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NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO LILCO MOTION FOR SUMMARY DISPOSITION OF CONTENTIONS 7 AND 8 (INGESTION PATHWAY AND RECOVERY AND REENTRY)

I. INTRODUCTION

LILCO's Motion for Summary Disposition of Contentions 7 and 8 (Ingestion Pathway and Recovery and Reentry) ("Motion") seeks to summarily dispose of the two referenced legal authority contentions on the basis of the adequacy of LILCO and New York State Plan provisions for these functions, and the presumption of best effort State and County response in the event of an emergency at Shoreham. Motion at 2. Contentions 7 and 8 assert that LILCO lacks legal authority to make and implement decisions and protective action recommendations for the ingestion exposure pathway and for recovery and reentry, respectively.

As set forth below, the previous findings that the LILCO Plan is adequate with regard to the ingestion exposure pathway and recovery and reentry procedures, provisions of the LILCO Plan, and the regulatory presumption that the State and County will use their best efforts to follow the LILCO Plan or another adequate and feasible timely-proffered plan, support summary disposition of contentions 7 and 8.

II. DISCUSSION

A. There are no Litigable Issues with Respect to Ingestion Pathway Planning

In remanding the legal authority contentions, the Commission in CLI-86-13 directed that the Licensing Board address several factual questions going to whether, assuming a best efforts response by State and County authorities generally following the LILCO Plan, the LILCO-only plan permits a finding of reasonable assurance that adequate protective measures can and will be taken in the event of an emergency at Shoreham. 24 NRC 29, 31-32. The Commission adopted a similar generic standard in 10 C.F.R. Section 50.47(c)(1) (52 Fed. Reg. 42086, November 3, 1987), applicable to cases in which a utility can show that its non-compliance with Section 50.47(b) is substantially related to the non-participation of state and local governments in planning.

With respect to ingestion pathway planning, the Commission's questions in CLI-86-13 relate to whether lack of familiarity with the LILCO Plan, or delays in making decisions and recommendations as to protective actions would stand in the way of such a finding. 24 NRC at 31. The Board was encouraged to "use the existing evidentiary record to the maximum extent possible, but should take additional evidence where necessary." Id. at 32. The Commission treated the issue of immateriality as a factual issue for resolution in connection with further proceedings on realism. Id.

In previously rejecting summary disposition of Contention 7, the Licensing Board conceded that it had, under the rubric of Contention 81, found that the LILCO Plan for the ingestion pathway could be implemented without legal authority to compel public action. Memorandum and Order,

September 17, 1987, at 37, citing 21 NRC 644, 877-78. However, the Board declined to grant summary disposition because of the question of lack of coordination between LILCO actions and possible State and local government actions in the event of an accident. Id. at 38. The Board stated:

> It is by no means clear to the Board at this time that the two groups would not work at cross purposes, nor is it clear that if LILCO simply withdrew the resulting actions by the Governments, presently unspecified, would comply with NRC regulations. Thus we cannot grant summary disposition on Contention 7.

Id. Similarly, in granting summary disposition of Contention 92 (Memorandum and Order, November 6, 1987, at 14, 15), the Board treated the question of the adequacy of a government response as a matter for consideration under Contention 7. While the Board found that the Appeal Board had ruled that there was no requirement for further inquiry into State ingestion pathway functions beyond the four litigated under Contention 92, it treated the question of whether the State would do a better job than LILCO as a matter for consideration under Contention 7. Id. at 14. See ALAB-847, 24 NRC 412, 432.

The Licensing Board's previous rulings, that further evidentiary hearings are necessary on the possibility that LILCO and the State would work at cross purposes or on how the State's participation would make the plan better, are incorrect.

First, the LILCO Plan, which was found adequate in this regard, states that if State authorities "are willing and able to implement the ingestion pathway plan for their state, no further action is necessary..." OPIP 3.6.6, cited in Motion at 25. Thus, LILCO's Plan does not provide

for LERO to implement its ingestion pathway plan in the face of State ingestion pathway response. The Licensing Board accepted this fact as admitted. November 6, 1987 Memorandum and Order, at 7, 16. Thus, any conflict between the State and LILCO response is prevented by the LILCO Plan itself. As a result, the Board should reverse its finding that the LILCO and the State might work at cross purposes.

In addition, any inquiry into whether the LILCO Plan is deficient because the State might do a better job is foreclosed by CLI-86-13, which directs inquiry into whether, because of lack of familiarity with the LILCO Plan, and delays in decisionmaking and recommendations, a best efforts State or local response might preclude a reasonable assurance finding. The question is not whether a state may do a better job but whether the LILCO Plan, together with a best efforts government response, considered on its own merits, would be adequate. 52 Fed. Reg. 42085. Further, the Appeal Board in ALAB-847, 24 NRC at 432, indicated that a Licensing Board may not impose requirements beyond those in the regulations simply because the State might do a better job than LILCO. As there stated a plan that meets regulatory requirements is sufficient, regardless of whether a governmental plan might be better. 1/ Id.

Moreover, the adoption by the Commission of the regulatory presumption that State and local authorities would use their best efforts

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1/ In the NRC Staff Response to the Board's Memorandum Requesting the Views of Parties on the Matters to be Decided on the Realism Remand, October 30, 1987, at 14, noted that, given the finding that the LILCO Plan was adequate and implementable without mandatory authority warranted summary disposition based on immateriality.

to implement the LILCO Plan or another adequate and feasible timely-proffered plan has the effect of superceding the Licensing Board's prior determinations that the State and LILCO might somehow work at cross purposes or that LILCO might simply withdraw and the Governments would proceed on an ad hoc basis. See Memorandum and Order, September 17, 1987, at 38; Section 50.47(c)(1)(iii).

The regulatory presumption under 10 C.F.R. § 50.47(c)(1)(iii) is that the State will either follow the LILCO Plan or its own adequate plan. In the case of the ingestion pathway, New York State has a generic plan, but not one specifically oriented to the Shoreham plant. Motion at 18 et seq. Section 50.47(c)(1)(iii) creates a presumption that the State and local authorities will follow the LILCO Plan, already found workable. 21 NRC at 878.

With respect to the Commission's factual questions concerning the adequacy of such a response (see 24 NRC at 31), it appears that most portions of New York State within the Shoreham ingestion pathway zone are covered by the ingestion pathway zones for Indian Point or Millstone. Motion at 19, Attachment 6, at K-9. Thus, the State is already prepared to perform ingestion pathway response functions for a substantial portion of the areas of New York State under consideration for the Shoreham ingestion exposure pathway EPZ. Familiarization of State organizations and personnel with the State's functions under those plans is obviously unnecessary. Since New York State already has plans for portions of the Shoreham EPZ, it will require little familiarization with the LILCO Plan in order to determine that LILCO's plan, which covers the entire Shoreham ingestion pathway EPZ, is preferable to use of the State's plan, which

does not. Finally, coordination should not be an issue, since the LERO organization is instructed to follow the State's direction. OPIP 3.6.6.

In sum, a best efforts response using the LILCO Plan already found workable with respect to ingestion pathway functions would bring those State officials responsible for these functions into contact with similarly tasked LERO managers. Those State officials would then direct ingestion pathway response using the only fully-developed plan for the Shoreham pathway.

As a result, the existing record shows there are no facts material to disposition of Contention 7 which are genuinely in dispute, and summary disposition of Contention 7 is appropriate.

B. There are no Litigable Issues with Respect to Recovery and Reentry Procedures

In the PID, the Licensing Board considered the adequacy of the LILCO Plan for recovery and reentry against the regulations, and found it adequate, save for the issue of legal authority. The regulations, 10 C.F.R. Section 50.47(b)(13), state that: "General plans for recovery and reentry are developed." Moreover, the planning guidance criteria contained in NUREG-0654, Section II.M, refers only to "general plans and procedures" and "the means by which decisions . . . are reached," the "means for informing" emergency responders, and a "method of periodically estimating total population exposure." The Board, in the PID, emphasized that detailed planning for contingencies was not required. 21 NRC at 880. It also noted that at the time consideration of recovery and reentry would be undertaken, "the public would be safe from radiation exposure" and the recovery committee "would have time to

deliberate and decide what it should recommend." Id. Thus, the requirement for general recovery and reentry plans was there interpreted to require establishment only of the appropriate framework for decisionmaking at a later time. In finding the LILCO Plan adequate for recovery and reentry, the PID stated:

> The Board concludes that LILCO's general plans for recovery and reentry are adequate under the guidelines of 10 C.F.R. §50.47(b)(13) and NUREG-0654 §II.M. A plan to form an expert committee at the time of an accident to make decisions according to predetermined guidelines constitutes a reasonable plan for recovery and reentry. It is not necessary to preplan at this stage for contingencies that a committee can resolve at the time of an accident when it has the necessary information for decisionmaking.

21 NRC at 880.

However, the Licensing Board subsequently rejected summary disposition of Contention 8 in its Memorandum and Order of September 17, 1987, stating:

> The possible participation by local authorities and the "best efforts" assumption do not combine to assure that proper reentry and recovery procedures will either be evolved or enforced without some knowledge concerning who will decide and by what standards. We must agree with the Intervenors' position that the record does not support a conclusion that the proper decisions, recommendations, or actions concerning recovery and reentry would materialize..."

Id. at 38-39.

While the questions posed by the Licensing Board must be answered to resolve Contention 8, an examination of the existing record indicates that the combination of the already approved plan, the established existence of a State plan, and the best efforts presumption resolves these matters.

First, as noted above in connection with the ingestion pathway, the LILCO Plan provides that if the State or County decide to act to protect the health and safety of the public, LERO would not only give precedence to those State or County actions, but would support those activities as needed. LILCO Plan, Section 1.4-1a; OPIP 3.6.6.

Second, the following facts have been deemed established:

> The State of New York has a New York State Radiological Emergency Preparedness Plan for nuclear power plants other than Shoreham.
>
> The New York State Radiological Emergency Preparedness Plan calls for the Disaster Preparedness Commission to appoint a Recovery Committee. (Rev. July 1984), at IV-1.
>
> The State has officials who are trained to direct State resources to assist in recovery from a radiological emergency.

Admitted Facts 43, 61, 62. See September 17, 1987 Memorandum and Order at 44.

As detailed in its Motion, at 8, the State generic plan calls for the State recovery committee to address: (1) determination of the recovery actions to be taken, (2) dissemination of information, (3) provision of assistance to affected areas, and (4) provision for continued monitoring. This State framework is consistent with the criteria in NUREG-0654, outlined above, and is similar to the decisionmaking framework discussed and approved in the PID. 21 NRC at 878-880.

Given the similarity in structure and function of the LERO and State recovery committees, the capabilities of those persons already designated to the State and LILCO recovery committees, State authorities can be quickly familiarized with the specific needs of the Shoreham ingestion EPZ and the scope of LILCO's planned protective measures. In addition, with

the LILCO Plan provision for deference to actions undertaken by the State, coordination between the two entities would not be difficult. Since the best efforts presumption dictates that the State and County will attempt to follow the LILCO Plan, and the LILCO Plan calls for LERO to defer to decisions taken by the State, the LILCO Plan provides for any necessary coordination.

Also, given the availability of time to convene a recovery committee and gather the information needed to determine when to implement recovery and reentry and the resources needed to implement it, there is time to familiarize State and County officials with the LILCO Plan and for those officials to determine what measures to institute. See PID, 21 NRC at 880.

Thus, further examination of the Commission's factual questions in CLI-86-13, as applied to recovery and reentry, establishes that neither lack of familiarity with the LILCO Plan or time pressures on decision-making are significant considerations in reaching a conclusion as to whether adequate protective measures can and will be taken. As a result, there are no material facts genuinely in dispute precluding summary disposition of Contention 8.

III. CONCLUSION

Summary disposition of Contentions 7 and 8 should be granted.

Respectfully submitted,

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Counsel for NRC Staff

Dated at Rockville, Maryland
this 10th day of February, 1988

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO LILCO MOTION FOR SUMMARY DISPOSITION OF CONTENTIONS 5 AND 6 (MAKING DECISIONS AND TELLING THE PUBLIC)", "NRC STAFF RESPONSE TO LILCO MOTION FOR SUMMARY DISPOSITION OF CONTENTION 10 (ACCESS CONTROL AT THE EPZ PERIMETER)", "NRC STAFF RESPONSE TO LILCO MOTION FOR SUMMARY DISPOSITION OF CONTENTIONS 4 AND 9 (TOW TRUCKS AND FUEL TRUCKS)", AND "NRC STAFF RESPONSE TO LILCO MOTION FOR SUMMARY DISPOSITION OF CONTENTIONS 7 AND 8 (INGESTION PATHWAY AND RECOVERY AND REENTRY)" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 10th day of February 1988.

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