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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

GOVERNMENTS' OPPOSITION TO LILCO'S MOTION TO DISMISS EXERCISE CONTENTIONS 4-20 ON THE BASIS OF ALAB-903

I. INTRODUCTION

On November 21, 1988, LILCO filed a Motion to Dismiss Exercise Contentions 4-20 on the Basis of ALAB-903 (the "Motion"). Suffolk County, the State of New York, and the Town of Southampton (the "Governments") hereby respond in opposition to LILCO's Motion.

The purported basis for LILCO's Motion is ALAB-903, 28 NRC ___, which the Appeal Board issued on November 10, 1988 for the purpose of providing this Board and the parties with guidance concerning the meaning of the term "fundamental flaw." LILCO

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claims that the Governments' October 24 original Contentions[1/] do not meet the new standards set forth in ALAB-903 and that the Governments have waived any right they may have had to conform the original Contentions to ALAB-903.

LILCO's Motion should be rejected on multiple grounds. First, to the extent the Motion complains that the Governments' original Contentions may have failed to address ALAB-903's guidance explicitly, those complaints are now moot. On November 29, the Governments filed timely Amended Contentions which fully comply with that guidance. Contrary to LILCO's assertions, the Governments at no time waived their right to file such amendments.

Second, LILCO's Motion misinterprets ALAB-903's guidance as it applies at the contention pleading stage. In particular, LILCO's failure to recognize the distinction between pleading requirements and merits considerations has led it to take the extreme position that ALAB-903's standards are almost impossible for anyone to meet. ALAB-903, of course, cannot be interpreted in such an extreme fashion as to impose (using LILCO's words) "almost insurmountable" barriers to the admission of exercise contentions. Motion at 5.

Third, the timing of the Motion was premature in the extreme, coming only 11 days after ALAB-903 was issued and one day before a scheduled conference of counsel at which the Board

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1/ Emergency Planning Contentions Relating to the June 7-9, 1988 Shoreham Exercise (Oct. 24, 1988) ("original Contentions").

had indicated the effects of ALAB-903 on the Governments' Contentions would be discussed. Thus, LILCO's Motion should be denied.

II. BACKGROUND

In LBP-88-2, 27 NRC 85, 92-93 (1988) and certain prior orders,[2] this Board issued guidance on the meaning of the term "fundamental flaw." That guidance was the law of the case on October 24, when the Governments were required to file their original Contentions. Accordingly, those Contentions were drafted to conform with that guidance.

Two days after the Governments submitted their October 24 Contentions, counsel for LILCO wrote a letter to the Appeal Board asking for additional guidance on the meaning of "fundamental flaw."[3] The letter recognized that any modifications to the meaning of "fundamental flaw" would require the parties to address those modifications in further submissions.[4]

LILCO submitted its Objections[5] to the Governments'

2/ Most notably, this Board's unpublished Prehearing Conference Order of October 3, 1986.

3/ Letter from Donald P. Irwin to Christine N. Kohl, Esq., et al. (Oct. 26, 1988) ("October 26 letter").

4/ October 26 letter at 2, n.1.

5/ LILCO's Response to 1988 Exercise Contentions (Nov. 3, 1988) ("LILCO Objections").

Contentions on November 3; the Staff's Objections[6] followed on November 8, 1988. As ALAB-903 had not yet been issued, nor its imminent arrival made known to the parties, both Objections were grounded on LILCO's and the Staff's interpretation of the Board's pre-ALAB-903 guidance. Indeed, LILCO explicitly confirmed this fact in its Motion at 3 ("In LILCO's Response to Intervenors' exercise contentions, LILCO applied the definition of 'fundamental flaw' adopted by this Board in LBP-88-2").

The Governments were required to file their Response[7] to LILCO's and the Staff's lengthy Objections by noon on November 15. Shortly before that deadline, on November 10, the Appeal Board issued ALAB-903. After reviewing ALAB-903, the Governments realized that it arguably established modified pleading requirements for exercise contentions. In view of the short time before their Response was due, they attempted on the same day to contact this Board for the purpose of arranging a conference call among the parties to discuss the effect of ALAB-903, and to obtain Board guidance as to how the parties should proceed. In a series of conversations with the Board's secretary, counsel for Suffolk County conveyed the Governments' reasons for seeking such a conference call. The Board's secretary informed counsel, however, that the Board had decided

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6/ NRC Staff Response to Intervenors' Proffered Contentions Relating to the Emergency Planning Exercise Held on June 7-9, 1988 (Nov. 8, 1988) ("Staff Objections").

7/ Governments' Response to the LILCO and NRC Staff Objections to the 1988 Exercise Contentions (Nov. 15, 1988).

that the matter could be addressed at the conference of counsel, which was then scheduled for November 22.

Under these circumstances, the Governments did not address ALAB-903 in their Response. Indeed, as explained in the Governments' recent Motion for Leave,[8/] it was not appropriate to do so because: (1) the Governments' Response was in essence a rebuttal to LILCO's and the Staff's Objections to the Governments' Contentions (all of which were focused on pre-ALAB-903 standards) and thus was not an appropriate vehicle to respond to ALAB-903; (2) the Governments anticipated receiving further guidance at the November 22 conference of counsel as to how to proceed in light of ALAB-903; and (3) it was impossible in the short time remaining between November 10 and the noon November 15 filing date to address ALAB-903 in the Response, even if it were appropriate to do so.

Three days after the Governments submitted their Response, and only eight days after the issuance of ALAB-903, LILCO informed this Board by letter[9/] that Contentions 4-20 should be dismissed because they did not meet ALAB-903 on their face, and that LILCO considered the Governments to have waived any right to amend their contentions to meet ALAB-903. LILCO's letter also notified the Board of its intention to file a motion to that effect. As promised, LILCO filed its Motion on November 21.

8/ Motion for Leave To File Amended Exercise Contentions (Nov. 29, 1988) ("Motion for Leave") at 4-5.

9/ Letter from Donald P. Irwin to John H. Frye, Esq., et al (November 18, 1988).

On the same day, this Board postponed the conference of counsel, scheduled for the next day, until December 6. In the absence of the procedural guidance they had anticipated, the Governments decided at that time that the best course of action was to amend their Contentions to address ALAB-903's standards explicitly, and to submit those amendments prior to the December 6 conference of counsel. The Governments did so promptly, submitting their Amended Contentions, accompanied by the Motion for Leave, on November 29 a week before the newly-scheduled conference of counsel.[10/]

In essence the Governments' Amended Contentions dispose of LILCO's complaints that Contentions 4-20 should be dismissed for failure to meet the requirements of ALAB-903. While the Governments do not concede that their original Contentions could not have been read to comply with ALAB-903,[11/] the Amended

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10/ The Governments' filing was particularly prompt in light of the intervening Thanksgiving holiday and the need to respond to the OL-6 Board's November 21 order authorizing a 25% power license.

11/ For example, contrary to LILCO's assertion (Motion at 6), each of the original contentions challenged in LILCO's Motion allege a failure of an essential element of LILCO's Plan to comply with specified regulatory requirements, thus satisfying the ALAB-903 "essential element" test. Further, original Contentions 4-20 also list multiple bases supporting the specified regulatory noncompliance, indicating that the problems revealed by the exercise would not be easy to correct and, if correctable at all, would require substantial revision of LILCO's Plan. Indeed, many contentions reference problems which have not been corrected since the 1986 exercise, making it clear that correction will require substantial effort and major plan revisions. Thus, while not explicitly addressing ALAB-903 requirements, the Governments submit that the original contentions are sufficiently detailed and precise to constitute

(continued...)

Contentions now explicitly meet the pleading requirements of ALAB-903. Thus, most of LILCO's Motion is now moot. The Motion does raise certain issues, however, which should nevertheless be addressed.

III. DISCUSSION

A. LILCO's Motion Contains False Allegations

Before responding to the merits of LILCO's Motion, the Governments must first address a matter which, unless corrected, could adversely affect the efficient and professional conduct of this proceeding. It could have hardly have escaped the Board's attention that the tone of the Motion was extreme, unnecessarily bitter and accusatory. Not only does the Motion take an extreme position on the Governments' right to file amended contentions; the Motion also repeatedly attacks the integrity of the Governments for allegedly engaging in ex parte communications and delay tactics, and chastises this Board and the Governments for the allegedly "torpid" pace of the earlier Shoreham exercise hearings. Motion at 2, 13, 15, 16. In this way, the Motion presages a proceeding based not on fair arguments well grounded in fact and sound legal principles, but rather burdened with

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11/(...continued)
compliance with any new requirements set forth in ALAB-903. See also discussion at Section III.B.3 below.

bitterness, extremism, attacks on alleged motives,[12] and intemperate language.

The most glaring, but not the only, example of this potential problem is LILCO's constantly-repeated theme[13] that the Governments acted improperly in contacting this Board (through its secretary) on November 10 to attempt to arrange a conference call for the purpose of discussing ALAB-903 and its effects on the Governments' original Contentions. Not only does LILCO mischaracterize the Governments' efforts to set up a conference call as an improper ex parte contact with this Board -- LILCO also suggests that the Governments' conduct was sanctionable. Motion at 3.

Here, LILCO has gone off the deep end. As stated in Mr. Miller's letter of November 21 (a copy of which is attached hereto for the Board's convenience), the only purpose of the Governments' telephone contact with the Board's secretary was to attempt to schedule a conference call to discuss the effects of ALAB-903. In response to questions posed by the Board through its secretary, Mr. Miller merely told the Board why the Governments sought a conference call. Surely, LILCO is not

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12/ For example, the Governments' efforts to arrange a conference call on November 10 are attacked not only for being allegedly ex parte, but also as part of an effort "to twist ambiguities so as to effect delay." Motion at 16. Such baseless accusations have no place in this proceeding.

13/ LILCO's Motion refers to this allegedly improper "ex parte" contact with the Board no less than eight times (nine times if the letter from counsel covering the Motion is included).

suggesting that Mr. Miller should have refused to answer those questions.

The law is clear that contacts with a Licensing Board (or in this case the Board's secretary) on routine procedural matters (e.g., setting up a conference call) are not improper. It is the way things are normally done in this and most other forums. Only ex parte contacts concerning substantive issues are improper. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1203 (1983); Consumers Power Co. (Big Rock Point Plant), LBP-82-8, 15 NRC 299 (1982); see also 10 C.F.R. 2.780(a)(2) (prohibition on Commission ex parte communications restricted to "any substantive matter at issue in a proceeding"). Indeed, LILCO has contacted Licensing Boards to set up conference calls with no qualms and no attacks from the other parties on its integrity. There is no reason why different rules should apply to the other parties.

LILCO has ignored the law and long-time practice and instead has chosen to make accusations of sanctionable conduct where none has occurred. The Governments will not attempt to explore LILCO's motives for doing so. The point here is that LILCO's approach to this proceeding threatens to divert this Board's attention and the parties' energies from the real issues which are on the table regarding LILCO's latest exercise. The Governments intend to keep their focus on the facts and the law. LILCO should do likewise.

B. LILCO Has Misconstrued the Pleading Requirements of ALAB-903

1. Pleading Requirements Versus Merits Consideration

In ALAB-903, the Appeal Board established a two-part test to determine whether a fundamental flaw exists. First, a fundamental flaw reflects a failure of an essential element of an emergency plan. Second, the flaw must be one that can be remedied only through significant revision of the plan. As always, any contentions must be supported by adequate bases, and they must be pled with a level of detail befitting the late stage of proceeding in which such contentions arise. ALAB-903, slip op. at 8-10.14/

These standards are straightforward and are not meant to hinder the litigation of exercise issues, but rather to keep them well-focused. See ALAB-903, slip op. at 9. LILCO, however, has a distorted view of the significance of this guidance at the pleading stage. As LILCO sees it, it is virtually impossible for any exercise contention to meet ALAB-903's standards. For instance, with respect to the first standard, LILCO states that any alleged flaws based on delays or individual failures "face an almost insurmountable pleading standard." Motion at 5. Likewise, in LILCO's view, the second prong of the test --

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14/ LILCO alleges that the Appeal Board has essentially adopted LILCO's three-part test. Motion at 4. The Governments disagree. The Appeal Board's two-part test eliminates any need to attempt to link exercise problems to a specific health or safety impact and, instead, focuses on whether a regulation (which presumably was enacted to protect public health and safety) has been implicated. Thus, the focus of the Appeal Board's test differs markedly from LILCO's test.

correctability -- "is even harder to satisfy on the first." Motion at 5. In short, LILCO argues that the Appeal Board has established pleading standards that can only be met in rare instances. This, of course, is not at all what the Appeal Board intended. In fact, such an interpretation would fly in the face of the UCS holding that intervenors have a right to litigate exercise results. See Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985).

The source of LILCO's confusion appears to be its failure to distinguish between what an intervenor must contend in order to adequately plead a fundamental flaw, and what that intervenor must then prove in order to prevail on the merits. LILCO argues that any contention must "satisfy" both prongs of the ALAB-903 test in order to pass muster (Motion at 5); however, to the extent that LILCO means that an intervenor must prove its case in any way at the contention stage, or that the Board is entitled to make a merits decision on the basis of allegations set forth in contentions, it has seriously misconstrued both ALAB-903 and prevailing NRC case law.

What ALAB-903 says is that an exercise contention must "address" or "identify" the two elements of a fundamental flaw, and it must do so in adequate detail. ALAB-903, slip op. at 8-10. Thus, a contention must allege that an essential element of a plan (generally identified by reference to NRC regulations or other such authority) has failed and that the failure is curable only by a significant revision to the plan. Once a contention

does so, however, and provides adequate bases which, if true, would support the conclusion that the plan is flawed, the contention is admissible and it is inappropriate to look behind those allegations to determine their merits.

It is well-established in NRC case law that a Licensing Board considering the admissibility of contentions is prohibited from making rulings on the merits of those contentions. E.g., Duke Power Co. (Transportation of Spent Fuel from Oconee to McGuire), ALAB-528, 9 NRC 146, 151 (1979); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980). Indeed, the Commission itself confirmed that principle in CLI-86-11, 23 NRC 577, 581 (1986), concerning LILCO's 1986 exercise.

> However, we agree with Intervenors' second point, that the wording of LILCO's proposal to exclude contentions which do not demonstrate fundamental flaws in the emergency plan, has the potential to require premature evidentiary decisions. We remedy that possible defect by directing the Board to admit only those Intervenor contentions which satisfy the specificity and other requirements of 10 C.F.R. § 2.714 by (1) pleading that the exercise demonstrated fundamental flaw sin LILCO's plan, and (2) by providing bases for the contentions which, if shown to be true, would demonstrate a fundamental flaw in the plan.

The Appeal Board in ALAB-903 did not rule that merits considerations are appropriate at the pleading stage; nor could it, in light of CLI-86-11.

Given the clear state of the law, it is evident that LILCO is in error when it argues that the Governments bear a near-insurmountable burden at the pleading stage. The Appeal Board revealed no intention to make it exceedingly difficult for

intervenors to draft appropriate contentions. It merely stated that any such contentions must address ALAB-903's two-part test. The Governments' original Contentions did not address that test explicitly, for obvious reasons, but nevertheless were pled in great detail. The Governments' Amended Contentions retain that detail, add more detail, and address the Appeal Board's new test explicitly. Thus, they meet the standards of ALAB-903 and are admissible.

2. FEMA Conclusions

LILCO also argues that ALAB-903 "establishes a higher threshold for contention admissibility in areas where FEMA has found no Deficiencies . . . ." Motion at 11. The Governments disagree.

The discussion of the deference to be given to FEMA exercise findings is found at pages 12-13 of ALAB-903. While it is true that ALAB-903 states that such findings are to be given presumptive weight, it does not state that such weight is a factor to be considered at the pleading stage. Indeed, the Appeal Board begins the entire discussion with the statement:

> Lastly, there is the question of what weight should be given to FEMA's post-exercise assessment in making a fundamental flaw determination.

ALAB-903, slip op. at 12. That language indicates that the weight to be accorded to FEMA's findings is applied at a later stage in the proceeding when the merits of the contentions are considered. Thus, when viewed in its proper context, the later

statement that "an intervenor seeking the admission of contentions that allege a fundamental flaw has a more difficult task" (ALAB-903, slip op. at 12) appears to relate to the task of proving the contentions not the admissibility of the contention.

LILCO's contrary interpretation would appear to require merits considerations at the pleading stage which, as explained above, are impermissible. As the Court stated in UCS, a party to an exercise proceeding must be given the opportunity to contest FEMA's conclusions. 735 F.2d at 1451. This Board applied that rule of law in its October 3, 1986 Prehearing Conference Order (at 8) when it ruled that FEMA's conclusions are contestable, and can only be contested by allowing admissible contentions and then determining the weight to be given to those conclusions. ALAB-903 must therefore be read in the context of these prior decisions which ALAB-903 has not overruled.

Nevertheless, to avoid this question from becoming an issue, the Governments have drafted their Amended Contentions to include, in all appropriate instances, arguments as to why FEMA's findings do not preclude the admission of the Contentions.15/ Thus, LILCO's arguments are, once again, moot.

15/ The Governments' original Contentions -- specifically Contention 3 -- already dispute the bases for FEMA's conclusions and thus, even before ALAB-903, set forth multiple reasons why the Governments dispute FEMA's conclusions.

3. LILCO's Specific Complaints

At pages 7-12 of its Motion, LILCO argues that the Governments' original Contentions failed to meet ALAB-903's standards in three ways: (1) they did not allege that a significant revision of the LILCO Plan is required; (2) they did not explain why the problems they allege, collectively considered, demonstrate a fundamental flaw; and (3) they did not address why FEMA's findings are not entitled to presumptive weight.16/ To the extent that any of those complaints may have been legitimate, they have now been disposed of by the Governments' Amended Contentions which explicitly address all necessary ALAB-903 elements. A few words are necessary, however, to clear up some further confusion and misconceptions evident in LILCO's Motion.

First, it is not true that the Governments' original Contentions 4-20 could not be fairly read to meet ALAB-903's standards. See Motion at 7. For instance, each of those Contentions was pled with extensive detail. The Governments based the Contentions not only on the FEMA Report, but also on documentation received from FEMA and, to a lesser extent, LILCO. Furthermore, each contention not only alleged the existence of a fundamental flaw (and the bases supporting that flaw), but also

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16/ Although LILCO makes broad allegations applicable to original Contentions 4-20, LILCO actually discusses only three Contentions specifically -- Contentions 4, 5, and 14. As to the rest, LILCO makes no specific mention. Such general arguments, lacking in specifics, merit summary rejection.

tied each flaw to violations of one or more regulatory standards and, where appropriate, to provisions of the LILCO Plan and FEMA exercise objectives. Where delays were alleged, the original Contentions almost always claimed that such delays were detrimental to the public health and safety. The multiple bases provided in most of the original Contentions demonstrated the pervasive and repeated nature of LILCO's failures. Accordingly, every one of Contentions 4-20 adequately pled a failure of an essential element of LILCO's Plan.

With respect to the second prong of the two-part test, it is true that none of the Contentions explicitly addressed the correctability of the alleged flaw. Nevertheless, that element was easily discernable from the nature of the flaws alleged. In virtually every instance, those flaws reveal significant problems which will require substantial review and revision of the LILCO Plan, and retraining of LILCO personnel, if LILCO is even to attempt to correct them. Moreover, several of the Contentions allege that the same flaw existed in the 1986 exercise, leading to the conclusion that LILCO is incapable of correcting such flaws.

Second, LILCO is wrong when it states that ALAB-903 requires a specific explanation as to why the numerous bases provided for each contention, collectively considered, demonstrates a fundamental flaw. Motion at 9-10. ALAB-903 sets no such standard, which would require a merits-type demonstration of the evidence in support of the bases of a contention. Rather, ALAB-

903 requires that for a contention relying on multiple bases to be admissible, those bases, if true, must be pervasive and demonstrate a pattern of related or repeated failures of an essential element of LILCO's Plan. Whether that requirement is met is evident from the face of the contention and the nature of the bases alleged; ALAB-903 requires no further explanation as to why that requirement is met.

Nor is LILCO correct in its assertion that, when read fairly, the numerous bases in the Governments' original Contentions (which are the same bases asserted in the Amended Contentions) do not demonstrate pervasive problems or a pattern of related or repeated failures in an essential element of LILCO's Plan. Motion at 10. For example, LILCO cites Contention 5 regarding the failure of the notification element of its Plan. Four examples of LILCO's failures are provided as the Contention's bases. LILCO appears to argue, however, that because the failures are not all of exactly the same type, they do not demonstrate a pervasive failure or a pattern of failures. Here, LILCO interprets ALAB-903 far too narrowly.

The essential element of LILCO's Plan at issue in Contention 5 is LILCO's ability to provide prompt notification. The four diverse failures cited (i.e., siren failure, inadequate and delayed EBS messages, inadequate dispatch of route spotters, and inadequate implementation of notification for the deaf) demonstrate that the flaw in LILCO's ability to notify the public is not an isolated incident, but rather is pervasive, affecting

many parts of the notification element. Furthermore, these multiple failures plainly represent a "pattern" in that they provide numerous, repeated examples of LILCO's inability to meet the notification element. The same arguments apply to LILCO's attack on the multiple bases provided in Contention 14.

In essence, LILCO's argument is a variation on its repeated attempts in its Objections to treat the Governments' bases as individual contentions, rather than as a whole. ALAB-903 makes clear, however, that multiple failures, considered collectively, can constitute a fundamental flaw. The multiple bases found in the majority of Contentions 4-20 provide more than adequate support to meet the first prong of ALAB-903.

C. The Governments Did Not Waive Their Right to Amend Their Contentions

LILCO also argues that as of the date of its Motion (November 21), the Governments had waived any opportunity to amend their original Contentions. This argument is wrong.

LILCO first asserts that the Governments should have addressed ALAB-903 in their November 15 Response. Motion at 13. The Governments addressed this argument in their November 29 Motion for Leave at 4-5 and will not reargue the matter here. Suffice it to say that the three reasons why ALAB-903 was not addressed in the Response (the inappropriateness of responding to ALAB-903 in a document that was focused on objections and contentions based on pre-ALAB-903 standards; lack of time; and

the Governments' good faith expectation that procedural guidance would be forthcoming at the November 22 conference of counsel) demonstrate that LILCO's assertion is groundless.

LILCO's next complaint that the Governments have taken no steps to amend their Contentions (Motion at 14) is also groundless in light of the Governments' November 29 submission of their Amended Contentions. Nevertheless, LILCO suggests that any amendments filed subsequent to its Motion are untimely and cannot be accepted. Motion at 15. Here the facts run plainly against LILCO's argument.

As stated above, the Governments diligently attempted to obtain procedural guidance on the very day that ALAB-903 was issued and were informed that the matter would be addressed at the November 22 conference of counsel. When that conference was postponed on November 21, the Governments promptly began to amend their Contentions. In view of the fact that the Governments' efforts took place during the Thanksgiving holiday and were delayed somewhat by the need to address the OL-6 Board's authorization of a 25% power license, the Governments' November 29 submission of its Amended Contentions was especially prompt.

LILCO further complains, however, that to permit the Governments to amend their Contentions will lead to a delay in these proceedings and prejudice LILCO. Motion at 3, 15-16. In light of the fact that the Amended Contentions were filed on November 29, one week before the December 6 conference of counsel, the Amended Contentions are unlikely to be the source of

any delay. All of the parties will have had an adequate opportunity to review the Amended Contentions and to discuss them at the conference of counsel. Thus, LILCO has suffered no prejudice at all. But, even if it does, the blame does not lie with the Governments. It is LILCO, not the Governments, which asked the Appeal Board for further guidance on the meaning of "fundamental flaw" two days after the Governments had submitted their original Contentions. LILCO has never explained why it did not ask for such guidance earlier so that the Governments could have incorporated it into their original Contentions. Further, even LILCO noted in its letter to the Appeal Board that any modification to the meaning of "fundamental flaw" would require additional submissions by the parties to address such modifications. In light of these facts, it ill-behooves LILCO to complain about potential delays.

Finally, LILCO claims that any contentions submitted subsequent to its Motion must be treated as late-filed contentions. Motion at 14. LILCO cites no case law in support of this argument, but rather relies on 10 C.F.R. 2.714(a) and (b) which govern the filing of contentions. Those provisions, however, do not address the conditions prevailing here where contentions were filed in a timely manner and where an intervening modification in the applicable law makes amendment of those contentions appropriate. Thus, the regulatory provisions relied upon by LILCO are simply inapplicable here.

The only factors which the Board needs to consider is whether there is good cause for the amendments and whether they are submitted on a timely basis. Here, the Governments have plainly met that standard. Obviously, they could not have drafted their original Contentions using ALAB-903's guidance since ALAB-903 was issued after the Governments' Contentions were submitted. The subsequent issuance of ALAB-903 arguably modified the pleading standards for exercise contentions which the Governments had a right to attempt to meet, and which they did meet in their subsequent Amended Contentions. As explained above, the Amended Contentions were filed expeditiously and in a timely manner.

However, even if the Board were to consider the five standards applicable to late-filed contentions, the outcome would surely lead to the Board's acceptance of the Amended Contentions. Those factors are discussed briefly below:

(1) Good cause for failure to file on time. This factor has already been discussed and will not be repeated here. For the reasons stated above, there was plainly good cause for the Governments' inability to address ALAB-903 in their original Contentions, and the subsequent submission of their Amended Contentions was timely.

(2) The availability of other means whereby the Governments' interests would be protected. Here, LILCO repeats its familiar argument that the Governments' interests would be protected if they capitulated and joined LILCO in emergency

planning. Clearly, that would advance LILCO's interests, but not the Governments'. The point which LILCO avoids is that, just as occurred in 1986, LILCO's 1988 Exercise has revealed significant flaws in its emergency Plan. The Governments have an interest in having those flaws brought to light so that this Board can make the determination whether LILCO's Plan is implementable, not just on paper, but in reality. LILCO has offered no suggestions as to how that can occur absent this Board's consideration of either the Governments' original or Amended Contentions. LILCO itself is unwilling to admit its flaws.

(3) The extent to which the Governments' participation may reasonably be expected to assist in developing a sound record. The Governments' ability to assist in developing a sound record in this proceeding is beyond dispute. LILCO has completely ignored the fact that it was precisely because of the Governments' participation in the litigation of the 1986 exercise that several fundamental flaws were determined to exist. Indeed, Judge Shon, a member of this Board, has explicitly stated that, in his opinion, the Governments are in the best position, and are thus likely, to make a worthwhile contribution to any litigation of the results of the 1988 Exercise.[17] LILCO ignores this fact as well.[18]

17/ Concluding Initial Decision on Emergency Planning, LBP-88-24, 28 NRC __ (September 23, 1988), partial dissent of Judge Shon at 12.

18/ LILCO's further argument that the Governments' Contentions are based only on the FEMA Report and secondary materials, and (continued...)

(4) The extent to which the Governments' interests will be represented by existing parties. As stated above, the Governments have an interest in seeing that the flaws cited in their Contentions are brought to light and evaluated by this Board. No party other than the Governments has stated an intention to do so. Of course, LILCO's suggestion that the Governments' interests will be represented by LILCO, FEMA or the NRC Staff are absurd. Both LILCO and the Staff have already taken adverse positions to the Governments' Contentions and, as stated in those Contentions, FEMA has ignored numerous flaws of a serious nature.

(5) The extent to which the Governments' participation will broaden the issues or delay the proceeding. There is no evidence that acceptance of the Governments' Amended Contentions will delay this proceeding by one day. The proceeding is at exactly the same stage as it was just before the postponed November 22 conference of counsel. The purpose of that conference of counsel was to consider the Governments'

18/(...continued)
that the Governments therefore cannot contribute to any litigation based on first hand observation at the Exercise is untenable. First, it is untrue that some of the problems noted by the Governments were not observed at the Exercise -- some were. It is important to note, however, that in many instances, LILCO went out of its way to assure that the Governments' presence at the Exercise provided as little data as possible. For instance, at the EOC, the undersigned counsel was restricted to a small area at the outer edge of the EOC from which he could see very little and, more importantly, his specific requests to listen in on conversations among members of the emergency response team were repeatedly denied. Thus, it is little wonder that the Governments were required to rely heavily on secondary materials.

Contentions. The conference was postponed, however, to accommodate the Board's schedule, and was rescheduled for December 6. The Governments submitted their Amended Contentions well in advance of December 6, and those Contentions can be considered at that time. In any event, as explained above, if any delay results from the need to amend the Governments' original Contentions, that delay is a result of the timing of LILCO's request to the Appeal Board for guidance, which was submitted after the Governments' original Contentions were filed.19/

In summary, even if the five late-filed standards were applicable (which the Governments do not concede), they clearly point to acceptance of the Governments' Amended Contentions.

19/ LILCO attempts to bolster its argument regarding this factor by pointing to the number of pages which the Governments have filed both in presenting their Contentions and in responding to LILCO's and the Staff's Objections. Motion at 19. Here, LILCO ignores the requirement of ALAB-903 that exercise contentions be pled with detail. Even before ALAB-903 was issued, the Governments endeavored to do so through extensive research on the exercise results, and the subsequent preparation of contentions supported by numerous, detailed bases. The number of pages required to plead with the required detail is obviously larger than if no such detail were required. Likewise, the number of pages required to respond to LILCO's and the Staff's Objections was reasonable in light of the number and scope of those Objections. Thus, LILCO's complaints about the volume of the exercise litigation record to date are groundless.

For the foregoing reasons, LILCO

Respectfully submitted,

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IV. CONCLUSION

For the foregoing reasons, LILCO's Motion should be denied.

Respectfully submitted,

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November 21, 1988

BY HAND

John H. Frye, III, Esq.
Mr. Frederick J. Shon
Dr. Oscar H. Paris
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Docket No. 50-322-OL-5-R

Gentlemen:

At 4:30 p.m. last Friday, counsel for Suffolk County received a copy of a letter addressed to the Board from LILCO's counsel. In that letter, LILCO's counsel accused the undersigned of an improper ex parte communication with the Board. LILCO's counsel further alleged that Contentions 4 through 20 from the Governments' October 24 "Emergency Planning Contentions Relating to the June 7-9, 1988 Shoreham Emergency Planning Exercise" fail to comply with ALAB-903 pleading requirements, and that the Governments, by failing to address ALAB-903 in their November 15 submission (or thereafter), had waived "whatever right they might have otherwise had in this expedited proceeding to recast their contentions to take account of ALAB-903, ..."

Counsel for Suffolk County will address the ALAB-903 matters during tomorrow's conference of counsel. That is consistent with our understanding of the agenda contemplated by the Board.

Ordinarily, tomorrow's conference would also provide an opportunity for me to respond to the accusation made by LILCO's counsel concerning the ex parte matter. I will be unable to attend tomorrow's conference, however. Thus, I feel it is incumbent on me to respond in this letter to Mr. Irwin's baseless accusation, and to set the record straight on this matter.

The facts are as follows:

1. The County's counsel received ALAB-903 late in the morning on November 10. After reading the decision, conferring among ourselves, and discussing ALAB-903 with New York State's counsel, it was determined that ALAB-903 had the potential to

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impact the matters pending before this Board. The contentions and the LILCO and Staff responsive filings had all been made on the basis of prior guidance. ALAB-903 potentially changed that guidance and, arguably, established new pleading requirements.

2. Counsel decided that it made sense to bring this matter to the Board's attention and to seek the Board's guidance. We thus began drafting a letter describing the likely options that the Board might wish to consider, including: (1) staying the November 15 filing date in order to permit the Governments time to revise their contentions; or (2) holding to the November 15 date for responses to the Staff and LILCO filings, and thereafter permit all the parties to brief ALAB-903's potential significance.

3. It was counsel's intention to complete the letter and telecopy it to the Board and parties so that, if possible, a telephone conference call could have been convened by the Board on November 10 or 11. Before the letter was completed, however, New York State counsel reminded us that November 11 was a Federal holiday; thus, if a conference call were to be held, it probably had to be that day, November 10.

4. I then telephoned the Board's secretary (Call 1) to inquire whether the Board was in Bethesda and thus potentially available for such a call. After several unsuccessful attempts (I began telephoning during the lunch hour), I managed to reach the Board's secretary, who told me that the Board was in Bethesda. In asking whether the Board was available for a conference call, it was of course necessary for me to explain the reason for my inquiry. During this initial telephone conversation, I simply explained that the conference call, if scheduled, would be to discuss ALAB-903. I also told the Board's secretary that we were preparing a letter which would help set the agenda for any conference call.

5. Shortly after Call 1, the Board's secretary called back (Call 2). She stated that she had been instructed by Judge Frye to obtain further details about what we wished to discuss on the conference call. I provided the requested information, focusing on the fact that our contentions and the LILCO/Staff responses had addressed one set of guidance, which had been potentially changed, at least to some extent, by ALAB-903.

6. Shortly thereafter, the Board's secretary called again (Call 3) seeking further details. I basically reiterated the points already mentioned; in addition, I told her that our letter to the Board was just about ready to be sent.

7. I was placed on hold during Call 3. The Board's secretary then informed me that there would be no conference call and that ALAB-903 would be addressed at the November 22 conference of counsel. In view of the information conveyed by the Board's secretary, no letter was sent on November 10.

To the best of my recollection, the foregoing fully and fairly summarizes the matters discussed by me with the Board's secretary on November 10. LILCO's accusations are thus most out of place. There was no improper ex parte contact but, rather, merely a good faith attempt by me, on behalf of the Governments, to inquire about the possibility of a conference call with the Board -- something counsel for all the parties have frequently done. Had LILCO's counsel had the courtesy to inquire of me, I would have related these facts to him.

Sincerely yours,

Michael S. Miller

Michael S. Miller

cc: Donald P. Irwin, Esq. (by telecopy)
Edwin J. Reis, Esq. (by telecopy)
William R. Cumming, Esq. (by telecopy)
Richard J. Zahnleuter, Esq. (by telecopy)
Stephen B. Latham, Esq. (by telecopy)
Docketing and Service Section (by hand)

December 1, 1988

'88 DEC -5 A9:19

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Governments' Opposition to LILCO's Motion to Dismiss Exercise Contentions 4-20 on the Basis of ALAB-903" have been served on the following this 1st day of December 1988 by U.S. mail, first-class, except as otherwise noted.

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Washington, D.C. 20555

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*Additional hand delivery on December 2.
**Via Federal Express
***Additional service by telecopy on December 2.