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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Alan S. Rosenthal
Dr. W. Reed Johnson

September 20, 1988
(ALAB-900)

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

Donald P. Irwin, Richmond, Virginia (with whom Lee B. Zeugin, Richmond, Virginia, was on the brief), for applicant Long Island Lighting Company.

Lawrence Coe Lanpher, Washington, D.C. (with whom E. Thomas Boyle, Hauppauge, New York, Susan M. Casey, Washington, D.C., Richard J. Zahnleuter, Albany, New York, and Stephen B. Latham, Riverhead, New York, were on the brief), for the intervenors Suffolk County, the State of New York, and the Town of Southampton.

Edwin J. Reis (George E. Johnson and Lisa B. Clark were on the brief) for the Nuclear Regulatory Commission staff.

DECISION

Applicant Long Island Lighting Company (LILCO) has appealed a December 1987 partial initial decision in which the Licensing Board concluded that the scope of the February 13, 1986, exercise of the offsite emergency plan for the Shoreham Nuclear Power Station was insufficient to comply with the NRC's emergency planning requirements. See LBP-87-32, 26 NRC 479. The NRC staff supports LILCO's

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appeal, and the intervenors Suffolk County, the State of New York, and the Town of Southampton (hereinafter, "the Governments") oppose it. As explained below, we affirm the Licensing Board's ultimate conclusion that the exercise did not satisfy certain regulatory requirements.

I.

The Commission's regulations require, prior to issuance of an operating license for a nuclear power plant, a finding of "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." 10 C.F.R. § 50.47(a)(1) (1988). To determine if such reasonable assurance exists, section 50.47(b) of these regulations describes 16 standards that an acceptable emergency plan must satisfy. Pertinent to the instant appeal is section 50.47(b)(14), requiring "[p]eriodic exercises . . . to evaluate major portions of emergency response capabilities . . . ." Appendix E to 10 C.F.R. Part 50 elaborates on this requirement. As part of the training portion of an emergency plan, Appendix E, § IV.F, requires generally that emergency preparedness exercises

> test the adequacy of timing and content of implementing procedures and methods, test emergency equipment and communications networks, test the public notification system, and ensure that emergency organization personnel are familiar with their duties.

Section IV.F goes on to specify, to a limited extent, the requirements and timing of both onsite and offsite

exercises, beginning two years before license issuance and continuing throughout the life of the plant. Of particular relevance here is paragraph 1 of section IV.F:

> 1. A full participation exercise[4] which tests as much of the licensee, State and local emergency plans as is reasonably achievable without mandatory public participation shall be conducted for each site at which a power reactor is located for which the first operating license for that site is issued after July 13, 1982. This exercise shall be conducted within two years before the issuance of the first operating license for full power (one authorizing operation above 5% of rated power) of the first reactor and shall include participation by each State and local government within the plume exposure pathway EPZ [emergency planning zone] and each State within the ingestion exposure pathway EPZ. . . .

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[4] "Full participation" when used in conjunction with emergency preparedness exercises for a particular site means appropriate offsite local and State authorities and licensee personnel physically and actively take part in testing their integrated capability to adequately assess and respond to an accident at a commercial nuclear power plant. "Full participation" includes testing the major observable portions of the onsite and offsite emergency plans and mobilization of State, local and licensee personnel and other resources in sufficient numbers to verify the capability to respond to the accident scenario.

At one time, Commission regulations essentially precluded consideration of the results of emergency exercises in licensing proceedings. See 10 C.F.R. § 50.47(a)(2) (1983). In Union of Concerned Scientists v.

NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985) (hereinafter, "UCS"), however, the court struck down that rule, concluding that it denied intervenors their right under section 189(a)(1) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a)(1), to a hearing on an issue considered material to licensing. The Commission thereafter amended its rules accordingly, and intervenors may now litigate the results of "pre-license," or initial, emergency exercises. See 50 Fed. Reg. 19,323 (1985).

On February 13, 1986, the Federal Emergency Management Agency (FEMA) conducted a pre-license emergency preparedness exercise at Shoreham pursuant to the NRC's request and in conjunction with that of LILCO. Because the State of New York and local governments oppose LILCO's license application, there was no governmental offsite emergency response plan for FEMA to test, as is usually contemplated in such an exercise. Instead, FEMA evaluated an exercise based on LILCO's own offsite plan, as implemented by the Local Emergency Response Organization (LERO) -- i.e., LILCO employees and contractors working with support organizations such as the American Red Cross, the U.S. Coast Guard, the U.S. Department of Energy, and private firms.[1]

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[1] Various aspects of the LILCO offsite plan and the utility's authority to implement it have been litigated
(Footnote Continued)

After the February 1986 exercise, the Governments sought the Commission's advice on how to proceed with the litigation of contentions concerning the exercise. The Commission responded in CLI-86-11, 23 NRC 577 (1986). Taking note of the court's UCS decision, the Commission stated that any hearing would be restricted to the issue whether "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." Id. at 581. The Commission also confirmed, however, that the usual threshold for the admission of contentions -- a pleading requirement that the bases of each contention be set forth with reasonable specifity -- was to remain unchanged. Ibid. See 10 C.F.R. § 2.714(b).

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before the Licensing Board, Appeal Board, Commission, and state and federal courts since 1983. A number of issues remain unresolved, and at present litigation before the Licensing Board continues. Pertinent to the February 1986 exercise is the Commission's ruling in CLI-86-13, 24 NRC 22, 29 (1986), that it is obliged to give consideration to an offsite emergency plan prepared by a utility without governmental cooperation. In addition, the Commission assumes that in an actual emergency, state and local governments would make a "best effort" response, relying on the LILCO plan. Whether such response would be adequate to meet the Commission's "reasonable assurance" standard remains to be determined in the pending litigation before the Licensing Board. Id. at 31. (The Commission codified this view in its emergency planning regulations. See 10 C.F.R. § 50.47(c)(1); 10 C.F.R. Part 50, Appendix E, § IV.F.6 (1988). The court recently upheld these regulations in Massachusetts v. NRC, No. 87-2032 (1st Cir. September 6, 1988).)

The Governments subsequently tendered, and the Licensing Board admitted, numerous contentions alleging "fundamental flaws" in the emergency plan as revealed by the exercise. See Prehearing Conference Order (October 3, 1986) (unpublished), as modified, LBP-86-38A, 24 NRC 819 (1986). Pertinent here are contentions EX-15 and EX-16, which challenge the scope of the exercise itself for its failure to test certain assertedly major portions of the emergency plan, thereby demonstrating further fundamental flaws in the plan and precluding the ultimate reasonable assurance finding.[2] The Board held hearings on these issues in May and June of 1987 and issued its decision the following December.

By the time LILCO's instant appeal from that decision was fully briefed, the two-year window for the pre-license exercise required by 10 C.F.R. Part 50, Appendix E, § IV.F.1 (see supra p. 3), was already closed. In any event, the existence of other unresolved emergency planning issues has thus far prevented the issuance of a full-power operating

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[2] Contentions EX-15 and EX-16 are too lengthy and convoluted to reprint here verbatim. See Suffolk County, State of New York, and Town of Southampton Memorandum Transmitting Exercise Contentions (August 1, 1986), Attachment at 16-31 (hereinafter, "Governments' Contentions"). The Board disposed of the remaining "exercise" contentions in LBP-88-2, 27 NRC 85 (1988); LILCO's appeal from that initial decision is pending.

license for Shoreham.[3] Hence, another emergency preparedness exercise was conducted this past June.[4] In this circumstance (and in the absence of an exemption from the Commission's requirement that an initial exercise be conducted in the two years preceding issuance of a license), the February 1986 exercise is apparently without significance vis-a-vis license issuance, and LILCO's appeal from the Board decision finding that exercise deficient is technically moot. In an unpublished order issued June 27, 1988, we therefore solicited the parties' views on whether LILCO's appeal should be dismissed and the Licensing Board's partial initial decision vacated. In a rare instance of agreement, LILCO, the Governments, and the NRC staff each urged us not to dismiss the appeal and to resolve the legal issues at hand.

There is no jurisdictional limitation or other "insuperable barrier to our rendition of an advisory opinion on issues which have been indisputably mooted by events

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[3] In addition, LILCO has recently negotiated an agreement to sell the Shoreham facility to the State of New York, which would then decommission the facility. The agreement, however, has not yet been approved by the state legislature, and, thus, Shoreham's future remains in doubt.

[4] In an unpublished memorandum issued May 25, 1988, we disclosed our tentative conclusions on this appeal so that they could be taken into account, as appropriate, in the June exercise.

occurring subsequent to licensing board decision." Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), remanded on other grounds sub nom. Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979). Where an issue is of "demonstrable recurring importance," an opinion that is essentially advisory in nature is warranted. ALAB-743, 18 NRC 387, 390 n.4 (1983). We believe that LILCO's appeal presents just such a circumstance.

As noted above, the regulation here at issue, 10 C.F.R. Part 50, Appendix E, § IV.F.1, requires a full participation emergency preparedness exercise sometime during the two-year period preceding full-power (i.e., operation above five percent of rated power) licensing. Another such exercise has already been conducted, and FEMA's evaluation was issued recently. The history of this proceeding suggests that litigation concerning that exercise would not be unexpected. And, as this proceeding has also demonstrated, the exercise evaluation and the subsequent litigation of issues arising from the exercise is a time-consuming process.[5] Therefore,

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[5] In his dissent in UCS, Judge MacKinnon expressed concern that litigation relating to pre-license exercises -- especially including court review -- would lead to substantial delays and costs. 735 F.2d at 1455 & n.6. At the time of the UCS decision, Commission regulations required the pre-license exercise to be conducted just one year before license issuance. In 1987, the Commission expanded this period to two years (see 52 Fed. Reg. 16,823

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given that the matters raised by LILCO's appeal from LBP-87-32 involve primarily issues of law and require the first-time interpretation of certain Commission regulations that will likely be invoked again in the near future (in this case or th[illegible]ving the Seabrook facility), we agree with the partie[illegible]re is value in addressing those matte[illegible]pe of obviating or at least expediting their [illegible]

II.

A. Li[illegible]irst argues that the Licensing Board erred in admitting contentions EX-15 and EX-16 for litigation. In its view, these contentions -- addressed to the scope of the February 1986 emergency exercise -- exceed the limits of the issues required to be litigated by the court's UCS decision and, more important, those authorized to be litigated by the Commission in CLI-86-11. As LILCO reads those decisions, only the results of an exercise may be challenged in a hearing and, then, solely to determine if those results demonstrate a fundamental flaw in the plan itself; the design or scope of the exercise may not be litigated to determine if the exercise was fundamentally flawed. LILCO

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(1987)) -- which was barely adequate in this case to permit completion of the first level of administrative hearing. Judge MacKinnon's prediction that litigation of pre-license exercises would consume a substantial amount of time has thus proven truer than he could have imagined.

also contends that litigation of the exercise scope is contrary to the Memorandum of Understanding (MOU) between FEMA and the NRC concerning their respective roles in emergency planning (see 50 Fed. Reg. 15,485 (1985)), as well as certain technical guidance documents of both agencies. According to LILCO, FEMA is responsible for the design and content of emergency exercises. By attacking the scope of the FEMA-designed exercise conducted at Shoreham in February 1986, contentions EX-15 and EX-16 fail to accord FEMA's judgment the substantial deference and presumption of validity to which it is entitled. Moreover, the contentions do not even claim that the exercise varied significantly from the many others FEMA has conducted. Thus, as LILCO sees it, the Licensing Board should never have permitted the litigation of any issue challenging the scope of the FEMA-designed exercise.

We disagree. To be sure, the Commission confined the issues subject to litigation in this proceeding to consideration of whether the results of the exercise revealed any fundamental flaws in the emergency plan. CLI-86-11, 23 NRC at 581. At the time the Licensing Board admitted contentions EX-15 and EX-16, FEMA (supported by LCO) sought our interlocutory review of the Board's ruling, arguing (as LILCO does now) that CLI-86-11 forecloses any consideration of the scope of the exercise, as determined by FEMA. In ALAB-861, 25 NRC 129 (1987), we

denied FEMA's request because it did not meet either of our standards for intermediate appellate review. In so ruling, however, we explicitly rejected FEMA's interpretation of the Commission's directive as to what issues could be litigated:

> Such a reading of CLI-86-11 would effectively confer upon FEMA and the NRC staff, which jointly decide the elements to be tested, the unreviewable authority to determine that their sampling of observable elements of the LILCO plan was sufficient to satisfy Commission regulations. While FEMA's professional judgment as to what elements should be tested at the pre-license stage is entitled to substantial deference, the Commission's regulations plainly accord interested parties an opportunity to rebut FEMA's views on questions concerning the "adequacy and implementation capability" of the plan. See 10 C.F.R. 50.47(a)(2). And the determination of whether the LILCO plan, including the exercise, satisfies the Commission's regulatory requirements rests squarely and exclusively in the hands of the Commission.

Id. at 139 n.38.

In resurrecting FEMA's failed argument, LILCO provides us no cause to depart from our earlier reasoning and conclusion. Indeed, the necessary, albeit implicit, assumption in the Commission's CLI-86-11 criterion for an admissible exercise contention is that the exercise itself must be comprehensive enough to permit a meaningful test and evaluation of the emergency plan to ascertain if that plan is fundamentally flawed.[6] An intervenor must therefore be

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[6] The FEMA/NRC MOU also recognizes the need for the (Footnote Continued)

allowed to challenge the scope of an exercise as too limited. To hold otherwise would allow the unreviewable scope of the exercise to dictate the outcome of the exercise evaluation: i.e., an unduly limited exercise of only a plan's strong points would obviously reveal no fundamental flaws in the plan and, conversely, an unduly limited exercise of solely a plan's weakest areas would doom the outcome of the evaluation to failure.

Further, the Commission's regulations themselves provide the predicate for challenging the scope of a pre-license emergency exercise. Section IV.F.1 of Appendix E to 10 C.F.R. Part 50 describes the proper scope of a full participation pre-license exercise and, as such, it imposes regulatory requirements. Assuming that the general subject of such requirements is not otherwise expressly foreclosed from challenge, an intervenor (through the appropriate procedural vehicle) can always raise issues concerning compliance with regulatory requirements. Here, given that the assessment of an emergency exercise is material to a licensing decision and therefore may be litigated (see UCS, 735 F.2d at 1442, 1445-46), the

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exercise scenario to be broad enough in scope. See 50 Fed. Reg. at 15,487 ("failure of a licensee to develop a scenario [to be tested in the exercise] that adequately addresses both onsite and offsite considerations may result in NRC taking enforcement actions").

Governments cannot be denied the opportunity to challenge LILCO's compliance with any of the Commission's regulations concerning emergency exercises, including that addressed to the scope of the exercise. The Licensing Board thus did not err in admitting contentions EX-15 and EX-16.

B. The heart of LILCO's appeal is directed to the Licensing Board's interpretation and application of the primary regulation involved here, section IV.F.1 of Appendix E to 10 C.F.R. Part 50. The Board began its discussion by noting that, under the terms of the regulation itself, an initial, or pre-license, exercise must meet certain requirements that subsequent biennial, or post-license, exercises need not. It contrasts paragraphs 1 and 3 of section IV.F, pertaining to pre-license and post-license exercises, respectively. Paragraph 1 requires a "full participation" exercise by applicant, state, and local personnel (or, as in this case, LERO personnel substituting for the governmental authorities) and a test of as much of the emergency plan as is reasonably achievable without mandatory public participation, while paragraph 3 permits "partial participation" and makes no reference to what might be "reasonably achievable" without mandatory public participation. LBP-87-32, 26 NRC at 484-85.

Because the Commission's requirements for emergency exercises have been amended several times since 1980, however, the Board also considered the parties' arguments

based on the administrative history of the regulation at issue. LILCO and the staff essentially argued that the Commission meant to impose no additional or special requirements for pre-license exercises. The intervening Governments, on the other hand, argued that such initial exercises must be more comprehensive because there is no "track record" of the emergency preparedness for the particular, not yet licensed site. Id. at 485-88. Concluding that a 1984 amendment to the rule made "substantive changes in the required scope of initial and biennial exercises," and citing the "clear language" of section IV.F.1, the Board agreed with the Governments' reading of the regulation. Id. at 488.[7] The Board thus reiterated its conclusion that pre-license exercises must be broader in scope than post-license exercises. The Board also stated that it was

> unnecessary . . . to consider the parties' positions regarding the interpretation of the definition of full participation found in footnote 4 of that paragraph [section IV.F.1]. Because the initial exercise must be more comprehensive than the biennial exercises, a fortiori an exercise that meets that requirement will qualify as a full-participation exercise.

Id. at 488-89.

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[7] The Board also determined that certain FEMA and NRC guidance documents were of "no value in understanding the additional requirements for initial full-participation exercises." LBP-87-32, 26 NRC at 488 n.11.

LILCO presses several complaints about the Licensing Board's analysis and conclusion. First, in LILCO's view, the Board interpreted section IV.F.1 in isolation and without reference to the ultimate "reasonable assurance" standard of 10 C.F.R. § 50.47(a) and all pertinent regulatory history. Second, the Board violated the basic tenets of statutory construction by failing to construe all parts of the regulation at issue, specifically footnote 4. Third, the Board erred in concluding that the 1984 amendment to the exercise regulation added special, substantive requirements for pre-license exercises. Fourth, the Board failed to give adequate consideration to NRC and FEMA guidance documents and appropriate deference to those agencies' expertise and experience in conducting emergency exercises.

We agree with LILCO to the extent that the Licensing Board's analysis of the regulation here at issue does not fully comport with basic principles of statutory construction.[8] Our application of those principles,

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[8] We do not follow, however, LILCO's complaint that the Board somehow failed to give adequate attention to the reasonable assurance standard of 10 C.F.R. § 50.47(a). As LILCO acknowledges, "reasonable assurance" is the ultimate finding the Commission must make in connection with the overall emergency preparedness of a facility. But this standard is of limited use in attempting to determine if a given exercise satisfies the more specific (and thus

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however, does not lead us to the same ultimate conclusions reached by LILCO concerning the interpretation of section IV.F.1.

As is the case with statutory construction, interpretation of any regulation must begin with the language and structure of the provision itself. 1A Sutherland, Statutory Construction § 31.06 (4th ed. 1984); Lewis v. United States, 445 U.S. 55, 60 (1980). Further, the entirety of the provision must be given effect. 2A Sutherland, Statutory Construction § 46.06 (4th ed. 1984). Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language, its interpretation may not conflict with the plain meaning of the wording used in that regulation. Abourezk v. Reagan, 785 F.2d 1043, 1053 (D.C. Cir. 1986), aff'd, 108 S.Ct. 252 (1987); GUARD v. NRC, 753 F.2d 1144, 1146 (D.C. Cir. 1985).

(Footnote Continued)
controlling) requirements of another provision in the regulations. The reasonable assurance criterion, however, is of general significance in that it embodies the basic notion that pervades all of the Commission's emergency planning requirements: the fundamentals of the emergency plan are important, not the details or minor, ad hoc problems. See generally UCS, 735 F.2d at 1448; Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-86-24, 24 NRC 769, 775 n.8, 777 & n.10 (1986), aff'd sub nom. Eddleman v. NRC, 825 F.2d 46 (4th Cir. 1987). See also 52 Fed. Reg. at 16,824.

The regulation involved here, section IV.F.1 of 10 C.F.R. Part 50, Appendix E, states that "full participation" is required for the initial emergency exercise to be conducted during the two-year period preceding license issuance. The regulation immediately calls attention to the definition of full participation found in footnote 4 -- which is as much a part of the regulation and entitled to equal legal effect as if it were in the text.[9] Among other things, a full participation exercise must test "the major observable portions" of the onsite and offsite emergency plans and mobilize "sufficient numbers" of state, local, and licensee/applicant personnel and other resources so as to permit verification of their "integrated capability" to respond to the particular accident scenario being tested.[10] A further gloss on the meaning of full participation is added in the text: such an exercise should test "as much of the licensee [applicant], State and local emergency plans as is reasonably achievable without mandatory public participation."

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[9] Thus, insofar as the Licensing Board found it unnecessary to consider footnote 4 (see LBP-87-32, 26 NRC at 488-89), the Board erred.

[10] This focus on the major portions of the plans is another indication of the Commission's concern with the fundamentals of planning, rather than the details that can be dealt with more easily, should problems develop. See supra note 8.

The principal ambiguity in this provision -- especially insofar as the scope of a pre-license exercise is concerned -- lies in determining what the major observable portions of the plans are. The planning standards in section 50.47, of course, are the original source of this language, inasmuch as they require exercises "to evaluate major portions of emergency response capabilities." 10 C.F.R. § 50.47(b)(14). The administrative history of section IV.F.1 in Appendix E, however, is of modest assistance. The 1980 version of the rule used the terminology "full-scale exercise" but did not define it. See 10 C.F.R. Part 50, Appendix E, § IV.F.1 (1981); 45 Fed. Reg. 55,402, 55,405, 55,407, 55,408 (1980). In 1984, "full-scale" became "full participation" and footnote 4, with its reference to the "major observable portions of the plans," appeared for the first time, but without explanation. See 10 C.F.R. Part 50, Appendix E, § IV.F.1 (1985); 49 Fed. Reg. 27,733 (1984).[11] The source of the particular language in footnote 4, however, appears to be a 1982 petition for rulemaking filed by the National

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[11] The lack of explanation about footnote 4 is understandable because the primary focus of the 1984 rulemaking was not the content or scope of emergency exercises. Rather, the main purpose of the amendment was to change the frequency of participation by state and local governments in emergency preparedness exercises for operating plants from once a year to once every two years. See 49 Fed. Reg. 27,733-36. Compare LBP-87-32, 26 NRC at 488.

Emergency Management Association (NEMA), a group of directors of state emergency services programs. See 48 Fed. Reg. 33,307 (1983); 47 Fed. Reg. 29,252 (1982). NEMA's petition suggested a definition of "full participation" that would include a "test [of] all major elements of the integrated plans." 47 Fed. Reg. at 29,252 n.2 (emphasis added). Two years later and without elaboration, the Commission essentially adopted and expanded NEMA's full participation language to its existing form in footnote 4. 49 Fed. Reg. at 27,736. In response to the issue of whether there were adequate procedures to determine if "major elements" are performed satisfactorily during an exercise, however, the Commission concurred in the need for uniform evaluation procedures and mentioned with seeming approval a FEMA document titled "Procedural Policy on Radiological Emergency Preparedness Plan Reviews, Exercise Observations and Evaluations, and Interim Findings" (August 5, 1983) (hereinafter, "FEMA Objectives").[12] Id. at 27,734.

LILCO contends that the FEMA Objectives include all the major observable elements of an offsite emergency plan, and that therefore one should rely on that document in interpreting section IV.F.1. But more significant to its

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[12] LILCO introduced this document into evidence in this proceeding as Attachment F to its Exhibit 12.

case here, LILCO claims that, pursuant to other NRC and FEMA guidance documents, testing of these major observable elements may be accomplished in several exercises over a six-year period and need not all be included in the initial, pre-license exercise. Specifically, LILCO relies on NUREG-0654/FEMA-REP-1, Rev. 1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (November 1980) (hereinafter, "NUREG-0654"), and FEMA Guidance Memorandum PR-1, "Policy on NUREG-0654/FEMA-REP-1 and 44 CFR 350 Periodic Requirements" (October 4, 1985) (hereinafter, "FEMA PR-1").[13] NUREG-0654 is the principal guidance document for NRC staff and FEMA review of emergency plans. As pertinent to LILCO's argument, it provides that the accident scenarios tested in emergency exercises "should be varied from year to year such that all major elements of the plans and preparedness organizations are tested within a five-year period." NUREG-0654 at 71 (Planning Standard N.1.b).[14] FEMA PR-1 states that the exercise scenario

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[13] FEMA PR-1 is Attachment E to LILCO's Exhibit 12.

[14] To take account of emergency planning rule changes since 1980 when NUREG-0654 was issued, NRC and FEMA have issued just this month Supplement 1 to that document. It provides that accident scenarios be varied from exercise to exercise so that all major elements of the plans are tested within a six-year period. NUREG-0654, Supp. 1 (September 1988) at 24 (Planning Standard N.1.b).

should be varied so that the major elements of the plans are tested within a six-year period, beginning with the first exercise. It also notes that the major elements are incorporated in the FEMA Objectives. FEMA PR-1 at 2. LILCO complains that the Licensing Board failed to give adequate consideration to these documents.

As we have often stressed, NUREG-0654 and similar documents are akin to "regulatory guides." That is, they provide guidance for the staff's review, but set neither minimum nor maximum regulatory requirements. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 709-10 (1985), aff'd in part and review otherwise declined, CLI-86-5, 23 NRC 125 (1986); Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 568 n.10 (1983). Where such guidance documents conflict or are inconsistent with a regulation, the latter of course must prevail. On the other hand, guidance consistent with the regulations and at least implicitly endorsed by the Commission is entitled to correspondingly special weight. See, e.g., Limerick, 22 NRC at 711 & n.40.

In the Statement of Considerations for the 1984 amendments to the emergency planning rules, the Commission specifically referred to the FEMA Objectives in connection with the evaluation of the major elements of the exercise. See supra p. 19. Given the dearth of other guidance that

would aid our interpretation and the lack of obvious conflict with the regulation itself, we agree with LILCO that the FEMA Objectives can provide an appropriate measure for determining whether an exercise meets the regulation's "major observable portions of the plans" criterion for full participation.[15]

We cannot agree, however, that, insofar as the initial, pre-license exercise is concerned, the major elements of the emergency plan can be tested in the aggregate over a six-year period, beginning with the pre-license exercise and extending to one or more post-license exercises.[16] To the extent that NUREG-0654 and FEMA PR-1 suggest such an interpretation, those guidance documents conflict with the language and structure of the regulation and thus may not be relied upon. As the Licensing Board found, section IV.F of Appendix E, on its face, draws a distinction between the initial exercise required before licensing and the periodic, post-license exercises required for an operating plant.

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[15] Interestingly, under FEMA's regulations, a "full participation" exercise tests "the observable portions" of the plans, rather than the major observable portions. 44 C.F.R. § 350.2(j) (1987).

[16] We need not, and thus do not, express any opinion on whether section IV.F.1 permits the testing of the major observable portions of the plans in more than one pre-license exercise conducted during the two-year period preceding license issuance.

Section IV.F.1 refers only to the requirement for a full participation exercise in the two years before licensing, whereas IV.F.3 permits both full and partial participation exercises, explicitly staggered over several years.[17] Thus, NUREG-0654 and FEMA PR-1 provide guidance essentially consistent with the post-license exercise requirements of section IV.F.3, but are at odds with the unequivocal command of section IV.F.1 for a pre-license full participation exercise -- i.e., all "the major observable portions" of the onsite and offsite emergency plans must be tested before a license is issued. Accordingly, the Licensing Board gave appropriate weight to those guidance documents. See LBP-87-32, 26 NRC at 488 n.11.

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[17] To support its view that the Commission has never intended higher standards for initial exercises than for subsequent ones, LILCO cites the preamble to a proposed 1981 rule change. See 46 Fed. Reg. 61,135 (1981). This citation, however, does not help LILCO's case. For one thing, the purpose of the statement was to justify the Commission's decision to exclude issues concerning pre-license exercise results from litigation in licensing proceedings, by showing their parity with post-license exercise results (which obviously are not litigated). But the court in UCS struck down that rule. Moreover, the rules in question have undergone a number of changes since the referenced 1981 statement, and, as noted above, section IV.F on its face treats pre- and post-license exercises differently. In any event, the primary concern here is what the rules currently require for an initial, pre-license exercise -- irrespective of whether those requirements are more or less extensive than those once required before licensing, or more or less extensive relative to the requirements of post-license exercises.

Lastly, we are unpersuaded by LILCO's argument that the Licensing Board failed to give due deference to the FEMA/NRC Memorandum of Understanding and the views of the FEMA and NRC staff witnesses, especially concerning FEMA's customary practice in designing emergency exercises. There is no dispute that, under the MOU, FEMA has the lead responsibility for assessing offsite emergency planning and preparedness. 50 Fed. Reg. at 15,486. But as for emergency exercises, in particular, the MOU provides for cooperation between the NRC and FEMA on determining exercise requirements and evaluating results. It also explicitly recognizes the NRC's right to take enforcement action if a licensee does not develop an accident scenario for an exercise that adequately addresses both onsite and offsite considerations. See supra note 6. FEMA findings on questions of adequacy and implementation capability are considered presumptively valid in NRC licensing proceedings, but such presumptions may be rebutted. 10 C.F.R. § 50.47(a)(2). FEMA has considerable experience in designing and assessing exercises; most of this experience, however, has been gained in connection with the more numerous post-license, biennial exercises. See 52 Fed. Reg. at 16,824 (supra note 5). See also Tr. 7232, 7544 (FEMA's Region II office had no prior experience in conducting pre-license exercises). Thus, the fact that the February 1986 Shoreham exercise was designed according to standard

FEMA practice and was as comprehensive as other exercises FEMA has conducted may be of interest, but it is not dispositive of the question whether the exercise complies with NRC pre-license exercise regulations. See Tr. 7501-02, 7624 (FEMA did not purport to determine if the exercise satisfied NRC regulatory requirements). As the Licensing Board observed when it first admitted contentions EX-15 and EX-16,

> [t]he correct requirement is that the emergency preparedness exercise meet the regulation standard of 10 CFR 50.47 and App. E. Whether the exercise per se is not materially different from other FEMA-approved scenarios at other nuclear plants is irrelevant. It is the regulatory standard that must be met.

Prehearing Conference Order (October 3, 1986) at 7.

In summary, the adequacy of the scope of a pre-license emergency exercise must be judged against the NRC's regulatory requirements, not the customary practice of FEMA in designing and conducting such exercises. The general focus of the NRC's emergency planning requirements is on whether there is reasonable assurance that adequate protective measures can and will be taken in the event of an emergency -- i.e., whether there is an absence of any fundamental flaws in the emergency plans. Particularly pertinent among those requirements insofar as emergency exercises are concerned is 10 C.F.R. Part 50, Appendix E, § IV.F.1, the entirety of which (including footnote 4) must be given effect. That provision requires a pre-license

exercise to be "full participation." This means that all "the major observable portions of the onsite and offsite emergency plans" must be tested in that pre-license exercise; the FEMA Objectives can serve as guidance in determining what the major observable elements are. In addition, a pre-license exercise includes the mobilization of state, local, and licensee personnel "in sufficient numbers" to verify their "integrated capability" to assess and to respond to the particular accident scenario being tested.

III.

Given the framework for analysis discussed above, we now turn to the four omissions from the February 1986 exercise, which, according to the Licensing Board, demonstrate a lack of compliance with the requirements for a full participation exercise specified in section IV.F.1 of Appendix E.

A. During the exercise, sirens to alert the public to an emergency were not sounded, no emergency broadcast system (EBS) message was aired,[18] and LERO made no contacts with

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[18] Eleven EBS messages, however, were simulated during the exercise. See LILCO's Testimony on Contentions EX 38 (ENC Operations) and EX 39 (Rumor Control) (March 13, 1987), Attachment B. (This evidence pertains more directly to issues involved in the Licensing Board's subsequent other initial decision on the February 1986 exercise, LBP-88-2, supra note 2. It was to have been bound into the hearing transcript at Tr. 3206-07 but inexplicably was not. See

(Footnote Continued)

the then-designated EBS station, WALK Radio. The intervening Governments alleged that the failure to include these elements unduly limited the scope of the exercise, precluding a finding of reasonable assurance.

The Licensing Board concluded that sounding of the sirens and broadcast of an EBS message were "not reasonably achievable," and that it would not consider these omissions in determining whether the requirements of section IV.F.1 were met. LBP-87-32, 26 NRC at 491. In so concluding, the Board took note of a New York state court decision suggesting that such activities undertaken by LERO might constitute an unlawful exercise of the state's police power. In addition, the month before the exercise, the Suffolk County legislature passed a law imposing civil and criminal penalties on anyone participating in an exercise activity that could affect the general public. That law was enjoined three days before the exercise -- too late, however, to incorporate a test of the alert and notification system into the exercise. Id. at 490-91. The Board thus stated that, "[g]iven the County's efforts to preclude any testing of the alert and notification system at the Exercise, it ill behooves the Intervenors to complain that [sounding of

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(Footnote Continued)
also Tr. 3304-25 (motion to strike certain testimony denied).)

sirens and broadcast of the EBS message] were not carried out at the Exercise." Id. at 491. But as for the lack of contact with WALK Radio, the Board found nothing in the record to show whether the County prevented its inclusion in the exercise. Ibid. The Board stated that "accurate communication of the text of EBS messages to the radio station which is to broadcast them is of paramount importance" and is not simply a "mechanical activity." It therefore determined that "testing of communications with WALK Radio was reasonably achievable and should have been included in the Exercise." Id. at 492.

LILCO argues that the Board failed to explain how it could be reasonably achievable for WALK Radio to have received an EBS message but not reasonably achievable for it to have transmitted a test message to the public. In LILCO's view, the County ordinance effectively precluded both. LILCO also asserts that, in any event, contact with the EBS station is not material to the exercise, as it involves only the ability of radio station personnel to answer a telephone call from LERO, verify a code provided by the caller, and record the caller's EBS message.

Public alert and notification is unquestionably a major element of emergency planning. See 10 C.F.R. § 50.47(b)(5), (6). Section IV.F of Appendix E makes clear that "[e]xercises shall . . . test the public notification system," and FEMA includes this as an exercise objective.

See FEMA Objectives, No. 13. The EBS message is an integral component of the public notification system, and ordinarily should be tested in a full participation exercise. But once the Licensing Board determined that the broadcast of an EBS message was not possible during the February 1986 exercise, it logically follows that no useful purpose would have been served by LERO's making contact with the radio station that would have nothing to broadcast. In other words, the key ingredient in this element of the public notification system for testing purposes is the broadcast of the message. Little information of significant independent utility would be gained by testing actual contact with the station, where the station has no corresponding responsibility to broadcast the message conveyed to it.[19] Thus, in this circumstance, LERO's failure to contact WALK in and of itself does not

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[19] This is not, as the Governments suggest, a matter of who (i.e., LILCO or the Licensing Board) had the burden of explaining or showing what is reasonably achievable. Rather, it is a matter of whether it is reasonable to expect the performance of an activity that would be largely meaningless for purposes of the overall exercise.

The Governments also argue that the tasks involved in LERO's communicating with the EBS station are not as simple as LILCO suggests. They note, in this regard, that the Licensing Board found numerous problems with LERO's communications skills in the other decision that addresses the February 1986 exercise, LBP-88-2, 27 NRC 85. We therefore believe it is more appropriate to deal with those asserted communications deficiencies in that context, rather than in connection with this challenge to the scope (as opposed to the implementation) of the exercise.

show a lack of compliance with the requirements of a full participation exercise.

This ruling, however, is subject to several caveats. We do not have before us any direct challenge to the Licensing Board's determination that sounding sirens and broadcast of the EBS message were not reasonably achievable and thus need not be considered in deciding if the requirements of section IV.F.1 have been satisfied; our ruling therefore assumes the correctness of the Board's decision on that score. Inasmuch as this opinion is advisory in nature, however, we feel compelled to express our doubts about certain aspects of the Licensing Board's analysis in this regard and the parties' arguments that led to that analysis.

The parties and the Licensing Board have focused a lot of attention on language in section IV.F.1 that states that a full participation exercise should "test[] as much of the licensee, State and local emergency plans as is reasonably achievable." They have all failed, however, to give due weight to the rest of the phrase -- "without mandatory public participation." We believe that a proper understanding of the intent and purpose of this language requires consideration of the entirety of the phrase as one complete thought -- i.e., "as much of the . . . plans as is reasonably achievable without mandatory public participation" -- as well as its administrative history.

The genesis of this language shows that all it means is that emergency exercises should not involve actual participation by the general public, or so-called "live tests and drills." It does not explain or define "full participation" exercise -- footnote 4 serves that purpose; nor does it refer to the relatively recent development in which state and/or local governments have refused to participate in emergency planning for nuclear power plants. "No mandatory public participation" was the Commission's position in 1977 (see 42 Fed. Reg. 36,326-28 (1977); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-486, 8 NRC 9, 16-17 (1978)), and nothing in the several subsequent changes to the agency's emergency planning regulations gives us cause to doubt the vitality of that interpretation of the language today. This language first appeared in the rules themselves in 1980, without any explanation, and it applied to both pre- and post-license exercises. See 45 Fed. Reg. 55,402 (1980); 44 Fed. Reg. 75,167 (1979); 10 C.F.R. Part 50, Appendix E, § IV.F.1 (1981). It is reasonable to infer from the lack of explanation about this phrase that the Commission was simply codifying its existing position of "no mandatory public participation." As the Licensing Board noted, in the 1984 amendments this language was dropped insofar as it applied to post-license exercises. LBP-87-32, 26 NRC at 486 n.8; 10 C.F.R. Part 50, Appendix E, §§ IV.F.1, IV.F.3 (1985).

Contrary to the Board and the Governments (LBP-87-32, 26 NRC at 487-88), however, we see nothing in the administrative history to indicate that this was an intentional substantive change[20] or that, in any event, the phrase as retained in the pre-license exercise provision was to have a meaning different from that ascribed to it since 1977.

In light of this interpretation of the "reasonably achievable" language in section IV.F.1, we believe that the parties and the Licensing Board erred in turning to that provision as essentially an "affirmative defense" for LILCO to a claim that an exercise was not "full participation." Instead, 10 C.F.R. § 50.47(c)(1) (1987) provided the appropriate provision to apply to circumstances where an applicant could not meet the Commission's emergency planning requirements. As observed earlier (supra note 1), the Commission has recently amended this provision to address, in addition, the specific circumstance where state and/or local governments refuse to participate in emergency

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[20] We are inclined to think that careless drafting accounts for this change. It is unlikely that the Commission meant to require public participation for post-license exercises (the logical consequence of dropping the "no mandatory public participation" language from the biennial exercise provision), particularly without explaining such a significant change. There is also other evidence of a lack of precision in the drafting of the rule. For instance, section IV.F.1 pertains only to pre-license exercises, yet it refers to the licensee's (rather than the applicant's) emergency plans.

planning. Thus, in the future where an applicant claims that it was not possible to test an element of an emergency plan that would otherwise be required to be included in a full participation pre-license exercise, the Board should analyze that claim pursuant to 10 C.F.R. Part 50, Appendix E, § IV.F.6, and 10 C.F.R. § 50.47(c)(1) (1988).

B. Only one of 11 school districts participated in the February 1986 emergency exercise at Shoreham. New York Exhibit 1 at 60-61. This participation involved the actual completion by LERO personnel of one school bus route (after a 40-minute delay in dispatch of the vehicle) and the simulated dispatch of 17 school buses to one high school. In its evaluation, FEMA concluded that greater school participation was needed and assigned this aspect of the exercise an "ARCA," or Area Requiring Corrective Action, rating. FEMA also noted that, despite its prior request for more school participation, LILCO decided not to invite other districts to participate. See LBP-87-32, 26 NRC at 496; FEMA Exhibit 1 at 38, 41, 66, 67; Tr. 7603, 7606-09.

The Governments contended that there was inadequate school participation in the exercise, and the Licensing Board agreed. The Board observed that the only evidence as to why LILCO did not invite more schools to participate was the speculation of a LILCO witness on cross-examination that other schools would not have likely participated because of resolutions expressing opposition to Shoreham. The Board

also noted that LILCO conceded that more schools should have been included in the exercise and committed itself to seek such participation in the future. See Tr. 6951-53. The Board stressed that, under 10 C.F.R. § 2.732, LILCO has the burden of proof and therefore was obliged to establish why greater school participation was not reasonably achievable. LBP-87-32, 26 NRC at 496-97. LILCO having failed to do so, the Board thus concluded that the exercise was deficient for insufficient school participation. Id. at 501.

LILCO complains that it is being faulted for the mere informality of its documentation concerning the unwillingness of other school districts to participate in the exercise. It notes that FEMA characterized the lack of greater school participation as only an ARCA, rather than the higher-level "Deficiency." LILCO infers from this that FEMA does not consider the lack of greater school participation to be essential to the ultimate "reasonable assurance" finding. LILCO argues that the Licensing Board improperly ignored the significance of this inference from FEMA's testimony.

There is no dispute that the potential evacuation of schools within the emergency planning zone (EPZ) is a major element of offsite emergency planning. See FEMA Objectives, No. 19. See also 10 C.F.R. § 50.47(b)(10). A sufficient number of school and related personnel must therefore participate in a full participation exercise so as to permit

verification of their integrated capability to respond to the accident scenario. 10 C.F.R. Part 50, Appendix E, § IV.F.1 n.4. As LILCO acknowledged, the participation of one high school -- out of a total of 48 public and private schools in the EPZ (see Governments' Contentions, supra note 2, at 28) -- is not enough to satisfy this regulatory standard. Hence, FEMA's assessment rating of this matter is beside the point. Nonetheless, it is clear from the record that, notwithstanding the ARCA rating, FEMA determined much broader school participation would be necessary before it could verify the ability of the schools generally to respond in the event of an emergency at Shoreham. Tr. 7603. Indeed, FEMA strongly recommended that in the future all schools (presumably in the 10-mile plume EPZ) be included in offsite exercises. FEMA Exhibit 1 at 38, 41. We therefore find LILCO's attempt to draw contrary inferences from this evidence to be unpersuasive.

We also reject LILCO's claim that, because greater school participation was so unlikely, the absence of proof on that score was just a technicality. The Licensing Board correctly ruled that LILCO has the burden of proving that the pertinent regulatory requirements are satisfied. Satisfaction of the burden of proof regarding a factual matter is not just a formality. It goes to the heart of the legal process and requires evidence -- not speculation, regardless of how well-founded such speculation might appear

to be. In future exercises, therefore, LILCO should at least attempt to obtain the participation of a sufficient number of schools; but if they decline, thereby precluding full participation as contemplated by the Commission's regulations, LILCO has the burden of establishing such fact pursuant to 10 C.F.R. § 50.47(c)(1). See supra pp. 32-33.

C. The Commission's regulations define two emergency planning zones around a nuclear power plant facility -- a "plume exposure pathway EPZ" about 10 miles in radius, and an "ingestion pathway EPZ" about 50 miles in radius. 10 C.F.R. § 50.47(c)(2). The FEMA Objectives identify three areas in connection with the ingestion pathway EPZ that are to be tested in an emergency exercise: (1) equipment and procedures for the collection, transport, and analysis of soil, vegetation, snow, water, and milk samples; (2) the ability to project dosage to the public via ingestion (based on field data) and to determine appropriate protective measures; and (3) the ability to implement protective actions for ingestion pathway hazards. FEMA Objectives, No. 9, 11, 12. None of these objectives was tested in the February 1986 exercise,[21] and the Governments contended that

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[21] New York and Connecticut are ingestion pathway states. Apparently, there was limited involvement by Connecticut in the February 1986 exercise (see Tr. 6851-52), but neither state participated in the matters covered by the

(Footnote Continued)

they were improperly excluded. The Licensing Board agreed. It noted that ingestion pathway activities were excluded from the exercise largely because the NRC staff advised FEMA to emphasize areas related to emergency preparedness and response capabilities within the 10-mile plume EPZ. LBP-87-32, 26 NRC at 498-99. While the Board described this an "unfortunate," it nonetheless found that section IV.F.1 "clearly requires . . . that each state within the ingestion exposure pathway EPZ participate in the initial full-participation exercise." Id. at 499. Accordingly, the Board concluded that the exercise was unduly limited and did not comply with regulatory requirements. Id. at 499, 501.

LILCO argues that ingestion pathway exercises are not uniformly performed and have never been conducted to any significant extent in New York because of the lack of final FEMA guidance on this subject. LILCO draws an analogy to recovery and reentry activities, which the Licensing Board determined were not reasonably achievable due to a lack of guidance from the Environmental Protection Agency. See id. at 499-500. It also asserts that the regulations require the inclusion of ingestion pathway activities only to the

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(Footnote Continued)
three specified FEMA objectives, nor did LERO participate in this regard as New York's surrogate.

extent dictated by the accident scenario tested and only once every five years for each ingestion pathway state.

We agree with the Licensing Board that the dictates of the regulation are unequivocal and that the February 1986 exercise was deficient for failure to test state ingestion pathway objectives. A pre-license full participation exercise "shall include participation by . . . each State within the ingestion exposure pathway EPZ." 10 C.F.R. Part 50, Appendix E, § IV.F.1. This language leaves little room for interpretation. To be sure, the extent of each state's participation is not detailed and will necessarily be limited by the particular accident scenario tested in the exercise. That scenario, of course, must be broad enough to meet all regulatory requirements for a pre-license exercise. See supra pp. 25-26. LILCO's assertion that the regulations require states to test their ingestion pathway plans only once every five years pertains solely to post-license biennial exercises and thus is of no assistance here. See 10 C.F.R. Part 50, Appendix E, § IV.F.3(e). And, in any event, because section IV.F.3(e) provides that ingestion pathway plans be tested "at least once every 5 years" (emphasis added), there is no irreconcilable conflict with the more explicit command of section IV.F.1 that ingestion pathway states shall participate in pre-license exercises.

With respect to the asserted practice of not regularly including ingestion pathway activities in emergency

exercises, we have already determined that custom is not dispositive, particularly when the regulations clearly require otherwise. See supra pp. 24-25.[22] The fact that the NRC staff advised FEMA to focus on plume EPZ activities is, as the Licensing Board described it, unfortunate, but is also of little aid to LILCO. As the applicant for an operating license, LILCO is ultimately responsible for analyzing the Commission's regulations and determining its obligations thereunder. Finally, insofar as LILCO claims the lack of FEMA guidance on ingestion pathway activities prevented their inclusion in the exercise (the "reasonably achievable" argument), we have already explained that the proper remedy for extenuating circumstances that may preclude satisfaction of the Commission's exercise requirements is found in 10 C.F.R. § 50.47(c)(1). See supra pp. 32-33.[23]

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[22] LILCO notes that NRC records reveal that ingestion pathway states did not participate in the pre-license exercises for several other facilities. That may well be true, but so too is the fact that no party invoked its right to litigate the matter in those cases.

[23] In this connection, we note that the Licensing Board's determination that the testing of recovery and reentry functions was "not reasonably achievable" and therefore need not be considered (see LBP-87-32, 26 NRC at 499-500) is not before us on appeal. But see supra pp. 30-32.

D. Under the accident scenario tested in the February 1986 exercise at Shoreham, special facilities such as nursing homes were to be evacuated. Except in two or three instances, LILCO's communications with such facilities were simulated. FEMA evaluated the performance of only one ambulance and one ambulette, and it did not determine whether enough of such vehicles and drivers would have been available to handle an actual evacuation. LBP-87-3[illegible], 26 NRC at 500. The Licensing Board concluded that the coordination and communication between LERO and the special facilities, and especially the preparedness of ambulance companies, should have been tested and evaluated in the exercise. Because the Board found nothing to indicate that a test of those aspects of the emergency plan was not reasonably achievable, it determined that the exercise failed to satisfy the requirements of section IV.F.1. Id. at 501.

LILCO argues that these omissions from the exercise are not material and thus do not constitute a failure to comply with the Commission's regulations. LILCO stresses that essentially all that is involved in communicating with special facilities is their ability to answer telephone calls from LERO workers. Where a special facility has its own vehicles to transport residents, this call would simply advise the facility of the need to evacuate -- information it would have already obtained through the public alert and notification system. If a special facility does not have

its o[illegible]hicles, the call would merely add the expected a[illegible]e of LERO vehicles. LILCO also argues that, in ac[illegible] with FEMA's judgment and guidance, not all s[illegible]acilities need to be tested in the initial pre-license exercise, but rather can be tested in several exercises over a six-year period. As for the Board's ruling on the need for an evaluation of the preparedness of ambulance companies, LILCO is uncertain of the Board's intent. It believes, however, that the Board would require FEMA to evaluate the performance of ambulance company officials in their function of dispatching vehicles. But in LILCO's view, this is the routine job of these persons and thus is not significant vis-a-vis FEMA's evaluation in an emergency exercise.

The participation of special facilities is a major observable portion of the offsite emergency plan and, thus, the Commission's regulations require contact with a sufficient number so as to verify their integrated capability to respond to an accident. See FEMA Objectives, No. 18; Tr. 7663-64.[24] Actual contact with only two or three such facilities during the 1986 exercise is

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[24] We therefore agree with LILCO that all special facilities need not be tested in the exercise, but disagree that all may be tested in several exercises over a six-year period, without regard to how many participate in the initial, pre-license exercise. See supra pp. 22-23.

insufficient to satisfy this requirement, particularly insofar as those facilities that lack their own vehicles for the transportation of mobility-impaired persons are concerned.[25] LILCO attempts to minimize the significance of the calls to these facilities, but communication and coordination with special facility personnel concerning the arrival time of LERO's vehicles is patently essential to the effective implementation of an evacuation and hence should be tested in an exercise.[26]

We agree with LILCO, however, that there is some ambiguity in the Licensing Board's ruling relating to the need for an evaluation of the preparedness of the ambulance companies that would serve the special facilities: it is not entirely clear what the Board intends by "preparedness." If the Board means that the evaluation of the actual performance of only one ambulance and one ambulette was inadequate, then we concur that that level of participation does not constitute the "sufficient number" contemplated by

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[25] There are three hospitals and 10 major nursing and adult homes in the plume EPZ. Most will require vehicles provided by LERO. New York Exhibit 1 at 85, 93, 95.

[26] This contrasts with our judgment (supra pp. 28-30) that, in the circumstance of the February 1986 exercise where no EBS message was broadcast, actual communication between LERO personnel and the EBS radio station would have been largely meaningless.

the regulation requiring a full participation pre-license exercise. See New York Exhibit 1 at 95.[27]

The Licensing Board's conclusion that the February 13, 1986, emergency preparedness exercise at Shoreham was not inclusive enough to meet the Commission's regulatory requirements (see LBP-87-32, 26 NRC 479) is affirmed for the reasons set forth in this opinion.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[27] With respect to the Licensing Board's references to FEMA's failures to evaluate the number of ambulances and drivers actually available, and to interview ambulance company officials concerning their knowledge of their emergency response duties (LBP-87-32, 26 NRC at 500), it is not clear whether those omissions were solely the consequence of LILCO's/LERO's actions or FEMA's. In light of the advisory nature of this opinion, the issue need not be resolved. We question, however, the fairness of penalizing a license applicant for the shortcomings in an exercise evaluation (as contrasted with the exercise itself) that are solely attributable to FEMA.