7202

LILCO, October 3, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL - 3
	)	
(Shoreham Nuclear Power Station, Unit 1)	)	
	)	

LILCO'S COMMENTS ON THE IMMEDIATE EFFECTIVENESS OF LBP-88-24

In LBP-88-24 the Licensing Board resolved in LILCO's favor all matters remaining in controversy before it and dismissed the Intervenors (Suffolk County, the State of New York and the Town of Southampton) from the Shoreham proceeding. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-24, 28 NRC ___ (Sept. 23, 1988) ("Concluding Initial Decision"). Accordingly, the Licensing Board authorized the Director of the Office of Nuclear Reactor Regulation, upon making the requisite findings on matters not embraced in the Concluding Initial Decision, to issue a full power operating license for the Shoreham facility. Pursuant to 10 C.F.R. § 2.764(f)(2)(ii), LILCO presents its views on the Commission's determination whether LBP-88-24 should become immediately effective.[1/]

In LILCO's view, no health and safety concerns remain that warrant a stay of the licensing authorization in LBP-88-24. Therefore, LILCO respectfully urges the Commission promptly to authorize the issuance of a full power operating license for Shoreham.

1/ These comments are styled "Docket No. 50-322-OL." They address matters in both the 50-322-OL-3 and 50-322-OL-5 subdockets.

D503

I. Introduction

It is startling, but instructive, to note that LILCO applied for a permit to construct Shoreham two decades ago. There followed the most extensive construction permit hearings in the history of AEC licensing, culminating in favorable Licensing Board (1972) and Appeal Board (1973) decisions. [2/]

Thirteen years later, LILCO submitted its application for an operating license for Shoreham. The NRC docketed the application early in 1976. Litigation over it began that April. The operating license hearings were again record-setters -- the most exhaustive and protracted in NRC history. Again the results have affirmed Shoreham's safety. But simply to state this conclusion does not adequately convey a sense of the high degree of confidence it warrants. The following operating license statistics describe a proceeding of unprecedented thoroughness and scope:

Prefiled written testimony	27,321 pages
Number of witnesses	706 witnesses[3/]
Number of exhibits	1,095 exhibits
Days of prehearing conferences hearings	356 days
Number of hearing transcript pages (not including deposition pages)	63,170 pages
Pages of findings of fact and conclusions of law proposed by the parties	10,252 pages
Pages of written rulings and decisions by NRC judges	5,980 pages
Number of people deposed during discovery	327 persons

2/ There were 70 days of AEC hearings, which began in September 1970 and continued episodically for 2-1/2 years, ending in January 1973.

3/ This number includes each witness who testified on each contention. Thus, persons who testified on more than one contention are counted for each contention.

During Shoreham's 12-1/2 years of operating license litigation, over 20 NRC Licensing Board judges have dealt with one or another of its facets. These judges have formed six Licensing Boards, focusing on (1) the extensive prehearing and environmental matters at issue from 1976-81, (2) hundreds of health and safety issues, including diesel generator matters and onsite emergency planning, (3) plant security, (4) low power, (5) offsite emergency planning and (6) the February 1986 emergency response exercise. Few proceedings of any kind in any context involve, as has Shoreham, more than 63,000 pages of hearing transcript. Nothing else in NRC jurisprudence approaches the scope or depth of the Shoreham litigation. Repeatedly Shoreham has been found safe by NRC judges after exhaustive evidentiary inquiry.

The Shoreham OL proceeding comes at last to immediate effectiveness review. If ever such a review deserved the Commission's focused, decisive attention, Shoreham deserves it. While the Intervenors will surely place some remaining appellate issues before the Appeal Board (the overwhelming bulk of the potential appellate issues in this proceeding have already been raised and lost by the Intervenors), none of the remaining issues justifies delay by the Commission in permitting Shoreham's licensing at full power.

A. The Immediate Effectiveness Review

Under the Commission's regulations, a licensing board decision authorizing the issuance of a full power operating license cannot become effective until the Commission performs its "immediate effectiveness" review. 10 C.F.R. § 2.764(f)(1). The Commission conducts its sua sponte review of the licensing board decision to decide whether the effectiveness of the decision should be stayed "in the public interest." 10 C.F.R. § 2.764(f)(2)(i). In effect, such licensing board decisions are automatically stayed for up to 30 days, pending Commission review. Id.; Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-86-11, 23 NRC 294, 409 (1986).

The Commission makes its stay decision based on four factors:

1. the gravity of the substantive issue(s) decided below;

2. the likelihood that that issue has been resolved incorrectly below;

3. the degree to which correct resolution of the issue would be prejudiced by operation pending agency review; and

4. "other relevant public interest factors".

10 C.F.R. § 2.764(f)(2)(i). The purpose of the Commission's review is "to determine whether significant safety issues exist" that warrant a stay of the licensing authorization. 47 Fed. Reg. 40,535 (Sept. 15, 1982). The Commission's review is not intended to be a detailed, formal scrutiny of the record developed by the licensing board; instead, the review is informal, expedited, and focused on "significant issues of public health and safety." Id.

Unless the Commission otherwise explicitly so directs, any statement made in the course of its immediate effectiveness review is without prejudice to subsequent Appeal Board consideration of a 10 C.F.R. § 2.788 stay motion or of any merits appeals duly raised by the parties. 10 C.F.R. § 2.764 (g); 47 Fed. Reg. 40,536 (Sept. 15, 1982). However, in announcing its immediate effectiveness decision the Commission may give instructions about any future handling of the proceeding, for example, by directing the Appeal Board to expedite its review of particular issues, furnishing guidance on how to resolve particular issues, or bypassing the Appeal Board and accepting for itself the initial appellate review of particular issues. 10 C.F.R. § 2.764(f)(2)(iv).

B. Issues Subject to Review

The issues remaining in litigation, or potentially subject to litigation, before the Commission can be summarized as follows:

1. Issues resolved in LBP-88-24 (EBS, school bus driver role conflict, hospital evacuation time estimates, and realism issues)

2. Issues concerning LILCO's June 1988 exercise (the second exercise) of the Shoreham emergency plan

3. Issues pending before the Appeal Board (LILCO's appeals from the 1988 exercise and Intervenors' appeal of the Licensing Board's 1988 reception centers decision)

4. Issues pending before the Commission itself (preemption and GUARD matters)

As noted in greater detail below, LILCO believes that the merits rulings and dismissal sanctions in LBP-88-24 are unassailable[4/] and thus present no outstanding health and safety issues for immediate effectiveness purposes. Moreover, LILCO believes that its 1988 exercise presents no such issues, in light of a deficiency-free FEMA evaluation and a FEMA finding of reasonable assurance based on both the LILCO Plan and the exercise.[5/] Nor do any of the other remaining issues warrant staying the effectiveness of LBP-88-24.

4/ LILCO will address the authority of the OL-3 Licensing Board to impose the dismissal sanction in a brief to be filed with the Appeal Board tomorrow, October 4, 1988. That brief will respond to the Intervenors' brief on whether the Licensing Board in the emergency planning (OL-3) docket had the authority to dismiss the Intervenors from the entire emergency planning proceeding, including that phase initiated to consider the results of the 1986 exercise (designated by the Chairman of the Atomic Safety and Licensing Board Panel as the OL-5 docket). The dismissal issue is also inextricably intertwined with the issue of which licensing board, if any, should hear any issues arising from the 1988 exercise. The Appeal Board has decided that the licensing board in the OL-5 docket should hear such issues, even though that board had disbanded following its conclusion, over six months ago, that it had fulfilled its limited mandate of reviewing the 1986 exercise. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-901, 28 NRC ___ (Sept. 20, 1988); LBP-88-7, 27 NRC 289 (Mar. 9, 1988). LILCO strongly disagrees, and will file by October 5 its petition for Commission review of ALAB-901. LILCO is also filing today with the Chairman of the Atomic Safety and Licensing Board Panel a motion for reconstitution of the Licensing Board to hear exercise issues, if litigation of those issues becomes necessary.

5/ Letter, Grant C. Peterson (FEMA) to Victor Stello, Jr. (NRC), September 9, 1988, forwarding RAC review of Revision 10 of Shoreham Offsite Emergency Plan (September 8, 1988) and Post-Exercise Assessment of June 7-9, 1988 Shoreham Offsite Emergency Preparedness Exercise (September 2, 1988).

This view is supported by the Licensing Board's failure to identify serious issues requiring special consideration. The regulations give the licensing boards specific instructions in writing their decisions:

> The Commission expects the Licensing Boards to pay particular attention in their decisions to analyzing the evidence on those safety and environmental issues arising under applicable Commission regulations and policies which the Boards believe present serious, close questions and which the Boards believe may be crucial to whether a license should become effective before full appellate review is completed. Furthermore, the Boards should identify any aspects of the case which in their judgment, present issues on which prompt Commission policy guidance is called for.

10 C.F.R. § 2.764(f)(1)(ii). Despite the vigor with which the Intervenors pursued the issues, the Licensing Board identified no such policy issue and noted no safety or environmental issue that requires special consideration by the Commission in its immediate effectiveness review.[6/] Nor did the Board hedge its merits rulings so as to give the Commission caution in permitting LBP-88-24 to become effective. This aspect of the Licensing Board's decision deserves deference.

LILCO's view is further supported by the many years of inquiry in this case, which provide ample basis for confidence in the merits determinations underlying the Licensing Board's action. No nuclear plant or operating utility in this country has ever been subject to as broad, intensive, and repetitious litigation scrutiny as have Shoreham and LILCO. Intervenors in this proceeding have sought to litigate, and in fact have litigated, virtually every conceivable health and safety and emergency planning issue,

---

6/ See the decisions resolving the "health and safety" issues, namely Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445 (1983) (Partial Initial Decision); aff'd as to most parts, ALAB-788, 20 NRC 1102 (1984); LBP-84-53, 20 NRC 1531 (1984)(ruling on remand issues); LBP-84-45, 20 NRC 1343 (1984)(grant of exemption to requirements of ground design criteria to authorize license for low-power operation), stay denied, Cuomo v. NRC, 772 F.2d 972 (D.C. Cir. 1985) petition for review dismissed, No. 85-1042 (D.C. Cir. Mar. 12, 1987).

along with a host of other issues. In particular, the issues resolved in LBP-88-24 -- EBS, school bus driver role conflict, hospital evacuation and realism -- have been in near-constant litigation since 1983. Occasionally this process has produced improvements in emergency planning (though they could have been effected far more easily with the co-operation of the intervening governments). But mostly it has produced delay and its offspring, i.e., opportunity for interference with and obstruction of effective emergency planning.

The Licensing Board has long since found an absence of unremovable obstacles to emergency planning for Shoreham. The Board has found

> [nothing] unique about the demography, topography, access routes, or jurisdictional boundaries in the area in which Shoreham is located. To the contrary, the record fails to reveal any basis to conclude that it would be impossible to fashion and implement an effective offsite emergency plan for the Shoreham plant.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-31, 22 NRC 410, 427 (1985). This finding has never been disturbed on appeal. ALAB-832, 23 NRC 135 (1986). Indeed, it has been noted by the Commission. CLI-85-12, 21 NRC 1587, 1589 (1985). Thus, it has been settled for over three years that effective emergency planning for Shoreham is not only possible but achievable absent active obstruction. But Intervenors' efforts to derail Shoreham licensing through litigation did not cease upon that ruling; to the contrary, Intervenors to this day seek to litigate every imaginable facet of the LILCO plan, all the while claiming that radiological emergency planning is impossible on Long Island. Indeed, they have already indicated their intent to appeal LBP-88-24. Governments' Motion for Bifurcation of Appeal and for Expedited Treatment of Jurisdictional Issue, September 27, 1988.

In LBP-88-24, the Licensing Board resolved in LILCO's favor the last of the significant remaining emergency planning issues standing as an obstacle to full power operation. The Board identified no issues that would cause the Commission to stay the

effectiveness of the Board's license authorization. In LILCO's view, no public interest considerations dictate that result. Thus, LILCO respectfully urges the Commission not to stay LBP-88-24 and, upon review of the Staff's findings under 10 CFR § 50.57(a), to authorize forthwith a full power operating license for the Shoreham Nuclear Power Station.[7/]

C. The Commission's Third and Fourth Factors

The third and fourth factors that the Commission considers in its review are "the degree to which correct resolution of the issue would be prejudiced by operation pending review" and "other relevant public interest factors." 10 C.F.R. § 2.764(f)(2)(i). Both factors militate in LILCO's favor on all remaining issues.

The third factor definitionally favors LILCO. None of the issues on appeal will be prejudiced by Shoreham operation because they concern offsite emergency planning. These are not plant issues where, for example, operation would irradiate or stress a reactor component and thereby affect an appeal of an issue concerning that component. The issues remaining before the Commission exist in the world outside the plant, and the legal arguments can (and undoubtedly will) go on unaffected by plant operation.

Likewise, the "other relevant public interest factors" consideration militates in LILCO's favor because it is in the "public interest" to operate a safe plant. The Commission has found that the Shoreham plant is safely designed and constructed. In addition, all emergency planning issues have now been resolved, at least in the first

---

7/ The Intervenors, notwithstanding their dismissal from this proceeding in LBP-88-24, will undoubtedly claim that the public interest requires closer examination and further litigation on the remaining issues and urge the Commission to stay Shoreham licensing pending that process. But it would be unseemly for them to seek a stay of Shoreham licensing "in the public interest" in light of the Licensing Board's finding that Intervenors' misconduct and repeated refusal to be forthcoming on emergency planning matters over the years -- already sanctioned by dismissal of their contentions in the "Phase I" (onsite) portions of this proceeding have themselves been "prejudicial to the public interest." Concluding Initial Decision, LBP-88-24, slip op. at 127.

instance, in LILCO's favor. The "public interest" dictates that a safe plant backed by an adequate emergency plan should be allowed to operate.

II. Discussion

A. Issues Resolved in LBP-88-24

In LILCO's view, there is no outstanding issue from the Concluding Initial Decision that is of sufficient gravity to warrant a stay, that is likely to have been resolved incorrectly below, or the resolution of which would be prejudiced by plant operation pending further review. Nor are there any interest factors that "public militate" for a stay. LILCO discusses each issue in turn below.

1. Emergency Broadcast System (EBS)

LILCO filed a motion for summary disposition with the Licensing Board on the Emergency Broadcast System (EBS) issue on June 20, 1988. LILCO's motion on the official New York State EBS system for the Nassau-Suffolk Counties Operational Area both to broadcast EBS messages and to activate the tone alert radios in schools, special facilities and other institutions. See LILCO's Second Motion for Summary Disposition of the EBS Issue (June 20, 1988). LILCO emphasized that the State EBS is composed of a network of about 30 radio stations on Long Island, including WALK Radio and other stations that previously were part of the Shoreham-specific EBS network that was litigated and approved by the Licensing Board in 1985. Id. at 5, 7. LILCO's motion relied primarily on the Commission's "best efforts" principle for activation of the system, Id. at 3, and provided facts sufficient to establish the ability of the State EBS to activate tone alert radios and broadcast EBS messages across the full Shoreham 10-mile EPZ.

The Licensing Board granted LILCO's summary disposition motion, finding that LILCO had established "the adequacy of its [EBS] plan to comply with NRC regulations and guidance concerning a public emergency warning system." Concluding Initial Decision at 32-33. The Board noted that, despite having had a full opportunity to confront

LILCO's material facts, Intervenors had failed in their response to controvert any of them. Id. at 32. The Board therefore found, based on LILCO's uncontroverted facts and previously established facts, that LILCO had demonstrated the ability of the State EBS to inform the public in the EPZ through direct radio broadcast and activation of tone alert radios.[8/]

Consideration of the factors in 10 C.F.R. § 2.764(f)(2)(i) precludes a stay of the effectiveness of LBP-88-24 based on the EBS issue. The LILCO Plan relies on precisely the same EBS that the State of New York and Nassau and Suffolk Counties rely on to broadcast information in emergencies. LILCO attached to its summary disposition motion a copy of the State EBS plan and the specific annex to it that contains EBS provisions for Nassau and Suffolk Counties. Intervenors did not disavow these plans or the EBS system itself; nor did they challenge its broadcast capabilities, despite full opportunity to do so.[9/]

The Board found that Intervenors' statement of "facts" was nothing but an "inadequate and improper" list of issues that "did not tend to disprove or controvert any information submitted by LILCO." Concluding Initial Decision at 18. LILCO's motion demonstrated, with relevant attachments and appropriate affidavits, that (1) an official State EBS exists, (2) the State, Suffolk County and LILCO have detailed procedures for activating it, and (3) the EBS has sufficient broadcast capabilities to broadcast emergency information to the 10-mile EPZ and activate the (redundant) tone alert radios. The Board expressly found that none of LILCO's material facts had been controverted.

8/ The Board reaffirmed, however, that tone alert radios are not required by NRC regulations and that LILCO's use of them is merely another redundancy in its alerting and notification capabilities. Concluding Initial Decision at 27; see Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 760 (1985).

9/ Intervenors have had an exceptionally long time to raise issues about the adequacy of the State EBS. LILCO first relied on that system, in detail, in its Second Renewed Motion for Summary Disposition of the Legal Authority Issues, filed March 20, 1987.

Id. In short, Shoreham's ability to rely on the existing official EBS system for the State of New York and the Nassau-Suffolk Counties Operational Area is clear.

Nor will resolution of the EBS issue be prejudiced by plant operation pending review. Any EBS matters that the Intervenors wish to raise on appeal will survive plant operation unimpaired. The plain fact is that a state EBS system exists, and the intervening governments would, as part of their "best efforts" response to any Shoreham emergency, activate that system to help protect the public. If LBP-88-24 were reversed and further litigation on EBS matters allowed, Intervenors could dispute details about the broadcasting characteristics of various stations without prejudice from Shoreham operation.

2. School Bus Driver Role Conflict

At issue is whether "role conflict" would cause school bus drivers to abandon their jobs in an emergency.[10/] "Role conflict," as the massive record in this case shows, has not proved to be a serious problem in any real emergency response in history. Moreover, it is a generic issue of human behavior that has been litigated, and resolved in the applicant's favor, in a number of NRC cases besides this one.[11/] In these cases,

---

10/ Issues were also raised below about whether additional drivers supplied by LILCO would be able to do their job, but no serious reason why they could not was ever put forth; see Concluding Initial Decision at 51-56. "Role conflict" of LILCO employees was resolved in LILCO's favor long ago.

11/ See LBP-85-12, 21 NRC 644, 679 (1985), Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-85-40, 22 NRC 899, 915 (1985) and LBP-85-27A, 22 NRC 207, 227-29 (1985), aff'd, CLI-87-1, 25 NRC 1 (1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-86-32, 24 NRC 459, aff'd, ALAB-857, 25 NRC 7 (1987); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), DD-84-11, 19 NRC 1108, 1116-18 (1984); Consolidated Edison Co. (Indian Point, Unit No. 2), LBP-83-68, 18 NRC 811, 959 (1983), reviewed, CLI-85-6, 21 NRC 1043 (1985); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-82-70, 16 NRC 756, 767-68 (1982), aff'd, CLI-84-13, 20 NRC 267 (1984); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 NRC 1211, 1486-89 (1981), aff'd in principal part, CLI-83-22, 18 NRC 299 (1983). The same issue is now being litigated in the Seabrook case, Docket No. 50-443-444-OL, and was litigated in the

(footnote continued)

the licensing boards typically found that the hypothetical problem of "role conflict" was not borne out by the historical record. In some of the cases the Appeal Board remanded for additional evidence, but once that additional evidence was presented, role conflict was found not to be a problem.

The likelihood that the issue of "role conflict" has been resolved incorrectly by the Licensing Board is negligible. The record in this case alone is overwhelming that the hypothetical problem of role conflict has not manifested itself in real emergencies. This issue has been in litigation since 1982 (counting the "Phase I" testimony) and the Intervenors have failed utterly to produce any empirical evidence that "role conflict" interferes with emergency response. LILCO, on the other hand, presented evidence that in over 6,000 interviews the Disaster Research Center found no instance where the functioning of an emergency organization was undercut by personnel not reporting to duty, Crocker et al., ff. Tr. 19,431, at 11-12, Tr. 19,527-28, (Mileti), Cordaro et al., ff. Tr. 831, at 16-17; that in some 300 "disaster response questionnaires" compiled by FEMA since 1986, no mention is made of role abandonment as a problem in real emergencies, Crocker et al., ff. Tr. 19,431, at 32-33; and that LILCO's own phone surveys of bus drivers and emergency personnel show that in some 16 large-scale evacuations in which buses were used to evacuate people there were always enough drivers for evacuation buses, Crocker et al., ff. Tr. 19,431, at 28-29. LILCO's witness's testimony that "there has never in the history of the country been an organization that has been unable to do what it was supposed to do in an emergency because of role abandonment or role conflict or role stress," Tr. 19,570-71 (Mileti), is uncontradicted on the record.

(footnote continued)

Zimmer case, where it was remanded but never resolved because of the cancellation of the plant. See Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 NRC 1538, 1597 (1982), remanded, ALAB-727, 17 NRC 760, 772 (1983).

Neither New York State nor Suffolk County was able to cite emergencies in which role abandonment has been a problem.[12/] Indeed, the case against "role abandonment" was also made by Suffolk County's own witnesses.[13/]

Finally, as with the EBS issue, operation of Shoreham can have no adverse effect on the appellate consideration of "role conflict," and the overwhelming weight of the evidence makes clear that school bus drivers will evacuate school children if the need arises.

3. Hospital Evacuation Time Estimates

The factors that militate against a stay of effectiveness pending appellate review are analyzed in detail below, but they can be capsulized by three facts:

12/ See Board Memorandum and Order (Ruling on LILCO Motion to Compel Answers to Certain Interrogatories and Request for Production of Documents) at 2 (Apr. 14, 1988) (unpublished); Response of the State of New York to LILCO's Second Set of Requests for Admissions Regarding Role Conflict of School Bus Drivers at 3 (Mar. 4, 1988).

13/ Suffolk County's school administrator witnesses emphasized how responsible, carefully selected and well-trained their regular school bus drivers are. For example, the Director of Transportation for Middle Country Central School District personally interviews and approves each driver. Brodsky et al., ff. Tr. 10,259, at 8. He looks for the "composure and capability to gain the confidence and respect of children and parents." Id. at 9. Among other requirements, each bus driver for that District must submit three letters of reference and undergo fingerprinting to verify that she does not have a criminal record. Id. at 9. Bus drivers for the District then undergo 40-50 hours of instruction. Id.; see also id. at 15 (Riverhead Central School District provides such training), 18 (Longwood Central School District provides such training), 20 (Superintendent of East Meadow Union Free School District personally approves drivers), 21, 22 (Superintendent of Mt. Sinai School District personally approves drivers; Transportation Director personally interviews every driver); 23-26 (drivers receive extensive supervised on-the-job training, including biennial refresher courses and additional meetings), Tr. 20,344-50 (Doherty, Koenig, Rossi) 20,352-53 (Rossi). As a result, the drivers take their jobs seriously, or else they are removed from duty. Tr. 20,353 (Smith). And the Licensing Board has already found that regular school bus drivers are expected to drive school buses in an evacuation of school children. LBP-85-12, 21 NRC at 859.

Also, the drivers are assigned to drive the same routes every day so they "can learn who the children are on their bus, and hopefully develop a first name relationship with the kids." Tr. 20,353 (Smith). One County witness indicated that the school district strives for a "feeling of family on that bus." Tr. 20,354 (Suprina). The drivers, mostly women, do a "terrific job." Tr. 20,354 (Doherty). "The rapport that drivers establish with children going to school on an everyday basis is sound and it is strong." Tr. 20,403 (Suprina).

1. The Intervenors themselves, in their proposed findings, conceded that LILCO's model "is close enough to provide adequate hospital ETEs." Suffolk County, State of New York, and Town of Southampton Proposed Findings of Fact and Conclusions of Law on the Remanded Issues of School Bus Driver Role Conflict and Hospital Evacuation Time Estimates at 117 ¶ 167 (June 30, 1988).

2. The issue affects approximately 300 hospital patients, see Concluding Initial Decision at 79, who are at the very edge of the 10-mile EPZ and who would be evacuated, if at all, only in the most extreme accidents.

3. Any changes resulting from an appeal of this issue would, at most, require LILCO to include additional information in its plan to help make decisionmakers make marginally better decisions in the most unlikely of accidents.

The remanded hospital evacuation issue was a narrow one: whether LILCO's evacuation time estimates (ETE's) for the three hospitals included for planning purposes in the 10-mile EPZ have adequate bases and accuracy to comply with NRC regulations and guidance. Concluding Initial Decision at 66.[14/] After hearings in which it heard testimony by experts presented by New York State, LILCO and the Staff, the Board found LILCO's hospital ETE's to be accurate and "adequate to meet the standards and criteria of NRC's regulations." Id. at 66-67, 87. The Board also found no merit in Intervenors' insistence that LILCO be required to include the results of sensitivity analyses along with the ETE's in the plan. Id. at 67.

14/ In its 1985 Partial Initial Decision the Licensing Board found LILCO's plan for protective actions for hospital patients adequate and reasonable, despite the fact that the LILCO Plan did not provide specific ETE's for each hospital. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 835-46 (1985). On appeal, the Appeal Board remanded, holding that LILCO must provide the same degree of planning for hospitals as it does for other special facilities and, in particular, LILCO must supply hospital ETE's. ALAB-832, 23 NRC 135, 154-57 (1986). The Commission took review and agreed with the Appeal Board that the regulations require ETE's for the 10-mile EPZ "without exceptions for special facilities such as hospitals." CLI-87-12, 26 NRC 383, 398 (1987). LILCO filed a summary disposition motion on the hospital evacuation plan on December 18, 1987. The Licensing Board denied that part of LILCO's motion dealing with hospital ETE's. Memorandum and Order (Ruling on LILCO's Motion for Summary Disposition of the Hospital Evacuation Issue), February 24, 1988 (unpublished). The Board ordered a hearing, restricting it to "the narrow confines of the bases and the accuracy of the evacuation time estimates" in the LILCO Plan. Id. at 12

First, the gravity of the hospital ETE issue is not sufficient to stay the licensing authorization pending further review. As the Licensing Board found in 1985, in the "vast majority of cases" of an accident at Shoreham, sheltering would be the protective action of choice. PID, 21 NRC at 844, 846 (1985). This is due to the hospitals' location about 10 miles from Shoreham, the high sheltering characteristics of the hospital buildings, and the potential for further injury to hospital patients in an evacuation. Id. The Commission has previously agreed that "sheltering will quite likely be the preferred protective action for EPZ hospitals in the event of a serious accident." CLI-87-12, 26 NRC 398 (1987). Moreover, as the Board realized, the ETE's are only one small factor in deciding whether to evacuate the hospitals. Concluding Initial Decision at 83. Given the extreme unlikelihood that the hospitals would ever have to be evacuated, the public interest does not require that operation be stayed to allow further quibbling over the details or alleged calculational errors in hospital ETE's.

Second, the Licensing Board's decision on this issue is correct. Despite Intervenors' numerous allegations of flaws in LILCO's ETE's, Intervenors' own expert witness deemed them "close enough." Concluding Initial Decision at 69, 76-77. Indeed, Intervenors' witness calculated his own ETE's for the hospitals, and they turned out "sufficiently similar to LILCO's for similar assumed conditions to conclude that there is no factual controversy concerning the basis and accuracy of LILCO's ETE's." Id. at 73-74, 76. The Staff's expert witness also supported LILCO's ETE's. Id. at 68. Nonetheless, Intervenors continued to press their claims that LILCO's ETE's were replete with error, unreliable, and deficient because of LILCO's "failure" to include multiple sensitivity analysis in its calculations.[15/] The Board properly rebuffed these claims, and

---

15/ As the Licensing Board's decision indicates, Intervenors expanded the hospital ETE proceeding, without the Board's consent, from a narrow examination of the bases and accuracy of LILCO's ETE's to the broader inquiry of whether LILCO should be re-

(footnote continued)

articulated its reasoning in full detail. In short, the Licensing Board's decision on this matter is unassailable, and provides no reason to stay the effectiveness of LBP-88-24 pending appellate review.

Finally, any further process on the hospital ETE issue would not be prejudiced by Shoreham operation. Intervenors' "pursuit of precision" in LILCO's calculations, if allowed, could go on indefinitely, uninfluenced by plant operation (and, most likely, without influence on plant operation or effective emergency planning).

4. Realism

The history of the realism contentions is well known to the Commission, and, in any event, is set forth in the Licensing Board's decision. Concluding Initial Decision at 89-94. It is sufficient to note that the realism principle, first propounded by LILCO in 1984, was adopted by the Commission in CLI-86-13, 24 NRC 22 (1986) and codified and expanded in the Commission's new "realism rule." 10 C.F.R. 50.47(c)(1), 52 Fed. Reg. 42078 (Nov. 3, 1987). The realism rule has been upheld by the U.S. Court of Appeals for the First Circuit. Massachusetts v. NRC, Nos. 87-2032, 87-2033, 88-1121 (1st Cir. Sept. 6, 1988).

The Licensing Board resolved the realism contentions against the Intervenors by way of a ruling on the merits and by dismissing Intervenors from the Shoreham proceeding. Concluding Initial Decision at 89. The merits rulings are based on LILCO's

---

(footnote continued)

quired to include multiple sensitivity analyses in its plan. Concluding Initial Decision at 69, 70, 76-77. The controversy was pressed by Intervenors well past the point at which, in the Board's view, it should have stopped, i.e., when it became clear that there was no significant factual dispute. As a result, Intervenors forced the expenditure of hearing time on "meaningless pursuit of precision, strenuous efforts to find error however small, and to debug LILCO's computer program." Id. at 76. The Board noted that the "good faith course" for Intervenors to have taken when it became clear that no controversy existed on the narrow issue set of hearing would have been to settle or withdraw the issue. Id at 85. Had the Board recognized Intervenors' attempts to enlarge the hearing, it likely would have prevented them. Id. at 77.

prima facie case, on the Commission's realism rule, and on the presumption that, had Intervenors not defied the Board and defaulted on their discovery obligations, information elicited from Intervenors would have been adverse to their position on the contentions. The Board's dismissal sanction was based on a six-year pattern of discovery abuses, other obstructionist activities, and overall disregard for the authority of and processes instituted by the NRC's licensing boards. The Board found Intervenors' obstructive conduct in the realism proceeding to be "the culmination of a pattern of behavior designed to prevent the Commission from reaching an informed conclusion with respect to the adequacy of LILCO's emergency plan." Concluding Initial Decision at 108.

As to the gravity of the realism contentions, the Licensing Board noted that they are important to safety. Concluding Initial Decision at 108. It can hardly be gainsaid that the legal authority contentions, as originally formulated, were potentially grave issues, since they questioned the legal authority of LILCO to carry out certain functions that the LILCO Plan contemplated it performing, without the aid of nonparticipating governments.

However, after CLI-86-13 and the promulgation of the realism amendments to 10 C.F.R. § 50.47(c)(1), the Licensing Board reformulated the legal authority contentions to reflect the Comission's presumptions that, in an emergency (1) state and local governments will use their best efforts to protect the public health and safety and (2) their best efforts response would, in the absence of an adequate and feasible alternative plan, utilize the utility's emergency plan. See 10 C.F.R. § 50.47(c)(1)(1988); 52 Fed. Reg. 42078 (Nov. 3, 1987). The "legal authority" question thus became a question of coordination of utility emergency response with the state and local governments' response. Thus, the realism contentions pending before the Licensing Board questioned whether LILCO's emergency plan and the best efforts response of the State and County

governments will satisfy regulatory requirements concerning the specific emergency function at issue in each contention. Concluding Initial Decision at 133-34. These issues, in light of LILCO's provision of detailed information, unrebutted by Suffolk County or New York State, concerning their postulated (and undeniable) emergency response capability, are matters now resolved in LILCO's favor. In addition, given these governments' position over the past six years, they are not issues that will be developed significantly by further scrutiny (or the delay attendant upon it).[16/]

In any case, it is unlikely that the Licensing Board resolved the realism contentions incorrectly. Both the Board's merits ruling and dismissal from the proceeding are firmly supported by the record.

The Licensing Board dismissed Intervenors from the proceeding based on the entire record of the emergency planning proceeding. Although the Board focused on Intervenors' obstructionist conduct in the realism proceeding,[17/] it made clear the fact that Intervenors' recent conduct was merely a continuation of a six-year strategy of delay and prevention of the Commission from making the required assessment of

---

16/ It is noteworthy that the Licensing Board in LBP-88-24 was unanimous in concluding both that LILCO deserves a victory on the merits on the realism issues and that Suffolk County's and New York State's misconduct is both repeated and deserving of sanction. Judge Shon departed from his colleagues only on the issue of whether that conduct warranted their dismissal from the entire proceeding.

17/ The Intervenors defied the Licensing Board's discovery and other orders on at least four different occasions. The Intervenors filed testimony that was unresponsive to the realism issue, Id. at 93; prevented LILCO from obtaining relevant information during depositions by asserting unreasonble objections, Id.; refused to make knowledgeable people available for depositions, Id. at 128; refused to answer LILCO's interrogatories completely and forthrightly, Id.; produced a key emergency planning document, the Suffolk County Emergency Operations Plan (EOP) about five years after it first should have been produced, Id. at 119-21; and filed their improper "Notice that the Board Has Precluded Continuation of the CLI-86-13 Remand," in which they not only refused to proceed according to the Board's orders but also laid the blame for their "inability" to do so at the Board's feet. Id. 95-97. This pattern of conduct was akin to, if more exaggerated than, that which had led to the dismissal of their "Phase I" (onsite) emergency planning contentions in 1982. See LBP-82-115, 16 NRC 1923 (1982), aff'd, ALAB-788, 20 NRC 1102, 1176-79 (1984).

LILCO's emergency plan. Concluding Initial Decision at 102, 108, 109-115. This course of conduct included insistence that emergency planning for the Shoreham plant was impossible, despite the Commission's rulings that only the Federal Government has jurisdiction over radiological health and safety issues, and the Commission's factual finding (on a record that included full consideration of Intervenors' views) that emergency planning for Shoreham is possible; a motion to terminate the proceeding based on Suffolk County emergency planning resolutions; enactment of an unconstitutional criminal law in an attempt to prevent a Federally-mandated emergency exercise; and disconnection of emergency telephone lines. Id. at 110-112.

The Board duly considered imposing the lesser sanction of dismissal of the realism contentions, but concluded that that sanction was insufficient in the face of Intervenors' willful, bad faith refusal to comply with Board orders. Concluding Initial Decision at 112, 114-115, 129-30. Importantly, the Board pointed out that imposition of that lesser sanction at an earlier phase in the proceeding had not had the desired effect of mitigating the harm of Intervenors' conduct and deterring future misconduct. Id. at 108, 113. In short, the Board's dismissal sanction was appropriate for the length and severity of Intervenors' misconduct in this proceeding, and thus is unlikely to be overturned.

The Board's merits determinations also are fully supported by the record. They are based on LILCO's prima facie case (which is itself based on previously adjudicated or admitted facts), on LILCO's prefiled testimony, on previously submitted affidavits, on the Commission's realism regulations, and on the Intervenors' refusal to come forward with an affirmative case.[18/] In the case of each emergency planning function

---

18/ Intervenors filed testimony on the realism contentions, but it did not address the substantive questions that the Board defined for hearing. Concluding Initial Decision at 93. In addition, the Intervenors defied the Board's orders and refused to proceed with discovery on the realism issues, thus allowing the Board to presume that the information that would have been elicited from Intervenors would have been adverse to their position.

specified in the realism contentions -- traffic control (Contentions 1 and 2), clearing road obstructions (Contention 4), siren and EBS activation (Contention 5), making and issuing protective action recommendations (Contention 6), making and issuing protective action recommendations for the ingestion pathway (Contention 7), recovery and reentry decisionmaking (Contention 8), and perimeter access control (Contention 10) -- the substantive actions to be taken and procedures to be followed were previously adjudicated and decided in LILCO's favor. Concluding Initial Decision at 135, 138-139, 140, 141, 143, 145, 146. And for each function the Board duly considered the extent and effect of the forthcoming State and County response, including any delay that might be occasioned by LILCO's need to consult or coordinate with each. Id. at 135-47. Given the Licensing Board's previous acceptance of LILCO's plan for performing these functions, the ample evidence in the record demonstrating the resources and capabilities of the State and County, the Intervenors' discovery default and the adverse presumptions flowing therefrom, and the Commission's best efforts presumption, the Licensing Board's merits determinations on the realism contentions are virtually immune to challenge.

Finally, further process on the realism issues will suffer no prejudice from Shoreham operation pending review. First, it is unlikely that these issues were decided incorrectly. Second, given their performance in these proceedings to date, it is unlikely that Intervenors would ever be forthcoming on the realism contentions in a way that would contribute materially to their further resolution. Last, it is likely that if the Commission allows LBP-88-24 to become effective, and authorizes full power operation, the County and State will accede to the Commission's judgment and begin participating in the emergency preparedness effort. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 29 n.9 (1986); CLI-85-12, 21 NRC 1587, 1589-90 (1985); see also CLI-86-14, 24 NRC 36, 40 n. 1 (1986). In that case, the realism issues would be moot.

In LILCO's view, it is unlikely that the Licensing Board decided any grave issues incorrectly in LBP-88-24. To the contrary, the decision is amply supported by the record and the Board's reasoning is clearly articulated. Therefore, no public interest consideration warrants a Commission stay of the decision's effectiveness, and LILCO urges the Commission to make it immediately effective.

In addition, however, if the Commission thinks that the issues decided in LBP-88-24 merit expeditious additional review, LILCO respectfully suggests that the Commission itself hear Intervenors' appeals, pursuant to 10 C.F.R. § 2.764(f)(2)(iv). Intervenors already have noticed their appeals and are currently preparing their brief for filing with the Appeal Board. The Commission could expedite the final resolution of those appeals, if it deems that course necessary, by directing that appeal briefs be filed directly with the Commission.

B. Issues Arising from the 1988 Exercise

The second set of issues pending before the Commission are those arising from the FEMA-graded exercise conducted at Shoreham on June 7-9, 1988. The exercise lasted three days and included emergency response functions concerning protective actions for the 10-mile plume exposure pathway, 50-mile ingestion exposure pathway, and recovery and reentry. FEMA issued its Post-Exercise Assessment ("PEA") on September 2, 1988, finding that "the exercise demonstrated adequate overall preparedness on the part of LERO personnel." Letter from Grant C. Peterson, Associate Director, State and Local Programs and Support (FEMA) to Victor Stello, Jr., Executive Director for Operations, NRC, dated September 9, 1988. Based on the 1988 exercise and a review of the LILCO Plan, FEMA reached an overall finding of reasonable assurance that the LILCO Plan can protect the health and safety of the public living in the vicinity of the plant. Id.

The 1988 exercise presents no reason to stay the effectiveness of the Licensing Board's license authorization, even though the exercise results have not been litigated.[19/] FEMA has thoroughly examined the exercise results, using reports filed by the 68 federal evaluators who were present at the exercise. PEA at 2. FEMA found no Deficiencies[20/] in the exercise, and identified only a small number (14) of ARCA's.[21/] Based on the exercise and on a Regional Assistance Committee (RAC) review of the LILCO Plan, FEMA reached a finding of reasonable assurance which it has officially transmitted to the NRC. Letter, Grant C. Peterson (FEMA) to Victor Stello, Jr., (NRC), September 9, 1988 with enclosures.

The Commission need not await litigation of the exercise results to authorize Shoreham operation. First, litigation of exercise results is not required. All the Union of Concerned Scientists case requires is that intervenors in NRC operating license hearings not be precluded from the opportunity to dispute issues raised by an exercise. Union of Concerned Scientists v. NRC, 735 F.2d 1437 at 1449 (1984). Here, the Intervenors in the Shoreham proceeding have been dismissed for their pattern of misconduct and defiance of the NRC's licensing boards over the last six years. Thus, Intervenors

---

19/ It is questionable whether the 1988 exercise reuslts will be litigated. Although the Intervenors have indicated their desire to litigate those results, the Licensing Board in LBP-88-24 has dismissed them from the entire emergency planning proceeding. Intervenors have appealed, and the issue of whether the Licensing Board had the authoristy to so dismiss them is now being briefed before the Appeal Board. LILCO's brief on this matter will be filed tomorrow, October 4, 1988. LILCO's position is that the Licensing Board clearly had such authority.

20/ FEMA defines "Deficiency" as a demonstrated and observed inadeqaucy that would cause a finding that off site emergency preparedness is not adequate ot provide reasonable assurance that appropriate measures can be taken to protect the health and safety of the public living in the vicinity of a nuclear power facility in the event of a radiological emergency. PEA at 10.

21/ ARCAs are demonstrated and observed inadequacies of performance, and although their correction is required, they are not considered, by themselves to adversely impact public health and safety. PEA at 10.

have forfeited any opportunity they once had to litigate the 1988 exercise, and the Licensing Board has properly dismissed them as parties.

Second, even if the Intervenors were allowed to litigate the recent exercise, it is not likely that they would identify new problems, or shed additional light on those FEMA has already identified in its Post-Exercise Assessment (PEA). It is likely, however, that such litigation would take a considerable amount of time and unnecessarily bleed the resources of the NRC and the parties. Intervenors have litigated LILCO's 1986 exercise in extreme detail over a course of more than 2½ years, and yet the fundamental flaws that the Licensing Board found generally followed the contours of the FEMA PEA. Intervenors did not materially aid the Board's assessment of the exercise; they merely piggybacked onto the FEMA PEA, elaborating and supplementing FEMA's findings along the way, and arrived at basically the same conclusions that FEMA reached in its assessment. The same result probably would reached if litigation of the 1988 exercise were to proceed. With a deficiency-free FEMA assessment, however, there is little justification for such a course.

The Commission should rely on the findings of the Staff and FEMA concerning the exercise. FEMA has made a finding of reasonable assurance, based on the LILCO Plan and the 1988 exercise, independent from the Licensing Board's finding of reasonable assurance in LBP-88-24. As the Commission has previously stated in this case, "under [NRC] regulations and practice, Staff review of exercise results is consistent with the predictive nature of emergency planning. . . ." CLI-86-11, 23 NRC 577, 581 (1986). Nothing in the 1988 exercise warrants a stay of Shoreham licensing. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685 (1986).[22/]

22/ In CLI-86-22, the Commission authorized the issuance of a full power operating license for the Perry unit 1 plant based on its review of matters adjudicated before the

(footnote continued)

C. Issues Pending Before the Appeal Board

Two sets of issues are currently pending before the Appeal Board: LILCO's appeal from the Licensing Board's Initial Decision in the OL-3 docket on LILCO's performance during the 1986 exercise (LBP-88-2), and Intervenors' appeal from the Licensing Board's decision in the OL-3 docket approving the LILCO Plan provisions for general population reception centers (LBP-88-13, 27 NRC 509 (1988)).[23/] Neither warrants the Commission's staying the Licensing Board's full power licensing authorization.

1. 1986 Exercise Appeals

LILCO has appealed the OL-3 Licensing Board's finding of fundamental flaws in the LILCO Plan arising out of the February 1986 exercise. Since the regulations' presumptive two-year exercise effectiveness period has expired, the results of that exercise cannot serve as a basis for a license absent an exemption, and the specific factual issues on appeal are technically moot. See 10 C.F.R. Part 50, App. E § IV.F.1. The Appeal Board's decision is desirable primarily to provide guidance on the definition of "fundamental flaw," for application in any future exercise litigation. However, in the event that the 1988 exercise is not litigated, even this advisory-opinion function loses its relevance. Thus the Appeal Board's decision is not of sufficient import to forestall

---

(footnote continued)

licensing board and uncontested matters. The licensing board had relied heavily on FEMA's finding of no deficiencies in a 1984 exercise. 24 NRC at 689-90. When the Governor of Ohio subsequently withdrew his support for Perry emergency plans pending the findings of his own investigatory team, the Commission declined to delay the effectiveness of the licensing board's license authorization, primarily because FEMA found no reason to retract its reasonable assurance finding. Id. at 693-95.

23/ Also pending before the Appeal Board, as mentioned previously, are Intervenors' recently noticed appeals of LBP-88-24. These appeals await briefing; the Appeal Board has bifurcated Intervenors' appeal pursuant to Intervenors' motion and has indicated its intent to expedite its consideration of the question of the OL-3 Licensing Board's authority to dismiss Intervenors from the entire proceeding. Appeal Board Order (Sept. 27, 1988); Memorandum and Order (Sept. 29, 1988). LILCO will file its brief on that question on October 4, 1988.

Shoreham licensing pending the completion of appellate review. See generally Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 548 n. 75 (1986) (an operating license may be authorized before completion of the agency's internal appellate process).

2. Reception Centers Appeal

The issues involving the adequacy of three reception centers proposed by LILCO for public use in the event of a radiological emergency were resolved entirely in LILCO's favor in the Partial Initial Decision on Suitability of Reception Centers, LBP-88-13, 27 NRC 509 (1988). The Intervenors have raised four issues on appeal, but only one of them is even arguably substantial: the question whether it is adequate, as FEMA and the NRC Staff maintain, to make detailed arrangements for monitoring 20 percent of the EPZ population. An additional issue, which has not been properly raised but was argued by the Intervenors in a letter to the Appeal Board and at oral argument, is a recent decision by a New York State court holding that one of the three of LILCO's reception centers violates local zoning laws. Town of Hempstead v. Long Island Lighting Co., Index No. 23779/87 (N.Y. Sup. Ct. Aug. 22, 1988).

As to the gravity of the substantive issues, the providing of reception centers for the public is important, though not as important as, for example, the size of the EPZ, evacuation time estimates, the means by which protective action recommendations are made, or the means by which people without cars are to be evacuated from the EPZ. However, the issues being raised by the Intervenors on appeal do not go to whether or not there are reception centers for the public at all but rather to whether more of them must be provided. While the FEMA guidance is that 20 percent of the EPZ population should be planned for in detail, LILCO has in fact conservatively provided resources for approximately 46.6 percent. If the one of the three reception centers, the Bellmore facility, that is subject to the recent state court order is eliminated for the

sake of argument, LILCO still provides for 36 percent of the EPZ population -- more than half again what FEMA guidance specifies.

Moreover, the evidence in these proceedings shows that what is important in providing monitoring for the public is not so much that specific resources be dedicated in advance in great detail as that there be an organizational structure that can expand the plan ad hoc if necessary. NRC Staff Ex. 5 (Kantor direct testimony) at 3-5, Tr. 18,369, 18,374-75 (Keller), 18,357 (Husar), 19,202-03, 19,224 (Kantor), 17,744 (Dreikorn), 17,481-83 (Crocker), 17,485-86 (Donaldson). LILCO has provided this, as the Board below found. In short, while the issue cannot be said to be trivial, neither is it as important as many of the issues that have been resolved in this proceeding.

As for the likelihood that the issue was resolved incorrectly below, the answer is that the evidence was quite one-sided in LILCO's favor. Both FEMA and the NRC Staff, as well as LILCO, testified that the 20 percent guidance is appropriate. The 20 percent was supported on a variety of grounds: historical experience with real accidents, both radiological and nonradiological; a probabilistic analysis done by an NRC Staff witness; the considerations that led to the development of the relevant NUREG-0654 provisions; and the experience of emergency planners on how protective action recommendations are made. Perhaps most important, the 20 percent figure was supported by the judgment of expert emergency planners who judge that a 20 percent planning base provides a substantial basis on which larger efforts can be built ad hoc if necessary.

By contrast, the Intervenors supported their argument that the 20 percent guidance is inadequate based on nothing more than (1) the State's witnesses' belief about that FEMA required 100 percent (which belief is wrong) plus their opinion that 100 percent rather than 20 percent would be "prudent" and (2) opinion polls taken by Suffolk County, which have been rejected as a predictive tool many times in this proceeding

As with the other issues under discussion, the operation of the plant would not be at all prejudicial to the continuing appeals of the reception center issues.

As for other "public interest factors" that might argue in favor of postponing operation, LILCO knows of none.

D. Issues Directly Before the Commission

Two issues remain directly before the Commission itself: the adequacy of LILCO's planning provisions concerning contaminated injured individuals (GUARD issue) and the question of whether New York laws that allegedly prohibit LILCO from implementing certain emergency response functions are preempted by the Atomic Energy Act.[24/] The Commission need not decide the preemption question in order to authorize issuance of a Shoreham operating license, in light of CLI-86-13, the Commission's new "realism rule," the Licensing Board's resolution of the realism issues in LILCO's favor, and the reversal of Cuomo v. LILCO, the case which once held that certain actions under a utility-only plan were illegal in New York State. The GUARD issue is ripe for a Commission ruling without remand or further proceedings.

1. Preemption

Suffolk County emergency planning contentions 1-10 asserted generally that LILCO lacked the legal authority to implement certain functions called for in the LILCO Plan. LBP-85-12, 21 NRC 644 (1985). LILCO moved for summary disposition of these contentions on three grounds: federal law preemption of State and local laws purporting to prevent LILCO from developing and implementing emergency plans for

---

24/ On October 5, 1988, LILCO will also petition the Commission for review of the Appeal Board's September 20, 1988 decision in ALAB-900. In ALAB-900 the Appeal Board defined the necessary scope of an initial full scale exercise under 10 C.F.R. Part 50 Appendix E § IV.F.1 and affirmed the OL-5 Licensing Board's decision that LILCO's 1986 exercise failed to meet the Commission's standards for such an exercise. LILCO believes that the Appeal Board's decision contains errors that present important questions of law and policy. However, while LILCO believes that the issues presented in that decision may be important for other, future initial licensing exercises, the effectiveness of LBP-88-24 need not await the Commission's resolution of them.

Shoreham; the "realism" argument, i.e., the State and local governments would respond in the event of an emergency, eliminating any "legal authority" problem; and the "immateriality" argument, i.e., that NRC regulations do not require LILCO to provide for some of the functions at issue in Contentions 1-10. CLI-86-13, 24 NRC 22 at 25 (1986).

The Licensing and Appeal Boards decided against LILCO on all three arguments. LBP-85-12, 21 NRC 644 (1985); ALAB-818, 22 NRC 651 (1985). The Commission took review and reversed the lower Boards on the realism and immateriality issues. CLI-86-13, 234 NRC 22 (1986). However, the Commission deferred ruling on the preemption question. Id. at 24. In light of subsequent events, the Commission need not decide the preemption question in order to authorize a full power operating license for Shoreham. The Commission's decision in CLI-86-13 adopting the realism theory, that theory's codification in 10 C.F.R. § 50.47(c)(1), and the Licensing Board's application of the rule in LILCO's favor in LBP-88-24 have made preemption an unnecessary basis for Shoreham licensing. Hence, licensing should not be stayed pending the Commission's resolution of that issue.

2. GUARD

On February 25, 1987, the Intervenors filed a motion asking the Commission to admit a new contention alleging that LILCO did not comply with FEMA Guidance Memorandum MS-1, concerning the provision of medical services for contaminated injured individuals. Motion of Suffolk County, the State of New York and the Town of Southampton to Admit New Contention (Feb. 25, 1987). LILCO and the Staff filed timely responses, urging the Commission to reject the proposed contention. LILCO's Opposition to Intervenors' Motion to Admit a New Contention (March 9, 1987); NRC Staff Response in Opposition to Motion to Admit a New Contention (Mar. 17, 1987). The Commission never having ruled on Intervenors' motion, LILCO filed a paper renewing its opposition to the motion, requesting the Commission to either dismiss the

proposed contention as moot or reject Intervenors' motion for failure to meet the Commission's requirements for reopening a closed record. LILCO's Renewed Opposition to Intervenors' Proposed Contention on Emergency Medical Services for Contaminated Injured Individuals and Suggestion of Mootness (July 28, 1988).

LILCO respectfully urges the Commission to reject Intervenors' motion and rule in LILCO's favor for the reasons stated in LILCO's July 28, 1988 paper. As recounted therein, FEMA has rated adequate all of the LILCO Plan provisions relating to the MS-1 requirements, and thus the contention which Intervenors' motion seeks to have admitted is moot. Moreover, Intervenors have made no effort to satisfy the Commission's requirements for reopening a record which has long since closed. Intervenors' motion should therefore be denied outright.

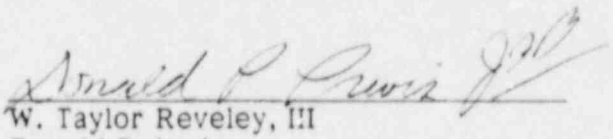
In any case, Intervenors' motion does not present a sufficient basis on which to forestall Shoreham operation pending its resolution. The Commission's effectiveness decision need not await its consideration of this issue.

III. Conclusion

The Licensing Board has resolved in LILCO's favor the last remaining emergency planning obstacles to a full power operation license. None of the issues remaining before the Commission warrant the imposition of a stay on the Licensing Board's license authorization in LBP-88-24. In addition, no public interest consideration requires such a stay. For the reasons set forth above, LILCO respectfully urges the Commission to make that decision effective and, upon review of the Staff's findings pursuant to

10 C.F.R. § 50.57(a), authorize the issuance of a full power operating license for the Shoreham Nuclear Power Station.

Respectfully submitted,



W. Taylor Reveley, III
Donald P. Irwin
James N. Christman
Scott D. Matchett

Counsel for Long Island Lighting Company

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

DATED: October 3, 1988

CERTIFICATE OF SERVICE

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

'88 OCT -3 P8:23

I hereby certify that copies of LILCO'S COMMENTS ON THE IMMEDIATE EFFECTIVENESS OF LBP-88-24 were served this date upon the following by hand as indicated by an asterisk, by Federal Express as indicated by two asterisks, or by first-class mail, postage prepaid.

Lando W. Zech, Jr., Chairman *
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

Commissioner Thomas M. Roberts *
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

Commissioner Kenneth M. Carr *
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

Commissioner Kenneth C. Rogers *
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

William C. Parler, Esq. *
General Counsel
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

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

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

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

Thomas S. Moore, Chairman **
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
East-West Towers, Fifth Floor
4350 East-West Highway
Bethesda, MD 20814

Howard A. Wilber **
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
East-West Towers, Fifth Floor
4350 East-West Highway
Bethesda, MD 20814

James P. Gleason, Chairman **
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
513 Gilmoure Drive
Silver Spring, MD 20901

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

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

John H. Frye, III, Chairman **
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
East-West Towers
4350 East-West Hwy.
Bethesda, MD 20814

Dr. Oscar H. Paris **
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
East-West Towers
4350 East-West Hwy.
Bethesda, MD 20814

Secretary of the Commission *
Attention Docketing and Service
Section
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Scott D. Matchett

Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

DATED: October 3, 1988