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May 17, 1988

BY HAND

Christine N. Kohl, Chairman
Mr. Alan S. Rosenthal
Dr. W. Reed Johnson
Atomic Safety and Licensing
Appeal Board
East-West Towers, Fifth Floor
4350 East-West Highway
Bethesda, Maryland 20814

Dear Administrative Judges:

The enclosed Attachment was inadvertently omitted from the Governments' Brief in Response to NRC Staff Brief Supporting LILCO's Appeal From LBP-88-2. We apologize for the error.

Sincerely,

Karla Letsche
Karla J. Letsche

cc: Service List

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August 1, 1986

EMERGENCY PLANNING CONTENTIONS RELATING
TO THE FEBRUARY 13, 1986 EXERCISE

I. CONTENTIONS EX 1-7: LILCO'S LACK OF LEGAL AUTHORITY
IS A FUNDAMENTAL FLAW

Preamble to Contentions Ex 1-7

LILCO has no authority to implement its Plan. Cuomo v. Long Island Lighting Co., Consol. Ind. No. 84-4615 (N.Y. Sup. Ct., slip op., Feb. 20, 1985) and Partial Declaratory Judgment entered March 28, 1985, appeal pending.¹ In permitting the exercise to

¹ The Partial Declaratory Judgment entered against LILCO decreed that "the contested acts, enumerated more fully in the [C]omplaints, contemplated by LILCO in implementing its Plan, are acts which are inherently governmental in nature and are embraced by the State's police powers and are therefore prohibited." (Emphasis supplied). The Complaints challenge LILCO's legal authority to carry out the following specific functions, among others:

1. Exercise of basic command and control functions in the offsite area during a nuclear emergency;
2. Determination of how to protect the health, safety and welfare of persons within the plume exposure pathway and ingestion pathway EPZs;
3. Determination of whether EPZ residents should be evacuated or sheltered and, if so, where and how and communication of LILCO's recommendations concerning evacuation or sheltering to the general public;
4. Declaration of a public emergency, notification of the public concerning the emergency and communication of LILCO's recommendations concerning the emergency and all protective actions to the general public;
5. Direction of any evacuation effort and control and management of evacuation traffic;
6. Determination of protective measures throughout the ingestion pathway concerning food, produce and other health and safety issues and notification of the public concerning such measures.

(footnote continued)

go forward, the Commission mistakenly asserted that the exercise would test only those elements of the Plan that "LILCO may lawfully do on its own." NRC Memorandum and Order, Jan. 30, 1986, at 3-4. In fact, the exercise involved a purported attempted demonstration of LILCO's ability to perform activities (i) that had been challenged by the Governments in the Cuomo litigation, (ii) that were embraced by the New York State Supreme Court's finding that LILCO had no legal authority to implement its Plan, and (iii) that LILCO cannot legally carry out under the Cuomo decision or the Partial Declaratory Judgment entered therein.

The exercise results demonstrated fundamental flaws in the Plan, because the exercise demonstrated the importance of functions that are included in the Plan, as exercised, but that LILCO has no authority to perform. Indeed, the LILCO Plan, as exercised, could only be implemented if LILCO carried out the functions (such as basic command and control) which the Cuomo court ruled were beyond LILCO's power to perform. Since the LILCO Plan, as exercised, cannot be implemented absent LILCO's performance of these prohibited functions, and since LILCO cannot actually perform those functions, the exercise results demonstrate a fundamental flaw in LILCO's Plan, i.e., that the Plan, as exercised, cannot be implemented. Accordingly, neither the Plan nor the exercise provides the predicate for the reasonable assurance finding required under the NRC's emergency planning

(footnote continued from previous page)
County of Suffolk v. LILCO Complaint, ¶ 17; Cuomo v. LILCO Complaint, ¶ Fifteenth; Town of Southampton v. LILCO Complaint, ¶ 19.

regulations. See 10 CFR § 50.47(a)(1). The functions that are embraced by the Plan and the exercise and that are beyond LILCO's legal authority as defined by Cuomo v. LILCO include the following:

CONTENTION EX 1. The exercise attempted to demonstrate LILCO's ability to carry out the basic command and control functions outlined in the Plan. See, e.g., objectives EOC 8, 9, 14-21; FIELD 6, 10, 11, 12, 21; SA 6, 8, 9; EOF 3, which are set forth in the FEMA Post Exercise Assessment ("FEMA Report"), April 17, 1986, at 9-15; Long Island Lighting Company, Shoreham Emergency Preparedness Drill Scenario, No. 8 - Final ("Scenario"), Section 1.1.C. LILCO has no authority to exercise basic command and control functions in the offsite area during a nuclear emergency. See Cuomo v. LILCO, slip op. at p. 4, ¶ 2; Partial Declaratory Judgment, ¶ 2. In view of the necessity under the LILCO Plan, as exercised, for LILCO to perform such command and control functions, and in view of LILCO's lack of authority to carry out the basic command and control functions set forth in the Plan, the exercise results demonstrate that the Plan cannot be implemented, which precludes the required finding that there is reasonable assurance that adequate protective measures can and will be taken or that the Plan can be implemented. 10 CFR § 50.47(a)(1) and (a)(2). Moreover, LILCO's Plan, as exercised, fails to comply with NRC emergency planning regulations. 10 CFR § 50.47(b); 10 CFR Part 50, App. E §§ IV.A and B; NUREG 0654 §§ II.A.1-4. Accordingly, the exercise demonstrated a

fundamental flaw in LILCO's Plan, because that Plan, as exercised, requires LILCO to perform command and control functions that are beyond LILCO's legal authority.

CONTENTION EX 2. The exercise attempted to demonstrate LILCO's ability to make and implement decisions on health, safety, and welfare protective actions for the general public and to communicate those decisions to the public at large, all in accordance with the Plan. See, e.g., objectives EOC 12, 15, 21; FIELD 5; Scenario §§ 1.1.C, 1.1.D, 1.1.F.1. LILCO has no authority to decide on basic protective actions, to communicate its decisions to the public or to implement its decisions as to how best to protect the health, safety, and welfare of the general public. See Cuomo v. LILCO, slip op. at p. 4, ¶ 5; Partial Declaratory Judgment, ¶ 2. LILCO's lack of authority to make, communicate and implement health, safety, and welfare protective action decisions in accordance with its Plan precludes the required finding that there is reasonable assurance that adequate protective measures can and will be taken or that the Plan can be implemented. 10 CFR §§ 50.47(a)(1) and (a)(2). Moreover, LILCO's Plan, as exercised, fails to comply with NRC emergency planning regulations. 10 CFR §§ 50.47(b)(1), (b)(5), and (b)(6); 10 CFR Part 50, App. E § IV.D; NUREG 0654 §§ II.E.5, 6, F.1, J.9, 10 and 11. Accordingly, the exercise demonstrated a fundamental flaw in LILCO's Plan because that Plan, as exercised,

requires LILCO to make, communicate and implement protective action decisions for the public that are beyond LILCO's legal authority.

CONTENTION EX 3. The exercise attempted to demonstrate LILCO's ability to make and implement decisions for the public at large with respect to evacuation or sheltering and the appropriate means of effecting such protective responses, together with LILCO's ability to communicate its decisions concerning evacuation or sheltering to the general public, all in accordance with the Plan. See, e.g., objectives EOC 8-11, 13-21; EOF 3; SA 8, 9; FIELD 5, 6, 9-16, 21; Scenario §§ 1.1.C, 1.1.D, 1.1.F.1, 3. LILCO has no authority to determine whether residents of and transients within the plume exposure pathway EPZ should be evacuated or sheltered, or, if so, where and how, nor does it have the authority to implement any such decisions. See Cuomo v. LILCO, slip op. at pp. 4-5, ¶¶ 3, 4, and 7; Partial Declaratory Judgment, ¶ 2. LILCO's lack of authority to make decisions concerning evacuation or sheltering and to communicate those decisions to the general public in accordance with its Plan precludes the required finding that there is reasonable assurance that adequate protective measures can and will be taken or that the Plan can be implemented. 10 CFR § 50.47(a)(1) and (a)(2). Moreover, LILCO's Plan, as exercised, fails to comply with NRC emergency planning regulations. 10 CFR §§ 50.47(b)(5), (b)(6) and (b)(10); 10 CFR Part 50, App. E § IV.D; NUREG 0654 §§ II.E.5, 6, and J.9-11. Accordingly, the exercise demonstrated a

fundamental flaw in LILCO's Plan, because that Plan, as exercised, requires LILCO to make, communicate and implement evacuation or sheltering decisions for the general public that are beyond LILCO's legal authority.

CONTENTION EX 4. The exercise attempted to demonstrate LILCO's ability to assess the nature of a Shoreham accident and declare a public emergency, to notify the public concerning the emergency and to communicate its protective action recommendations to the public, all in accordance with the Plan. See objectives EOC 8, 21; FIELD 5; Scenario, §§ 1.1.C, 1.1.D, 1.1.F.1, 1.2.8.6-7. LILCO has no authority to declare a public emergency, to notify the public concerning the existence of a radiological emergency or to communicate its recommendations concerning required protective actions to the public. See Cuomo v. LILCO, slip op. at 4-5, ¶¶ 5, 6, and 7; Partial Declaratory Judgment, ¶ 2; 10 CFR Part 50, App. E § IV.D.3. LILCO's lack of authority to declare an emergency, to give public notice of the emergency and to communicate its protective recommendations to the public in accordance with the Plan precludes the required finding that there is reasonable assurance that adequate protective measures can and will be taken or that the Plan can be implemented. 10 CFR §§ 50.47(a)(1) and (a)(2). Moreover, LILCO's Plan, as exercised, fails to comply with NRC emergency planning regulations. 10 CFR § 50.47(b)(5), (b)(6) and (b)(10); NUREG 0654 §§ II.E.5 and 6. Accordingly, the exercise demonstrated a fundamental flaw in LILCO's Plan, because that Plan, as exer-

cised, requires LILCO to make, communicate, and implement evacuation or sheltering decisions for the general public that are beyond LILCO's legal authority.

CONTENTION EX 5. The exercise attempted to demonstrate LILCO's ability to recommend or order an evacuation of the plume exposure pathway EPZ, to direct evacuation traffic and to control and manage the evacuation effort. See e.g., objectives EOC 8, 9, 13, 14, 16-21; EOF 3; SA 9; FIELD 5, 6, 9-16; Scenario § 1.1.C. LILCO has no authority to order a public evacuation, to direct traffic or to control or manage an evacuation of the general public. Cuomo v. LILCO, slip op. at 5, ¶¶ 8, 10; Partial Declaratory Judgment, ¶ 2. LILCO's lack of authority to order an evacuation of the offsite area, to direct traffic or to control and manage the evacuation effort precludes the required finding that there is reasonable assurance that adequate protective measures can and will be taken or that the Plan can be implemented. 10 CFR § 50.47(a)(1) and (a)(2). Moreover, LILCO's Plan, as exercised, fails to comply with NRC emergency planning regulations. 10 CFR § 50.47(b)(10); NUREG 0654 §§ II.J.9-11. Accordingly, the exercise demonstrated a fundamental flaw in LILCO's Plan, because that Plan, as exercised, requires LILCO to order or recommend an evacuation and to conduct evacuation management activities, including traffic direction functions, that are beyond LILCO's legal authority.

CONTENTION EX 6. During the exercise LILCO attempted to demonstrate its ability to make and implement protective action determinations concerning milk-producing animals within that portion of the ingestion pathway EPZ which is within 10 miles of the Shoreham plant and to notify the public concerning its recommendations. See, e.g., FEMA Report at 26. LILCO has no authority to decide upon and implement protective measures in the ingestion pathway EPZ concerning health and safety issues or to notify the public concerning such measures. Cuomo v. LILCO, slip op. at 5, ¶ 11; Partial Declaratory Judgment, ¶ 2. LILCO's lack of authority to make protective action decisions for the ingestion pathway EPZ and to communicate those decisions to the general public precludes the required finding that there is reasonable assurance that adequate protective measures can and will be taken or that the Plan can be implemented. 10 CFR § 50.47(a)(1) and (a)(2). Moreover, LILCO's Plan, as exercised, fails to comply with NRC emergency planning regulations. 10 CFR §§ 50.47(b)(1) and (b)(10); NUREG 0654 §§ II.J.11. Accordingly, the exercise demonstrated a fundamental flaw in LILCO's Plan, because that Plan, as exercised, requires LILCO to decide upon, communicate, and carry out protective actions that are beyond LILCO's legal authority.

CONTENTION EX 7. The exercise demonstrated that implementation of the LILCO Plan requires LILCO to perform the police power functions inherent in the activities necessary to accomplish the exercise objectives asterisked by FEMA (see FEMA

Report at 9-15), as well as others not asterisked by FEMA but which also are beyond LILCO's legal authority under Cuomo v. LILCO. Such objectives are listed below. Thus, during the exercise LILCO personnel pretended or attempted to satisfy these objectives because under the LILCO Plan the activities contemplated by such objectives were essential elements of the required response to the postulated accident. However, LILCO's lack of legal authority actually to perform the activities involved in satisfying such objectives means that LILCO, in fact, is incapable of satisfying them. Because the exercise demonstrated that the capability of performing the functions referenced in such objectives is a prerequisite to implementation of the LILCO Plan, the exercise results, in light of LILCO's lack of legal authority set forth in Cuomo, preclude a finding of reasonable assurance that protective measures can and will be taken in the event of a Shoreham accident -- i.e., the LILCO Plan is fundamentally flawed. The exercise objectives which LILCO is incapable of satisfying are: EOC 5, 6, 8-21; EOF 3; BHO 10; ENC 4. 7; SA 6, 7, 9; EWDF 3; and FIELD 5, 6, 9-16, 21.

II. CONTENTIONS EX 8-14: LACK OF ACTIVE GOVERNMENTAL PARTICIPATION IS A FUNDAMENTAL FLAW

Preamble to Contentions Ex 8-14:

LILCO has previously asserted that the exercise of its Plan was intended to test its "realism" argument, i.e., that State and County governments would act in the event of a radiological accident at Shoreham and carry out emergency response functions.

Thus, LILCO has argued that the exercise was intended to demonstrate that LILCO's Plan can accommodate ad hoc responses by governmental entities including, specifically, New York State and Suffolk County.

The exercise did not attempt to demonstrate the "emergency response capabilities" of State and local governments nor did it attempt to demonstrate that the governments could implement the LILCO Plan without any preplanning or training. That fact is incontrovertible in light of the exercise scenario and the Commission's prior statements: "[T]his exercise will assume that the State/local government will not activate their emergency powers and authorities: e.g., at no time will the State/local government assume responsibility for protective action decisions, or take actions to effect/implement these decisions." Scenario, § 1.3.D, at 1-21. Similarly, the NRC described the passive role assigned to "simulated" State and local government officials in the exercise as follows:

[F]ederal employees will play the role of [state and local governmental] officials during the Exercise. Through this role-playing, the NRC is attempting to evaluate LERO's capabilities (1) to accommodate the presence of state and local officials, (2) to support those officials using the resources available through LERO, and (3) to provide those officials with sufficient information to carry out their state and county responsibilities. These 'actors,' however, will be instructed not to play decision-making roles, not to assume any command and control authority, not to interact with members of the public so as to lead anyone to believe that they are actually county officials and not to actually perform any state or local functions exclusively reserved to state or county officials by state or county laws.

NRC Memorandum and Order, Jan. 30, 1986, at 5. (Emphasis supplied).

The exercise thus did not test the active emergency response participation by State and local government officials. And FEMA noted that it "cannot measure the capabilities and preparedness of State and local governments if called upon to respond." FEMA Report at 3. Therefore, by definition, the exercise cannot provide any basis for a reasonable assurance finding with respect to the "emergency response capabilities" of such governments or LERO's ability to accommodate the active, ad hoc participation by State or local governments in emergency response activities in the event of a radiological accident at Shoreham. Thus, considered in the light of LILCO's "realism" argument and its premise of active State and local government participation, the exercise demonstrated fundamental flaws in the following particulars:

CONTENTION EX 8. LILCO's "realism" argument assumes that State and local governments will respond to a radiological accident at Shoreham, use their emergency response powers and authorities, and carry out major portions of any required emergency response. The exercise, as conducted, assumed that State and local governments would not use their emergency powers and authorities and would not carry out major portions of any required emergency response. E.g., Scenario § 1.3.D; FEMA Report at 30-31; Log of LERO Director at 2-5. Indeed, during the exercise, State and County simulators refused to assume active roles. Insofar as LILCO's "realism" argument assumes the active

participation of State and local governments in carrying out required emergency functions, the exercise, as conducted, did not permit an evaluation of "major portions of emergency response capabilities." Accordingly, the exercise of the Plan did not comply with 10 CFR § 50.47(b)(14). See also 10 CFR Part 50, App. E § IV.F. Absent an exercise carried out in compliance with § 50.47(b)(14) and Appendix E, there is no basis for a reasonable assurance finding with respect to the Plan. Union of Concerned Scientists v. N.R.C., 735 F.2d 1437 (D.C. Cir. 1984), cert. denied sub nom. Arkansas Power & Light Co. v. UCS, 105 S.Ct. 815 (1985).

CONTENTION EX 9. LILCO's "realism" argument assumes that State and local government officials will respond to a radiological emergency at Shoreham and carry out governmental emergency response functions. In fact, the State and local government officials whose roles were allegedly "simulated" during the exercise assumed passive roles. The simulated State and local government officials did not assume any command and control authority, interact with the public, or seek to perform State or local governmental functions. See Scenario, § 1.3.D; NRC Memorandum Order dated Jan. 30, 1986, at 5. The Plan, as exercised, is inconsistent with LILCO's "realism" argument, and the exercise, as conducted, did not permit an evaluation of "major portions of emergency response capabilities." Accordingly, the Plan, as exercised, fails to comply with NRC emergency planning regulations, including specifically 10 CFR §§ 50.47(b)(1) and

(b)(14), the exercise demonstrated a fundamental flaw in the Plan if interpreted in light of LILCO's "realism" argument, and there is no basis for a reasonable assurance finding with respect to the Plan, as exercised.

CONTENTION EX 10. LILCO's "realism" argument assumes that the Plan will be implemented with the active participation of State and local governments. LILCO's Plan does not establish specific emergency responsibilities of State and local governments nor does the Plan assign primary responsibilities for emergency response to State and local governments, as required by 10 CFR § 50.47(b)(1). The Plan, as exercised, is inconsistent with LILCO's "realism" argument and did not demonstrate the State and local governments' conduct or performance of "primary responsibilities for emergency response." Accordingly, the Plan, as exercised, fails to comply with NRC emergency planning regulations, including specifically 10 CFR §§ 50.47(b)(1) and (b)(14), the exercise demonstrated a fundamental flaw in the Plan if interpreted in light of LILCO's "realism" argument, and there is no basis for a reasonable assurance finding with respect to the Plan, as exercised.

CONTENTION EX 11. LILCO's "realism" argument assumes that State and local governments will actively respond to a radiological emergency at Shoreham and that LILCO and its Plan could effectively accommodate the active ad hoc exercise of emergency response functions by State and local governments. In fact, the

exercise did not test the ability of LILCO, LERO or the Plan to accommodate State or local governments' active exercise of emergency response functions, because the exercise scenario stipulated that State and local governments, as simulated, would not activate their emergency powers and authorities, would not assume responsibility for protective action decisions, and would not take any actions to implement such decisions. See Scenario, § 1.3.D. Thus, the Plan, as exercised, and the exercise, as conducted, fail to comply with 10 CFR §§ 50.47(b)(1) and (b)(14) or NUREG 0654 §§ II.N.1 and 3. Accordingly, the exercise demonstrated a fundamental flaw in the Plan, if interpreted in the light of LILCO's "realism" argument, and there is no basis for a reasonable assurance finding with respect to the Plan, as exercised.

CONTENTION EX 12. LILCO's "realism" argument assumes that State and local governments will actively respond to a radiological emergency at Shoreham and that LILCO could implement its Plan under circumstances involving joint action by State and local government officials and by LILCO and its employees. In fact, the exercise did not test the ability of LILCO, LERO or the Plan to accommodate a joint government/utility response, because the exercise scenario stipulated that State and local governments, as simulated, would remain passive observers rather than carry out a joint response with LILCO or LERO. See Scenario, § 1.3.D. Accordingly, the exercise did not permit any assessment of the effectiveness of the Plan under circumstances in which

State and local government officials and LILCO personnel would jointly, but without preplanning, attempt to implement the Plan. The exercise failed to comply with 10 CFR § 50.47(b)(14), and the Plan, as exercised, does not comply with 10 CFR § 50.47(b)(1). Accordingly, the exercise demonstrated a fundamental flaw in the Plan, if interpreted in light of LILCO's "realism" argument, and there is no basis for a reasonable assurance finding with respect to the Plan, as exercised.

CONTENTION EX 13. The exercise did not involve the active participation by New York State and local governments. See FEMA Report at ix. Insofar as the "realism" argument assumes that the Plan would be implemented with the active participation of State and local governments, the exercise did not constitute an exercise of actual State and local government actions nor did it provide an opportunity to "evaluate major portions of emergency response capabilities" allocated to State and local governments as required by 10 CFR § 50.47(b)(14). Accordingly, the exercise, considered in the light of the "realism" argument, did not comply with Section 50.47(b)(14), and there is no basis for a reasonable assurance finding with respect to the Plan.

CONTENTION EX 14. The exercise did not involve the active participation by New York State or local governments. See FEMA Report at ix. Insofar as the "realism" argument assumes that the Plan will be implemented with the active participation of State and local governments, the exercise demonstrated a fundamental

flaw in the Plan, because that Plan does not assign "primary responsibilities for emergency response" to the governments assigned those responsibilities under the "realism" argument. Accordingly, the Plan fails to comply with NRC emergency planning regulations, including 10 CFR §§ 50.47(b)(1), (3), (4), (5), (6), (8), (10), (11), (12), (13), (14), (15) and (16).

III. CONTENTIONS EX 15-19: LIMITED SCOPE OF THE EXERCISE PRECLUDES REASONABLE ASSURANCE FINDING

CONTENTION EX 15. The scope of the February 13 exercise of the LILCO Plan was so limited that it could not and did not yield valid or meaningful results on implementation capability as required by 10 CFR § 50.47(a)(2), in that it did not include demonstrations or evaluations of major portions of the LILCO Plan. The data set forth in subparts A-M of this contention individually and collectively establish that the exercise demonstrated a fundamental flaw in the LILCO Plan. The exercise results do not demonstrate that the LILCO Plan could or would be implemented, and the exercise results preclude a finding that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at Shoreham, as required by 10 CFR § 50.47(a)(1). Thus, the exercise demonstrated a fundamental flaw in the LILCO Plan.

Specifically, several critical aspects of offsite emergency preparedness, and major substantive portions of the LILCO Plan, were excluded from the exercise. Neither the exercise scenario (which LILCO prepared), nor responses by players during the