UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

LILCO'S MOTION TO COMPEL NEW YORK STATE TO RESPOND TO LILCO'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS, AND REQUEST FOR EXPEDITED RESPONSE AND DISPOSITION

In accordance with 10 CFR § 2.740(f), Long Island Lighting Company ("LILCO") moves this Board for an order compelling the State of New York to respond to "LILCO's First Set of Interrogatories and Requests for Production of Documents" served November 3, 1986.

I. INTRODUCTION

On November 3, 1986, LILCO propounded its "First Set of Interrogatories and Requests for Production of Documents" on the State of New York. These nine interrogatories and requests for production, discussed more fully below, seek information concerning New York State's participation in previous FEMA-graded emergency planning exercises for nuclear power plants. Such information is highly relevant to issues raised in the Intervenors' contentions and therefore LILCO's interrogatories and requests are clearly proper under the NRC's Rules of Practice, 10 CFR §§ 2.740, 2.740(b), 2.741.

On November 19, 1986, New York State responded by objecting to each of LILCO's interrogatories and refusing to produce the requested documents. See "State of New York's Response to LILCO's First Set of Interrogatories and Requests for Production of Documents" (November 19, 1986). The State claims that each of the

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interrogatories and requests for production is "overly broad, unduly burdensome, and not relevant." Id. at 2. In the State's view, the information sought is not relevant because "none of the contentions challenge the design of the Shoreham exercise scenario or FEMA's generic processes for review of exercises", and because the Intervenors "do not allege that FEMA's methodology or procedures for design and execution of the Shoreham exercise are any different than those it customarily uses for other exercises." Id. at 2, 3.

As LILCO demonstrates below, however, the requested information is clearly relevant to the subject matter of this proceeding, and the State's refusal to provide it is baseless.

II. DISCUSSION

A. The Quoted Portion of the Board's Prehearing Conference Order Does Not Apply Here

The State of New York relies for its relevancy objection on the following passage from page 7 of the October 3 Prehearing Conference Order:

> 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 10.47 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.

See State of New York's Response at 3.

The cited passage is inapposite here. It goes solely to the nature of the pleading requirement necessary in the Board's view to state an admissible contention. It does not attempt to determine or limit the nature of proof which may be adduced in support of or opposition to a contention once admitted. The Board did not require Intervenors specifically to plead, as part of their contentions concerning the adequacy of the

exercise, that the Shoreham exercise was different in material respects from other exercises whose objectives and scenarios FEMA has found adequate: it simply focused on the consistency of the exercise with the provisions of 10 CFR § 50.47 and Appendix E thereto. However, in reaching this result on pleading requirements the Board was not even faced with, much less did it determine, the very different question of what kinds of comparison of the Shoreham exercise with other offsite exercises would be appropriate in determining the merits of a contention on exercise scope once admitted. That latter issue is the one now before the Board. Thus New York State's citation to the Board's treatment of threshold pleading requirements does not apply at this point.

As is outlined in more detail below, the discovery sought is in fact the most directly relevant evidence available on the sufficiency of the scope of the Shoreham exercise. The reasons are simple. First, the provisions held by the Board to govern, 10 CFR § 50.47 and Appendix E, are neither specific nor self-explanatory on the issue of what constitutes a "full-scale" exercise or in various other respects; therefore, extrinsic sources of interpretation of these provisions must be examined. Second, the most directly applicable body of empirical data in the entire country on this issue consists of the objectives, scenarios, actual sample sizes and other pertinent requirements, and post-exercise assessments of the offsite FEMA-graded exercises for the five operating power plants in New York State. This is what LILCO seeks. This is what the New York State government, which participated in each of these exercises and is uniquely qualified to shed light on them, refuses to provide without this Board's compulsion.

B. The Requested Information Is Relevant

1. The Information Is Relevant to the Standard Set by the Board

The Board held that the sufficiency of the exercise itself could be contested.[1/] It

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1/ Prehearing Conference Order at 6 ("Because the scope of the emergency preparedness exercise and the manner in which it was conducted are material considera-

(footnote continued)

then held that the standard against which the Shoreham exercise should be compared is the "full participation exercise" described in 10 CFR § 50.47, and in App. E. IV.F.1. However, that regulation does not clearly state what a "full participation" exercise is or what it should include. Neither does any other regulation, case, or guidance document.[2/] In the absence of an allegation that FEMA conducted this exercise differently

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tions in the licensing process, they are matters Intervenors may contest".) This holding is the subject of FEMA's pending Motion to Reconsider, in which FEMA argues that the Board should not have admitted contentions such as EX 15 and 16, which challenge long-standing FEMA processes and practices in supervising and conducting radiological emergency preparedenss exercises. See Federal Emergency Management Agency's Motion to Reconsider Atomic Safety and Licensing Board Prehearing Conference Order Dated October 3, 1986 (October 27, 1986). LILCO supports FEMA's motion. See LILCO's Response in Support of FEMA's Motion to Reconsider That Aspect of the Licensing Board's Prehearing Conference Order Permitting Challenges to the Scope of the February 13, 1986 FEMA Graded Exercise (November 10, 1986). While the discovery sought from New York State is required in order to address the averments of Contentions 15 and 16, that discovery would still be necessary even if the Board were to delete those contentions. As is shown below, numerous other contentions allege deficiencies in the scope or intensity of the exercise which can be effectively rebutted only by first-hand information from other exercises.

2/ The regulation requires that

> A full participation 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 . . .
>
> "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, [sic] to verify the capability to respond to the accident scenario.

10 CFR Part 50, App. E. IV.F.1. LILCO is aware of no case, regulation, or other guidance which quantifies or otherwise sheds light such clauses as "as much of the licensee, State and local emergency plans as is reasonably achievable," "major observable

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than it has conducted other exercises, and in the absence of a self-evident or fully interpreted regulation, it becomes necessary to examine practice under it. The most direct sample consists of the wealth of offsite exercise information from the five other operating plants in New York State, which were supervised by the same State government and FEMA regional organization which are in this proceeding. It is thus highly relevant to examine previous FEMA-conducted exercises in which the State of New York has participated. Indeed, information from these other exercises will certainly be a direct, and may be the most probative, way of determining how, in the real world, FEMA and New York State have implemented those aspects of the full-participation exercise regulations which the Board has allowed to come into contest here by admitting the numerous contentions which allege the scope and intensity of the exercise.

Since New York State does not allege that the Shoreham exercise was more limited in scope or intensity than other exercises in which it has participated, but nevertheless contends that it was deficient in those regards, it is essential to learn what FEMA (and the State of New York) has found adequate in other recent New York exercises. LILCO -- and the Board -- needs to know the scope and nature of previous "full participation" exercises within New York State. They are the most logical, perhaps the only, available yardstick by which the scope of the Shoreham exercise can be measured in determining whether it was a "full participation" exercise within the regulations.

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portions," and "in sufficient [n]umbers to verify the capability to respond to the accident scenario." In the past the NRC apparently has relied on FEMA's experience and expertise in conducting exercises of sufficient scope. Therefore, it is impossible to determine if the Shoreham exercise was a "full participation" exercise without comparing it to previous "full participation" exercises which FEMA has conducted at other nuclear plants in New York.

2. The Information Is Relevant to Admitted Contentions

As an intervenor in this proceeding, the State of New York sponsored the exercise contentions filed on August 1, 1986. Several of those contentions admitted by the Board, principally Contentions EX 15-19, and to some degree Contentions EX 20-22 and later contentions, expressly challenge the adequacy of the scope of the February 13 exercise scenario.[3/] But now as previously in this proceeding the State refuses to answer any questions voluntarily about issues which it has sponsored into controversy.[4/] The

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3/ The State asserts that "none of the contentions challenge the design of the Shoreham exercise scenario or FEMA's generic processes for review of exercises." State of New York's Response at 2. That statement is incredible in light of the express language of the contentions. For example, the first sentence in Contentions EX 15 and 16 says that "The scope of the February 13 exercise of the LILCO Plan was so limited that it could not and did not yield valid or meaningful results . . ." Clearly, an assertion that the exercise could not yield valid results is an attack on the design of the exercise scenario. Moreover, Contention EX 21 states that "the samples which FEMA reviewed were much too small to permit valid generalizations or to support FEMA's conclusions. . . . " Since FEMA conducted this exercise no differently from the way it always conducts such exercises (except for the use of government simulators), and presumably used the same sampling methods, Contention EX 21 is nothing but an attack on "FEMA's generic processes for review of exercises."

4/ In the earlier emergency planning proceedings, LILCO filed a motion to compel the State to produce a copy of the New York State Emergency Preparedness Plan. See LILCO's Motion to Compel Expedited Production of the New York State Emergency Preparedness Plan (Feb. 10, 1984). LILCO argued that knowledge of the State Plan was "a unique and irreplaceable component in understanding how the [State] Disaster Preparedness Commission and other New York State agencies involved in radiological emergency response conceive and execute their duties with respect to nuclear plants in New York . . .", and that it would enable LILCO "to understand the criticisms which New York State witnesses may make of the Shoreham Radiological Emergency Response Plan. . . ." Id. at 3. The State opposed production, saying the State Plan was irrelevant, because "how the State of New York performs its emergency functions is insignificant in evaluating the LILCO Plan . . ." See "Memorandum of Governor Mario Cuomo, Representing the State of New York, in Opposition to LILCO's Motion to Compel Expedited Production of Documents by New York State" (February 13, 1984). The Board granted LILCO's Motion to Compel, because the State Plan could "certainly be reasonably expected to lead to information regarding the attitudes and beliefs of authorities relied upon by New York in emergency planning matters . . ." Order Granting LILCO's Motion to Compel Expedited Production of the New York State Emergency Preparedness Plan (February 28, 1984), at 4. The present circumstances are very similar. New York State has sponsored contentions criticizing the scope of the Shoreham exercise and the degree of participation of LILCO and other entities. Yet the State re-

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State cannot have it both ways; that is, the State cannot on the one hand claim that the Shoreham exercise was deficient in scope, and on the other hand refuse to divulge information concerning its own participation in previous radiological emergency preparedness exercises, exercises that the State apparently accepted as "full participation" exercises. Such information is highly relevant, for if a comparison of the Shoreham exercise with those previous New York State exercises shows that the Shoreham exercise was equivalent -- or greater -- in scope or intensity, it would show that the State's position in these contentions is without merit.

Specific review of each interrogatory reveals its relevance. LILCO Interrogatory No. 1 simply asks the State to identify each FEMA-graded exercise in which New York State has participated within the last five years. Interrogatory No. 2 asks the State to identify New York State personnel who have been involved in the development, review, or approval of the scenarios and/or objectives for such FEMA-graded exercises during the past five years. LILCO Interrogatory No. 3 asks the State to provide copies of the scenarios and objectives which were developed, reviewed, or approved by New York State personnel, and the FEMA post-exercise assessment concerning those previous exercises. One need only to assume that New York State officials intended, in these exercises, to develop scenarios and objectives adequate to satisfy FEMA and NRC requirements to see clearly that the information requested in these interrogatories and requests for documents is at least reasonably calculated to lead to information regarding the knowledge, professional judgment, attitudes and beliefs of authorities relied upon by the State of New York for its assertions that the Shoreham exercise was deficient in scope.

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fuses to disclose information concerning its own participation in previous FEMA-graded exercises in New York -- information which is reasonably calculated by LILCO to lead to information regarding the State of New York's views on the necessary elements of a "full participation" exercise.

LILCO Interrogatory No. 4 asks the State to identify, for each FEMA-graded exercise in which it has participated within the last five years, the number of hospitals, schools, nursing homes, and adult homes that participated. This information is directly relevant to Contentions EX 15.D-G and EX 16.F, H, and I.[5/]

LILCO Interrogatory No. 5 asks the State to identify all FEMA-graded exercises, within the last five years, in which New York State personnel have participated in the ingestion pathway portion of the exercise. This information is relevant to Contentions EX 15.I and EX 16.A,[6/] in which Intervenors complain about the Exercise's failure to test LERO's ingestion pathway response procedures.

LILCO's Interrogatory No. 6 asks the State to provide, with regard to each FEMA-graded exercise within the last five years in which New York State has participated, information concerning the number and/or description of certain organizations that participated or elements that were tested, namely (a) buses, ambulances, and ambulettes, (b) reception and congregate care centers, (c) and (d) equipment, personnel and facilities for monitoring and decontamination of evacuees, (e) traffic impediments, (f) traffic posts, and (g) rumor control capabilities. This information is relevant to various subparts of Contentions EX 15, 16, 21, 39, 40, 41, 47, 49, and 50.

LILCO Interrogatory No. 7 asks the State to identify each FEMA-graded exercise during the last five years, in which New York State participated, which included a hypothesized wind shift, and for each, information about the State's response. This information is relevant to Contention EX 36, in which Intervenors criticize LILCO's response to a projected wind shift during the February 13 exercise.

5/ LILCO has argued that the only subparts of Contentions EX 16 that were admitted are EX 16.E, L, and K. See LILCO's Revised Standard Version of the Intervenors' August 1, 1986 Emergency Planning Contentions Relating to the February 13, 1986 Exercise, served November 17, 1986. However, since Intervenors believe that the other subparts of EX 16 were also admitted, LILCO notes them here.

6/ See n.7 above.

LILCO Interrogatory No. 8 asks the State to identify all New York State personnel who have been involved in the development of training programs to train and evaluate New York State radiological emergency response personnel. Interrogatory No. 9 asks the State to identify the sample groups, sample sizes, or sampling criteria used by the personnel identified in Interrogatory No. 8 to evaluate the ability of New York State personnel to respond to a radiological emergency or to evaluate the effectiveness of a training program. This information is obviously relevant to Contention EX 50, in which Intervenors allege fundamental flaws in LILCO's training program.

As demonstrated above, the information sought in LILCO's Interrogatories and Requests for Production of Documents is clearly discoverable under NRC regulations, since the information is directly relevant to the subject matter of this proceeding. See 10 CFR § 2.740 (b)(1). At the very least, the information is reasonably calculated to lead to information regarding the attitudes and beliefs of New York State personnel about "full participation" emergency planning exercises. Therefore, LILCO's interrogatories and requests are proper under the discovery rules, and the State should be ordered to answer them.

C. LILCO's Interrogatories and Requests for Production Are Neither Overly Broad Nor Unduly Burdensome

The State objects to each of LILCO's interrogatories and requests for production as overly broad and unduly burdensome. These objections should be rejected out of hand. All of the requested information is clearly identifiable and all of it should be within the State's possession. As for the State's burdensomeness objection, which the State has nowhere particularized, an earlier Board ruling should be dispositive. In February 1984, when LILCO sought production of the State Plan, the State objected in part because that plan was a voluminous document which did not then exist in a complete form, and the task of bringing the materials together and copying them was

alleged to be time-consuming and burdensome. See Order Granting LILCO's Motion to Compel Expedited Production of the New York State Emergency Preparedness Plan (February 28, 1984), at 3. The Board dismissed that objection outright:

> We sympathize with New York in the difficulty of assembling and copying a Plan which, if aggregated, "would consist of a stack of paper approximately three feet high" and which includes "oversized and cumbersome maps and diagrams." (NY Opposition at 3). Nevertheless, when New York entered into active participation in our proceedings, it assumed all the duties of a litigant, including the duty to comply with reasonable and proper discovery requests. We find that compliance here would not create an undue burden.

Id. at 4.

LILCO's present interrogatories and requests for production of documents are no more burdensome than its earlier request for a copy of the State Plan. The Intervenors in this proceeding have already propounded to LILCO extensive interrogatories, document requests, and requests for admissions, and LILCO has endeavored to answer them in good faith. The State, as a full party in this proceeding, cannot now evade its own responsibility to answer proper and relevant discovery requests propounded by LILCO simply because it would be required to expend some time and resources in doing so.

III. REQUEST FOR EXPEDITED RESPONSE AND DISPOSITION

LILCO filed the pending request for discovery November 3, 1986. New York State took the full time allowed for response and served its response by federal express on November 19. LILCO counsel received New York State's response on November 20. LILCO is serving this motion by telecopier on the affected parties. In order that discovery, if the Boards grants it, may be readily completed before the December 19 cutoff, LILCO requests that the Board require responses to this motion be received by the Board and other affected parties not later than the close of business December 1, and that the Board rule on it as soon thereafter as its schedule permits.

IV. CONCLUSION

For the reasons stated above, LILCO respectfully moves that this Board enter an order on an expedited basis compelling the State of New York to respond fully to LILCO's First Set of Interrogatories and Requests for Production of Documents.

Respectfully submitted,

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DATED: November 24, 1986

LILCO, November 24, 1986

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO's Motion to Compel New York State to Respond to LILCO's First Set of Interrogatories and Requests for Production of Documents, and Request for Expedited Response and Disposition were served this date upon the following by telecopier, as indicated by an asterisk, by Federal Express as indicated by two asterisks, or by first-class mail, postage prepaid.

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