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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL-5 (EP Exercise) (ASLBP No. 86-533-01-OL) October 3, 1986

PREHEARING CONFERENCE ORDER
(Ruling on Contentions and Establishing Discovery Schedule)

A prehearing conference was held in Hauppauge, New York on September 24, 1986. The conference dealt with the admissiblity of proposed contentions and establishing a discovery schedule. During the conference, the parties were requested to submit a proposed discovery order to the Board by October 1, 1986. The Board has considered the positions and arguments of all parties on these matters, presented in their written submissions and at the conference.

Contentions

A. Standards For Admissibility

The Commission in authorizing the institution of the hearing litigating the matter of the LILCO emergency planning exercise,

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conducted pursuant to 10 CFR 50.47 and Part 50, App. E, adopted a "fundamental flaw in the plan" criterion, as a standard for use in the proceeding. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986). The Commission in responding to Applicant's proposal to use "threshold pleading" and summary disposition prior to discovery to exclude contentions which do not demonstrate, as pleaded, a fundamental defect in the emergency plan, stated:

> Under our regulations and practice, staff review of exercise results is consistent with the predictive nature of emergency planning, and is restricted to determining if the exercise revealed any deficiencies which preclude a finding of reasonable assurance that protective measures can and will be taken, i.e., fundamental flaws in the plan. Since only fundamental flaws are material licensing issues, the hearing may be restricted to those issues.

We adopt the foregoing standard to be employed in the proceeding as well as the following set forth in the Commission's Memorandum and Order. The Commission directed the Board to admit "only those Intervenor contentions which satisfy the specificity and other requirements of 10 CFR 2.714 by: 1) pleading that the exercise demonstrated fundamental flaws in LILCO's plan; and 2) by providing bases for the contentions which, if shown to be true, would demonstrate a fundamental flaw in the plan." Id.

One cannot merely utter the words "constituting a fundamental flaw" as part of the contention to have those words act as a shibboleth and allow its admittance as litigable. There needs to be alleged the activity or circumstance which constitutes the fundamental flaw, i.e., that which precludes a reasonable assurance finding, and the allegation

must be supported by an adequate basis. An adequate basis assures that the contention raises a matter appropriate for litigation in the proceeding, establishes a sufficient foundation for the contention to warrant further inquiry into the subject matter addressed by the allegations, and puts the other parties sufficiently on notice so that they will know at least generally what they will have to defend against or oppose.

The standards contained in CLI-86-11 are not the only criteria for determining the admissibility of contentions in a proceeding to evaluate the emergency planning exercise. It must be remembered that in CLI-86-11 the Commission in the main was responding to proposals made by Applicant as to how the emergency planning exercise should be litigated and the action the Commission took was not wholly dispositive of the matter of standards for the admission of contentions. For a more detailed discussion of criteria and their applicability, one must look to the seminal case of Union of Concerned Scientists v. Nuclear Regulatory Comm., 735 F.2d 1437 (D.C. Cir. 1984), cert. denied 105 S. Ct. 815 (1985). The Court in UCS, in discussing the balance between efficiency of proceedings and the public's right to a hearing stated that there is nothing to prevent "the Commission from holding a special supplementary hearing solely on issues raised by the emergency exercises closer to the date of full power operation. And certainly the Commission can limit the hearing to issues--not already litigated--that it considers material to its decision" (footnote omitted). The Court went on to state that it in no way restricts the Commission's authority

to adopt as a substantive licensing standard one that considers "minor and ad hoc problems occurring on the exercise day" as irrelevant to the proceeding. Id. at 1447, 1448.

We find the above UCS standards to be wholly applicable to this proceeding and we adopt them. Fairness and maintaining the effectiveness of the administrative process dictate that we adopt these measures in a proceeding where emergency planning has been in litigation rather continuously since 1983, where we have a transcript record of more than 16,000 numbered pages and approximately 7,000 additional pages of prefiled written testimony and exhibits.

UCS standards were adopted by the Licensing Board in Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-49, 22 NRC 899, 910 (1985). In so doing, the Board noted that although the Commission had not formally adopted the standards in UCS, the Board's delegated authority to decide the Shearon Harris case included the authority to decide novel legal questions, subject to Appeal Board and Commission review. On that basis it adopted the UCS standards. The Board's action was cited with approval by the Appeal Board in Carolina Power & Light Company, et al. (Shearon Harris Nuclear Plant, Units 1 and 2), ALAB-843, 23 NRC __ (August 15, 1986) (slip opinion at 26, n.71). The Licensing Board in Shearon Harris, LBP-85-19, stated that contentions alleging minor or readily correctable problems should be rejected, which is also a standard we accept.

Proposed contentions can meet criteria other than those discussed above to be acceptable for litigation. These include situations where the emergency preparedness exercise itself is so fundamentally inadequate that it cannot be used to make a reasonable assurance finding. This can occur where the exercise is so limited in scope that it does not evaluate what it is supposed to under the regulations. It can also occur where the exercise was conducted in a manner that was so essentially defective that the results cannot be relied upon.

Authority for approving such contentions is to be found in UCS, supra. In UCS the Court stated that where a hearing is required the agency must generally provide an opportunity for submission and challenge of evidence as to any and all issues of material fact. Id. at 444. The NRC cannot issue an operating license for a nuclear power plant absent a finding that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. 10 CFR 50.47(a)(1). In order that there be an adequate record for the Commission to make this determination, NRC regulations require among other things that an offsite emergency plan be developed, and that there be an exercise of the plan. 10 CFR 50.47, App. E IV.F.1. very specifically provides what the plans shall prescribe for the conduct of the emergency preparedness exercise upon which the agency is to rely. Paragraph 1 states:

> 1. A full participation[4] exercise which tests as much of the licensee, State and local emergency plans as is reasonably achievable without mandatory public participation shall be conducted for each site at which a power reactor is located for which the first operating license for that site is issued

after July 13, 1982. This exercise shall be conducted within 1 year before the issuance of the first operating license for full power and prior to operation above 5% of rated power of the first reactor, and shall include participation by each State and local government within the plume exposure pathway EPZ and each State within the ingestion exposure pathway EPZ.

4/ 'Full participation' when used in conjunction with emergency preparedness exercises for a particular site means appropriate offsite local and State authorities and licensee personnel physically and actively take part in testing their integrated capability to adequately access and respond to an accident at a commercial nuclear power plant. 'Full participation' includes testing the major observable portions of the onsite and offsite emergency plans and mobilization of State, local and licensee personnel and other resources in sufficient numbers to verify the capability to respond to the accident scenario.

It is clear beyond cavil that if the Commission is to properly exercise its statutory responsibilities, it must act in making its reasonable assurance finding on an exercise that is not so fundamentally flawed that it cannot be relied upon. Because the scope of the emergency preparedness exercise and the manner in which it was conducted are material considerations in the licensing process, they are matters Intervenors may contest.

The Court in UCS stated:

> Where, as with preparedness exercises, the decision involves a central decisionmaker's consideration and weighting of many other persons' observations and first hand experiences, questions of credibility, conflicts and sufficiency surface and the ordinary reasons for requiring a hearing come into the picture. Id. at 450.

The NRC in making its reasonable assurance finding bases it on a review of the FEMA findings and determinations on whether the offsite plans are adequate and whether there is a reasonable assurance that they can be implemented. 10 CFR 50.47(a)(2). The post exercise assessment

is based on observations made in testing the plan, which are evaluated by FEMA. Applicant agrees that the Federal Emergency Management Agency (FEMA) approved scenario is not completely immune from Board review. It acknowledges a contention can be admissible if it alleges that the scenario was so deficient that it simply failed to live up to the standard that the NRC requires for its ultimate licensing decision. Applicant claims, however, that for such a contention to be admissible Intervenors would have to allege that the scenario was materially different from other FEMA-approved scenarios at other nuclear plants. Applicant's stated requirement is erroneous. The correct requirement is that the emergency preparedness exercise meet the regulation standard of 10 CFR 50.47 and App. E. Whether the exercise per se is not materially different from other FEMA-approved scenarios at other nuclear plants is irrelevant. It is the regulatory standard that must be met.

The full participation exercise described in 10 CFR 50.47, App. E IV.F.1., and set out above, provides the standard against which the February 13, 1986 exercise is to be measured. The Commission did not call for more than one exercise and the conduct of that referenced above is mandatory. FEMA stated in its Post Exercise Assessment that it was requested by the NRC to conduct "a full-scale exercise of all functions and normal exercise objectives." FEMA was to exercise the current version of the LERO Plan. Exercise controllers would simulate the roles of key state or local officials unable or unwilling to participate. Post Exercise Assessment, February 13, 1986, Exercise of the Local Emergency Response Organization (LERO), as specified in the LILCO

Transition Plan for the Shoreham Nuclear Power Station at Shoreham, New York, April 17, 1986, at ix.

The Commission in making its reasonable assurance finding is called upon by regulation to consider the FEMA emergency preparedness exercise evaluation. There is nothing sacrosanct about the FEMA evaluation which makes it uncontestable. The FEMA finding constitutes a rebuttable presumption on questions of adequacy and implementation capability. 10 CFR 50.47(a)(2). Inherent in the matter of adequacy and implementation capability are the issues of the sufficiency of the exercise and its evaluation. Aside from due process considerations, the Commission regulations make the FEMA review contestable and that can only be accomplished by way of allowing admissible contentions.

The general principle that in an operating license proceeding (with the exception of certain NEPA issues), the Applicant's license application is in issue, not the adequacy of the Staff's review of the application, does nothing to relieve FEMA from the scrutiny called for by the admitted contentions. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983). The Board considers FEMA's responsibilities for participation in the exercise to be akin to Staff's responsibilities as called for by NEPA. FEMA cannot be called upon by the NRC to conduct a mandatory exercise to test offsite emergency preparedness at the Shoreham Nuclear Power Station, proceed to conduct the test and evaluate its results, and then not be available to justify its actions. The FEMA review is directly at issue in the proceeding and that agency can be called upon

to defend it. The regulations provide for making the FEMA finding a rebuttable presumption, not an irrebuttable one.

This proceeding, like any other, has no place for duplicative contentions, whether all of the repetitiveness occurs in the proposed contentions currently being filed or whether the contention now being filed repeats that which has previously been litigated. It is possible for a single factual situation to support more than a single contention. Where that occurs it is not permissible to allow proof of the underlying factual circumstances to be presented more than once. Hearing requirements are not at odds with disallowing a contention from being litigated more than once and not permitting the relitigation of the same factual matters. This proceeding involves myriad factual matters. It will require the professional skills of all concerned to make for a concise and clear record. All parties are called upon to make a maximum effort to accomplish this result.

B. Ruling on Contentions

Contentions EX 1-7. Denied.

The contentions allege that LILCO lacks legal authority to implement critical areas of its plan. This being so, the LILCO plan as exercised, cannot be implemented absent LILCO's performance of these prohibited functions and since LILCO cannot actively perform these functions, the exercise results demonstrate a fundamental flaw in the LILCO plan. These contentions are inadmissible because they allege matters that have already been litigated and were not raised by the

exercise. The contentions thus do not meet the criteria for admittance. This Board has already found "that because of Applicant's inability to perform these functions the LILCO plan cannot and will not be implemented as required by regulation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 895-919 (1985). The determination has been affirmed by an Appeal Board. ALAB-818, 22 NRC 651 (1985) CLI-86-12, __NRC__ (1986). The Commission has taken cognizance of the situation in its decision remanding the realism issue to the Board CLI-86-13 __NRC__ 1986. Relitigation before us of the issue in this exercise proceeding would accomplish nothing.

Contentions EX 8-14. Denied.

Although we have considered Contentions EX 8-14 individually, we dispose of them as a group because they each allege matters which are mere variations of a central theme, the essence of which is that the State and local governments did not participate or assume responsibility in the exercise and that there was no opportunity to measure the emergency response performance of these governments.

The contentions are all rejected for the same reasons. First, it is already well known to all parties and decision makers and well established on the emergency planning record that State and local governments refuse to participate in Shoreham emergency planning and exercises. The exercise was planned without state and county participation and FEMA has declined to make a reasonable assurance finding because of that fact. No basis is presented for believing that

new material facts arose from the exercise that would have any important bearing on that situation. Second, the contentions are inconsistent with the posture of this case. We have already decided the realism argument in Intervenors' favor. The Appeal Board has affirmed. The Commission has remanded the issue to us for further consideration. We shall give the matter the consideration called for in a separate proceeding in due course. The lack of government participation will hardly escape our notice in that proceeding.

Contention EX 15. Admitted.

As explained above, this Board views the matter of the scope of the exercise as being within the ambit of the present proceeding. We will admit this contention, treating the individual bases as specific examples of features of the plan which should have been exercised but were not. Basis 15J, however, we find inadmissible. We have already ruled a contention concerning provisions for "contaminated injured individuals" is inadmissible in this proceeding, and our ruling has not been reversed. (Memorandum and Order Denying Suffolk County's and New York State's Motion to Admit New Contention, August 21, 1986; ALAB-832, 23 NRC 152 (1986).) We note there is a recent policy statement from the Commission which supports our reasoning in rejecting Basis 15J. See 51 Fed. Reg. 32,904-06 (September 17, 1986). Basis 15L will be subsumed under EX 21 along with EX 32.

Contention EX 16. Admitted.

As with Contention EX 15, we see Contention EX 16 as alleging omissions in the exercise, which, in our view, could preclude a finding of reasonable assurance. We admit Contention EX 16. However, of its bases we view only E, L, and K as raising omissions independent of those raised in Contention EX 15. The other bases are subsumed within the corresponding portions of Contention EX 15, with the understanding that they name individuals or entities whose failure to participate led to a failure to exercise the feature of the plan named in Contention EX 15. Basis M of Contention EX 16 will be specifically excluded for the reasons cited in excluding Contention EX 8 through Contention EX 14, supra.

Contention EX 17. Withdrawn.

This contention has been withdrawn.

Contention EX 18. Denied.

The main body of this contention merely expands on the allegations of incompleteness in Contentions EX 15 and EX 16. We reject it because it is simply a clarification of certain matters admitted in Contentions EX 15 and EX 16. We will admit one of its bases as a further clarification and specification of the matters admitted in Contention EX 15 or Contention EX 16. Basis C is admissible as detailing further deficiencies in the exercise. Basis A merely repeats the previous

contentions. Basis B is inadmissible for the reasons set forth in excluding Contentions EX 8 through 14.

Contention EX 19. Admitted for Argument Only.

Contention EX 19 is, in the Board's view, a matter for legal argument, not for factual dispute. We will not accept evidence on it, but we will entertain legal argument as to the extent to which FEMA's inability to make a favorable finding reveals a fundamental flaw in the plan.

Contention EX 20. Denied.

This contention, in essence, states that FEMA "did not review" the features and participants which the previous contentions complained were not exercised. We reject it as being adequately covered by Contentions EX 15, and 16, which we are admitting.

Contention EX 21. Admitted.

This contention challenges the sufficiency of the data used by FEMA to reach the conclusion that certain exercise objectives were satisfied. To the extent that the data might be insufficient to support such a conclusion, the conduct of the exercise might indeed preclude a finding of reasonable assurance, as we have reasoned above. We will admit the contention.

Contention EX 22. Admitted.

This contention asserts that certain FEMA findings are premised on matters contrary to fact. On its face it would be admissible if its individual bases presented specific deficiencies educed by the exercise. We find only one such instance: Basis A is admitted for litigation. While it is true that the lack of the Nassau Coliseum was not revealed by the exercise, it is also true that the exercise may have shed considerable light on the Coliseum's importance to the plan. In particular, this contention states that FEMA's conclusions on objectives EOC 16 and FIELD 9, 17, 19, and 21 are all based on the presumed availability of the Coliseum. That is certainly a matter ostensibly revealed by the exercise about which there is a factual dispute.

Bases B, C, D, E, G, and H concern the lack of school plans, bus drivers, buses, and school facilities, nursing homes, and hospitals located outside the EPZ. None of these matters arose during the exercise. To the extent that they were untested they are covered by other contentions. These bases will not be accepted.

The substance of basis F will be dealt with under Contentions EX 38 or 39, and need not be admitted here.

Basis I presents a matter better treated under Contention EX 41. It will be dealt with there.

Basis J raises a matter (overloaded telephones) which was dealt with and disposed of earlier in these hearings (LBP-82-115, 16 NRC 1923 (1983)). By no stretch of the imagination did it arise during the

exercise, nor, in fact, was any light shed on it by the exercise. This basis is rejected.

Basis K seeks to raise the question of the availability of congregate care centers. That question was dealt with in our earlier partial initial decision (22 NRC 410, 422-23). To the extent that this basis concerns the fact that only two centers were activated, it is subsumed under Contention EX 21 as an additional example of the inadequacy of the data gathered in the exercise.

Contention EX 23. Denied.

This contention. alleging as it does that an error in dose data was made and went uncorrected for 2½ hours, does not present, in itself, a "fundamental flaw". It is clear that this is one of the "minor or ad hoc problems occurring on the exercise day" which the Court in UCS v. NRC specifically excepted from proceedings of this sort (733 F.2d 1437, 1448). As to whether this particular misstep, combined with others, could be taken as indicative of a deeper deficiency, that matter will be addressed in dealing with Contention EX 50, basis C, admitted below. Contention EX 23 is rejected.

Contention EX 24. Denied.

This contention is rejected. The failure to test the siren system will be dealt with as an example of an additional omission under Contention EX 15, basis A.

Contention EX 25. Denied.

To the extent that this contention may allege more than a minor ad hoc flaw on the day of the exercise, it will be dealt with under Contention EX 41, basis B, admitted below. It is rejected.

Contention EX 26. Denied.

This contention cites a FEMA Area Requiring Corrective Action (ARCA). That in itself suggests that the matter at hand, a paucity of participating school districts, is not a deficiency per se, for FEMA lists ARCAs and deficiencies separately. To the extent the lack of sufficient school districts in the exercise, in concert with other omissions, may show an inadequate exercise, it will be dealt with under Contention EX 15, bases F and G. Contention EX 26 is rejected.

Contention EX 27. Denied.

The contention cites ARCAs which focus on the lack of health physics training for school bus drivers. In view of the minor and readily correctable nature of the flaw, we do not find it to be fundamental. To the extent it may demonstrate a serious lack of training it will be dealt with under Contention EX 50, basis H.

It is not admitted.

Contention EX 28. Denied.

On the basis of the same reasoning as that for Contention EX 27, this contention will not be separately admitted.

Contention EX 29. Denied.

As with the immediately preceding contentions, this contention cites an ARCA which shows at most a matter cognizable under Contention EX 41, basis B. It is rejected.

Contention EX 30. Denied.

This contention is also rejected. The matter of the bus dispatched to Ridge School, to the extent to which it, taken with other matters, may demonstrate a fundamental flaw, will be examined under Contention EX 15, basis G.

Contention EX 31. Denied.

This contention alleges an inability on LERO's part to monitor people in the required period of time. It will not be separately admitted, but the matter it alleges will be subsumed under Contention EX 49, basis A admitted below.

Contention EX 32. Denied.

As an additional instance of failure to exercise the plan in sufficient depth, this contention will be deemed an additional basis for Contention EX 21, two congregate care centers being alleged to be insufficient data to test the functioning of the total number relied upon. Contention EX 32 is rejected.

Contention EX 33. Denied.

The slight delay in notifying Nassau County and the State of Connecticut which is alleged here does not rise to the importance of a fundamental flaw in the plan. The contention is rejected.

Contention EX 34. Denied.

This contention alleges that the response of route-alerting in the event of siren failure was slow. Route-alerting procedures are mere backup procedures. It is understood that, if they become necessary, they will not be as prompt as sirens in alerting the public. It is clear to the Board that delay in route-alerting cannot be considered a fundamental flaw. The contention is rejected.

Contention EX 35. Denied.

The NRC Staff and Applicant oppose admission on the basis that the alleged flaws in the exercise are not fatal and because (in the case of Applicant) it raises a previously litigated issue (conflict of interest). 21 NRC 644, 686 (1985).

Admission is denied because the contention fails to allege a violation of NRC regulations with sufficient specificity to be litigated. Intervenors' assertion that the failure to make independent assessments by LERO violates OPIP 3.6.1 in the plan does not save this contention, since that provision states only that independent confirmation should be made if time is available. The contention makes no reference to the time that was available in the exercise. Further,

omission of an activity which is required only if time is available cannot on its face be a fundamental flaw even if the matters asserted are true. The thrust of 10 CFR 50 App. E IV.D.3. which is cited as basis is to assure capabilities for prompt notification of government agencies and the public. Nothing in that section supports a contention alleging a failure to make independent calculations of a confirmatory nature. Finally, the section cited in our initial decision dealing with conflict of interest has been vacated on appeal.

Contention EX 36. Admitted.

NRC Staff objects that this contention is redundant with Contention EX 35 and should be rejected for the same reasons. Applicant advises rejection on the basis that the contention does not postulate a fundamental flaw in the plan.

The Board finds that Contention EX 36 is not redundant with Contention 35 and that a fundamental flaw could exist if the alleged facts are proved. This contention asserts performance errors in the conduct of the exercise, while EX 35 asserts a failure of independent action without adequate basis in the regulations. The failure asserted here might have affected the welfare of some 20,000 people. The assertion and bases are sufficient to pursue the matter further and to put LILCO on notice as to what it must defend.

Contention EX 37. Denied.

Staff advised denial on the basis that the contention asserts matters that are beyond the scope of the exercise. Applicant rejects this contention on the basis that a fundamental flaw is not properly asserted, it challenges the exercise scenario, and it lacks basis.

The Board disagrees with both Applicant and Staff on the question of permissibility of challenges to the scope of the exercise. We do not, however, admit this contention separately because it is redundant to others. Instead, we incorporate it into Contention EX 15 wherein Intervenors may present their evidence concerning the ingestion pathway when it addresses its asserted basis numbered 15I which is already admitted.

Contention EX 38. Admitted.

Staff advises that this contention is admissible with various reservations regarding redundancy in the bases. Applicant also has reservations to an otherwise admissible contention in that it objects that bases A and D address Phase I issues and that basis K has been previously litigated. Intervenor commits to presenting evidence only once on any basis for an admitted contention in answer to redundancy objections.

The Board will exercise its authority to manage hearings to the extent required to prevent redundant or cumulative evidentiary presentation. The Board is not persuaded by the Phase I objection at this stage in the proceeding since the errors asserted are based on the

exercise which came years after the original Phase I default and controversy. Nothing arising from the exercise could be known at the time the Phase I sanction was imposed and we conclude that the disciplinary intent of that sanction has already had all the effect we could reasonably expect and that the matter is now closed. The Board agrees with LILCO, however, that the issue specified in basis 38K has already been heard and decided and that it should therefore not be admitted in this proceeding. 22 NRC 410, 422 (1985).

Contention EX 39. Admitted.

The Staff advises admission of this contention with reservations about redundancy in the bases. LILCO objects on the basis that the matters alleged do not constitute a fatal flaw in the plan.

LILCO's objection is not persuasive since the numerous bases asserted might collectively reveal a fundamental flaw in the plan if proved. The ability to deal with rumors or inquiries from the public was thought to be important enough to test by the designers of the exercise and we assumed from that that it is material to a licensing decision. Whether alleged flaws are correctable is precisely the matter that litigation is needed to resolve either by summary disposition or at hearing.

The Board admits the contention but affirms that it will enforce the Intervenors' commitment to presenting evidence only once on a particular factual issue regardless of how many different propositions the Intervenors might attempt to prove using the same factual basis.

Contention EX 40. Admitted.

The NRC Staff recommends acceptance of the contention and bases A, B, and C, subject to reservations concerning possible redundancy with other contentions and to the restriction that contentions must r eal a flaw in the plan as opposed to one of performance of the exercise. Applicant has no objection to basis 40B and 40E but advises rejection of bases A, C and D on the basis of lack of fatal flaw or that the issues asserted have been litigated. The Board agrees with both Staff and Applicant that evacuation shadow issues posed by basis 40D are already litigated and settled and should be excluded. Contention EX 40 however is stated with sufficient basis and specificity to be admitted. The fatal flaw criterion cannot be used to exclude the bases A, B, C and E since they would collectively demonstrate a fundamental flaw in the plan if proved on the record.

Contention EX 41. Admitted.

LILCO objects to bases 41A, C and D and has no objection to bases 41B and E. The NRC Staff objects to bases 41C, D and E but would admit 41A and B with some reservations. The Board agrees with both LILCO and Staff that bases 41C and D assert fundamental flaws in the exercise related to voluntary or shadow evacuation which is a matter already litigated and settled and should on that ground be excluded. We are not persuaded by LILCO's lack of basis argument for rejecting 41A. The paragraph numbered 41A is Intervenors' basis for Contention EX 41 and it puts LILCO on adequate notice of what it must defend. Staff's

prematurity argument for rejection of basis 41E is unconvincing. We see no reason why a LILCO document cannot be cited as basis for a contention simply because it is newly drafted. Such citation differs in no material way from citations of published journal papers or a Staff SER supplement as bases for contentions. We, therefore, admit Contention EX 41 together with bases 41A, B and E.

Contention EX 42. Denied.

LILCO objects to all parts of this contention on the grounds of lack of basis, lack of fundamental flaw, and redundancy of the bases to other contentions. Staff also objects to admission on the ground that each basis exhibits redundancy with some other contention and that many fail to identify a fatal flaw. The Board agrees that the redundancy exhibited in this contention does not permit its separate admission. Each stated basis alleges facts which relate to other admitted contentions. To the extent that new factual evidence would have been presented in this contention and not elsewhere, we expect that Intervenors will have adequate opportunity to present all of their relevant evidence in connection with other admitted contentions on the same subjects. Intervenors' general assertion that the same factual bases may be used to prove different propositions does not save this contention. That principal may not be used to fragment issues or to extend a proceeding. Even if true that LILCO personnel made errors under certain conditions that fact would constitute nothing more than contributing evidence to the test of other contentions dealing with

training (EX 50), information and rumors (EX 38 and 39) or ability to handle road impediments effectively (EX 41). The contention is rejected.

Contention EX 43. Denied.

LILCO objects to the principal numbered contention and bases 43A and 43B. The Staff advises with reservations that 43A may be basis for admission of the contention. It asserts, however, that 43B is an attempt to raise evacuation shadow issues one more time and should be rejected on the basis that that issue is now settled in this case. LILCO further asserts that the factual comparisons recited as part of Contention 43 are inapt for demonstrating that mobilization of bus drivers was untimely.

The Board agrees with LILCO that Intervenors' factual recitation of mobilization times presents no basis for acceptance of the contention since even if true they point to no particular flaw and Intervenors assert none. We also agree that 43B should be excluded from the proceeding because it raises an already litigated issue.

Basis 43A, which the Staff accepts, alleges that EBS messages concerning bus transportation for the public were false and misleading because buses were not available at the times the message was broadcast. The Board however concludes that Contention EX 43 should not be admitted since even if true that EBS messages were out of synchrony with bus availability, such a matter is subject to administrative remedy that is entirely within LILCO's administrative capability to implement and the

Staff's to enforce. Thus, there is no basis for alleging that a fundamental flaw in the plan exists.

Contention EX 44. Denied.

LILCO objects to the contention on the basis that it reopens old issues, is not based on the exercise, and impermissibly challenges the scenario/FEMA review. The Staff advises that consideration of this contention should be deferred pending consideration of the remand issues contained in CLI 86-13.

The factual question raised by this contention is whether or not an evacuation shadow phenomenon will arise in an evacuation as a result of an inability of LILCO to provide clear nonconflicting information to the public. This contention is therefore of a contingent nature. Its resolution is dependent on the outcome of litigation on the information contentions numbered EX 38 and EX 39. An acceptable basis for the contention is traceable to our partial initial decision where the Board found:

> The Board's finding on this contention strongly depends on there being clear nonconflicting notice and instructions to the public at the time of an accident. If for any reason confused or conflicting information was disseminated at the time of an accident the Board accepts that a large excess evacuation on Long Island could materialize. 21 NRC 644, 670 (1985).

Other than a citation to our initial decision, Intervenors provide nothing more in their discussion of Contention EX 44 that would provide an acceptable basis for admission of matters that have been previously litigated. We need not look again at consequences of shadow evacuation

because this was previously litigated and decided and because Intervenors have shown no basis for believing they could learn anything new on this subject from an exercise that did not include a public evacuation.

We find no basis for assertions of Intervenors that we must require LILCO to test its preparedness for a large shadow evacuation or to plan for an ad hoc expansion of the EPZ. Planning to take an ad hoc action seems to us to be an oxymoron. If Intervenors prevail on Contentions EX 38 and EX 39 and the evidence is sufficient to conclude that a large shadow evacuation will occur, Intervenors will be free to claim that this constitutes a fundamental flaw in the plan because the evacuation could not be controlled. We see no value in taking the matter further than that. In view of the fact that the bases submitted with this contention are invalid in all respects save the reference to our initial decision, we conclude that this contention should not be separately admitted. However, there is sufficient basis to link the assertion of Contention EX 44 to those of Contentions EX 38 and EX 39. We therefore consolidate the first full sentence of Contention EX 44 with Contentions EX 38 and EX 39 and deny admissibility of all other parts and bases of Contention EX 44.

We further conclude that the matter can be resolved on the basis of information gained during the exercise and that there is therefore no need to defer consideration as urged by the Staff.

Contention EX 45. Denied.

LILCO objects to this contention in its entirety because in its view it is redundant to 50C, it lacks basis, lacks specificity and does not show fundamental flaws. The Staff also objects on the grounds of redundancy or lack of fatal flaw.

The Board finds (in agreement with LILCO) that the wording of this contention is virtually identical in meaning with Contention EX 50 and one of its bases, 50C. Presumably, in order to prevail on Contention EX 50 that training was inadequate, Intervenors must as a first step show that failures of the type cited in Contention EX 45 actually occurred. They will have adequate opportunity to do this in connection with the litigation of EX 50. The bases cited in EX 45 are therefore consolidated with EX 50.

Contention EX 46. Denied.

The Staff objects to admission on the grounds of mootness since it admits that the Coliseum is no longer relied upon in its plan. LILCO objects on the grounds that the information is not based on the exercise and that it reopens old issues.

This contention is redundant with Contention EX 22 basis A which is admitted. Contention EX 46 will not be separately admitted.

Contention EX 47. Admitted.

LILCO objects to admission on the grounds that it is redundant with EX 15 basis K, shows no fundamental flaw, is not based on the exercise, reopens old issues, challenges the scenario and lacks basis. The Staff

also objects in part on the grounds of redundancy and more importantly in part because the bases rely on LILCO's Revision 7 to the plan which has not yet had the results of a FEMA review. Thus, in Staff's view, Revision 7 is irrelevant to the proceeding.

The Board does not agree that Revision 7 to the LILCO plan is an impermissible basis for a contention simply because the FEMA review has not yet been completed. To the extent that Rev. 7 contains LILCO's proposed remedies for flaws that surfaced during the exercise, it is relevant to the correctability of those flaws.

The Board understands from both the original statement of the contention and Intervenors' reply to objections that the essence of this contention is that LILCO failed to demonstrate matters that should have been demonstrated because of their importance to public health and safety. In this case they have alleged enough basis to conclude that a matter of sufficient importance has been raised to make it reasonable to pursue the matter further.

Contention EX 48. Denied.

This contention alleges failure to provide for contaminated injured individuals. It is rejected since the Commission has previously ruled that this is a matter not to be taken up in emergency planning proceeding except under limited circumstances that are not met here. The Board has previously rejected a late filed contention on the same subject and for the same reasons and we have no cause to reconsider that

action because of events that occurred during the exercise. 50 Fed. Reg. 20892, May 21, 1985. (See also EX 15 basis J supra).

Contention EX 49. Admitted.

This contention alleges that LILCO is incapable of performing necessary registration and radiological monitoring within 12 hours. Staff and Applicant both oppose its admission in part on the grounds that some of its bases involve matters which were then being considered on appeal. Although there is a remand pending involving the question of the total number of people to be monitored, there is a sufficient alternative basis to admit this contention, namely that the time to monitor each person was allegedly shown by the exercise to be far longer than planned for. We also combine the matters alleged under Contention EX 31 with Contention EX 49 and will hear them together as Contention EX 49. The bases for this contention adequately put LILCO on notice as to what it must defend.

Contention EX 50. Admitted.

This contention alleges that numerous flaws that came to light during the exercise demonstrate collectively a fatally inadequate training program. The many bases are redundant to many other contentions. However, we have consolidated other admissible referenced contentions in EX 50 wherever possible. Our initial decision on emergency planning acknowledged that the exercise was to be the vehicle that would confirm the adequacy of LILCO's training program. Indeed, we

were repeatedly told by FEMA witnesses during the planning hearing that FEMA followed a two-stage review process in which the adequacy of the written plan was first reviewed and that adequacy of training would be reviewed later as revealed by personnel performance in an exercise. We are now at that second stage where adequacy of training as revealed by the exercise is ripe for litigation. There can be little question that the plan would be fundamentally flawed if it were proven that a large training program having ample opportunity to train has failed in its mission.

LILCO has correctly pointed out that the issues posed by this contention are diffused by the use of extensive references to other contentions. The Board emphasizes that it will hear evidence only once on each admitted factual matter in dispute regardless of whether it pertains to Contention EX 50 or to some referenced contention that has not been consolidated. The Board will not take evidence on the details of the training program because that has been thoroughly ventilated in previous hearings. The only issues of interest in this proceeding will be whether flaws specified in the bases occurred in the exercise and if so whether they collectively point to a fundamentally deficient training program.

DISCOVERY SCHEDULE

The Commission in instituting the proceeding stated, "the Board is to expedite the hearing to the maximum extent consistent with fairness to the parties." The following schedule was arrived at with the

foregoing in mind along with the positions expressed by the parties during the prehearing conference and in the proposed orders for establishing a discovery schedule submitted October 1, 1986. Particular difficulty in setting the schedule was caused by the limited availability of FEMA personnel. Absent this problem a shorter discovery period would have been set.

The discovery period is to commence as of the service date of this order and is to terminate on December 19, 1986. This period should provide the parties with adequate time to conduct discovery on the issues raised by the admitted contentions and to prepare for hearing on the issues. The schedule will be strictly adhered to. The Board is aware of the possibility of the need for some limited additional discovery in regard to the FEMA review of Revisions 7 and 8 to the LILCO Offsite Plan. That matter is not of sufficient consequence to the proceeding to warrant extending the discovery period and delaying the start of the hearing. With the foregoing discovery period in place, the hearing should commence sometime during the first week of February 1986, with prefiled testimony submitted two weeks prior thereto. Whatever additional discovery time is required pertaining to the FEMA evaluation of Revisions 7 and 8 can be conducted in the period immediately prior to the hearing period or simultaneously with it. The request for such

discovery shall be made within ten days of FEMA providing its findings to the NRC. Responses are due five days thereafter.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
ADMINISTRATIVE LAW JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 3rd day of October, 1986