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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)	)	

RESPONSE OF SUFFOLK COUNTY, THE STATE OF NEW YORK, AND THE TOWN OF SOUTHAMPTON TO LILCO'S MOTION FOR ESTABLISHMENT OF LICENSING BOARD AND INSTITUTION OF EXPEDITED PROCEDURES FOR EXERCISE LITIGATION

The State of New York, Suffolk County and the Town of Southampton (the "Governments") hereby respond to LILCO's "Motion for Establishment of Licensing Board and Institution of Expedited Procedures for Litigation of Shoreham Emergency Planning Exercise Issues, and Response to Intervenors' March 7, 1986 'Motion Concerning Proceedings Relating to the Shoreham Exercise,'" dated March 13, 1986 (hereafter, "Motion").

I. INTRODUCTION

As stated in the Governments' February 24, 1986, Motion to the Appeal Board, the Governments support the establishment of a licensing board to deal with exercise-related litigation in this

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proceeding. LILCO's Motion also suggests the establishment of such a board. LILCO's Motion, however, contains additional suggestions, the effect of which amount to a request that the Commission abrogate its own regulations and the principles of due process they were designed to protect, in favor of new procedures which would illegally restrict the Governments' right to a meaningful hearing guaranteed by Section 189a of the Atomic Energy Act. As demonstrated below, the procedures which LILCO suggests the Commission should impose upon the Governments, in the guise of "guidance" to a licensing board, violate the Commission's own regulations, depart from established NRC procedure, and are inherently illogical. Accordingly, the Commission should reject LILCO's suggestions. Instead, the Commission should establish a licensing board with specific directions that it follow the NRC's rules.

At the outset, it is important to set forth the following facts. Since December 1985, the Governments have attempted to begin the process of preparing for potential exercise-related litigation by requesting, through informal means, basic factual and structural information concerning the exercise of LILCO's Plan. The data requested by the Governments are exclusively within the knowledge and control of LILCO, FEMA, and the NRC. Prior to the exercise, counsel for LILCO, FEMA and the NRC Staff stated that the exercise scenario and logs generated during the exercise would be

provided to the Governments after the exercise.[1] The Governments still have received virtually no data regarding the exercise.[2] The fact that the Governments had monitors at various locations during the exercise is neither material to the Governments' requests nor a substitute for the essential information sought by the Governments: the contents of the scenario and how, when, and where LILCO responded to the scenario.[3] The foregoing refusals to provide

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[1] See Attachments to the March 7, 1986 Motion of Suffolk County, the State of New York, and the Town of Southampton for Ruling Concerning Proceedings Related to the Shoreham Exercise and Attachment 1 hereto. LILCO's repeated characterization of the Governments' post-exercise attempts to obtain basic exercise-related facts as "extremely broad," "unspecified" and "not focused" (Motion at 5, 14) are without foundation. The Governments have requested three specific items: (1) the exercise scenario, (2) "simulator" logs, and (3) logs and similar recordings generated by LILCO players during the exercise. This request is as narrow, specific, and crystal-clear as possible. The three items requested are essential to an understanding of what occurred during the exercise. They are necessary to enable the Governments to comprehend the context of the exercise and the FEMA evaluation of the exercise results. In fact, as noted, counsel for LILCO, FEMA and the NRC have indicated that the Governments are entitled to obtain these materials.

[2] The Governments' pre-exercise attempts to obtain basic data were rebuffed, purportedly due to concerns related to confidentiality and the County's local law. Since February 13, those concerns no longer pertain. Counsel for LILCO indicated by letter dated March 13, 1986, that a copy of the exercise scenario would be provided to the Governments. To date, however, the Governments have not received the promised exercise scenario, any scenario-related information, or the promised exercise logs from LILCO or from any other party.

[3] As noted in Attachment 1 hereto, the Governments' monitors were severely restricted during the exercise. They were required literally to stay behind taped lines on the floor, in corners of rooms or corridors; they were unable to see or read status boards; they were unable to hear or observe what many exercise players were doing; and they were not permitted to hear any of the interactions

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basic data have precluded the Governments from beginning the initial analytical work that is necessary to move forward in preparing to litigate the results of LILCO's exercise.

II. DISCUSSION

Beginning on page 11 of its Motion, LILCO suggests several actions it believes the Commission should take in connection with exercise-related litigation in this proceeding. The Governments discuss each in turn below.

A. Establishment of a Licensing Board

As noted, the Governments do not oppose the establishment of a licensing board. The Governments also believe that it would be appropriate for such a licensing board to schedule a conference of counsel to obtain status reports and the views of the parties concerning the procedural questions presented by this unique proceeding. Indeed, this suggestion was contained in the Governments' February 24, 1986 Motion to the Appeal Board which was summarily denied.[4]

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between LILCO personnel and the so-called "simulators." Other than the fact that simulators were present during the exercise and were seen conversing with LILCO exercise players as well as with exercise controllers, evaluators and counsel for LILCO, to date the Governments still have essentially no knowledge as to what the simulators did, or how LILCO players responded, during the exercise. Thus, LILCO's assertion that the Governments were able to observe the exercise "in depth and detail" (Motion at 3) is unfounded and misleading.

[4] See Motion of Suffolk County, the State of New York, and the Town of Southampton for Ruling Concerning Proceedings Related to the Shoreham Exercise (February 24, 1986); ALAB Memorandum and Order, dated February 24, 1986.

B. Suggested Instructions to a Licensing Board

Although the Commission is empowered to provide procedural guidance to a licensing board consistent with the Commission's regulations and the governing laws, none of the instructions suggested by LILCO fits that description. The bulk of LILCO's suggestions amount to a request that the Commission re-write its Rules of Practice governing hearings to satisfy LILCO's self-interests and to violate the due process rights of the Governments. Such action by the Commission, in the guise of "guidance," would destroy any semblance of fairness and would be illegal. The remainder of LILCO's suggested instructions are unnecessary or make no sense.

The Governments submit that the prehearing procedures set forth in the Commission's regulations should apply in this proceeding just as they do in every other NRC licensing hearing. LILCO suggests no legitimate reason for the abrogation of those established rules, for the creation of an entirely new prehearing procedural scheme, or for the Commission to "instruct" a board, which presumably is familiar with the NRC's rules, to take action in derogation of those rules. Accordingly, for the reasons stated below, the Governments submit that the "instructions" proposed by LILCO should be rejected.

1. LILCO's Proposed New Contention Admissibility, Summary Disposition, and Discovery Rules Are Illegal

LILCO suggests that the Commission should instruct a licensing board to adopt a procedure concerning admission of contentions, summary disposition, and discovery which is illegal and without rational basis. LILCO calls for a procedure by which factual rulings on the substantive merits of allegations are to be made by the Board before the Board (or the sponsors of the allegations) determine or review the facts relating to those allegations. Thus, LILCO's proposal would have the investigation and discovery of facts take place after, and only if, the Board (1) first makes the ultimate factual finding and legal conclusion that the allegation is correct, and (2) then makes a finding that there are no material facts in dispute. This LILCO scheme must be rejected.[5]

LILCO suggests that the Commission should instruct a licensing board as follows:

> That contentions which, as pleaded, do not demonstrate with adequate specificity and basis a fundamental flaw in the Shoreham Offsite Radiological Emergency Response Plan sufficient

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[5] LILCO's proposal is particularly ironic in light of its allegations that the Governments have "cast aside the perfectly applicable structure of the Commission's Rules of Practice," "ignored[d] the structure of the Commission's Rules of Practice" and urged the Commission to "effectively scrap the procedural format of its Rules of Practice." Motion at 14, 15, 17. In fact, what the Governments asserted in their March 7 Motion is that there is no precedent for the situation presented in this proceeding; that is, one in which the licensing and appeal boards have found that the applicant's emergency plan cannot be implemented and that a license cannot be issued, followed by the conduct of an exercise. Despite the uniqueness of this situation, and contrary to LILCO's assertions, the Governments assume that the NRC's Rules of Practice will apply in this proceeding, as they do in every other one.

> to prevent compliance with the requirements of 10 CFR § 50.47 shall be rejected by the Board at the threshold, without the need for summary disposition proceedings.

Motion at 11. LILCO dubs this notion its "threshold dismissal" procedure. LILCO couples this proposal with the additional one, discussed in more detail in Section b below, that discovery concerning admitted contentions should not be permitted to begin until after the contentions have survived both the "threshold dismissal" process and an expedited summary disposition process. Motion at 12.

LILCO's suggestion that by issuing an "instruction" to a licensing board the Commission could so drastically change the structure of its established hearing process set forth in its regulations is unsupportable.[6] LILCO does not suggest any legal basis or authority for the adoption of its proposals, aside from its broad-brush reference to the UCS case.[7] However, as demonstrated below, neither that case nor any other precedent or legal theory can be construed to authorize the adoption of LILCO's proposals.

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[6] LILCO's suggestion of such procedures brings to mind the draconian actions taken under the guise of procedural rulings by the Miller Licensing Board in April 1984 and enjoined by the U.S. District Court as due process violations.

[7] Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 815 (1985).

a. The "Threshold Dismissal" of Contentions on the Merits At the Initial Pleading Stage

The NRC's standards governing the admissibility of contentions are well established. The standards are set forth in 10 CFR § 2.714 and have been interpreted and applied uniformly in extensive NRC case law.

To be admissible, a contention must include a statement of its basis, and the basis must be stated with specificity. The case law interpreting these Section 2.714 requirements makes clear that sponsors of contentions are not required at the pleading stage to set forth their evidence or the factual underpinnings of their allegations, or even to establish that the allegations are well-founded in fact. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980); Duke Power Co. (Transportation of Spent Fuel from Oconee to McGuire), ALAB-528, 9 NRC 146 (1979); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13 (1974); Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423 (1973). See also Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54 (1979).

The NRC's admissibility rule in Section 2.714 is designed to track the notice pleading requirement in the Federal Rules of Civil Procedure. Accordingly, a contention's sponsor must include a statement of the reasons (i.e., the basis) for a contention so the

parties are put on notice as to what will be litigated. See, e.g., Peach Bottom, ALAB-216, 8 AEC at 20 ("purpose of the basis-for-contention requirement in Section 2.714 . . . is to help assure that other parties are sufficiently put on notice so that they will know at least generally what they will have to defend against or oppose"). Accord, Allens Creek, ALAB-590, 11 NRC at 549, n.10.

The NRC case law also makes clear that in ruling on the admissibility of contentions, a licensing board is prohibited from making rulings on the merits of the contentions. See, e.g., Duke Power Co., ALAB-528, 9 NRC at 151 ("whether a particular concern [set forth in a contention] is justified must be left for consideration when the merits of the controversy are reached"); Grand Gulf, ALAB-130, 6 AEC at 426 (in ruling on the admissibility of a contention "it is not the function of a licensing board to reach the merits of any contention"). Accord, Allens Creek, ALAB-590, 11 NRC at 549, n.10; Peach Bottom, ALAB-216, 8 AEC at 20. Indeed, in this very case, the emergency planning licensing board applied this well-established principle to reject efforts by LILCO to go beyond the Section 2.714 requirements to argue the merits of contentions at the admissibility stage:

> We have found that the contentions admitted in this Order meet the requirements of specificity and basis. 10 CFR § 2.714(b). In several instances LILCO objected to the admission of a contention on the basis of documents which were attached to its brief. It would be inappropriate to resolve the merits of any such contention at this stage of the proceeding.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1) Special Prehearing Conference Order, August 19, 1983 (unpublished) at 3 (emphasis added). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1) Order Ruling on Suffolk County Motion for Leave to File New Contentions Concerning the LILCO Offsite Emergency Preparedness Training Program, March 19, 1984 (unpublished) at 15, 16 (rejecting LILCO's "lack of basis" admissibility objections because they were "factual disagreement[s] with the merits of the proposed contention[s]").

Obviously, since contentions are not required to include evidence or the factual underpinnings of the allegations contained in them, at the pleading stage a licensing board would have no basis for making a ruling on the merits. See, e.g., Allens Creek, ALAB-590, 11 NRC at 552-53 (concurring opinion of Judge Farrar). A substantive ruling on the merits based solely on the wording of an allegation -- even one with a stated specific basis as required by Section 2.714 -- would be pure speculation and would deprive the contention sponsor of the right to a hearing guaranteed by Section 189(a), and the right to conduct discovery and present evidence as set forth in 10 CFR §§ 2.740 and 2.743.[8]

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[8] See, e.g., Allens Creek, 11 NRC at 549 ("whether [the intervenor] will be able to prove the assertions underlying the contention is quite beside the point at [the contention admission] preliminary stage of the proceeding. . . . [U]nder the Rules of Practice . . . as they have been uniformly interpreted, he is entitled to . . . the opportunity to attempt to do so"). See also Peach Bottom, ALAB-216, 8 AEC at 21 (admission of contentions meeting Section 2.714 basis and specificity requirements "merely sets in motion the next steps in the prehearing process which are

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The established rule that contentions need not contain evidence or factual underpinnings has a logical basis as well as one rooted in due process principles. Under the Commission's Rules of Practice, formal discovery is not permitted until after contentions have been admitted for litigation. 10 CFR § 2.740(b)(1). Thus, at the contention submission stage, the sponsors of a contention have not yet had an opportunity to conduct discovery and determine, much less marshal for evidentiary presentation the pertinent facts necessary to support the allegations contained in their contentions.

LILCO's suggested "threshold dismissal" rule violates the admissibility standard set forth in Section 2.714, as well as the due process principles which govern NRC hearings. LILCO's procedure turns the hearing process upside-down, by calling upon the licensing board to make ultimate substantive rulings on the factual and legal merits of allegations at the pleading stage, prior to discovery and the opportunity for a party to present evidence or argument. Indeed, under LILCO's proposal, a licensing board would be directed to reject contentions which it finds in fact and law "do not demonstrate" the existence of "a fundamental flaw" in the

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designed to assure that a genuine issue in fact exists which warrants an evidentiary hearing"). See also Allens Creek, 11 NRC at 549-50, n.11, in which the Appeal Board notes "the importance attached by the judiciary to insuring that persons have their day in court even with respect to claims which, on their face, appear to be of highly dubious merit," citing In re Grossman, 107 U.S.P.G. 181 (AEC Pat. Comp. Bd. 1955); remanded for reconsideration in light of additional evidence (D.C. Cir. No. 12959, February 10, 1956).

LILCO Plan "sufficient to prevent compliance" with Section 50.47. Such a procedure plainly would vitiate the hearing right guaranteed by Section 189(a).

LILCO's proposal thus boils down to an unsupportable suggestion that one of two equally illegal standards be adopted by the Commission for the Shoreham case:

> Either (1) the contention must include all the evidence in support of the ultimate factual and legal ruling that the contention is correct on the substantive merits (including factual proof of (a) a "flaw" in the Plan, (b) the "fundamental" nature of that flaw, and (c) the fact that the flaw is "sufficient to prevent compliance" with Section 50.47);
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> Or (2) the contention can meet the regulations' notice pleading basis and specificity requirements, but the licensing board must nonetheless make the ultimate substantive ruling on the factual and legal merits, and do so without having first given the sponsor of the contention an opportunity for discovery or presentation of the facts or supporting argument.

Neither proposal passes muster under Section 189(a), the Administrative Procedure Act, or constitutional principles of due process.[9]

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[9] Indeed, in Grand Gulf, the Appeal Board stated that the existence of the Section 2.749 summary disposition procedure (which under the regulations, but not under LILCO's proposed new procedure, takes place after discovery has occurred),

> is a further indication of the error in the view . . . that an intervenor must provide the evidentiary foundation for its contention (i.e., demonstrate that it has merit) before it is admitted into the proceeding.

ALAB-130, 6 AEC at 426 (emphasis added).

Contrary to LILCO's assertion, the UCS case neither suggests that the Commission could adopt LILCO's "threshold dismissal" scheme nor supports the legality of that proposed procedure. First, nowhere in the UCS opinion does the Court mention any kind of "threshold" rejection of contentions at the pleading stage in place of the established admissibility standards and precedent concerning them that were in existence at the time of the UCS decision. Rather, the Court's discussion focuses solely on the summary disposition process set forth in the Commission's own rules. Thus, even in the passages quoted by LILCO, purportedly in support of its "threshold dismissal" proposal (Motion at 8-9), the Court pointedly cites 10 CFR § 2.749, and expressly references summary disposition and findings as to whether there exist genuine issues of material fact. 735 F.2d at 1448.

Unlike LILCO's "threshold dismissal" rulings, the Section 2.749 summary disposition rulings referenced by the UCS Court occur after contentions have been admitted under the notice pleading standards of Section 2.714 and after discovery has occurred; and, they are based upon factual affidavits, depositions, answers to interrogatories, admissions, statements concerning material facts, and other filings in the proceeding that enable the Board to determine whether there are material facts in dispute. 10 CFR § 2.749. LILCO's "threshold dismissal" scheme would have the Board making the ultimate factual and legal determinations on the merits

based on nothing but the bare allegations in a contention. The UCS discussion of summary disposition cannot be stretched to support the LILCO scheme.

Second, the UCS Court's statement that it "in no way restrict[s] the Commission's authority to adopt [a fundamental flaw standard] as a substantive licensing standard," 735 F.2d at 1448, cannot be cited to support LILCO's "threshold dismissal" scheme either. There is no substantive similarity between the two. Nowhere does the Court suggest that such a "licensing standard" could properly be applied at the contention admissibility stage to deprive parties entitled to a hearing of their right to discover and present to the adjudicator the facts in support of their contentions. Indeed, the Court's characterization of the fundamental flaw criterion as "a substantive licensing standard" strongly suggests that the Court had in mind its use in the decision on the merits of the ultimate factual and legal issues presented in exercise litigation, rather than in preemptory rulings at the allegation-pleading stage of the hearing process. Thus, the Court states that to survive a summary disposition motion, assuming application of a fundamental flaw criterion, the Commission could require that a "claim" must "raise genuine issues of material fact about the fundamental nature of the emergency preparedness plans." Id. (emphasis added). Significantly, the Court did not state that the Commission could require that a contention "demonstrate" that there exists a "fundamental flaw" which is "sufficient to prevent

compliance" with 10 CFR § 50.47, even though at the summary disposition stage under § 2.749, unlike under LILCO's scheme, the parties have had discovery and an opportunity to present facts and legal argument to the adjudicator. LILCO's "threshold dismissal" scheme goes far beyond anything contemplated in the UCS case.

The UCS Court did acknowledge the existence of specific procedures, identified in the NRC's regulations, by which a licensing board could properly expedite proceedings and focus issues in appropriate circumstances (e.g., by prohibiting repetitious testimony or cross-examination). See 735 F.2d at 1448, n.21. Nonetheless, it is clear from the Court's holding in UCS that neither those expedition techniques, nor any other procedures proposed in the interest of "efficiency," could be applied to deprive a party of its Section 189(a) right to a meaningful hearing. According to the UCS Court, that right includes "an opportunity for submission and challenge of evidence as to any and all material issues of fact." Id. at 1444. See also, id. at 1449 (there must be "an opportunity to dispute issues raised by the exercise[]"). LILCO's "threshold dismissal" proposal thus clearly violates the UCS holding interpreting Section 189(a) and the Commission's own regulations and precedent.

Third, BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974), cited by the Shearon Harris Licensing Board [10] and by LILCO as "approv[ing] threshold exclusion of contentions" as suggested in LILCO's

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[10] Carolina Power and Light Co. (Shearon Harris Nuclear Plant), LBP-85-49, slip op. at 16, n.1 (Dec. 11, 1985).

"threshold dismissal" rule (Motion at 9, n.7), does no such thing. In BPI, the Court interpreted 10 CFR § 2.714 and upheld the denial of an intervention petition based upon a failure to state any contentions in support of a petition to intervene. Dismissal of contentions was not at issue; rather, the BPI court affirmed the application of the Section 2.714 requirement that an intervention petition must include a specification of contentions on which a hearing is requested and the basis therefor. See 502 F.2d at 428-29. BPI in no way supports the LILCO "threshold dismissal" scheme.

For the foregoing reasons, the Shearon Harris Licensing Board's decision cited by LILCO is itself erroneous and entitled to no weight. The Shearon Harris Board mischaracterized both the BPI and UCS cases in concluding that they supported the "threshold dismissal" of contentions on the merits at the admissibility stage.[11] Furthermore, as a review of that Board's opinion makes

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[11] The far-reaching extent to which that Board misapplied those case holdings is apparent from the following excerpt from its decision:

> In discussing the application of [the fundamental flaw] criteria, the [UCS] court stated that the NRC could "summarily dismiss any claim that did not raise genuine issues of material fact about the fundamental nature of emergency preparedness plans." Id. As an abstract proposition, therefore, it might be argued that the "fundamental flaw" criterion should only come into play at the summary disposition stage, that it should not be applied to exclude a contention at the threshold. We find it significant, however, that the court did not draw this distinction and that it cited with approval BPI v. AEC, F.2d 424 (CADC 1974) [sic], which approved threshold exclusion of contentions.

Shearon Harris, LBP-85-49, slip op. at 16, n.1 (emphasis added).
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clear, the Board made findings on the ultimate factual and legal merits of proposed contentions without having given the sponsor of the contentions the opportunity to submit evidence to support the contentions or to challenge assertions made by the applicant concerning the merits of the allegations in the contentions. The Board's actions thus violated Section 2.714, the NRC case law cited herein which prohibits such decisions on the merits in the context of admissibility rulings, and the intervenor's right in that case to a hearing. For purposes of the instant case, the Commission must disregard the erroneous actions and statements of the Shearon Harris Board.

b. Summary Disposition Before Discovery

LILCO's next suggestion, that the Commission should instruct a board to make summary disposition rulings (after having made the threshold rejection rulings) prior to permitting any discovery (Motion at 11-13), also constitutes an illegal re-writing of the NRC's regulations. LILCO does not offer any legal rationale to

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The Shearon Harris Board significantly omitted the citation which immediately followed the portion of the UCS opinion it chose to quote. The omitted citation is "See 10 CFR § 2.749 (1983)." And, the very next sentence in the UCS opinion is "To avoid summary disposition, a party would have to identify and support specific facts upon which a reasonable inference could be drawn that the plan provided inadequate assurances of safety. See id. [i.e., 10 CFR § 2.749] . . . " 735 F.2d at 1448. There can be no doubt, given the two citations to § 2.749, the words "summary disposition," and the reference to "identifying and supporting facts," that the UCS Court was not discussing "threshold" rulings on bare contentions, but rather summary disposition rulings based on affidavits with evidentiary facts. The Shearon Harris Board's assertions, and its conclusions, were simply wrong.

support its proposed procedure. The suggestion that parties could, much less should, be in a position to submit factual affidavits or prepare statements of material facts prior to their being given an opportunity to discover and learn the pertinent facts, is on its face preposterous.[12]

Furthermore, the Commission's rules recognize that discovery is a prerequisite to summary disposition rulings, a fact ignored by LILCO. Thus, the orderly pre-trial procedure set forth in the Commission's rules contemplates the following: first, the filing of contentions with stated specific bases, which put the parties on notice of the matters proposed to be litigated (§ 2.714); second, the identification of the issues to be litigated at a pre-hearing conference at which rulings on the admissibility of contentions are made, using the established basis and specificity standards (§ 2.751a); third, the conduct of discovery on the contentions admitted for litigation (§ 2.740); and, fourth, the preparation and submission of testimony and/or the filing of summary disposition motions, such motions to be accepted by the board only if the preparation of responses would not interfere with the parties'

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[12] It may well be that LILCO believes that it is in a position to file affidavits or statements concerning material facts without conducting any discovery. That is not surprising since LILCO is currently in possession of extensive factual information relating to the Shoreham exercise. As noted, however, despite the Governments' repeated requests, LILCO has refused to provide data to the Governments. Thus, the Governments do not possess even the level of basic information possessed by LILCO; clearly that information, in addition to discovery on issues identified for litigation, is necessary before the Governments could file or respond to summary disposition motions.

preparation for a scheduled evidentiary hearing (§ 2.749).[13] LILCO's suggestion that summary disposition motions must be filed and responded to, and that they must be ruled upon, in the complete absence of any opportunity for the parties to obtain or present to the Licensing Board the material facts relating to the matters at issue is manifestly in conflict with the NRC's rules.

By definition, summary disposition rulings are rulings on the merits, based on a finding that there are no material facts in dispute. Such a finding cannot be made in the factual vacuum necessarily created by prohibiting the parties from discovering any facts. A ruling on the merits of a contention in the absence of a basis in the record -- including a basis for a finding that there are no material facts in dispute -- is prohibited by 10 CFR §§ 2.749(d), 2.760, 2.760a and principles of due process.[14] That

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[13] That the NRC's pre-trial procedure regulations contemplate discovery taking place prior to the summary disposition process is manifest in § 2.749 itself. The mere requirement of filing statements as to material facts indicates that parties must be given a prior opportunity to discover the existence of such facts. In addition, the rule states that affidavits may be "supplemented or opposed by depositions, answers to interrogatories or further affidavits," § 2.749(b), and that "the presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact . . ." § 2.749(d).

[14] See, e.g., Northern P.R. v. Dep't of Public Works, 268 U.S. 39, 44-45 (1925) ("An order based upon a finding made without evidence . . . is an arbitrary act . . . [and] a denial of due process"); The Chicago Junction Case, 264 U.S. 258, 265 (1924) ("To make an essential finding without supporting evidence is arbitrary action"); ICC v. Louisville & Nashville Ry Co., 227 U.S. 88 (1912); Golden Grain Macaroni Co. v. FTC, 472 F.2d 882, 886 (9th Cir.

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is precisely what is called for by LILCO's proposal for summary disposition rulings prior to the conduct of discovery.

Finally, the adoption by the NRC of a "fundamental flaw" substantive licensing standard mentioned in the UCS case, and the adoption of the entirely new pre-hearing procedural scheme proposed by LILCO, could only be done through a rulemaking proceeding. The Commission's own regulations provide:

> When the Commission proposes to adopt, amend, or repeal a regulation it will cause to be published in the Federal Register a notice of proposed rulemaking . . . .

10 CFR § 2.804(a). The "threshold dismissal" procedure proposed by LILCO as a substitute for the contention admissibility standards in Section 2.714, and the remainder of the LILCO pre-hearing scheme involving the prohibition of discovery until after rulings on the merits at both the contention admissibility stage and summary disposition stage, clearly would constitute drastic amendments to the prehearing procedures set forth in the Commission's Rules of Practice.[15] Thus, under Section 2.804 the new rules and standards

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1972), cert. denied, 412 U.S. 918 (1973); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966). See also Cotter v. Harris, 642 F.2d 700, 706-7 (3d Cir. 1981); Aberdeen & Rockfish Co. v. U.S., 565 F.2d 327, 334-35 (5th Cir. 1977) rev'd on other grounds sub nom Long Island Ry Co. v. Aberdeen & Rockfish Ry Co., 439 U.S. 1 (1978), modified sub nom Aberdeen Rockfish Ry Co. v. U.S., 586 F.2d 609 (5th CIr. 1979); Great Lakes Screw Corp. v. NLRB, 409 F.2d 375, 379 (7th Cir. 1969); Taylor v. Heckler, 595 F. Supp. 489 (D.D.C. 1984).

15 As noted, these proposals also constitute a drastic and supportable reversal of long-standing Commission practice and precedent.

proposed by LILCO could be lawfully considered and adopted only through a formal rulemaking proceeding.[16]

Significantly, in the NRC's "Final Rule" issued in response to the UCS decision and obviously in recognition of the Court's language in that decision, the Commission made no mention of a "fundamental flaw" standard, or of any new procedural rules to be applied in exercise-related litigation. 50 Fed. Reg. 19323 (1985). As long as 10 CFR § 2.714 and the other regulations governing prehearing discovery and summary disposition procedures and standards are in effect, and unless and until they are changed through the rulemaking process, the NRC must apply those regulations.[17] A refusal to do so by adopting the new rules proposed by LILCO would constitute a denial of due process. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363, 388 (1957); U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). See also Superior Sav. Ass'n v. City of Cleveland, 501 F. Supp. 1244, 1249 (N.D. Ohio 1980); Courts v. Economic

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16 See, e.g., Deukmejian v. NRC, 751 F.2d 1287, 1310-11 (D.C. Cir. 1984) reh'g granted and portion of opinion vacated on other grounds, 760 F.2d 1320 (D.C. Cir. 1985) (an NRC "long-standing practice" in direct contravention of a regulatory provision is entitled to no deference; it could not properly be applied in adjudication until the regulation had been formally amended); Union of Concerned Scientists v. NRC, 711 F.2d 370, 381 (D.C. Cir. 1983) (NRC has no discretion to avoid rulemaking under 10 CFR § 2.804, even if its prior "interpretations" of that regulation would permit it for "interim" rules).

17 See, e.g., U.S. v. Nixon, 418 U.S. 683, 695-96 (1974) (even if an agency has the authority to amend or revoke a regulation, as long as it is in effect it must be applied).

Opportunity Auth., 451 F. Supp. 587, 592 (S.D. Ga. 1978); Hupart v. Bd. of Higher Ed. of City of New York, 420 F. Supp. 1087, 1107 (S.D. NY 1976).[18]

2. LILCO's Proposed Two-Tracked Filing Procedure Would Be Wasteful and Makes No Sense

Next LILCO suggests that the Commission should instruct a licensing board to set up a contention-filing schedule requiring two separate sets of contentions, as well as related filings and rulings on admissibility, summary disposition, and discovery. Motion at 12-13. This proposal is premised on LILCO's assertion

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[18] In the instant case, there is no room to argue that the procedures which LILCO suggests should be adopted through "instructions" to a licensing board constitute mere "interpretations" of existing rules beyond rulemaking requirements. It is well established that so-called "interpretations" which in fact constitute amendments to rules adopted by rulemaking, or change or adopt standards already addressed in prior rulemakings, must be addressed through rulemaking and not through less formal or adjudicatory processes. See, e.g., Deukmejian v. NRC, 751 F.2d 1287, 1310-11 (D.C. CIr. 1984), reh'g granted and portion of opinion vacated on other grounds, 760 F.2d 1320 (D.C. Cir. 1985). See also, Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1329-30 (9th Cir. 1982) (attempted adjudicatory change in rule improper when change amounts to an amendment, and adds a requirement specifically proposed and rejected in rulemaking); Patel v. INS, 638 F.2d 1199 (9th Cir. 1980) (adjudicatory interpretation clearly contrary to plain meaning of regulation, and setting standard considered and rejected in rulemaking, constitutes abuse of discretion). Moreover, any suggestion that proceeding according to LILCO's proposed scheme would be consistent with the Atomic Energy Act, the NRC's existing regulations, or the NRC's precedent interpreting those regulations, must be rejected for the reasons set forth in the text. The Governments submit that the adoption of the LILCO proposals based on such a suggestion would be clear error. The courts have consistently held that an agency's action is arbitrary and capricious, and entitled to no deference, if that action does violence to the plain meaning of its own regulations. Guard v. NRC, 753 F.2d 1144, 1148-49 (D.C. Cir. 1985); UCS v. NRC, 711 F.2d 370, 381 (D.C. Cir. 1983). See also Columbia Broadcasting System v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

that the filing of some proposed contentions should not await the issuance of the FEMA report containing the exercise results. This LILCO proposal makes no sense and should be rejected.

First, the FEMA report is due in about three weeks. A Commission ruling on the pending Government and LILCO Motions, the establishment of a licensing board, and the scheduling and holding of a conference of counsel will presumably fill a large portion, if not all, of that time. Thus, as a practical matter it would not save time and it certainly would not increase efficiency, to put into motion a convoluted double-filing procedure that promises confusion more than it promises orderliness.[19]

LILCO's suggestion that contentions should be filed prior to the issuance of the FEMA report makes no sense for an additional reason. Under the Commission's regulations and the UCS case, the focal point of any post-exercise litigation will be the exercise results and the proper way to define those results in light of the applicable legal standards. In addition to the parties' views of what the results of LILCO's exercise were, given FEMA's formal role in the post-exercise analysis and litigation process FEMA's evaluation in its report will be essential to the litigation. LILCO's suggestion that parties should create issues out of whole

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[19] There is little doubt, for example, that a two-tracked procedure, where filings, rulings, and discovery on each track would be proceeding separately as suggested by LILCO, would result in schedule conflicts among attorneys, expert witnesses, and Licensing Board personnel. The net result would likely be unnecessary and counterproductive confusion, delays and procedural controversies.

cloth in the absence of the FEMA evaluation, and then revise, amend, withdraw, or supplement those issues after learning of the FEMA evaluation, is baseless and fundamentally nonproductive. LILCO's suggestion offers nothing more than an opportunity for the parties to become mired in wasteful paperwork and unnecessary procedural entanglements, not the least of which would be controversy over whether particular contentions are "uniquely dependent upon" the FEMA report and, therefore, properly filed in the second, rather than the first round of filings proposed by LILCO.

Third, even assuming arguendo that it makes sense to file exercise-related contentions before reviewing FEMA's report, LILCO's suggestion that the Governments are in a position now to file any contentions is unfounded. The Governments lack knowledge of even the most basic exercise facts, including the scenario itself and its underlying assumptions. Moreover, the Governments' monitors were so restricted during the exercise that in the major facilities, particularly the EOC, the EOF, and the Nassau Coliseum, they literally were unable to observe or hear major portions of the exercise activities, including all interactions involving the "simulators." In contrast, technical representatives and counsel for LILCO, FEMA and the Staff were permitted unrestricted access to all exercise events and facilities, and unlike the Governments' monitors, were in positions where they could observe all exercise

events and listen to all interactions.[20] Not only are the Governments not in a position to file contentions prior to obtaining the requested basic factual information and the FEMA report, but the disproportionate lack of information possessed by the Governments, as compared with all the other parties, would make the imposition of a contention filing schedule such as that proposed by LILCO grossly unfair. The situation at present is dramatically lopsided in LILCO's favor. What is needed now is not a requirement for the filing of necessarily speculative contentions, but a confirmation by the Commission that a fair proceeding will follow in due course and under lawful rules.

3. LILCO's Proposed Instruction On Contentions Which Were or Could Have Been Litigated Earlier, With One Caveat, Should Not Be Necessary

LILCO suggests that guidance to a licensing board should include the admonition that "no contention will be admitted if it involves issues which were or could have been litigated earlier." Motion at 11. With one caveat, such an instruction would be consistent with the NRC's procedures, and therefore should not need to be given to a licensing board. The caveat is important, however. It must be understood that contentions concerning the contents and assumptions of the exercise scenario, what happened

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[20] Thus, since the date of the exercise LILCO, FEMA and the NRC have been able to analyze facts, develop issues, gain knowledge and understanding of actual events and problems and, indeed, to formulate strategy and tactics to use in any post-exercise litigation. The Governments have been precluded from doing any of these things by the refusal of LILCO, FEMA and the Staff to provide the necessary fundamental information.

during the exercise, or evaluations, assessments, comments, or conclusions of FEMA or any other entity about the scenario, occurrences during the exercise, or regulatory compliance based on exercise occurrences, could not have been litigated earlier.

4. Time Limits on Discovery Should Be Considered by a Licensing Board Not the Commission

LILCO's suggestion that the Commission should impose time limits upon discovery (Motion at 12-13) is baseless. This kind of scheduling matter would be best handled by a licensing board after it had received from the parties factual information concerning discovery needs, time estimates, and other practical factors which make up the framework for such a discussion. Setting time limits in a vacuum, as the Commission would have to do here, would be arbitrary and potentially damaging to the parties' due process rights.

5. Special Discovery Rules for FEMA Should Also Be Considered by a Licensing Board, Not the Commission

LILCO's final suggestion, that FEMA personnel should not have to respond to discovery requests until after the FEMA report has been issued, is one which the Governments believe will be overtaken by events. The FEMA report is due within about three weeks.

Furthermore, if FEMA believes it is entitled to special treatment in connection with responding to discovery requests, counsel for FEMA, not LILCO, should make such a request. If FEMA

were to choose to make such a request, it should be dealt with by a licensing board which has become knowledgeable of the specific facts involved in the matter, rather than by the Commission.

III. CONCLUSION

For the foregoing reasons, the Governments submit that the Commission should establish a licensing board to deal with exercise-related litigation, and should otherwise deny the LILCO Motion.

Respectfully submitted,

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March 24, 1986

ATTACHMENT 1

Federal Emergency Management Agency

Region II 26 Federal Plaza New York, New York 10278

Karla J. Letsche, Esq.
Kirkpatrick & Lockhart
1900 M. Street, N.W.
Washington, DC 20036

Dear Ms. Letsche:

I am writing in response to your letter of February 20, 1986 and the items referenced therein.

In regard to your request for copies of the exercise scenario, the only complete copies in the possession of FEMA or its contractors are controlled copies which we are unable to duplicate at this time. I have spoken to counsel for LILCO and understand they will provide to you a copy of the scenario.

In regard to your request for copies of various messages, I understand that you were provided copies of free play and controller messages as they were introduced into the exercise.

In regard to your request for additional documents utilized or created at the exercise, we are presently sorting the documents in our possession. We will be unable to respond to your request until such inventory is completed.

I am awaiting the return of Mr. Kowieski sometime during the week of March 10, 1986 to review the pre-exercise materials. After that review is complete, I will be able to respond more fully to your request.

With regard to informal discovery at this time, FEMA wishes to cooperate with all parties but does not waive any of its rights.

Very truly yours,

Stewart M. Glass

Stewart M. Glass
Regional Counsel

cc: Donald P. Irwin, Esq.
Bernard M. Bordenick, Esq.
Martin B. Ashare, Esq.
Fabian G. Palomino, Esq.
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KARLA J. LETSCHE
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March 10, 1986

BY FEDERAL EXPRESS

Stewart M. Glass, Esq.
Regional Counsel
Federal Emergency Management Agency
26 Federal Plaza, Room 1349
New York, New York 10278

Dear Stewart:

I received today your letter of March 6, 1986, in which you state that at some unnamed future date, you will respond to my letter of February 20, 1986. In my letter, and those of February 27 and March 6 from Larry Lanpher, we requested the exercise-related materials which, prior to the exercise, you and counsel for LILCO and the NRC Staff had indicated would be made available to the Governments. As I stated in my February 20 letter, and as Larry reiterated in his follow-up of February 27, the requested materials are essential to the Governments' understanding and assessment of the exercise results. Accordingly, I reiterate our request that they be provided as soon as possible. For your information, to date we have received no materials from counsel for LILCO or the NRC Staff in response to our letters of February 20, February 27 or March 6.

One statement in your letter suggests that you have a mistaken understanding as to what materials were provided to the Governments, and under what circumstances, during the exercise. Let me correct your misunderstanding. You state "I understand that you were provided copies of free play and controller messages as they were introduced into the exercise." In fact, all "free play and controller messages" were not actually provided to us. For example, as I stated in my February 20 letter, we received no "messages" at all from "simulators" of governmental officials; indeed, as noted in my letter we have received essentially no information whatsoever describing the interactions between LILCO

employees and the "simulators" during the exercise. Similarly, during the exercise the Governments' monitors, including myself at the EOC, could see many conversations taking place between LILCO employees and various exercise controllers; however, due to restrictions placed on the monitors, we were unable to hear those conversations and therefore have no knowledge of their substance. For your information, I have enclosed copies of eleven FEMA "messages" -- these are the only ones which we received during the exercise.1/ Accordingly, I hereby reiterate my request for a complete set of all the free play, controller and simulator messages and communications which were transmitted to LILCO employees either in writing, over the telephone, or in person during the exercise.

In addition, knowledge of the content of exercise messages is clearly not sufficient to enable us to understand and assess the exercise results. The Governments also need to know when during the exercise each of the messages was given to LILCO, as well as the original transmittal location, the LILCO recipient of each message, and the actions taken upon receipt of the message. I assume this information is contained in the "logs," including the so-called "simulator logs," and other materials generated during the exercise which we have requested and which, prior to the exercise, we were told would be provided to us. Contrary to the implication in your letter, I do not know when even those messages I received during the course of the exercise actually were transmitted by FEMA to LILCO. Accordingly, I reiterate our request for copies of the logs and similar records that were generated during the exercise.

Sincerely,

Karla J. Letsche

KJL:so
Enclosures
cc (w/encls): Martin B. Ashare, Esq.
Fabian G. Palomino, Esq.
Stephen B. Latham, Esq.
Bernard M. Bordenick, Esq.
Donald P. Irwin, Esq.

1/ We also received copies of "LERO Message" Nos. L0-L23 from "LILCO Scenario No. 8 - Final," which I understand to be messages generated by LILCO, rather than FEMA.

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)	)	

Certificate of Service

I hereby certify that copies of RESPONSE OF SUFFOLK COUNTY, THE STATE OF NEW YORK, AND THE TOWN OF SOUTHAMPTON TO LILCO'S MOTION FOR ESTABLISHMENT OF LICENSING BOARD AND INSTITUTION OF EXPEDITED PROCEDURES FOR EXERCISE LITIGATION have been served on the following this 24th day of March 1986 by U.S. mail, first class, except as otherwise noted.

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Date: March 24, 1986

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* By Hand on 3/25/86
** By Federal Express on 3/24/86