 1986, FEMA filed a Motion for Reconsideration of the October 3 Order. The Staff responded to FEMA's Motion on November 10, 1986.[9/] In that filing the Staff never made the CLI-86-13 argument raised in the recent Staff Brief.

On June 18, 1987, the final day of the hearing below, the Board asked the parties to define a "fundamental flaw." The Staff responded that "a fundamental flaw means a deficiency which precludes a finding of reasonable assurance that protective measures can and will be taken." Tr. 8921. Despite this direct opportunity to bring its novel CLI-86-13 fundamental flaw theory to the attention of the Licensing Board, the Staff did not make, or even allude to, the CLI-86-13 argument raised in the recent Staff Brief.

The Staff also addressed the fundamental flaw standard in its post-hearing Proposed Findings filed September 11, 1987. Again, the Staff did not make or allude to the CLI-86-13 argument raised in the recent Staff Brief. Indeed, as already noted, in its Proposed Findings the Staff urged the Board to find that the Exercise revealed several fundamental flaws in the LILCO Plan. See Section I above, and the Governments' Initial Brief.

Finally, even if it made sense that the new rule somehow created the Staff's new CLI-86-13 argument, the Staff did nothing to bring that argument, the supposed new fundamental flaw standard, or the resultant total reversal of the Staff's own

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9/ NRC Staff Response to FEMA Motion for Reconsideration of the Licensing Board's Prehearing Conference Order (November 10, 1986).

position on the merits of the Exercise litigation, to the attention of the Licensing Board.

The new rule was adopted on October 29, 1987, three months before LBP-88-2 was issued. There was ample opportunity for the Staff to file a motion or otherwise seek to inform the Licensing Board of such a significant alleged change in the law or facts, and in the Staff's own position, with respect to the pending litigation. The Staff did nothing.

Finally, even after LBP-88-2 was issued, the Staff remained silent about its CLI-86-13 argument. The Staff did not appeal the Board's decision, even though it now believes that decision, which in large part adopted many of the Staff's own proposed findings, is wrong in every major respect. Similarly, the Staff never sought reconsideration of LBP-88-2. Instead the new CLI-86-13 argument, and the Staff's dramatic reversal of position on the merits of the exercise litigation, appeared for the first time in the Staff Brief filed with the Appeal Board on April 28, 1988.

It is well established that the Appeal Board will not consider new arguments or issues raised for the first time on appeal; an appeal may only be based on matters and arguments raised below. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20 (1986) ("Like the courts, we generally do not consider matters raised in the first instance on appeal; rather, appeals are decided on the basis of the record developed below"); Philadelphia Electric Co.

(Limerick Generating Station, Units 1 and 2, ALAB-819, 22 NRC 681, 699 n.20 (1985) (an argument presented for the first time on appeal can be summarily dismissed); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981) ("we will not entertain arguments that a licensing board had no opportunity to address and that are raised for the first time on appeal -- absent a 'serious substantive issue'"); Puerto Rico Electric Power Authority (North Coast Nuclear Power Plant, Unit 1), ALAB-648, 14 NRC 34, 37 (1981); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 348 (1978).10/

Moreover, the Appeal Board has held that its "disinclination" to entertain an issue raised for the first time on appeal "is particularly strong in circumstances where the issue and the factual averments underlying it could have been -- but were not -- timely put before the Licensing Board." Puerto Rico Electric Power Authority (North Coast Nuclear Power Plant, Unit 1), ALAB-648, 14 NRC 34, 37 (1981).

10/ Accord Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 82-83 (1985); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 47-48 (1984) ("a party cannot be heard to complain [on appeal] about a decision that fails to address an issue no one sought to raise"); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 907 (1982), citing Tennessee Valley Authority, 7 NRC 341, 348; Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 28 (1978).

In this case, the Staff had many opportunities to raise its novel CLI-86-13 fundamental flaw argument below, but repeatedly failed to do so. Accordingly, its attempt to pursue that argument for the first time in this appeal must be summarily rejected.

V. The Staff's Argument Has No Basis or Merit Whatsoever

Should the Board choose to attempt to address the merits of the Staff's argument, a brief review of the actual subject of CLI-86-13 and the actual contents of the new rule reveals why the Staff's argument must be rejected. The cases discussed in the Governments' Initial Brief and in the Licensing Board's decision are controlling on the question of what constitutes a fundamental flaw revealed during an exercise. Neither CLI-86-13 nor the new emergency planning rule have any relevance to that question. Furthermore, the factual and legal issues raised by the Shoreham Exercise were defined expressly to exclude the "realism" issues which were the sole subject of CLI-86-13. Thus, there is no basis for arguing that CLI-86-13 is relevant to the Licensing Board's application of the fundamental flaw standard to the Exercise results litigated before it.

A. CLI-86-13 Had Nothing to Do with Exercises or Fundamental Flaw Standards to be Applied in Reviewing Exercise Results

CLI-86-13 addressed LILCO's appeal of ALAB-818, 22 NRC 651 (1986). ALAB-818, in turn, had addressed LILCO's appeal of the Licensing Board's decision in LBP-85-12, 21 NRC 644 (1985). The Licensing Board had denied LILCO's motion for summary disposition of the "Legal Authority Contentions," rejecting LILCO's so-called "realism," "immateriality," and preemption defenses to those contentions. The Board ruled that LILCO's lack of legal authority to perform the essential emergency response functions identified in those contentions precluded a finding of reasonable assurance that adequate protective measures can and will be taken under the proposed LILCO Plan in the event of a Shoreham emergency. In ALAB-818, this Board affirmed that decision.

In CLI-86-13, the Commission addressed LILCO's "realism" defense to the Legal Authority Contentions, and remanded that argument to the Licensing Board for further proceedings. 24 NRC at 32. The Commission directed the Licensing Board to conduct the remand proceeding on LILCO's defense in light of the Commission's belief that in an emergency the State and County's "best effort" response would use the LILCO Plan as a source of emergency planning information and options. Id. at 31, 32.

The Commission noted that an evaluation of the realism defense to Contentions 1-10 required a determination of whether a "best efforts" governmental response would be adequate, and that "more information is needed about the shortcomings of the LILCO plan in terms of lesser dose savings and protective actions foreclosed, assuming a best-efforts State and County response . . . . Id. at 31. It also discussed, to a limited extent, some of the questions it believed were presented by LILCO's realism defense to the Legal Authority Contentions, including, for example,

> questions about the familiarity of State and County officials with the LILCO plan, about how much delay can be expected in alerting the public and in making decisions and recommendations on protective actions, or in making decisions and recommendations on recovery and reentry, and in achieving effective access controls.

Id. The Commission also identified the questions of "how important is th[e] time delay" which would result if an evacuation took place without traffic controls, and for "which scenarios, if any, does [such a delay] eliminate evacuation as a viable protective action?" Id. These are the questions which the Staff now asserts "define" a fundamental flaw revealed by an emergency planning exercise.

Clearly, in CLI-86-13 the Commission was addressing specific contentions, and providing directions for the conduct of a particular subsequent proceeding concerning the issues raised by those contentions. The Commission did not discuss or even mention an exercise or the "fundamental flaw" standard it had

discussed in its earlier CLI-86-11 decision, nor did it even mention the FEMA review or plan implementation issues which were presented by the Exercise and the litigation concerning its results. There is no basis for any suggestion to the contrary.

Similarly, there is no basis for the Staff's suggestion that CLI-86-13 somehow redefined the reasonable assurance standard of Section 50.47(a)(1). Clearly, the proposition that the Commission could rewrite its most fundamental emergency planning regulation -- by holding that "reasonable assurance that adequate protective measures can and will be taken" really means only that there will be no significant delay in alerting the public and that evacuation is a viable protective action option -- in an individual adjudicatory proceeding rather than by rulemaking, is preposterous.

B. The New Emergency Planning Rule Did Not Transform CLI-86-13 Into a Decision About Exercises or Fundamental Flaws, Nor Did It Purport to Change the Reasonable Assurance Standard in the Regulations

In its new rule adopted on October 29, 1987, the NRC purported to "codify" the portion of CLI-86-13 which postulated a "best efforts" response by non-participating governments in the event of an actual emergency. 52 Fed. Reg. 42078 et seq. Neither the new rule nor the accompanying NRC discussion of it said anything about the relevance or applicability of the CLI-86-13 holding to the litigation of exercise results, nor did the

rule or the NRC's discussion mention "fundamental flaws" or any other standard to be applied in reviewing exercise results.

Moreover, in its explanation of the new rule, the NRC was adamant in its insistence that the new rule was not intended to change the reasonable assurance standard set forth in the regulations, even as applied to reviews of utility plans in the face of State and local government non-participation in emergency planning. See 52 Fed. Reg. 42080, 42081, 42082, 42083.

C. The Exercise Litigation Which Was the Subject of the Proceeding Below Expressly Excluded "Realism" Issues

At the outset of the litigation below, the Governments' submitted Contentions EX 1-14 which alleged that the Exercise results demonstrated deficiencies related to issues raised by the Legal Authority Contentions and LILCO's realism defense to those contentions.11/ All of those contentions were denied admission, however, at the urging of the Staff and LILCO.12/ They argued that the "realism" issues raised by Contentions EX 1-14 should not be considered in the Exercise litigation because such issues were irrelevant to the Exercise, and because they were pending before the OL-3 Board in the CLI-86-13 remand proceeding.

11/ A copy of those contentions is attached to this brief.

12/ See, e.g., NRC Staff Response to Proposed Emergency Planning Contentions Relating to the February 13, 1986 Exercise (August 15, 1986) at 10-14.

The Board essentially agreed. It held, with respect to Contentions EX 1-7:

> The Contentions allege that LILCO lacks legal authority to implement critical areas of its plan. This being so, the LILCO plan as exercised, cannot be implemented absent LILCO's performance of these prohibited functions and since LILCO cannot actively perform these functions, the exercise results demonstrate a fundamental flaw in the LILCO plan. These contentions are inadmissible because they allege matters that have already been litigated and were not raised by the exercise. The contentions thus do not meet the criteria for admittance. This Board has already found "that because of Applicant's inability to perform these functions the LILCO plan cannot and will not be implemented as required by regulation. . . . The determination has been affirmed by an Appeal Board. . . . The Commission has taken cognizance of the situation in its decision remanding the realism issue to the Board CLI-86-13 . . . ."[13/]

Similarly, the Board held as follows with respect to Contentions EX 8-14:

> Contentions EX 8-14 . . . each allege matters which are mere variations of a central theme, the essence of which is that the state and local governments did not participate or assume responsibility in the exercise and that there was no opportunity to measure the emergency response performance of these governments.
>
> The contentions are all rejected for the same reasons. First, it is already well known to all parties and decision makers and well established on the emergency planning record that State and local governments refuse to participate in Shoreham emergency planning and exercises. The exercise was

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13/ Prehearing Conference Order (Ruling on Contentions and Establishing Discovery Schedule) October 3, 1986, at 9-10 (citations omitted).

> planned without state and county participation and FEMA has declined to make a reasonable assurance finding because of that fact. No basis is presented for believing that new material facts arose from the exercise that would have any important bearing on that situation. Second, the contentions are inconsistent with the posture of this case. We have already decided the realism argument in Intervenors' favor. The Appeal Board has affirmed. The Commission has remanded the issue to us for further consideration. We shall give the matter the consideration called for in a separate proceeding in due course. The lack of governmental participation will hardly escape our notice in that proceeding.[14]

As a result of the Board's rulings, the Exercise litigation expressly excluded any consideration of so-called realism issues such as those which were the subject of CLI-86-13. Therefore, there is no basis for the Staff's argument that the realism rulings in CLI-86-13 could be applied to issues presented in this appeal.

VI. Conclusion

For the foregoing reasons, the Board should reject the Staff's CLI-86-13 argument.

14/ Id. at 10-11. This decision was issued before a separate Board had been created to preside over the OL-5 exercise litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of GOVERNMENTS' BRIEF IN RESPONSE TO NRC STAFF BRIEF SUPPORTING LILCO'S APPEAL FROM LBP-88-2 have been served on the following this 16th day of May by U.S. mail, first class, except as otherwise noted.

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