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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 (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL-3 (Emergency Planning)

GOVERNMENTS' RESPONSE TO BOARD REQUEST FOR SCHEDULE PROPOSALS AND MOTION TO RECONSIDER DISCOVERY ORDERS

I. Introduction

In a Memorandum and Order dated February 8, 1988,[1/] the Board requested the parties to submit "a proposed schedule for hearing all remaining issues [except 25% power], including complying with any prehearing requirements on discovery and the submission of testimony."

1/ That Order was amended by an additional Memorandum and Order issued on February 16, 1988, and was further amended in the February 25, 1988 telephone conference of counsel. See Tr. 19,293.

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The parties have conferred on these matters but have reached no agreement.[2] Therefore, Suffolk County, New York State, and the Town of Southampton (the "Governments") submit the instant filing to make their views known to the Board.[3]

Before the Board can adopt any schedule, it must first take into account the following:

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[2] Counsel for Suffolk County spoke yesterday with counsel for the NRC Staff, FEMA and LILCO. Counsel for the County, speaking on behalf of not just the County but also New York State and the Town of Southampton, advised counsel for the Staff, FEMA and LILCO of the chief positions to be taken by the Governments in this pleading -- one versus multiple trials and the need for more realistic discovery parameters. Based upon yesterday's conversations, counsel for the County understands that the Staff and LILCO will likely propose schedules that are similar to each other, although the specifics of both the Staff and LILCO views were still being considered and formulated, particularly as relates to the proposed scheduling of the legal authority issues. Accordingly, the Governments are hesitant to characterize those parties' positions in this filing, or to attempt to respond to scheduling proposals which still were being formulated. If it turns out that the Staff and LILCO proposals raise matters which have not been addressed adequately herein, the Governments will promptly file a brief reply with the Board.

[3] In recent written and oral rulings, the Board has addressed the issues available to be litigated. See Memorandum and Order (Ruling on LILCO Motion in Limine and Motion to Set Schedule), dated February 23, 1988; Memorandum and Order (Board Ruling on Contentions Relating to LILCO's Emergency Broadcast System), dated February 24, 1988 ("EBS Order"); Memorandum and Order (Ruling on LILCO's Motion for Summary Disposition of the Hospital Evacuation Issue), dated February 24, 1988 ("Hospital Order"); Tr. 19,282-92 (Feb. 25, 1988). The Governments disagree in material respects with portions of the substantive rulings and guidance which have been provided by the Board. For purposes of this filing, however, the Governments have assumed that the substantive scope of the Board's rulings (but not the procedural or scheduling rulings) are correct. The Governments will likely seek reconsideration of certain of the Board's rulings in the near future.

a) There are four outstanding issues as to which a schedule has been requested: schools, hospital evacuation, EBS, and legal authority. These issues presently are at widely different stages: school discovery is nearly completed (except for discovery of FEMA's witnesses), but substantial time will be required to prepare testimony given the large number of witnesses; hospital and EBS discovery is just starting and, at this time, no one can predict precisely how many witnesses ultimately will be involved or the extent of discovery necessary to prepare adequately for trial; and legal authority discovery will not even begin until the LILCO record designations (Tr. 19,286-87) have been made and, thus, at this time, it is exceedingly difficult -- if not impossible -- to predict how long discovery will take, how many witnesses will appear, etc.

The first matter that the Board must address is whether these issues -- schools, EBS, hospital evacuation, and legal authority -- should be tried in separate hearings, or whether there should be one consolidated trial of all remaining issues. For the reasons discussed below, the Governments believe that one consolidated trial would be the most efficient, the least inconvenient, and the fairest way of proceeding.

b) The schedule -- regardless of whether it involves one, two, three or four trials -- must take into account the time required to get ready for trial. In particular, the Board must

take a realistic view of the time required for discovery and, thereafter, for preparation of testimony and for trial. Recently, the Board issued rulings allowing only 15 days for discovery on the hospital evacuation and EBS issues.[4/] Those limits are manifestly unfair and lack any articulated bases. The Board initially allowed 30 days for discovery on the schools issue; more than twice that amount of time was ultimately required to substantially complete discovery. It is error to suggest that two issues -- EBS and hospitals -- could be completed in an overlapping 15-day period. For the reasons discussed below, a discovery period of at least 60-75 days must be provided.

c) Any schedule established by the Board must take into account the fact that FEMA has not yet designated its witnesses on any issues, much less made them available to be deposed. FEMA has informed the parties that it will not be able to designate its witnesses on the EBS issue until late March, and on the schools issue until May. It appears that any FEMA legal authority witnesses (testifying, for example, on whether Revision 9 takes into account requirements of the NRC's amended 10 CFR § 50.47(c)(1)) will also not be designated until May. Before testimony can be prepared and filed, and a hearing commenced, the Governments must be afforded their right to depose FEMA's

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[4/] Hospital Order at 12; EBS Order at 8.

witnesses, particularly given the special status accorded to FEMA's views under the regulations. See 10 CFR § 50.47(a)(2).

d) The Board must also take into account other Shoreham-related obligations which exist. These include the preparation of briefs to the Appeal Board in April in response to LILCO's appeal of the OL-5 Licensing Board's February 1, 1988 Exercise Decision (LBP-88-2), an OL-6 25% power brief to this Board due to be filed April 1 (with replies due 20 days later), a possible new Shoreham exercise in June 1988, and other matters. These additional Shoreham-related obligations affect significantly the fairness and reasonableness of any schedule established by this Board for the schools, EBS, hospital evacuation, and legal authority issues.

e) Finally, the Board must be aware that "expedition" of the four issues before it -- purely for the sake of expediting the Shoreham litigation and without taking into account the kinds of factors and considerations mentioned in this pleading, and without providing a rational basis for the time limits and restrictions on the parties -- invites error. In considering appropriate time limits, the Board should keep in mind that, as recently as last week, both the NRC Staff and the Chief Administrative Judge of the Licensing Board Panel expressed the view that upcoming litigation arising from a new Shoreham exercise (tentatively scheduled for June, 1988) will likely take

until at least Spring 1989 to resolve. No full-power license for Shoreham could be issued before then, if ever. Accordingly, there is no basis for the imposition of any schedule that would threaten to affect the parties' rights unfairly.

II. The Governments' Proposed Schedule

The Governments' proposed schedule is set forth below. The bases for this schedule are discussed later in this pleading, in Section III.

March 1 - May 13:	Discovery on EBS, hospital, and legal authority issues (and remaining schools' discovery, including discovery from FEMA); last week (May 9-13) reserved for FEMA discovery.
	Note: premised on FEMA RAC review being available by May 6; discovery on legal authority issues may need to extend beyond May 13.
May 27:	Group 1 testimony filed: schools, EBS and hospital issues.

June 3:	Motions to strike Group 1 testimony.
June 10:	Group 2 testimony (legal authority issues) filed; responses to strike Group 1 testimony due.
June 17:	Motions to strike Group 2 testimony.
June 21:	Trial begins on Group 1 issues; trial continues with Group 2 issues, when Group 1 issues are completed.5/
June 24:	Responses to strike Group 2 testimony due.

5/ There is no basis now to predict how long trial will last on particular issues. LILCO has suggested to counsel for the Governments, the NRC Staff and FEMA that the schools trial can be scheduled to last only four days, and that a combined EBS and hospital trial can be assumed to last only four days as well. The Governments believe this to be baseless speculation. Just on the schools issues, 15 witnesses have thus far been designated by the parties. The testimony of the parties, of course, has not yet been filed or even prepared. Thus, at this time, no party can realistically predict how long trial may take, and this Board would commit error if it attempted now to impose limits on the time that will be permitted for trial. On the hospitals and EBS issues, there is even less basis for prediction, since discovery and witness designations are only now getting underway.

III. Discussion

A. One Trial or Multiple Trials

The Governments strongly favor scheduling a single trial to hear the four remaining issues before this Board. A single trial would provide for the most effective use of the parties' time and resources. Each trial in this proceeding properly requires relocation to Long Island. This results inevitably in a disruption of other work. These instances should be kept to a minimum.

More importantly, a single trial schedule would also permit more efficient discovery and testimony preparation. Because the Governments' counsel on the outstanding issues must necessarily overlap, separate proceedings on different tracks have the potential for causing significant disruption and unfair prejudice. The prospect of involvement in discovery on one issue, preparation of testimony on another issue, and a trial on yet another issue is fraught with the danger of curtailing the Governments' rights to a fair proceeding. Undoubtedly, such a practice would undermine the Governments' opportunity to prepare and participate in each proceeding meaningfully.

The Governments acknowledge that there is one potential difficulty in setting a single trial schedule -- that is, determining when the legal authority issues would be ready for trial. However, until the Board's detailed rationale for denying LILCO's summary disposition motions is issued, and LILCO makes its record designations (Tr. 19,286-87), it is not possible to know or even to predict with any certainty how long discovery on the legal authority issues will take. Thus, the Governments' proposed schedule is necessarily tentative, insofar as it pertains to the legal authority issues.

The Governments understand that the Staff is in favor of two trials: one covering schools, EBS, and hospital issues starting about April 25; and a second covering the legal authority issues starting sometime later. This Staff proposal will apparently be put forth for the Board's consideration, notwithstanding the fact that the Staff, like the Governments, wishes to avoid the disruptions occasioned by multiple trials. The Governments oppose the Staff's two-trial scheme for the reasons discussed above, as well as the fact that the discovery on the schools, hospital and EBS issues cannot be completed by April 25, as apparently assumed by the Staff (see Section III.B below). The earliest that a trial on schools/EBS/hospitals could begin is June: discovery (including that of FEMA) could not be completed until May 13 at the earliest; at least two weeks must be allowed thereafter to prepare testimony, and two weeks must also be built into any

schedule for the review of testimony, strike motions, etc. The Governments submit, accordingly, that their proposed schedule makes far more sense.

B. 15 Days for Discovery Is Insufficient

In the recent EBS and Hospital Orders, the Board specified 15 days for hospital and EBS discovery, but provided no rationale to support such an extreme limitation on the Governments' discovery rights. Viewed realistically, none could be provided. Fifteen days for discovery on these two issues is manifestly unreasonable.

Indeed, the Governments are simply unable to understand how this Board could possibly believe that 15 days constitutes an appropriate time period for discovery on the EBS and hospital issues. The Board is therefore requested to reconsider its rulings. In doing so, the Board should consider the following:

-- The NRC rules normally allow 14 and 30 days for responses to interrogatories and document requests, respectively. 10 CFR §§ 2.740b and 2.741(d). The 15-day period is thus inconsistent with the rules. While the Board has authority to alter the time periods for these responses, it has not done so. Further, the Governments submit that no rationale exists that

could justify any such curtailment of rights (see discussion below).

-- The recent history of discovery on the schools issue makes clear that a 15-day discovery period simply cannot work. On the schools issue, which involved one issue versus the two issues now in discovery (and there will soon be a third when LILCO's legal authority record designations become available), the Board initially set a 30-day discovery limit.[6/] It has now been necessary, despite diligence of the parties, to extend discovery until February 29, and in actuality all discovery will not be complete until nearly mid-March, given last minute LILCO discovery.[7/] Thus, on schools, well over 60 days have been required for discovery.

Moreover, it is clear that all of the time ultimately allowed by the Board for discovery on the schools issue has been needed. LILCO has served five sets of interrogatories and document requests[8/] and three sets of admission requests[9/] on the

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6/ Memorandum and Order (Ruling on the Applicant's Motion of October 22, 1987, for Summary Disposition of Contention 25.C Role Conflict of School Bus Drivers) (Dec. 30, 1987) at 7.

7/ Last week, for example, LILCO filed its "Second Set of Requests for Admissions to New York State." It is questionable whether that latest filing by LILCO was proper, since the Board had extended discovery to permit completion of depositions, not to permit another round of paper discovery.

8/ LILCO's interrogatories and document requests were filed on January 5, January 13, January 27, February 1 and February 8, 1988.

Governments. The Governments have filed seven sets of discovery on LILCO, the Staff and FEMA.[10] Thus far, there have been 15 depositions of witnesses, and three motions to compel[11] have been filed. In addition, virtually every day, one party or the other in the schools proceeding sends out requests for documents made known for the first time at depositions or otherwise. Thus, it is not exaggerating to say that, at least on the schools issue, discovery has been ongoing for 60 days, and will continue for yet some time to come.

The hospital and EBS discovery promises to be no less intense than the schools discovery. LILCO has already filed discovery on both issues[12] and the Governments have done

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9/ LILCO's requests for admissions were filed on January 20, February 3, and February 23, 1988.

10/ Suffolk County's discovery requests were filed on January 4 (separate requests to LILCO and the Staff), January 25 (requests for admissions to LILCO), February 5 (interrogatories and document requests to LILCO) and February 8 (to FEMA). The State of New York filed its discovery requests on January 22 (to LILCO) and January 23, 1988 (to the Staff and FEMA).

11/ Suffolk County's Motion for Order Compelling LILCO to Respond to Suffolk County's First Set of Interrogatories and Request for Production of Documents (January 25, 1988); State of New York's Motion for Order Compelling LILCO and the NRC Staff to Respond to the State of New York's First Set of Interrogatories and Request for Production of Documents (February 12, 1988); LILCO's Motion to Compel Answers to LILCO's Third Set of Interrogatories and Motion to Hold Decision in Abeyance (February 22, 1988).

12/ LILCO's First Set of Interrogatories and Requests for Production of Documents Regarding LILCO's Emergency Broadcast System to Suffolk County and New York State (Feb. 24, 1988); LILCO's First Set of Interrogatories and Requests for Production of Documents Regarding Hospital Evacuation Time Estimates to Suffolk County and New York State (Feb. 25, 1988).

likewise.[13] More written discovery is inevitable. LILCO has designated two witnesses on the EBS issues and is likely to designate a third; LILCO also has designated two witnesses on the hospital issues.[14] Furthermore, the Staff has designated one witness on the hospital issues.[15]

In addition, in anticipation of the Governments' document requests, Suffolk County received yesterday from LILCO a six-inch stack of technical documents allegedly supporting LILCO's hospital evacuation time estimates. These documents will require expert review, which will take many days, if not weeks. At this time, an exact estimate of the time needed to review and analyze LILCO's documents cannot be made, because the Governments' traffic experts have not even received the documents. It is clear, however, that no meaningful depositions of LILCO's witnesses (or the Staff's witness, who apparently supports LILCO's time estimates) on the hospital evacuation issue can be conducted before such a review is completed.

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[13] Suffolk County's First Set of Interrogatories and Request for Production of Documents to the Long Island Lighting Company Regarding Hospital Evacuation (Feb. 29, 1988); Suffolk County's First Set of Interrogatories and Request for Production of Documents to Long Island Lighting Company Regarding Emergency Broadcast System (Feb. 29, 1988).

[14] LILCO counsel letter to Christopher McMurray, dated February 25, 1988.

[15] The Staff has advised the Governments that Mr. Urbanik will testify on hospital issues, but that he can only be made available for deposition on one day during the entire 15-day discovery period -- this Friday, March 4. For the reasons set forth below, the Governments cannot be prepared to depose Mr. Urbanik this Friday.

The foregoing discussion demonstrates clearly that eventhe "beginning wave" of discovery on the EBS and hospitals issues cannot possibly be completed in 15 days. In addition, however, there are still more reasons why the Board's discovery limits cannot stand.

-- FEMA will have at least one witness on the EBS issues. FEMA counsel advised the Governments' counsel yesterday, however, that FEMA will not be in a position to designate the witness until March 21 at the earliest. Thus, it is clear that EBS discovery is not going to be completed in 15 days.

-- It also must be emphasized that schools discovery is not completed yet. In addition to the continuing discovery requests that have been made by LILCO (see discussion above), FEMA counsel advised the Governments' counsel on February 29 that FEMA may have witnesses on the schools issue, but will not know for certain whether that will be the case until the RAC review of Revision 9 is completed in early May. It clearly is not possible, therefore, to plan for trial -- or to have a final discovery cut-off -- until FEMA's RAC review process is completed.

-- FEMA will presumably have Contention 1-10 witnesses based on the RAC review as well. At a minimum, these witnesses would testify as to whether Revision 9 complies with draft

NUREG-0654, Rev. 1, Supp. 1.[16] There must be an opportunity for discovery in this regard, and such discovery must await the completion of the RAC review process.

The Board's Hospital and EBS Orders indicate a seeming desire for undue haste that is inconsistent with the NRC's rules and fundamental fairness. Such breakneck speed helps no one. In 1985, when the Board barred all discovery on relocation center issues, the Appeal Board reversed that decision. See ALAB-832, 23 NRC 135, 162 (1986). In 1984, when the Miller Board attempted to impose a 10-day schedule for discovery, the United States District Court enjoined the NRC. See Cuomo v. NRC, CCH Nuc. Reg. Rptr. ¶ 20,304 (D.D.C. 1984). The Board's present 15-day schedule resembles these prior orders. It is draconian; it has no basis; it will cause the Governments real and substantial prejudice; and it invites reversal.

The Governments have had no opportunity to identify witnesses on either the hospital or EBS issues -- and for good reason. Until last week, the Board had under consideration LILCO pleadings for summary disposition or in opposition to contentions that, if granted, could have barred all proceedings on these issues. The Governments could not have been expected to spend time and resources on finding and meeting with witnesses in

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16/ The Governments do not concede that NUREG-0654, Rev. 1, Supp. 1 should be used by FEMA in the RAC review of Revision 9 to LILCO's Plan. It is the Governments' understanding, however, that the RAC will use that document.

advance of the Board's rulings. Now that the Board has ruled, the Governments are proceeding diligently to identify witnesses. This cannot be done on a spur-of-the-moment basis, however. Among other things, the Governments, unlike LILCO, have strict fiscal accountability procedures and rules in place, which must be complied with and adhered to by counsel. Witnesses, as a result, cannot be retained without clearance in advance, including agreement upon contractual terms and conditions. Further, until the Governments have received LILCO's discovery responses and deposed its witnesses, it is not possible even to know precisely what witnesses will be needed to rebut LILCO's case.

LILCO has suggested that the parties voluntarily agree to 7-day response times for EBS and hospital discovery. The Governments do not have the resources to comply with such limits. Further, given the press of other work and the lack of need for such haste, the Governments will under no circumstance agree to such an abridgement of their rights. Again, that would harken back to 1984, when the United States District Court was forced to enjoin a denial of the Governments' due process rights, which had been occasioned by an unreasonable schedule.

* * *

As demonstrated by the foregoing, the Board's current discovery orders would deprive the Governments of any effective opportunity to pursue their case on the schools, hospital and EBS issues. Since no basis exists to justify the arbitrary time limits established by the Board, they cannot be permitted to stand. The discovery schedule for these issues should be revised to be consistent with the schedule set forth by the Governments above.

C. FEMA Discovery

Brief separate mention must be made of that discovery which is necessitated by FEMA's participation in this case. FEMA's testimony is entitled to some degree of presumptive validity in NRC proceedings. See 10 CFR § 50.47(a)(2). Given that fact, a party must have an opportunity to depose FEMA's witnesses before completing preparation of its affirmative case. Simply put, until then, a party cannot know whether its affirmative case must attempt to rebut or support whatever findings FEMA might make.

There has been no opportunity for any discovery of FEMA on the Revision 9 issues thus far. Indeed, FEMA did not even begin to review Revision 9 until recently, and its review will not be completed until early May 1988.

FEMA's schedule is a fact that cannot be ignored. That is especially the case here, because the Board and other parties have been specifically informed that FEMA intends to make an "overall bottomline finding" on Revision 9 following the RAC review process. See Tr. 19,293-94. Thus, in this case, there is simply no basis to set any schedule for trial until FEMA's witnesses have been made available for meaningful discovery. That will not be until May 1988. The Board cannot consider a schedule which concludes discovery prior to that time.

D. Other Work

The increasing work load in this case is a reality, which this Board cannot ignore. The matters on which the Governments must now devote their limited resources include:

-- EBS discovery;
-- Hospital evacuation discovery;
-- Schools discovery of FEMA, as well as completion of other outstanding schools discovery;
-- Review of [illegible]'s record designations, once they are filed, followed by discovery on Contentions 1-2, 4-8, [illegible];
-- 25% power issues, including an April 1 brief and a reply brief thereafter (there may also be a need to

review any Staff SER-type report and an Alternate Board Member report);

-- preparation of briefs on the OL-5 Licensing Board's February 1 Exercise Decision (LILCO brief due mid-March; Governments' responding brief due mid-April);

-- preparation for a new Shoreham exercise (tentatively scheduled for mid-June).

As demonstrated above, the schools discovery, by itself, has been an intense, exceedingly complex proceeding. At least in part the reason for the complexity of this proceeding must be attributed to the fact that the Board's initial 30-day discovery period was too short, thereby necessitating the parties to seek extensions to the discovery period. These extensions disrupted what could otherwise have been a more orderly discovery period. The Board should set a realistic schedule at the outset this time.

Furthermore, it must be recognized that the matters now pending, taken together, far exceed what has been going on. The Board's schedule cannot ignore this fact. The intense workload now facing the Governments mandates that somewhat longer -- and certainly not shorter -- than usual time periods should be established by the Board.

E. There is No Need For Haste

Perhaps the most compelling reason for adoption of the Governments' proposed schedule is that it will not prejudice anyone, whereas a shorter schedule clearly will prejudice the Governments.

At a briefing on February 24, 1988, the NRC Staff and the Chief Administrative Judge of the Licensing Board Panel advised the Commissioners that they viewed Spring 1989 as the likely earliest time for a decision on the issues to be litigated concerning the new Shoreham exercise (tentatively scheduled for June, 1988). It thus makes not the slightest difference to the ultimate licensing of Shoreham if this Board adopts a fair and reasonably-paced schedule, such as the schedule that the Governments have proposed. Such a schedule still leads to a decision before 1989 on all the remand issues pending before this Board.

One other matter merits discussion here. It was also suggested on February 24 that this Board has an internal schedule designed to reach a decision by August 1988 on the four remand issues. If that is in fact the case, the Governments must strongly voice their disapproval. Any such schedule, driven by the need to conclude the Shoreham licensing proceedings by a certain date, rather than by the need to afford a fair opportunity to be heard, would be arbitrary and improper.

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March 1, 1988

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-3 (Emergency Planning)
(Shoreham Nuclear Power Station, Unit 1)	

CERTIFICATE OF SERVICE

I hereby certify that copies of GOVERNMENTS' RESPONSE TO BOARD REQUEST FOR SCHEDULE PROPOSALS AND MOTION TO RECONSIDER DISCOVERY ORDERS have been served on the following this 1st day of March 1988 by U.S. mail, first class, except as otherwise noted.

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