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June 8, 1987

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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'87 JUN 11 P3:09

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING SERVICE  
BRANCH

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

NRC STAFF RESPONSE TO LILCO MOTION  
FOR LEAVE TO REPLY ON "REALISM"

I. INTRODUCTION

On May 22, 1987, Long Island Lighting Company (LILCO) filed a Motion for Leave to File Reply on "Realism" ("Motion") with the Licensing Board. This Motion was accompanied by LILCO's Reply to Intervenor's Answer to Motion for Summary Disposition of the "Legal Authority" Issues and Motion for Referral to the Commission. The Motion asserts good cause exists to permit the Reply, based on the following: (1) LILCO could not have anticipated that Intervenor's would recast the issues as legal ones, rather than specifically addressing the facts asserted in LILCO's Second Renewed Motion for Summary Disposition of the "Legal Authority" Issues (Contentions EP 1-10); (2) Intervenor's Answer (Answer of Suffolk County, the State of New York and the Town of Southampton to "LILCO's Second Renewed Motion for Summary Disposition of the 'Legal Authority' Issues (Contentions EP 1-10)) diffuses and expands the issues rather than narrowing them, warranting identification by LILCO of "the five or so real issues raised by the Answer;" (3) LILCO could not have anticipated Intervenor's challenge to Commission

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regulations and decisions and Federal law; and (4) LILCO could not have anticipated factual inaccuracies in the Answer.

For the reasons set forth below, the Motion should be granted.

## II. DISCUSSION

As noted by the Licensing Board in its Memorandum and Order (Ruling on Staff's Motion of April 8, 1987 to File Reply), dated April 22, 1987, the Commission's Regulations do not permit either the moving party or a party filing a response in support of summary disposition to file a reply. Memorandum and Order, at 1, 3, citing 10 CFR 2.749(a). However, the Board interpreted the Regulations as permitting the Board to allow a reply where there is a compelling reason for doing so. Memorandum and Order, at 4. Although the Licensing Board offered no elaboration as to what might constitute "compelling reasons," such a standard appears to control the decision on the subject Motion. <sup>1/</sup>

As LILCO's Motion suggests, Intervenor's Answer contains extensive legal argument as to the nature of the legal authority issues contained in Contentions EP 1-10 and as to the appropriate scope of litigation of the

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<sup>1/</sup> Title 10 CFR 2.749 provides for summary disposition of issues where there is no genuine issue as to any material fact and the moving party is entitled to a decision as a matter of law. Summary disposition is favored as a means for resolving and narrowing contentions when no genuine issues exist, thus avoiding the cost and delay of unnecessary litigation. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-73-12, 6 AEC 241 (1973), aff'd sub nom. BPI v. Atomic Energy Commission, 502 F. 2d 424 (D. C. Cir. 1974); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980); Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).

"realism" issue under the Commission's remand decision in CLI-86-13. The principal basis offered by LILCO for filing its reply brief is to address various legal arguments contained in Intervenor's Answer.

Given the unusual posture of the "realism" remand aspect of the proceeding, there are compelling reasons for permitting LILCO to file its reply. The instant motion for summary disposition and the Intervenor's Answer raise not only factual questions, but numerous legal questions relating to the nature and scope of the remanded "realism" aspect of this proceeding. Examination of both LILCO's and Intervenor's pleadings shows numerous disagreements regarding what facts are relevant to the remanded proceeding, what issues the Commission intended to be within its scope, the effect to be given official statements by the Governor of New York and the Suffolk County Executive, and the effect to be given New York State court decisions in light of CLI-86-13, to name several. Given the number and complexity of these legal issues, and the impossibility of LILCO anticipating in its original motion all of the arguments proffered by Intervenor, there are compelling reasons to provide LILCO with an opportunity to respond to the legal issues raised in Intervenor's Answer so that the Board will have the legal arguments of the Applicant as well as the Intervenor on what facts are material to the subject summary disposition motion.

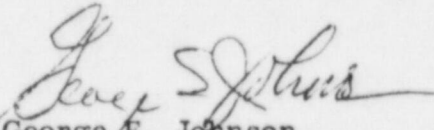
### III. CONCLUSION

Since Intervenor's Answer to the motion for summary disposition raises legal issues which could not have been anticipated and which must



be resolved in deciding the subject motion, there are compelling reasons for permitting LILCO to file a reply to address Intervenors' legal arguments.

Respectfully submitted,

  
George E. Johnson  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 8th day of June, 1987

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LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station,  
Unit 1) )

) Docket No. 50-322-OL-3  
) (Emergency Planning)  
)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO LILCO MOTION FOR LEAVE TO FILE REPLY ON 'REALISM'" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 8th day of June, 1987.

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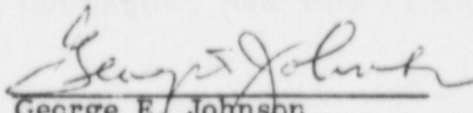
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