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LILCO, October 5, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

LILCO'S PETITION FOR REVIEW OF ALAB-900

LILCO petitions the Commission to review and reverse the Appeal Board's September 20, 1988 decision, ALAB-900, on the ground that it is incorrect on important grounds of law and Commission policy.

ALAB-900 upholds a Licensing Board's determination that the February 13, 1986 FEMA-graded exercise of LILCO's offsite response plan for the Shoreham Nuclear Power Station did not constitute a "full participation" exercise as defined by the NRC's emergency planning regulations. The Appeal Board finds that 10 C.F.R. Part 50 Appendix E ¶ IV.F.1 requires initial "full participation" exercises to be more comprehensive in scope than subsequent ones, after having given inadequate attention to the regulatory history of Appendix E and having erroneously concluded that the Commission intended to create such a distinction between the regulatory requirements for initial and subsequent exercises.

Relying on this fundamental misconstruction of Appendix E ¶ IV.F.1, ALAB-900 determines, in direct contrast to joint NRC-FEMA practice spanning over seven years and involving literally hundreds of exercises, that an initial exercise must test all the major elements of an emergency plan in order to constitute "full participation." And yet ALAB-900 makes little effort to reconcile this conclusion with the fact that the Commission has in the past issued operating licenses to other nuclear plants whose initial exercises, having

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been designed and conducted pursuant to the very NRC-FEMA guidance and practice that the decision disregards, presumptively did not meet these retroactively imposed regulatory requirements. As a consequence, ALAB-900 has the practical effect of subjecting LILCO (as well as all other current and future applicants for full power licenses) to a higher regulatory standard than that to which previous applicants have been held, as well as calling into question the validity of previously issued operating licenses. This manifestly unfair result demonstrates that the Appeal Board has failed to resolve properly the ambiguities in Appendix E ¶ IV.F.1 and has not given the deference which is due expert agency guidance and practice in the design and conduct of emergency preparedness exercises. In light of the clear need for a dispositive resolution of these issues, the Commission should exercise its discretion under 10 C.F.R. § 2.786 to review ALAB-900.

I. Summary of the Decision to be Reviewed

ALAB-900 decides LILCO's appeal of LBP-87-32, 26 NRC 479 (1987), one of two decisions related to the 1986 Shoreham exercise.[1/] In LBP-87-32, the Licensing Board concluded that the scope of the Shoreham exercise was not sufficient to constitute a "full participation" exercise within the meaning of 10 C.F.R. Part 50 Appendix E ¶ IV.F.1. In the time that it took for the supposedly expedited litigation of the exercise to pass through the first level of appellate review, the 1986 exercise's presumptive two-year effectiveness period for licensing purposes expired. As a consequence, the Appeal Board has ruled that LILCO's appeal from LBP-87-32 is technically moot. Nevertheless, the Appeal Board notes that "[w]here an issue is of 'demonstrable recurring importance,' an opinion that is essentially advisory in nature is warranted," and finds that LILCO's appeal "presents just such a circumstance." ALAB-900, 28 NRC ___, slip op. at 8 (1988). LILCO does not dispute that the issues presented by ALAB-900 should have been decided; it disagrees only with the Appeal Board's result and reasoning.

1/ LILCO's appeal of the other decision, LBP-88-2, 27 NRC 85 (1988), dealing with the adequacy of emergency worker performance during the 1986 exercise, is still pending before the Appeal Board, having been fully briefed and argued.

It is uncontroverted that FEMA made every attempt to ensure that its preparation for and evaluation of the 1986 Shoreham exercise was consistent with the parameters and process established for other full-scale radiological emergency preparedness exercises evaluated by FEMA Region II. For instance, in designing the 1986 exercise and in determining the objectives that it observed and evaluated, FEMA relied on its standard Guidance Memorandum PR-1, entitled "Policy on NUREG-0654/FEMA-REP-1 and 44 C.F.R. 350 Periodic Requirements" ("GM PR-1").[2/]

The objectives for the 1986 exercise, which were set by FEMA and approved by the NRC Staff, included 29 of the 35 standard FEMA objectives and seven additional objectives not included within the 35 standard objectives. Those objectives not included in the exercise were excluded at the direction of FEMA and the NRC; LILCO had expressed its willingness during exercise scenario preparation to demonstrate any and all of the standard objectives. Indisputably, the 1986 Shoreham exercise was, as the Licensing Board acknowledged, "as comprehensive as any conducted in FEMA Region II up to that time." 26 NRC at 501-02 (1987). Nevertheless, the Licensing Board found that the 1986 exercise "did not comply with the requirements of 10 C.F.R. Part 50 Appendix E, § IV.F.1." Id. at 506.

LBP-87-32 was the first NRC decision containing a substantive interpretation of the complex provisions of ¶ IV.F. Id. at 481. In pertinent part, ¶ IV.F.1 provides that

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2/ GM PR-1 specifies that for the biennial offsite exercise required by NRC regulations, the "scenario should be varied from exercise to exercise such that the major elements of the plans and preparedness organizations are tested within a six-year period." GM PR-1 at 2 (emphasis in original). The six-year period over which all of the major observable elements should be tested begins, according to GM PR-1, with the initial licensing exercise for an operating plant or a "near term operating license" plant ("NTOL"). Id. GM PR-1 incorporates by reference the 35 standard FEMA exercise objectives which are contained in an August 5, 1983 Memorandum from Dave McLoughlin (FEMA Deputy Associate Director) to the FEMA Regional Directors and Acting Regional Directors. These 35 objectives correspond generally to the observable elements of emergency plans in NUREG-0654 and, according to FEMA, encompass all the major observable elements of offsite emergency plans. Id. The August 5, 1983 McLoughlin Memorandum was cited favorably by the Commission in its 1984 revision of 10 C.F.R. Part 50 Appendix E as providing uniformity in the evaluation of emergency preparedness during exercises. See 49 Fed. Reg. 27,734 (1984).

> A full participation [footnote 4] exercise 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.

Footnote 4, which applies throughout ¶ IV.F to both initial and subsequent exercises, defines "full participation" to include "testing the major observable portions of the onsite and offsite emergency plans . . . ." The provisions of ¶ IV.F are at best ambiguous and perhaps even internally inconsistent. For instance, the clause ". . . which tests as much of the . . . plans as is reasonably achievable . . ." does not appear in ¶ IV.F.3 (pertaining to biennial exercises) even though, as the Appeal Board itself points out, it is "unlikely that the Commission meant to require public participation for post-license exercises . . ." ALAB-900, slip op. at 32 n.20.[3/] Similarly, it is by no means precisely clear what footnote 4 means by "major observable portions" of emergency plans.

ALAB-900 concurs in the bottom-line result of LBP-87-32, and, in so doing, accepts the Licensing Board's determination that Appendix E ¶ IV.F.1 draws a distinction between initial, pre-license exercises and subsequent, biennial exercises. Id. at 22. In most other respects, however, ALAB-900 rejects the Licensing Board's analysis of the regulation. For instance, the Licensing Board seized upon the statement in ¶ IV.F.1 that an exercise must test as much of the plan "as is reasonably achievable without mandatory public participation" as its only guiding principle in the determination of whether an exercise is "full participation." Applying this "reasonably achievable" test to the Shoreham exercise, the Licensing Board found it insufficient in four respects.[4/] ALAB-900, on the other hand, agrees with LILCO that the Licensing Board's analysis of the regulation "does not fully comport

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3/ The Appeal Board attributes this omission to "careless drafting," id., tacitly conceding the provision's ambiguity.

4/ Specifically, LBP-87-32 faulted the 1986 exercise for its failure to test (1) the transmission of an emergency message to an EBS radio station, (2) participation of more than one school district in the exercise scenario, (3) implementation of ingestion pathway activities in Connecticut and New York, and (4) coordination and communication between LERO and special facilities. 26 NRC at 501.

with basic principles of statutory construction," Id. at 15, since it reduces footnote 4 to mere surplusage.

In contrast to the Licensing Board, ALAB-900 finds that the "principal ambiguity" in Appendix E ¶ IV.F.1 is what footnote 4 means by "major observable portions" of the plan. Id. at 18. In resolving this ambiguity, the Appeal Board takes note of the fact that in its Statement of Consideration for the 1984 amendments to Appendix E, the Commission "specifically referred to the FEMA Objectives in connection with the evaluation of the major elements of the exercise." Id. at 21. In light of the "dearth of other guidance," the Appeal Board concludes (as LILCO had argued) that 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." Id. at 21-22.

ALAB-900 rejects, however, LILCO's position that the major elements of an emergency plan can be tested in the aggregate over a six-year period. Id. at 22. Joint NRC-FEMA guidance memoranda, as well as over seven years of NRC-FEMA practice, support LILCO's view. But the Appeal Board, relying on the distinction that it perceives Appendix E ¶ IV.F.1 as drawing between initial and subsequent exercises, finds that those guidance documents "conflict with the language and structure of the regulation and thus may not be relied upon." Id. Having so interpreted the regulation, the Appeal Board concludes that the 1986 exercise was insufficient due to its failure to test three of the four plan elements cited by the Licensing Board. Id. at 26-43.[5/]

II. Errors in ALAB-900

ALAB-900 is incorrect in two principal respects. First, it fundamentally errs when it finds that Appendix E ¶ IV.F.1 creates a "distinction between the initial exercise required before licensing and the periodic post-license exercises required for an operating plant." Id. at 22. ALAB-900 accepts the Licensing Board's determination that this

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5/ As for the fourth element, the Appeal Board finds that "LERO's failure to contact [the EBS radio station] in and of itself does not show a lack of compliance with the requirements of a full participation exercise." Id. at 30-31.

distinction is clear "on the face" of ¶ IV.F.1. Id. But in so doing, the Appeal Board never comes to grips with the fact that (1) Appendix E, when originally promulgated, plainly did not create a different standard between initial and subsequent exercises, and that (2) on the subsequent occasions that Appendix E has been amended, the Commission has never indicated that it was changing the provision with the intent of creating such a distinction.[6/]

In LBP-87-32, the Licensing Board found that "[i]t is clear that the July 1984 amendment [to Appendix E] did make substantive changes in the required scope of initial and biennial exercises." 26 NRC at 488 (1987). In contrast, ALAB-900 takes an agnostic approach to the matter, neither expressly accepting nor rejecting the Licensing Board's incorrect view regarding this "clear" purpose of the 1984 amendment.[7/] Instead, what the Appeal Board asserts is that 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. . . ." ALAB-900, slip op. at 23 n.17. But saying that the "primary concern" is what Appendix E ¶ IV.F.1 requires merely states the issue. The point the Appeal Board misses is that only by carefully considering the regulatory history of this provision, which is at best ambiguous and possibly inconsistent on its face, is it possible to determine what Appendix E ¶ IV.F.1 requires.[8/] In failing to give

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6/ As LILCO pointed out, between the regulation's initial promulgation in 1980 and its subsequent amendment in 1984, its provisions for both initial and subsequent "full participation" exercises were basically identical to those now applying specifically to initial exercises. 45 Fed. Reg. 55,412-13 (August 19, 1980). The regulatory history of Appendix E is described in the Appeal Brief of Long Island Lighting Company on Contentions EX 15 and 16 (January 19, 1988) ("Appeal Brief") at 33-36.

7/ The Appeal Board does concede elsewhere, however, that, as LILCO stressed, "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." ALAB-900, slip op. at 18 n.11. Moreover, as LILCO pointed out, even if the 1984 rulemaking is considered to have relaxed the substantive requirements (as well as the required frequency) for post-1984 exercises at operating plants, it does not follow that the definition of a "full participation" exercise itself changed, much less that the requirements applicable to initial exercises were somehow increased. See Appeal Brief at 35.

8/ ALAB-900 is unpersuasive in its one attempt to reconcile its position with the regulatory history of Appendix E. LILCO had noted that, in 1981, in the preamble to a proposed

(footnote continued)

adequate consideration to the regulatory history which argues against its interpretation of Appendix E, the Appeal Board errs.

Second, ALAB-900 is wrong when it finds that "full participation" -- as defined in footnote 4 of Appendix E -- means that all the "major observable portions" of the onsite and offsite emergency plans must be tested in the pre-license exercise. Id. at 26. This interpretation of "full participation" simply cannot be reconciled with the consistent NRC and FEMA regulatory guidance that indicates that the major elements of an emergency plan may be tested within a six-year period, beginning with the initial qualifying exercise. See footnote 2, supra. Nor can it be reconciled with NRC and FEMA practice. For instance, the FEMA witnesses testified that they had never made any distinction between full participation exercises sufficient for initial licensing purposes and subsequent full participation exercises. Tr. 7622 (Keller, Baldwin), 8513-14 (Baldwin, Keller, Kowieski). Similarly, the NRC Staff witnesses testified that in their view the 1986 Shoreham exercise was a "full participation exercise." NRC EX Exh. 1 at 7; Tr. 8851-53 (Weiss, Schwartz). As LILCO argued, such testimony, concerning joint NRC-FEMA practice in a highly technical area where the complexities of ¶ IV.F.1 are given meaning by that practice, should have been accorded great deference. See Appeal Brief at 39-43. The Appeal Board errs by not doing so.[9/]

(footnote continued)

rule change, the Commission had stated, inter alia, that "there should be no special significance attached to the actual state of implementation or preparedness at the time just prior to license issuance. . . ." 46 Fed. Reg. 61,135 (December 15, 1981). The Appeal Board claims that "[t]his citation does not help LILCO's case," since the purpose of the statement was to "justify" the Commission's decision to exclude exercise results from litigation, a rule change subsequently struck down in the Union of Concerned Scientists ("UCS") case. ALAB-900, slip op. at 23 n.17. The Appeal Board's objection is beside the point. The only issue the UCS case went to was the opportunity to litigate qualifying exercises, not their content. As LILCO explained, since the Court of Appeals in UCS in no way questioned the predictive nature of the Commission's emergency preparedness findings, the quoted language remains a useful indicator of the Commission's view of initial versus subsequent exercises for a given plant. See Appeal Brief at 34 n.35.

9/ LILCO argued in addition that Contentions EX 15 and EX 16 (pertaining to the scope of the 1986 exercise) should not have been admitted for litigation since, as written, they

(footnote continued)

In response to these considerations the Appeal Board concludes that NUREG-0654 and FEMA PR-1 are "at odds with the unequivocal command of section IV.F.1." ALAB-900, slip op. at 23. As for FEMA practice, ALAB-900 rejects it out of hand as "not dispositive." Id. at 24-25. But in so doing the Appeal Board fails to explain how it can be the case, if prior "full participation" exercises for NTOLs have not complied with the regulatory requirements of Appendix E (having been designed and conducted in conformity with that NRC-FEMA guidance and practice), that the Commission has nonetheless issued operating licenses based on the results of those (presumptively insufficient) exercises. The Appeal Board hints at the incongruity that its decision suggests but does not fully engage the issue.

For instance, ALAB-900 concedes that in the past, several nuclear facilities have been issued operating licenses despite the fact that ingestion pathway activities were not tested in the facilities' pre-license qualifying exercises. The Appeal Board says only that this "may well be true, but so too is the fact that no party invoked its right to litigate the matter in those cases." Id. at 39 n.22. The Appeal Board's point is not well taken, however, as it cannot be seriously argued that the regulatory standards to which an applicant for an operating license is held vary depending on whether or not that application is contested. Indeed, if the matter is as serious and clear as the Appeal Board now professes, it is surprising that the Appeal Board did not exercise its own sua sponte review powers in any of these several cases. The far better explanation, and the only one that is reconcilable with both NRC-FEMA guidance and practice and the Commission's past practice in licensing plants, is that ALAB-900 is wrongly decided.

(footnote continued)

contained no allegation that FEMA's methodology or procedures for the design of the 1986 exercise were any different from those it customarily uses at other exercises. In a separate error of law, the Appeal Board's failure to accord proper deference to FEMA's expert views on what is appropriate exercise design leads it to conclude that the Licensing Board "did not err in admitting contentions EX-15 and EX-16." ALAB-900, slip op. at 13. See Appeal Brief at 22-26.

III. Reasons Why the Commission Should Exercise Review

Review of ALAB-900 is appropriate for three reasons. First, as shown above, the dispute over what Appendix E ¶ IV.F.1 requires centers in large measure on whether the provision establishes separate standards for initial and subsequent exercises. Only the Commission can speak authoritatively as to whether, in fact, it intended to create such separate standards when it first promulgated Appendix E or when it subsequently amended the provision, as in 1984. The Appeal Board's resolution of this issue, to the extent it disclaims the need to address regulatory history and reconcile that history with its interpretation of the provision, should not be allowed to stand unreviewed. Similarly, Commission attention is needed in order to explain how, if ALAB-900 is correct, the decision can be squared with past Commission practice. The short of the matter is that if ALAB-900 is correctly decided, then over the past several years the Commission has issued operating licenses to plants that have not fully complied with NRC regulations. The Appeal Board makes no real effort to confront this fundamental incongruity. The Commission should address it.

Second, if ALAB-900 is allowed to become established law it will work an undesirable change in the intended functioning of the NRC-FEMA emergency planning relationship. Under ALAB-900, FEMA's expert views as to what is necessary in order to evaluate offsite emergency preparedness will be entitled to no particular deference; licensing boards, through post hoc substitution of their own opinions for those of expert regulators, will be the arbiters of first instance as to whether a given exercise was sufficient in scope to constitute "full participation."[10/] The potential for delay and unfairness this presents has already been borne out in the case of the 1986 exercise, where LILCO did all that was asked of it by FEMA, only to be told virtually two years later that its efforts had been doomed as inadequate from the start.

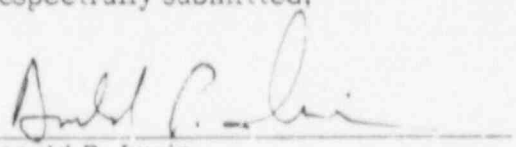
10/ ALAB-900 establishes that FEMA objectives can provide an "appropriate measure" for determining whether an exercise meets the requirements for full participation, but beyond that the decision offers little in the way of guidance as to how an applicant (or FEMA) can reasonably be sure before the fact that an initial, qualifying exercise satisfies the regulatory standards.

Third, Commission review is justified because, without dispositive guidance from the Commission, the issues addressed in ALAB-900 will almost certainly be revisited in subsequent exercise proceedings.[11/] That the Licensing Board and Appeal Board followed almost entirely different paths in reaching essentially the same conclusion suggests that the advisory decision rendered in ALAB-900 will not quell the dispute over what Appendix E ¶ IV.F.1 requires. By taking review now, the Commission will enable future litigants to avoid wasting time and resources debating the provision's meaning.

IV. Conclusion

ALAB-900 is significant in its implications for the NRC-FEMA relationship as it pertains to the design, conduct and evaluation of emergency preparedness exercises. It also misinterprets NRC regulations to impose a higher regulatory standard on LILCO than that to which previous applicants for operating licenses have been held. LILCO respectfully urges the Commission to promptly review and reverse ALAB-900.

Respectfully submitted,



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11/ The likelihood of renewed exercise litigation in the Shoreham case is currently in doubt, in light of the Licensing Board's recent decision dismissing Intervenors from the entire proceeding for their "sustained and willful strategy of disobedience and disrespect for the Commission's adjudicatory processes". LBP-88-24, 28 NRC ___, slip op. at 129 (1988). Litigation of the recently conducted exercise for the Seabrook facility is pending.

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LONG ISLAND LIGHTING COMPANY'S PETITION FOR REVIEW OF ALAB-901 AND FOLLOW-ON ORDERS, MOTION FOR LEAVE TO EXCEED PAGE LIMIT and LILCO'S PETITION FOR REVIEW OF ALAB-900 were served this date upon the following Federal Express as indicated by an asterisk, or by first-class mail, postage prepaid.

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