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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

REPLY BRIEF OF SUFFOLK COUNTY, THE STATE OF NEW YORK, AND THE TOWN OF SOUTHAMPTON ON THREE ALAB-832 ISSUES TO BE REVIEWED BY COMMISSION

October 16, 1986

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Suffolk County, the State of New York, and the Town of Southampton ("Governments") hereby respond to LILCO's Brief on the Three Issues Addressed in the Commission's September 19 Order, dated October 9, 1986 (hereafter, "LILCO Brief"), and the NRC Staff Brief on Issues Under Commission Review Pursuant to Order of September 19, 1986, dated October 9, 1986 (hereafter, "Staff Brief").

I. INTRODUCTION

The Governments' initial brief of October 9, 1986[1] answers the three specific questions posed by the Commission in its September 19 Order, and the answers contained in that brief are supported by cited regulations and NRC

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1 Brief of Suffolk County, the State of New York, and the Town of Southampton on Three ALAB-832 Issues to be Reviewed by Commission (Oct. 9, 1986) (hereafter, "Governments' Brief").

precedent. The LILCO and Staff Briefs, however, contain very little argument which responds to, or even addresses, the Commission's specific questions. The Governments reply herein to the few LILCO and Staff arguments which actually address the Commission's questions.

The majority of the LILCO and Staff Briefs is, upon examination, simply irrelevant to the questions upon which the Commission requested the parties' views, or, in the case of the Staff's Brief, it constitutes little more than strung-together quotations, without any substantive discussion or analysis. As a result, all such "argument" is inappropriate and should be disregarded by the Commission.

In its September 19 Order, the Commission identified three narrow portions of ALAB-832 which it intended to review and as to which the parties were permitted to file briefs. In accordance with the Commission's Order, the Governments' Brief was limited to those three subjects. In the LILCO Brief, however, and, to a lesser extent, the Staff Brief, matters having nothing to do with the three questions raised by the Commission are discussed at length.[2] In so doing, both LILCO and the Staff attempt to re-argue their positions that portions of ALAB-832, which the Commission, by way of its September 19 Order, already indicated it does not intend to review, should be reversed. Thus, in essence, the LILCO and Staff Briefs constitute impermissible motions for reconsideration following the Commission's September 19 decision on LILCO's Petition for Review. See 10 CFR § 2.786(b)(7), (g). Accordingly, all such

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2 For example, LILCO argues at length that it has planned adequately for hospital evacuation. See LILCO Brief at 16-18. The Governments disagree. But the key point is that LILCO's discussion at pages 16-18 is completely irrelevant to the narrow hospital-related issued posed by the NRC.

portions of the LILCO and Staff Briefs, which address matters outside the scope of the three questions posed by the Commission, must be rejected by the Commission.[3]

II. CONTENTION 22.B DOES NOT CHALLENGE NRC RULES

The Commission's first question was very specific: does the admission of Contention 22.B impermissibly challenge "the generic rulemaking finding that a 10-mile EPZ will provide an adequate basis for satisfactory ad hoc emergency response beyond 10 miles should this be required." As the Governments explained in their October 9 Brief, the answer is "no," because the referenced generic "finding" cannot be used to read out of existence the mandatory requirement of the Commission's adopted regulations. Section 50.47(c)(2) requires that "the exact size and configuration of the EPZs . . . shall be determined in relation to local emergency response needs and capabilities as they are effected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries." Thus, the referenced generic finding is just the general starting point from which the regulations proceed. See Governments' Brief at 3-7.

LILCO's only argument which actually addresses the Commission's question consists of the four sentence paragraph beginning on page three and ending at the top of page four of its Brief. That "argument," however, constitutes an exercise in selective quotation and mischaracterization of both the regulation and Contention 22.B.

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[3] Should the Commission determine that it wishes to revisit the portions of ALAB-832 which are improperly challenged in the LILCO and Staff Briefs, the Governments are entitled to an opportunity to respond to such arguments before the Commission. Thus, if the Commission accepts such portions of the LILCO and Staff Briefs, the Governments will respond to them when notified of the Commission's intent to consider such matters.

First, LILCO's assertion that "the regulation says that the EPZ should be 'about 10 miles (16 km) in radius'; the contention says the EPZ should be 'larger than 10 miles and perhaps as large as 20 miles,'" simply ignores the complete text of the regulation supposedly being quoted. Section 50.47(c)(2) states that "generally," the EPZ should be "about" 10 miles in radius, but goes on to require that "the exact size and configuration of the EPZs surrounding a particular nuclear power reactor shall be determined in relation to local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries." (Emphasis added). The contention's allegation that the "exact" size of the EPZ surrounding the Shoreham plant should be "larger than 10 miles" because of specifically identified "local emergency response needs and capabilities," including, among others, "demography," "land characteristics," and "access routes," is fully consistent with that regulation.

Second, LILCO asserts that "the regulation is based on the Commission's decision that 'planning within 10 miles would provide a substantial base for expansion of response efforts in the event that this proved necessary'; the contention says that 10 miles will not provide 'a substantial base for the expansion of response effort' in this case." (Emphasis in LILCO's Brief). Again, this selective and misleading quotation by LILCO ignores the primary point of both Section 50.47(c)(2) (i.e., that the precise boundaries of each particular EPZ must be set individually, and based upon a consideration of "local emergency response needs and capabilities") and of Contention 22.B. Contrary to LILCO's characterization, the contention does not simply assert the opposite of the "generic finding." To the contrary, as even a cursory

review of Contention 22.B reveals, it identifies eight specific local conditions and emergency response needs and capabilities which, as the contention states, "taken together, contribute to the need to plan beyond the 10-mile EPZ proposed by LILCO," because they demonstrate a requirement for planning and preparedness beyond the 10-mile area proposed by LILCO. Thus, in fact, the contention seeks nothing but the enforcement of the Commission's own regulations.

LILCO's citation to the San Onofre case (Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 533 (1983), vacated and remanded on other grounds, Guard v. NRC, 753 F.2d 1144 (D.C. Cir. 1985), see LILCO Brief at 3, n.2) does not support LILCO's argument that Contention 22.B challenges any regulations. Rather, the Commission in that case described the "concept" of emergency planning regulations as requiring "core planning with sufficient planning flexibility to develop a reasonable ad hoc response to those very serious low probability accidents that could affect the general public." In Contention 22.B, the Governments seek only to apply that concept, as required by Section 50.47(c)(2), by obtaining a ruling from the Licensing Board, after parties have had a chance to present evidence and argument, on whether the "core planning" proposed by LILCO is in fact "sufficient" and has sufficient "flexibility" to permit the "develop[ment of] a reasonable ad hoc response."

The remainder of the arguments in Section I of the LILCO Brief are irrelevant to the question posed by the Commission in its September 19 Order. They should be disregarded by the Commission for the reasons stated above in Section I. The Governments identify these inappropriate arguments briefly below:

LILCO's assertion that "[a]ny party seeking to depart from the standard 10-mile EPZ may only do so by seeking an exception to 10 CFR § 50.47(c)(2) . . . [and] [t]he Intervenors did not do so," (LILCO Brief at 4, n.3) is wrong. First, in their October 9 Brief, the Governments cited other NRC cases in which contentions have been admitted which challenged proposed 10-mile EPZ boundaries on the basis that certain local conditions were not considered in establishing those boundaries. The Appeal Board cited such cases as well. See Governments' Brief at 6-7, 11-12. Such cases did not proceed by way of exception to Section 50.47(c)(2); instead, they proceeded, as the Governments attempted to do in this case, by seeking enforcement of and compliance with that section through contentions. Second, this attempted LILCO argument contradicts LILCO's own quotation from the San Onofre decision. As cited by LILCO (LILCO Brief at 5, 7), that case stands for the proposition that the regulations "clearly allow leeway for a mile or two in either direction based on local factors." In this case, the Governments were absolutely precluded from submitting any evidence, or even arguing, that the EPZ proposed by LILCO needed to be adjusted -- even to a distance of one or two miles -- in order to account for the local emergency response needs and capabilities and other local conditions identified in Contention 22.B, or, for that matter, Contention 22.C. LILCO cannot and does not cite any NRC precedent which supports the result reached by the Licensing Board in this case.

LILCO's arguments about whether the conditions identified in Contention 22.B constitute the types of conditions referred to in Section 50.47(c)(2) (see LILCO Brief at 4-7) are far beyond the scope of the question posed by the Commission. Furthermore, the argument that, under LILCO's Plan the only emergency response would be provided by the utility, is, in LILCO's opinion,

not an appropriate condition to be considered in determining the exact size of the Shoreham EPZ, simply ignores the plain words of Section 50.47(c)(2). That regulation expressly includes "local emergency response . . . capabilities" among the conditions which "shall be considered" in determining the exact size and configuration of a particular EPZ. In addition, as even LILCO acknowledges, the Appeal Board already ruled on this question, finding that a proposed utility-only response is an appropriate local condition to be considered under Section 50.47(c)(2) (see LILCO Brief at 4, n.4). The Commission did not take review of that Appeal Board finding. Thus, this LILCO argument must be rejected.

Similarly, LILCO's assertion that certain conditions listed in Contention 22.B "have already been considered" with respect to other litigated contentions (LILCO Brief at 6-7, n.10) was also expressly rejected in ALAB-832, and the Commission has indicated it will not take review of that holding.

The NRC Staff fails to respond in any meaningful fashion to the Commission's Contention 22.B question. Pages 2 through 8 of the Staff Brief are nothing but a series of quotations from Licensing Board and Appeal Board decisions. They are devoid of analysis or discussion. The so-called "Discussion" section on the Contention 22.B question (Staff Brief at 9-13) also consists of nothing but quotations from the contention, Section 50.47(c)(2), NUREG 0396, NUREG 0654, the Licensing Board and Appeal Board decisions, and a Diablo Canyon case citing San Onofre. There is no substantive analysis or discussion of the question posed by the Commission, or even of the pertinence of the quoted material to that question. Because the Staff's Brief has no substantive argument or content, it neither requires, nor permits, intelligent response.

III. THE APPEAL BOARD WAS CORRECT IN RULING THAT CONTENTION 22.C SHOULD BE ADMITTED FOR LITIGATION

LILCO's response to the Commission's first question on Contention 22.C -- whether there is a logical connection between EPZ size and voluntary evacuation -- is once again based on a disregard of the plain words of the contention. Thus, in arguing that enlarging the EPZ "for people who are not truly at risk" is illogical (see LILCO Brief at 11-12), LILCO ignores the clear allegations in Contention 22.C that the EPZ needs to be expanded because voluntary evacuation will have an adverse impact upon the ability of persons inside the 10-mile zone to take protective actions deemed necessary to preserve their health and safety, as well as to prevent persons from outside the 10-mile zone from entering the area deemed to be hazardous -- i.e., within the 10-mile zone. Thus, this entire LILCO argument is specious and must be rejected.

Similarly, LILCO's unfounded assertion that Contention 22.C "proposes an EPZ that expands without bounds" (see LILCO Brief at 10-11) must also be rejected as a serious mischaracterization of that contention. Contention 22.C is specific. It alleges that EPZ expansion is necessary in particular areas: that is, those where voluntary evacuation activity would create congestion which could impact the ability of persons inside the EPZ to take necessary protective actions, or would result in persons from outside the EPZ entering a potentially contaminated area. It is preposterous to characterize this contention, which deals directly with areas and activities immediately adjacent to the east and west sides of the proposed 10-mile EPZ, which could impact the inside of that EPZ, as seeking an EPZ which "spreads out like oil on water til it runs out of people." LILCO Brief at 10. That

characterization is absurd for the additional reason that Long Island is just that -- a narrow island -- and its people and roads end at the Atlantic Ocean and the Long Island Sound.

Finally, LILCO's assertion that Contention 22.C is "an anti-planning contention" (LILCO Brief at 9) must be rejected out of hand. Once again, LILCO mischaracterizes the contention by asserting that it "seeks not to improve emergency response by planning but rather to increase the arbitrary area over which an unplanned response is assumed to occur." Id. Clearly, the contention addresses emergency response planning; it does not by any stretch of the imagination "seek . . . to increase" an "area over which an unplanned response" would occur.

The Commission must reject LILCO's distortions, hyperbole, and semantic games. Contention 22.C is clear and simple. It does not seek "futile" planning, nor does it challenge the idea that voluntary evacuation should be minimized if possible. Rather, it seeks to enforce the Commission's own regulations which require planning and preparedness to deal with real world facts particular to specific plant sites. The contention merely seeks consideration by the Licensing Board of the facts and realities created by actual local emergency response needs and capabilities on Long Island -- as the NRC is required to do by its own regulations. The logical connection between the size of the Shoreham EPZ and voluntary evacuation is plainly set forth in the text of Contention 22.C.

LILCO's purported response to the Commission's second question concerning Contention 22.C -- whether voluntary evacuation is a local condition, consideration of which is contemplated by the regulations -- is again based upon a distortion of that contention. It also makes no sense.

First, in asserting that voluntary evacuation is "a type of behavior," rather than a "condition" or one that is "local" (see LILCO Brief at 12-13), LILCO ignores what Contention 22.C says. It does not say, in a vacuum or otherwise, either that the behavior of Long Islanders is necessarily "unique" or that, standing alone, that "behavior" requires an EPZ different from the one arbitrarily selected by LILCO. Rather, it alleges among other things that the demography, geographical conditions, and access routes existing on Long Island and in and around the proposed 10-mile EPZ, combined with the fact that there will be voluntary evacuation due to Long Island's peculiar geography as a narrow island, will result in people within the 10-mile danger zone being unable to implement necessary protective actions, and people originating from outside that danger zone entering a potentially contaminated area and thus endangering themselves. Thus, the emphasis in Contention 22.C is not just on "human behavior"; rather, it is on precisely the local conditions and emergency response needs and capabilities contemplated by Section 50.47(c)(2).

Second, there is no basis, in logic or in Section 50.47(c)(2), for the implication that a human behavioral characteristic or pattern, prevalent in an area around a particular nuclear plant, which has an impact upon local emergency response needs and capabilities and the need for planning and preparedness to protect the public health and safety, is not a proper subject under Section 50.47(c)(2). The NRC cannot shut its eyes to the real world, as LILCO would have it do.

Finally, LILCO's and the Staff's repeated attempt to characterize Contention 22.C as seeking a "dramatically enlarged" or "20-mile EPZ" is an improper attempt to mislead the Commission through revisionist pleading. The contention is what it is. It seeks a determination of exact EPZ size, for one

particular plant, based upon a consideration of the factors contemplated by Section 50.47(c)(2). The contention does not allege that an EPZ of any particular size, be it 20 miles, 13 miles, 11 miles, or 50 miles, is necessary; rather, it merely seeks the opportunity for the Governments to present evidence and argument concerning the existence of facts and their impact on the necessary amount and extent of planning and preparedness, so that the Licensing Board can make the determination that is required by the Commission's regulations.[4]

The Staff's discussion of the Commission's questions on Contention 22.C is almost as lacking in content as the other parts of its Brief. In addition to its lack of analysis, however, the Staff's "discussion" also boils down to an improper argument about portions of the Appeal Board's decision which are not being reviewed by the Commission. Thus, for example, the Staff attempts to reargue, or obtain reconsideration of, LILCO's Petition for Review, by asserting that the matters raised in Contention 22.C were litigated in the context of other contentions. See Staff Brief at 14. See also id. at 16-17, n.10. The Appeal Board already rejected this argument and the Commission decided not to review that ruling. This Staff argument must therefore be disregarded as it is in violation of 10 CFR § 2.786. The remainder of the Staff's discussion is based on its mischaracterization of Contention 22.C as not involving the safety of persons inside or likely to enter the 10-mile zone. Those assertions are off base for the reasons discussed above with respect to a similar argument by LILCO.

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[4] No amount of whining about earlier versions of Contention 22 or other contentions or about the words in the contention's preamble that "an EPZ larger than 10 miles and perhaps as large as 20 miles is necessary" can change the assertions of Contention 22.C. The contention before the Commission seeks only that to which the Governments are absolutely entitled by the NRC's regulations. The Appeal Board acknowledged this fact and such cannot be denied, even by LILCO's facile mischaracterizations.

IV. EVACUATION PLANS FOR HOSPITALS ARE REQUIRED BY NRC REGULATIONS

On this third Commission question, once again LILCO devotes the bulk of its discussion to an issue which is outside the scope of the issue identified by the Commission in its September 19 Order. Thus, LILCO argues at length the factual question, already decided against it by the Appeal Board, of whether its Plan includes adequate planning and preparedness for evacuation of hospital patients. The Appeal Board unequivocally found, based upon the contents of LILCO's Plan, that the Plan's only proposals for evacuation of hospital patients were "ad hoc" and, in essence, that evacuation "plans" were nonexistent. See ALAB-832, slip op. at 33-40. The Commission has not taken review of these Appeal Board findings. LILCO's attempt to seek reconsideration of the Commission's decision not to disturb the Appeal Board's factual finding must be rejected.

LILCO's facile assertion that the regulations do not require evacuation plans for hospitals because "the regulations require adequate emergency plans, not evacuation plans per se" (LILCO Brief at 15), simply ignores the provisions of the regulations cited by the Appeal Board in ALAB-832 and by the Governments in their October 9 Brief, which do require evacuation plans, including time estimates and reception centers, for hospitals. LILCO's argument in Section III.B of its Brief simply reads out of existence the NRC regulations, NUREG 0654, and NRC precedent approved by this Commission. This Commission cannot ignore the regulations it is charged with enforcing, nor can it close its eyes to the plain words of NUREG 0654 and its own decisions in other cases.

Finally, LILCO's assertion that "the lack of detailed evacuation plans is not a significant safety issue" (LILCO Brief at 22) must also be rejected. This argument suffers from the same defect as LILCO's argument that planning for hospital evacuations is not necessary at all: it ignores the regulations. The regulations make clear that an implementable, pre-existing evacuation plan, including evacuation time estimates, identified and available vehicles and reception centers, and a means to accomplish an evacuation, is necessary to assure the public health and safety. LILCO's ipse dixit assertion that a plan deficiency and regulatory violation is, in its opinion, "not a significant safety issue" does not begin to satisfy the stringent requirements of 10 CFR § 50.47(c)(1), for the reasons stated in the Governments' Brief at 21-22.

The portion of the Staff's Brief which purports to address the Commission's third question is again a string of quotations without any substantive analysis or discussion. It merits no response.

V. CONCLUSION

For the foregoing reasons, the arguments made in the LILCO and Staff Briefs must be rejected, and the Appeal Board's rulings on the three ALAB-832 issues being reviewed by the Commission should be affirmed.

Respectfully submitted,

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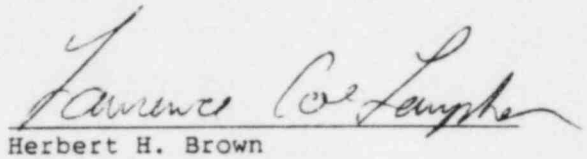

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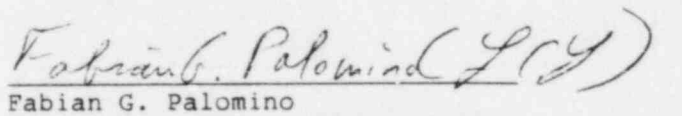

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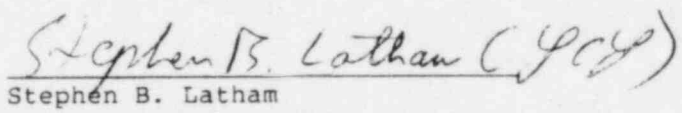

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CERTIFICATE OF SERVICE

I hereby certify that copies of the REPLY BRIEF OF SUFFOLK COUNTY, THE STATE OF NEW YORK, AND THE TOWN OF SOUTHAMPTON ON THREE ALAB-832 ISSUES TO BE REVIEWED BY COMMISSION have been served on the following this 16th day of October, 1986 by U.S. mail, first class, except as otherwise noted.

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