NUREG-0750
Vol. 29, No. 1
Pages 1-87

NUCLEAR REGULATORY COMMISSION ISSUANCES

January 1989

U.S. NUCLEAR REGULATORY COMMISSION

NUREG-0750
Vol. 29, No. 1
Pages 1-87

NUCLEAR REGULATORY COMMISSION ISSUANCES

January 1989

U.S. NUCLEAR REGULATORY COMMISSION

Available from

Superintendent of Documents
U.S. Government Printing Office
Post Office Box 37082
Washington, D.C. 20013-7082

A year's subscription consists of 12 softbound issues,
4 indexes, and 2-4 hardbound editions for this publication.

Single copies of this publication
are available from National Technical
Information Service, Springfield, VA 22161

Errors in this publication may be reported to the
Division of Freedom of Information and Publications Services
Office of Administration and Resources Management
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(301/492-8925)

NUREG-0750
Vol. 29, No. 1
Pages 1-87

NUCLEAR REGULATORY COMMISSION ISSUANCES

January 1989

This report includes the issuances received during the specified period from the Commission (CLI), the Atomic Safety and Licensing Appeal Boards (ALAB), the Atomic Safety and Licensing Boards (LBP), the Administrative Law Judge (ALJ), the Directors' Decisions (DD), and the Denials of Petitions for Rulemaking (DPRM).

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or to have any independent legal significance.

U.S. NUCLEAR REGULATORY COMMISSION

Prepared by the
Division of Freedom of Information and Publications Services
Office of Administration and Resources Management
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(301 / 492-8925)

COMMISSIONERS

Lando W. Zech, Jr., Chairman
Thomas M. Roberts
Kenneth M. Carr
Kenneth C. Rogers
James R. Curtiss

Christine N. Kohl, Chairman, Atomic Safety and Licensing Appeal Panel
B. Paul Cotter, Chairman, Atomic Safety and Licensing Board Panel

CONTENTS

Issuances of the Atomic Safety and Licensing Appeal Boards

Issuances of the Atomic Safety and Licensing Boards

Atomic Safety and Licensing Appeal Boards Issuances

ATOMIC SAFETY AND LICENSING APPEAL PANEL

Christine N. Kohl, Chairman
Alan S. Rosenthal
Dr. W. Reed Johnson
Thomas S. Moore
Howard A. Wilber

APPEAL BOARDS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Howard A. Wilber

In the Matter of

Docket Nos. 50-443-OL-1
50-444-OL-1
(Onsite Emergency Planning and Safety Issues)

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, *et al.*
(Seabrook Station, Units 1 and 2)

January 17, 1989

In the absence of an appeal from a Licensing Board's grant of the applicants' motion for summary disposition on an issue relating to the environmental qualification of a particular coaxial cable used principally for data transmission in the Seabrook facility's computer system, LBP-88-31, 28 NRC 652, the Appeal Board conducts a *sua sponte* review of that decision and affirms it.

RULES OF PRACTICE: *SUA SPONTE* REVIEW

It is appeal board practice to review on its own initiative any unappealed licensing board decision that finally disposes of significant safety or environmental issues.

MEMORANDUM AND ORDER

We have before us once again the issue of the environmental qualification of the RG58 coaxial cable used for data transmission in the Seabrook nuclear power facility's computer system and certain other purposes.[1] Following our most recent remand of that issue to the Licensing Board in ALAB-891,[2] the applicants filed a motion for summary disposition of the issue in their favor. In a December 7, 1988 memorandum and order, the Licensing Board granted the motion, which had been supported by the NRC staff but opposed by the New England Coalition on Nuclear Pollution (the intervenor that had raised the issue in the first instance).[3]

Despite its position below, the Coalition has not appealed the December 7 memorandum and order.[4] Accordingly, in conformity with our established practice in such circumstances, we have reviewed it on our initiative. That review has disclosed no error requiring corrective action. Because we are in essential agreement with not only the result but also the reasoning of the Licensing Board's published opinion, a lengthy discussion of the matter is unnecessary and we therefore confine ourselves to these brief observations.

From the outset, the applicants have maintained that the environmental qualification of the *RG58* cable — i.e., its ability to continue to perform its intended function for such period after an accident as might be necessary[5] — was demonstrated by the results of tests performed on *RG59* coaxial cable supplied by the same vendor (the International Telephone and Telegraph Corporation). Although on the prior occasions that this issue was under scrutiny, we determined that the record did not support the thesis that the RG58 and RG59 cables were sufficiently similar to warrant the environmental qualification of the former on the basis of the testing of the latter, the applicants' motion for summary disposition advanced it anew. But the motion went beyond that claim and rested on two additional assertions: (1) the RG58 cable has now undergone testing and has been found environmentally qualified, and (2) despite this development, the

---

[1] We were initially led to understand that the cable would be used solely in the computer system. More recently, however, we were given reason to believe that some of the cable would be put to use outside of that system. *See* ALAB-896, 28 NRC 27, 29 n.2 (1988).

[2] 27 NRC 341 (1988). ALAB-891 details the history of the extended litigation of the issue and that history need not be rehearsed here.

[3] *See* LBP-88-31, 28 NRC 652.

[4] In a January 3, 1989 order (unpublished), we concluded that, because it disposed of the last remaining safety issue before it in this operating license proceeding, the Licensing Board's action was immediately appealable under the test set forth in *Toledo Edison Co.* (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975). Inasmuch as it has not sought reconsideration of that conclusion, we infer that the Coalition made a conscious decision not to pursue the cable matter further.

[5] *See* 10 C.F.R. § 50.49; 10 C.F.R. Part 50, Appendix A, General Design Criterion 4.

applicants have substituted RG59 cable for all of the RG58 cable that, because of its particular location, required environmental qualification.

In granting the summary disposition motion, the Licensing Board relied exclusively on these assertions — i.e., it did not pass upon the applicants' renewal of their insistence that, for present purposes, any differences between the RG59 and RG58 cables are of no moment. We think that course was a wise one. For, in common with the Licensing Board, we are satisfied that the affidavits and analyses offered in support of the motion sufficiently demonstrate *both* the environmental qualification of the RG58 cable on the basis of the testing of that cable and the substitution of RG59 cable to the extent relevant here. Yet it would have sufficed had the applicants established either one of those factors.

The fact that RG59 cable has now replaced the RG58 cable does, however, give rise to a possible concern. The record discloses that, in the event of an accident, the substituted RG59 cable will not perform a safety-related (i.e., accident-mitigation) function. Rather, its sole responsibility will be to remain intact to the extent necessary to ensure that it will not impede the performance of other components that are involved in accident mitigation.[6] The record additionally reveals that a color-coding system is to be employed to provide a ready differentiation between cable that has a safety-related function and cable that does not.[7] This being so, we expected to find some indication in the papers accompanying the summary disposition motion that the substituted RG59 cable has a color tracing in its jacket that reflects that it does not possess a safety-related function. Our search for that indication, however, has proved unavailing.

This consideration does not affect our ability to affirm the result below. For that purpose, it is enough that the environmental qualification of the RG59 cable — i.e., its ability (when substituted for the RG58 cable) to avoid impeding the performance of components with accident-mitigation functions — is not in question. Rather, we have noted the uncertainty with respect to observance of the color-coding scheme only because we have been given reason to believe that the scheme has practical significance in the operation and maintenance of the facility.[8] Accordingly, the staff should ensure that it has in fact been observed with respect to the substituted RG59 cable.

---

[6] *See* Memorandum in Support of Applicants' Motion for Summary Disposition of NECNP Contention I.B.2 (RG-58 Coaxial Cable) (September 9, 1988), Affidavit of Richard Bergeron (hereinafter, "Bergeron Affidavit"). In ALAB-891, we noted that, as it then existed, the record did not adequately demonstrate that fact with regard to the *RG58* cable. 27 NRC at 349-51.

[7] *See* Bergeron Affidavit at 2-3. As the affidavit reflects, the Final Safety Analysis Report (FSAR) for the Seabrook facility commits the applicants to use the color-coding system.

[8] *See* p. 8.3-53 of the FSAR excerpt that was one of the attachments to the Bergeron Affidavit.

The Licensing Board's December 7, 1988 memorandum and order, LBP-88-31, 28 NRC 652, is *affirmed*.

It is so ORDERED.

FOR THE APPEAL BOARD

Eleanor E. Hagins
Secretary to the
Appeal Board

Atomic Safety and Licensing Boards Issuances

LICENSING BOARDS

ATOMIC SAFETY AND LICENSING BOARD PANEL

B. Paul Cotter, **Chairman*
Robert M. Lazo, **Vice Chairman (Executive)*
Frederick J. Shon, **Vice Chairman (Technical)*

Members

Dr. George C. Anderson
Charles Bechhoefer*
Peter B. Bloch*
Glenn O. Bright*
Dr. A. Dixon Callihan
James H. Carpenter*
Hugh K. Clark
Dr. Richard F. Cole*
Dr. George A. Ferguson
Dr. Harry Foreman
Richard F. Foster
John H Frye III*
James P. Gleason
Dr. Cadet H. Hand, Jr.
Jerry Harbour*
Dr. David L. Hetrick
Ernest E. Hill
Dr. Frank F. Hooper
Helen F. Hoyt*
Elizabeth B. Johnson
Dr. Walter H. Jordan
Dr. Michael A. Kirk-Duggan
Jerry R. Kline*
Dr. James C. Lamb III
Gustave A. Linenberger*
Dr. Linda W. Little
Dr. Emmeth A. Luebke
Dr. Kenneth A. McCollom
Morton B. Margulies*
Gary L. Milhollin
Marshall E. Miller
Dr. Oscar H. Paris*
Dr. David R. Schink
Ivan W. Smith*
Dr. Martin J. Steindler
Seymour Wenner
Sheldon J. Wolfe*

**Permanent panel members*

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

John H Frye, III, Chairman
Dr. Oscar H. Paris
Frederick J. Shon

In the Matter of

Docket No. 50-322-OL-5R
(ASLBP No. 89-581-01-OL-5R)
(EP Exercise)

LONG ISLAND LIGHTING
COMPANY
(Shoreham Nuclear Power Station,
Unit 1)

January 3, 1989

Applying the standards set out in this proceeding in ALAB 903, 28 NRC 499 (1988), the Licensing Board accepts for litigation portions of five (out of a total of twenty) contentions advanced with respect to the 1988 exercise of the Applicant's offsite emergency plan for the Shoreham Station which adequately allege a failure in an essential plan element requiring significant plan revisions to correct. The Licensing Board denies contentions that allege facts that do not materially differ from those found not to constitute a fundamental flaw in the litigation of the 1986 exercise and admits those alleging facts that do not materially differ from those found to constitute a fundamental flaw in the earlier litigation.

RULES OF PRACTICE: CERTIFICATION OF RULING

Because litigation of offsite emergency plan exercises must be completed in 2 years following the exercise, an appellate decision that follows an initial

decision and reverses the denial of a contention would leave little if any time to hear and decide that contention. Therefore, the Licensing Board concludes that deferring appeals of its rulings on contentions could affect the proceeding in a pervasive or unusual manner and certifies those rulings to the Appeal Board.

EMERGENCY PLANS: EXERCISES (PARTICIPATION IN)

Footnote 4 to 10 C.F.R. Part 50, Appendix E, ¶ IV.F.1 defines the scope of the "full-participation exercise" that is required prior to full-power operation of a reactor as one in which "appropriate offsite local and State authorities and licensee personnel" participate. It does not require the participation of organizations such as the American National Red Cross, the U.S. Departments of Commerce and Agriculture, the Federal Aviation Administration, and the Long Island Rail Road.

RULES OF PRACTICE: CONSOLIDATION OF CONTENTIONS

It is inappropriate to consolidate an otherwise inadmissible contention with one that is admissible if to do so would require an applicant to mount a defense that is substantially different or expanded from that which is required by the admitted contention.

MEMORANDUM AND ORDER
(Ruling on Contentions)

INTRODUCTION

Following an exercise of the LILCO emergency plan for the Shoreham Station held in February 1986, the Commission directed that a licensing board be appointed to hear any acceptable contentions that Intervenors might put forward alleging that fundamental flaws had been demonstrated.[1] Subsequently, Intervenors put forward acceptable contentions which alleged that the scope of the exercise failed to comply with the Commission's regulations and that the results of the exercise demonstrated fundamental flaws. In two Initial Decisions, this Board upheld Intervenors' position in part.[2]

---

[1] CLI-86-11, 23 NRC 577 (1986).

[2] LBP-87-32, 26 NRC 479 (1987), *aff'd*, ALAB-900, 28 NRC 275 (1988), *review declined*, CLI-88-11, 28 NRC 603 (1988); and LBP-88-2, 27 NRC 85 (1988), *modified in part*, ALAB-903, 28 NRC 499 (1988), *appeal pending in part*. In a third ruling, LBP-88-7, 27 NRC 289 (1988), this Board determined that its jurisdiction ended when it decided all of the issues in controversy before it related to the 1986 exercise. In ALAB-901, 28 NRC 302 *(Continued)*

LILCO requested a second exercise which was held on June 7, 8, and 9, 1988. In unpublished Memoranda and Orders of September 22 and October 12, 1988, we set a schedule for the filing of contentions and responses. ALAB-903, which modified the definition of fundamental flaw that we had adopted in LBP-88-2, was issued shortly before the Intervenors' reply to LILCO's and Staff's objections were due. Relying on ALAB-903, LILCO filed a motion to dismiss Contentions 4 through 20 on November 21. Intervenors opposed this on December 1, and Staff supported it on December 6.[3] Then, on November 29, Intervenors filed a motion seeking permission to amend their contentions in light of ALAB-903. At a conference of counsel held on December 6, Intervenors' motion to amend was granted.[4] LILCO's motion to dismiss was denied with the understanding that the arguments set forth in it, and in Intervenors' and Staff's responses would be considered in the context of the amended contentions.[5]

On December 1, 1988, the Commission issued CLI-88-9, 28 NRC 567, which, among other things, sets an expedited schedule for this proceeding, eliminates formal discovery, and places the burden of going forward with the evidence on Intervenors. At the conference of counsel, Intervenors raised and considerable discussion was devoted to the schedule set by the Commission and discovery. Subsequent to the conference, on December 9, Intervenors filed a motion with the Commission seeking reconsideration of CLI-88-9. Consequently, pending a Commission ruling we will not further consider Intervenors' concerns on these points.

At the conference of counsel, we raised with the parties the problem posed by LILCO's response which, as will be seen from the discussion of the individual contentions, often raises factual arguments against the admission of a particular basis for a contention. Considerable discussion was devoted to this topic which illustrates the problem well.[6] In the course of that discussion, we indicated to the parties that it had been our intention, following the example of Rule 12(b)(6), Federal Rules of Civil Procedure, to treat LILCO's opposition as a motion for summary disposition, permit LILCO to supplement its opposition, and afford Intervenors the opportunity to demonstrate that LILCO's factual arguments are either incorrect or at least subject to dispute. In this way it would have been

---

(1988), the Appeal Board remanded the litigation of the results of the 1988 exercise to this Board, noting that the conclusion reached in LBP-88-7 was incorrect. 28 NRC at 308 n.6.

[3] Staff's paper was served on the Board and the parties at the conference of counsel held on December 6. The parties were afforded an opportunity to review it over the lunch break and responded during the afternoon session of the conference. Tr. 86-87.

[4] All references to the contentions in this Memorandum and Order are to the amended contentions.

[5] Tr. 60, 62. On December 27, LILCO also filed a letter with us drawing our attention to the December 15 Memorandum and Order ruling on contentions issued in the ongoing *Seabrook* exercise litigation and asserting that it is relevant precedent for our disposition of the *Shoreham* contentions. This filing was not authorized and has not been considered.

[6] Tr. 63-86. *See also* Intervenors' Reply at 17-23.

possible in the process of ruling on contentions to avoid the necessity of making precise, and ultimately useless, factual distinctions, find those facts that are not subject to genuine disputes, and set down those that are for hearing. However, because CLI-88-9 eliminated summary disposition motions, we are bound by CLI-86-11, *supra*, 23 NRC at 581, and ALAB-903, *supra*, 28 NRC at 506, to accept for litigation all those contentions that establish a sufficient foundation for further inquiry by setting out bases with reasonable specificity alleging facts that could amount to a fundamental flaw. In applying this standard, we have sought to avoid accepting bases that are fairly characterized by the example of an unacceptable basis given by LILCO's counsel: "The moon is made of balsawood."[7] However, very few bases fall into that category, and very seldom are the facts so clear as to permit us to safely rely on them.

In its opposition to the contentions, Staff takes the position that, at least to the extent they are based on Intervenors' observations of the exercise as opposed to the FEMA Report, the contentions are late filed and should be dismissed for failure to address the factors set out in 10 C.F.R. §2.714(a)(1). Intervenors oppose this position.[8] We are in general agreement with Intervenors. Staff does not dispute the materiality of the FEMA Report to this proceeding and the formulation of contentions. Indeed, in view of the fact that FEMA's findings constitute a rebuttable presumption,[9] and in view of the holding in *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), that a hearing must be afforded on issues of material fact, the contrary position is not arguable. Whatever Intervenors may have observed or learned prior to the issuance of the FEMA Report, the fact remains that, given that FEMA has issued findings favorable to LILCO, they must refute those findings if they are to be successful. No useful purpose would be served by requiring that contentions be filed in advance of the FEMA Report, and nothing in the history of this proceeding suggests that the Commission intended that some earlier deadline should apply. Staff's position is rejected.

In this Memorandum and Order, we address complex and, to some extent, novel issues[10] concerning the proper scope of litigation of the results of a second exercise of a utility's offsite emergency plan. Moreover, the litigation of this exercise must be resolved within 2 years (i.e., June 1990) if the exercise is to qualify as the prelicensing full-participation exercise required by 10 C.F.R. Part 50, Appendix E, ¶ IV.F.1. This situation prompted the Commission to change

---

[7] Tr. 64.

[8] *See* Staff's Response to the Contentions at 6-11, Response to LILCO's Motion to Dismiss at 4-5; Intervenors' Reply to LILCO's and Staff's Objections at 23-30.

[9] 10 C.F.R. § 50.47(a)(2); CLI-88-9, *supra*, 28 NRC at 571; ALAB-903, *supra*, 28 NRC at 507.

[10] For example, ALAB-903, which defines the critical concept, "fundamental flaw," was issued less than 2 months ago.

the procedures that normally apply in order to reduce the time necessary to complete the proceeding.[11]

The Rules of Practice provide that appeals from rulings such as those made herein must normally await the conclusion of the hearing and the issuance of an initial decision.[12] The *Shoreham* Appeal Board has pointed out that rulings of a licensing board that merely admit or deny contentions in the context of an ongoing proceeding rarely provide reason for an exception to that rule.[13]

We believe that the circumstances of this proceeding dictate a different conclusion. Here, should an appeal following an initial decision result in a ruling that we have improperly excluded a contention or contentions, little if any time would be left in which to hear those contentions.[14] Thus we conclude that deferring appellate review of our rulings, as called for by the Rules of Practice, could affect this proceeding in a pervasive or unusual manner by possibly preventing, CLI-88-9 notwithstanding, the completion of the proceeding in the time allotted. Accordingly, pursuant to 10 C.F.R. § 2.718(i) and (m), we certify our rulings herein to the Atomic Safety and Licensing Appeal Board.

CONTENTIONS 1-3: THE SCOPE OF THE EXERCISE, THE ASSUMPTIONS UNDERLYING IT, AND FEMA'S EVALUATION WERE DEFICIENT

Contention 1: Scope of the Exercise

This contention alleges that the exercise did not comply with 10 C.F.R. §§ 50.47(a)(1), (b)(14), and Part 50, Appendix E, ¶ IV.F "in that critical elements of preparedness were omitted from or insufficiently tested during the exercise." It is supported by the following bases:

Basis A asserts that the public notification system was insufficiently tested because there was no adequate testing or evaluation of the siren system, no test broadcast of an EBS message, and the test of the EBS radio network did not involve the lead station and did involve a station that had withdrawn prior to the exercise. The Appeal Board in this proceeding has held that the public alert and notification system is a major element of emergency planning and has pointed

---

[11] CLI-88-9, *supra*.

[12] *See* 10 C.F.R. § 2.714a. Of course, under the terms of this section, LILCO may appeal our order by asserting that all of the contentions should have been denied.

[13] ALAB-861, 25 NRC 12[illegible]4-35 (1985), *quoting Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986).

[14] Given the protracted nature of this litigation and the fact that this is the second prelicensing exercise hearing, it may also by appropriate to review our rulings admitting contentions. *Cf. Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 25-27 (1987).

out that Appendix E, ¶ IV.F., makes it clear that this system is to be tested in the exercise.[15]

In its response, LILCO cites the FEMA Report at 44 for the proposition that LERO met the objective of demonstrating the ability to sound the sirens in a timely manner and in connection with the dissemination of emergency information. LILCO asserts that the participating EBS station, WPLR, was according to the FEMA Report at 44, prepared and equipped to carry out the broadcast and did conduct a test broadcast within the station. LILCO notes that political opposition led to WPLR's decision not to conduct a public broadcast. Finally, LILCO notes that at the time of the exercise, WPLR was the lead station for Shoreham, and its subsequent replacement by WCBS does not invalidate this portion of the exercise, and that its decision to rely on the realism principle in order to utilize WCBS and the Nassau-Suffolk Operational Area EBS was approved in LBP-88-24, 28 NRC 311, 331 (1988). Intervenors counter that to accept LILCO's assertions in opposition to basis A would be to impermissibly decide the merits of the contention without an evidentiary record.[16] Intervenors are correct. We may not consider the merits of this basis at this time.

Basis B asserts that LILCO's plan for school preparedness was not sufficiently tested because only one school district participated and then only to a limited extent. LILCO points to ALAB-900, *supra*, 28 NRC at 297, for the proposition that it should attempt to obtain the participation of a sufficient number of schools and, if the schools decline, establish that fact under 10 C.F.R. § 50.47(c)(1) and Appendix E, ¶ IV.F.6.[17] LILCO has documented the schools' refusal to participate, in its Attachment 2.

Intervenors take issue with LILCO's position that public school districts are government entities, assert that in any event there are a number of private schools that did not participate, and that, in opposing the basis, it is improper for LILCO to seek to prove the participation issue through Attachment 2. They also assert that LILCO has made no showing that satisfies the criteria of § 50.47(c)(1) on this issue.[18]

Again, we find that LILCO's response goes to the merits of this basis and is thus inappropriate for consideration at this juncture. The questions concerning

---

[15] *See* ALAB-900, *supra*, 28 NRC at 294.

[16] *See* LILCO's November 3 Response at 9-11; Intervenors' November 15 Reply at 41-45. Staff does not object to this basis beyond noting that the adequacy of the EBS system was determined in LBP-88-24, *supra*, thus precluding relitigation of that issue here. *See* Staff's Response of November 8, 1988, at 24. Intervenors assure us that they do not seek to relitigate that issue but to raise the question whether what was tested was in the plan. *See* Intervenors' Reply at 42 n.33.

[17] ALAB-900 also noted that the potential evacuation of schools within the EPZ is a major element of the offsite plan, and thus a sufficient number of school personnel must participate in the exercise in order to assess their response capability. *See* 28 NRC at 297.

[18] *See* LILCO's Response at 11; Intervenors' Reply at 45-48. Staff does not oppose this basis. *See* Staff's Response at 24.

the status of the school districts as governmental entities and the exact nature of their refusal to participate may well raise factual issues that should be aired in an evidentiary setting. In this regard, the parties should be guided by our discussion of bases J and N, *infra*.

Basis C alleges that the provisions of LILCO's plan for schools located outside of the EPZ were not exercised. Although it solicited participation by these schools, LILCO takes the position that these provisions do not constitute a major observable portion of the plan, citing the FEMA Report and FEMA Guidance Memorandum EX-3. Staff opposes on the ground that 10 C.F.R. § 50.47(b)(10) does not require LILCO to develop protective actions outside of the plume exposure EPZ. Intervenors assert that LILCO and Staff are improperly opposing this basis by arguing its merits and have taken issue with those arguments.[19] With regard to Staff's position, Intervenors believe that the fact that many of the schoolchildren reside within the EPZ and could be released back into it brings these schools within the purview of § 50.47(b)(10), despite the fact that that provision is clearly limited to protective actions within the EPZ. They believe that it is clearly wrong to argue that this situation is outside the scope of the regulations, especially given the existence of provisions within the LILCO plan covering it. They also believe that this situation presents a kind of access control problem covered by EOC Objective 20.[20]

Clearly, this situation is within the spirit but not the literal scope of the regulation. It should be, and has been, covered by a plan provision. But that does not make it a major observable portion of the plan which must be tested. We do not believe that LILCO may be fairly penalized for not including matters in the exercise which, although covered in the plan, lie outside the literal scope of the regulation's requirements.[21]

Basis D alleges that although the LILCO plan calls for EPZ schoolchildren to be evacuated, if necessary, to the Nassau County Coliseum and the Nassau County Community College, and although such an evacuation was called for in the exercise, these relocation facilities were not activated, staffed, tested, or evaluated. LILCO opposes this basis on the grounds that first, these facilities do not constitute a major observable portion of the plan; and second, that their refusal to participate has been documented. Staff opposes for the same reason

---

[19] *See* LILCO's Response at 12; Staff's Response at 25; Intervenors' Reply at 49-51.

[20] *See* FEMA Report at 13.

[21] Moreover, in ALAB-900 the Appeal Board held that the FEMA Objectives set forth in "Procedural Policy on Radiological Emergency Preparedness Plan Reviews, Exercise Observations and Evaluations, and Interim Findings" (August 5, 1983) "can provide an appropriate measure for determining whether an exercise meets the regulation's 'major observable portions of the plans' criterion for full participation." *See* 28 NRC at 291. Objective 19 set forth in that document covers school evacuation and does not include this situation. That objective was modified in FEMA GM EX-3, "Managing Pre-Exercise Activities and Post-Exercise Meetings," February 26, 1988, on which LILCO relies. Modified Objective 19 was used in this exercise (*see* FEMA Report at 10-11, 13). While it is less clear, we do not believe that it should be interpreted in such a way as to require demonstration of matters that are outside the literal terms of the applicable regulation.

advanced against basis C. Intervenors again assert that LILCO improperly argues the merits in opposing this contention, take issue with those arguments, and point out that Staff's objection is not relevant because reception facilities should be outside the 10-mile EPZ.[22]

We agree with Intervenors that Staff's objection is not relevant. However, LILCO is correct in its position that school relocation facilities by themselves do not constitute a major observable portion of the plan. The FEMA Objectives do not specifically include testing of relocation facilities.

Nonetheless, Intervenors correctly point out that FEMA evaluated school relocation centers under Objective 19: "Demonstrate the ability and resources necessary to implement appropriate protective actions for school children within the plume EPZ."[23] Intervenors also assert that this basis should not be considered in a vacuum, but should be viewed as a part of their overall challenge to the scope of the exercise of school plans. We agree that this matter can be appropriately considered in that context. We also agree that LILCO's other objections raise merit considerations which may not be properly considered now.

Basis E alleges that there was an inadequate test of LERO's ability to provide buses for and manage an evacuation of the EPZ schools. While Staff does not object, LILCO objects that this basis is "so lacking in specificity and clarity as to make it impossible to understand what Intervenors are alleging," and disagrees with the accuracy of some of the factual allegations of the contention. In reply, Intervenors assert that the basis is both specific and clear, and that LILCO once again improperly argues the merits.[24]

We agree with Intervenors that this basis should be considered as part of their contention that school plans were not adequately tested. We interpret it as raising issues under that portion of footnote 4 to Appendix E, ¶ IV.F.1 which states that: "personnel and other resources [shall be tested] in sufficient numbers to verify the capability to respond to the accident scenario." We also agree that LILCO's reliance on the FEMA Report improperly invites us to consider the merits.

Basis F asserts that there was no participation by special facilities and that there was no meaningful interaction between LILCO and the ambulance companies, and between the latter and the evacuated or relocation special facilities. LILCO responds that every special facility identified in the plan was contacted and asked to participate. Those that agreed apparently were contacted during the exercise. With regard to the allegation that insufficient resources (ambulances and ambulettes) were employed to provide meaningful results, LILCO asserts that to have involved a greater number would have impinged on the ban against mandatory public participation by depriving Suffolk Countians

---

[22] *See* LILCO's Response at 12; Staff's Response at 25; Intervenors' Reply at 51-53.

[23] *See* FEMA Report at 13, 113.

[24] *See* Staff's Response at 24; LILCO's Response at 13-14; Intervenors' Reply at 54-58.

of their services. LILCO also asserts that the FEMA Report indicates that the ability to manage an evacuation was demonstrated. Staff does not object to this basis to the extent that it alleges that the evacuation of special facilities was not adequately tested. Staff does object to Intervenors' allegation that there was no "meaningful interaction" on the ground that it is overly vague, an objection that LILCO also raises.

Intervenors again make the point that LILCO is improperly arguing the merits of the basis, not whether it is acceptable. They also assert that the "meaningful interaction" allegation is specific enough to assert that there was insufficient interaction to test response capabilities and that it is not possible to be more specific without discovery.[25] We agree with Intervenors that this basis is acceptable.

Basis G asserts that there was an inadequate test of LERO's ability to evacuate the homebound disabled. LILCO focusses on Intervenors' assertion that an actual individual should have been transported and points to the ban on public participation. Staff also makes this point. Further, LILCO quarrels with the Intervenors' assertion that the testing of only two ambulances was inadequate for the same reasons as those given in connection with Basis F. Intervenors note that neither LILCO nor Staff objects to the thrust of this basis — that there was an inadequate test of the ability to evacuate the homebound disabled. Further, they clarify that they did not intend, by asserting that an individual should have been transported, that a disabled person should have participated. Rather, their intent was that such a person should have been "simulated."[26] We agree that this basis is admissible.

Basis H alleges that during the exercise there was no designation, as called for by the plan, of hospitals, nursing homes, and similar facilities outside the EPZ to provide relocation services and health care. LILCO objects that this basis fails to allege that a major observable portion of the plan was not tested. Staff asserts that there is no requirement to plan for such facilities outside the EPZ and that this basis raises a planning, not an exercise, issue. Intervenors take issue with the assertion that this basis does not involve a major observable portion of the plan. They point out that it is necessary to plan for these facilities outside the EPZ and that this basis must be considered together with bases F and G. Together, these assert that part of the plan relating to special-facility and homebound individuals was not tested.[27]

The evacuation of mobility-impaired individuals is covered by FEMA Objective 18. Consequently, we agree with Intervenors that this basis should be

---

[25] *See* LILCO's Response at 14-15; Staff's Response at 24; Intervenors' Reply at 58-60.
[26] *See* LILCO's Response at 16; Staff's Response at 24; Intervenors' Reply at 60-61.
[27] *See* LILCO's Response at 16; Staff's Response at 25; Intervenors' Reply at 61-63.

considered together with bases F and G. As Intervenors point out, these individuals must be evacuated to a specific place.

Basis I alleges that the test of LERO's ability to transport and care for contaminated injured individuals was too limited. LILCO argues that this basis lacks specificity, would require mandatory public participation for the reasons given in response to Basis F (in that it quarrels with the number of ambulances that participated), and is contrary to the facts set out in the FEMA Report. Staff does not object to the extent that the basis asserts that there was an inadequate test of LILCO's ability to transport and care for contaminated injured individuals. Intervenors reply that the basis is specific and clear, and that LILCO is once again improperly arguing the merits.[28] We agree with Intervenors that this basis is admissible.

Basis J points out that there was no activation or testing of procedures and communications with regard to the congregate care centers run by the Red Cross. LILCO maintains that this basis is inadmissible because the failure to test the congregate care centers resulted from the Red Cross' refusal to participate, bringing into play the provisions of Appendix E, ¶ IV.F.6. Similarly, Staff asserts that the Red Cross' refusal to participate does not dictate the conclusion that the exercise failed to meet the full-participation requirements.

Intervenors point to FEMA Exercise Objective 22 and assert that clearly, the congregate care centers constitute a major observable portion of the plan. They also maintain that the arguments based on the Red Cross' refusal to participate improperly seek a determination on the merits.[29]

The subject matter of this basis appears to be covered by FEMA Objective 28: "Demonstrate adequacy of facilities for mass care of evacuees." Thus a major observable portion of the plan is involved. We believe that the Red Cross' refusal to participate presents a legal issue appropriate for resolution at this time. As Intervenors point out, the Red Cross clearly is not a state or local government provided for in § 50.47(c) and Appendix E, ¶ IV.F.6. Thus its refusal does not excuse its participation under those provisions. However, neither is the Red Cross "State, local, and licensee personnel and other resources" which, under footnote 4 to ¶ IV.F.1, must participate in sufficient numbers to verify response capability. As the Commission noted in CLI-87-5, 25 NRC 884 (1987), *reconsideration denied*, CLI-88-3, 28 NRC 1 (1988), the Red Cross does not furnish assistance under an agreement with LILCO, but rather honors the obligation imposed by its federal charter to provide assistance. Apparently the obligation imposed by its charter does not require the Red Cross to participate

[28] *See* LILCO's Response at 16-17; Staff's Response at 24; Intervenors' Reply at 63-64.
[29] *See* LILCO's Response at 17; Staff's Response at 25-26; Intervenors' Reply at 65-66.

in exercises.[30] Under these circumstances, we do not believe that LILCO may be faulted for a refusal to participate over which it has no control. The regulation clearly does not require participation by the Red Cross, and the fact that a major observable portion of the plan was omitted as a result does not dictate the conclusion that the exercise was less than "full participation."

Basis K alleges that procedures for public education and the dissemination of public information were not tested, nor was the adequacy of the public education materials demonstrated. LILCO cites LBP-87-32, 26 NRC 479, 491 n.13 (1988), for the proposition that the public information and education materials do not need to be tested in the exercise. Staff asserts that this is a planning issue. Intervenors correctly point out that the cited portion of LBP-87-32 did not set forth the proposition asserted by LILCO, but rather that actions taken by Suffolk County had prevented any test of these materials. They go on to argue that that ruling did not hold that the contention should not have been admitted, and indicate that they wish to proffer evidence that these materials constitute a major observable portion of the plan. Finally, they assert that there is no basis for the Staff's planning issue argument.[31]

Public information materials of this sort do not constitute a major observable portion of the emergency plan for purposes of an exercise. While 10 C.F.R. § 50.47(b)(7) provides for them, that provision contemplates that these materials are to be distributed periodically, not in connection with a specific emergency. They do not constitute the type of function that can be effectively tested in an exercise and are not covered by a FEMA Exercise Objective.

Basis L alleges that procedures related to the monitoring and decontamination of special-facility evacuees were not tested. LILCO counters that these procedures are not a major observable portion of the plan, relying on FEMA Objective 21 and LBP-87-32, 26 NRC at 501, and that even so, they were in fact tested. Staff points out that the exercise did test the ability to monitor and decontaminate emergency workers, and that Intervenors have put forward no reason why any additional demonstration was needed. Intervenors reply that the question whether these procedures constitute a major observable portion of the plan, and the question whether they were tested, is one of fact which they will contest.[32]

LILCO is correct that LBP-87-32 held that there was "no reason to reject LILCO's position that the monitoring and decontamination of special-facility populations requires no showing in addition to that made for the general

---

[30] An April 27, 1988 letter from Douglas M. Crocker, Manager of Nuclear Emergency Preparedness for LILCO, to the Executive Director of the Nassau Chapter of the Red Cross alludes to the Red Cross' position that it only responds to state requests for its participation in exercises. *See* Attachment 5 to LILCO's Response to the Contentions.

[31] *See* LILCO's Response at 17-18; Staff's Response at 25; Intervenors' Reply at 66-69.

[32] *See* LILCO's Response at 18; Staff's Response at 26; Intervenors' Reply at 69-70.

population." Intervenors argued this point in connection with the 1986 exercise and lost. There is no reason why they should be permitted to argue it once again.[33]

Basis M alleges that the Long Island Rail Road, the Federal Aviation Administration, the U.S. Department of Agriculture, and the U.S. Department of Commerce, although relied on by the plan, did not participate in the exercise. LILCO asserts that this does not amount to a major observable portion of the plan and that, in any event, its ability to contact outside agencies and request assistance was demonstrated. Staff states that there is no regulatory requirement that federal agencies participate in the exercise and that Intervenors have offered no reason to believe that the functions of the railroad under the plan constitute a major observable portion of the plan. Intervenors assert that these objections raise a factual question, that the basis somehow raises the question of LILCO's ability to communicate with these entities, and that the lack of a regulatory requirement calling for their participation is irrelevant to the question of the requirements of Appendix E, ¶ IV.F.1.[34]

We find that this basis is governed by the same rationale governing basis J concerning participation by the Red Cross. None of the organizations that Intervenors assert should have participated are within the category of personnel or other resources of the state, local government, or licensee set out in footnote 4 to Appendix E, ¶ IV.F.1. Thus there is no regulatory requirement that they participate in the exercise.

Basis N alleges that the exercise improperly failed to test the implementation of ingestion pathway protective actions in Connecticut. LILCO and Staff assert that this failure is not contrary to the requirements of Appendix E, ¶ IV.F.6, because Connecticut refused to participate. Intervenors assert that this objection raises a question of fact which may not properly be addressed in the contention admission process.[35]

Appendix E, ¶ IV.F.6, specifically excuses the participation of state and local governments that LILCO identifies "as refusing to participate further in emergency planning activities, pursuant to 10 C.F.R. 50.47(c)(1)." LILCO has furnished a letter from Connecticut indicating that it would not participate in the 1988 exercise absent coordination with other state and local governments.[36] It is beyond question that the other state and local governments that are affected have steadfastly asserted that they will never participate in emergency planning

---

[33] Intervenors rely on ALAB-900, *supra*, 28 NRC at 299-300, for the proposition that monitoring and decontamination should be included in the exercise of the special-facility portion of the plan. Nothing in the Appeal Board's opinion intimates that our conclusion in LBP-87-32 on which LILCO relies was incorrect. Indeed, because Intervenors did not appeal, it is doubtful that that issue came to the Appeal Board's attention.

[34] *See* LILCO's Response at 19; Staff's Response at 25-26; Intervenors' Reply at 71-72.

[35] *See* LILCO's Response at 19; Staff's Response at 25-26; Intervenors' Reply at 72-73.

[36] *See* Attachment 6 to LILCO's Response to the Contentions.

activities. Under these circumstances, Connecticut's failure to participate is excused. This basis is denied.

Bases O and P allege that there were an insufficient number of bus and ambulance companies and ambulances participating in the exercise and there was no check of the availability of the nonparticipating companies. LILCO argues that this basis is precluded by our earlier conclusion that there was no reason to require a greater role in the exercise for these companies, citing LBP-87-32, 26 NRC at 494. Staff does not object to the assertion that there were an insufficient number of companies participating, but does object to the asserted need to check the availability of those that did not participate. Intervenors assert that our conclusion in LBP-87-32 is not dispositive on the question of the compliance of the 1988 exercise with Appendix E. They also take issue with Staff's objection to the allegation of a need to check the availability of nonparticipating companies. They believe that LBP-87-32 and ALAB-900 support their admission.[37]

We find that Staff's position is the correct one. In the portion of LBP-87-32 cited by LILCO, we held that there was no need, in order to meet the full-participation requirements of the regulation, for FEMA to count available buses. Nothing in ALAB-900 appears to contradict that conclusion. However, in ALAB-900 the Appeal Board expressed agreement with the proposition that the participation of only one ambulance and one ambulette was insufficient to meet the "sufficient numbers" requirement of Appendix E, ¶ IV.F.1.[38] Clearly, Intervenors may raise the same challenge with regard to the 1988 exercise.

Basis Q alleges that the exercise failed to test the plan's communications network. LILCO maintains that this basis should be excluded as being duplicative of other bases and unsupported in law or fact. Staff objects that this basis is unsupported and overly vague. Intervenors point out that this basis is most specific in enumerating those communications that were not tested and that Appendix E, ¶ IV.F, requires the testing of communications networks. They believe that LILCO's objections are unavailing.[39]

In an exercise, an applicant or licensee must "[d]emonstrate the ability to communicate with all appropriate locations, organizations, and field personnel."[40] Thus Intervenors have raised a major observable portion of the plan in this basis. Moreover, we agree with Intervenors that this basis is sufficiently specific. It lists the organizations with whom it is alleged that communications were not demonstrated.

In conclusion, we find that Contention 1 is admissible to the extent of bases A (concerning public notification); B, D, and E (concerning protective actions in

---

[37] *See* LILCO's Response at 19-20; Staff's Response at 25; Intervenors' Reply at 73-75.
[38] *See* ALAB-900, *supra*, 28 NRC at 300.
[39] *See* LILCO's Response at 20-21; Staff's Response at 26; Intervenors' Reply at 75-76.
[40] FEMA Objective 5, Exercise Objective 4.

schools); F, G, and H (concerning evacuation of disabled persons); I (concerning contaminated, injured individuals); O and P (concerning the number of buses and ambulances that participated); and Q (concerning communications).

Contention 2: The Exercise's False Premises and Assumptions

This contention challenges the assumption that the various affected governments would interact with LERO in such matters as approving EBS messages, authorizing LERO to take various actions, and delegating certain authority to LERO, and the assumption that these governments would provide certain resources. Any test of LERO's ability to interact is invalid unless there is a realistic basis for the assumption that the affected governments would in fact act in such a manner. The contention asserts that there is no such basis.

Both LILCO and Staff assert that this contention is a challenge to the Commission's realism rule, § 50.47(c)(1). LILCO goes on to assert that the contention is also a collateral attack on the findings reached in LBP-88-24, *supra*, 28 NRC at 385, and that it lacks basis and specificity.

Intervenors argue that there is nothing in the realism rule that requires the assumption that the affected governments would authorize illegal acts, such as directing traffic. They also argue that FEMA's assumptions must be open to scrutiny, and that the contention is adequately supported by reasonably specific bases.[41]

We agree with LILCO and Staff that this contention constitutes a challenge to the realism rule and thus is inadmissible. That rule specifically directs us to presume that the affected governments will follow LILCO's plan in an emergency unless these governments rebut that presumption. These Intervenors were afforded an opportunity to do just that in the OL-3 proceeding, but refused to do so.[42] Almost 3 years ago, the Commission found the proposition that these governments would be legally precluded from making use of the LILCO plan in an actual emergency to be "too preposterous an abrogation of [their] obligations . . . to be taken seriously."[43] Despite that conclusion, the Intervenors persist in making this argument. This argument clearly violates the realism rule. Consequently this contention is denied.

Contention 3: The FEMA Report's Unfounded Conclusions

This contention asserts that no weight should be given to FEMA's conclusion that the exercise results permit FEMA to make a reasonable assurance finding.

---

[41] *See* LILCO's Response at 21-22; Staff's Response at 27; Intervenors' Reply at 76-78.
[42] LBP-88-24, *supra*, 28 NRC at 357-60.
[43] *See* CLI-86-14, 24 NRC 36, 40 n.1 (1986).

To support this assertion, Intervenors attack FEMA's review process. They assert that they are clearly entitled to do this. Both LILCO and Staff counter that the contention does not allege a fundamental flaw and improperly brings FEMA's review process into issue.[44]

LILCO and Staff are clearly correct. FEMA's review process cannot constitute a fundamental flaw in the plan. Thus the contention fails to satisfy the essential requirement for admission. Moreover, it is not appropriate to challenge FEMA's (or Staff's) review process in this proceeding. *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant), ALAB-728, 17 NRC 777, 807, *review declined*, CLI-83-32, 18 NRC 1309 (1983). This is not to say that Intervenors are precluded from arguing that FEMA reached inappropriate conclusions. They remain free to assert that, contrary to FEMA's conclusions, the exercise did demonstrate fundamental flaws in the plan. *See* ALAB-903, 28 NRC at 508.[45] But they are not entitled to challenge the integrity of FEMA's review process as an independent matter.

CONTENTION 4: FUNDAMENTAL FLAWS RELATING TO LILCO'S INTERFACE WITH STATE AND LOCAL GOVERNMENTS

This contention alleges that the exercise demonstrated a fundamental flaw in LERO's ability to interface with state and local governments as required by 10 C.F.R. §§ 50.47(b)(1) and (b)(3) and 50.47(c)(1)(iii)(B). It is supported by the following bases:

Basis A alleges that LERO did not keep the simulated government officials informed of the status of the emergency on a timely basis, citing two examples.

Basis B alleges that LERO did not inform the governments of the failure of fifty-seven of the system's eighty-nine sirens.

Basis C provides nine examples of allegedly "wrong, confusing, or unhelpful" information that was provided to the simulated governments.

Basis D alleges that many LERO representatives exhibited difficulty in conveying and eliciting pertinent information from simulated government officials.

---

[44] *See* LILCO's Response at 22-23; Staff's Response at 29; Intervenors' Reply at 79-81.

[45] We recognize that the statement in ALAB-903, *supra*, 28 NRC at 507-08, that a party seeking to establish that a FEMA finding is incorrect "has a greater, but not impossible, task . . ." may not be entirely consistent with the holding in *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1298-99 (1982), that a FEMA finding is akin to a Regulatory Guide and is to be treated simply as evidence of compliance with regulatory requirements. We do not believe that possible inconsistency is relevant at the contention admission stage and have not applied a more stringent standard in ruling on contentions that challenge FEMA's conclusions. (In this regard, we agree with Intervenors that the presumption that attaches to the FEMA findings is not relevant at this stage. *See* Intervenors' Reply at 13-16.) However, these two holdings will need to be reconciled when dealing with the evidence addressing the question whether a fundamental flaw was demonstrated by the exercise.

Basis E alleges that many LERO workers requested information from the simulated government representatives that was in the plan.

Basis F alleges that LERO representatives contacted the wrong simulated government to obtain information.

Basis G provides two examples of LERO representatives allegedly taking actions without having first consulted with the simulated government concerned.

Basis H alleges that LERO representatives prematurely requested government approval of certain actions.

Basis I alleges that LERO's difficulties in interfacing with the simulated governments resulted in delays in the broadcast of Protective Action Recommendations (PARs).

LILCO believes that bases supporting this contention, either singly or collectively, raise only minor *ad hoc* problems that occurred on the day of the exercise. LILCO also notes that some of the bases are fatally nonspecific and that others raise unrelated incidents which do not have any impact on the public health and safety. Staff raises the same objections but would accept bases A, C.1, C.2, C.6, C.9, and D. Intervenors believe that these objections, in the main, improperly invite us to determine the issue raised by Contention 4 on the merits.[46]

LILCO, Intervenors, and Staff all agree that in order to be admitted under ALAB-903, a fundamental flaw contention must allege that the exercise revealed a failure in an essential element of the plan, and that that failure can only be corrected through significant plan revisions.[47] They sharply disagree with regard to the application of this standard. LILCO believes that this standard states an extremely difficult test. LILCO concedes that the requirement that the contention identify an essential element of the plan is relatively easy to satisfy.

Contention 4 cites §§ 50.47(b)(1), (b)(3), and (c)(1)(iii)(B) as the essential elements that allegedly failed. The first two relate to the assignment of responsibilities and arrangements for requesting and using assistance. We interpret the citation of the last to refer to that provision which states that the Commission will presume that nonparticipating state and local governments will respond with their best efforts in an emergency and will, in the absence of evidence to the contrary, follow the utility emergency plan.

We do not believe that the factual allegations set out in the bases supporting Contention 4 concern § 50.47(b)(1). Because subsection (b)(1) requires the assignment of responsibilities in advance of an emergency, it is not implicated by allegations concerning communications and coordination during an emergency exercise with governmental units that refuse to participate in emergency planning. Subsection (b)(3) is arguably relevant because it concerns requests for as-

---

[46] *See* LILCO's Response at 23-28; Staff's Response at 33; Intervenors' Reply at 82-97.

[47] *See* LILCO's Motion to Dismiss Contentions 4-20 of November 21 at 4-5; Intervenors' Opposition of December 1 at 10-11; Staff's Response of December 6 at 2-4.

sistance. Subsection (c)(1)(iii)(B) seems clearly implicated because it implicitly raises the question of communication between LERO and the nonparticipating governments. Indeed, the contention recognizes that one of the objectives of the exercise was to:

> [d]emonstrate the capability of utility offsite response organization personnel to interface with nonparticipating state and local governments through their mobilization and provision of advice and assistance.[48]

Thus we agree with Intervenors that Contention 4 implicates subsection (c)(1)(iii)(B) and perhaps (b)(3) relating to communications between LERO and the nonparticipating governments.

There is disagreement among the parties with regard to what is required in order to successfully allege a failure in an identified essential element. LILCO maintains that it is not easy to satisfy this element, arguing that minor or isolated problems do not show a failure in an essential element unless they are pervasive and show a pattern of repeated failures. LILCO also argues that a FEMA deficiency does not necessarily amount to a failure, that an allegation of delay must be substantial and likely to affect PARs in an actual emergency, and that an allegation that a particular individual failed to discharge his responsibilities must also allege that that individual's role is critical and there is no backup. LILCO bases its position on ALAB-903. Staff generally agrees with LILCO.[49]

Intervenors assert that LILCO has, in arguing that it is most difficult to meet this standard, confused the standards for pleading with that for proof. Intervenors argue that the Appeal Board did not intend that an intervenor offer proof that its allegations are correct in order to have a contention admitted, citing, among other authority, the Commission's statement to this effect in CLI-86-11, 23 NRC at 581. Intervenors maintain that the test set out in ALAB-903 is designed to ensure that any contentions that are admitted at this late stage in the proceeding are well focussed.[50]

Intervenors are correct that ALAB-903 did not and of course could not establish a standard for contentions that is not in accord with CLI-86-11. There is no requirement that evidence be pleaded in order to have a contention admitted for litigation. What is required is that the bases be set forth with sufficient specificity so that all parties are on notice of what the intervenor intends to litigate and so that the board can determine whether the assigned bases, if true, demonstrate that a fundamental flaw exists. We also agree with Intervenors

---

[48] *See* Contentions at 20. While it is not totally clear, we believe that "their" in the quoted objective refers to the offsite response organization personnel, not the governments.

[49] *See* LILCO's Motion at 4-5; Staff's Motion at 2-3.

[50] *See* Intervenors' Opposition at 10-13.

that we should consider the bases collectively, not in isolation, in determining whether they allege a failure.

Basis A alleges that LERO failed to keep simulated government officials informed of the emergency on a timely basis, citing a delay from 05:40, when an alert was declared on Day 1, until 06:43 on the same day, when the State was informed, and allegedly "very slow" communication of dose rate estimates to Suffolk County. Basis G alleges that LERO did not always consult with the governments prior to taking action, citing as examples a failure to coordinate prior to extending the ingestion PAR to 50 miles and prior to implementing access control in certain zones. Basis B asserts that the governments were not informed of the siren failures. Basis C lists nine examples of allegedly wrong, confusing, or unhelpful information conveyed to the governments.[51] Basis D alleges that LERO had difficulty in conveying important information, citing as an example the alleged inability to relate how many emergency vehicles were needed for hospital evacuation purposes.[52] Bases E and F allege that LERO personnel in some instances called government officials for information that was available in the plan and in others called the wrong officials for information, respectively. Basis I alleges that, as a result, delays were incurred in broadcasting PARs, citing a 35-minute delay in EBS 2, and a 53-minute delay in the initial evacuation and sheltering notification.[53]

These allegations indicate that Intervenors may be able to show that a failure in communication and coordination required by §§ 50.47(b)(3) and (c)(1)(ii)(B) exists following a hearing. While the examples cited in support of the allegations may not be sufficient to demonstrate such a failure in themselves, to deny admission to the contention on that basis would be tantamount to requiring the Intervenors to prove their case at this stage of the proceeding. That would not be proper. *See* CLI-86-11, *supra*. The bases that we accept are set out with reasonable specificity and establish a sufficient foundation for the contention to warrant further inquiry into the question whether a failure in this element has occurred.[54]

However, Intervenors have not, in the bases for this contention, addressed the second part of the ALAB-903 test: Would correction of the alleged failure require significant changes to the plan. The amendments that they submitted in response to ALAB-903 argue that such is the case, but Intervenors provide no factual underpinning for that position, despite the fact that ALAB-903 requires

---

[51] Examples 4, 5, and 7 are overly vague.

[52] This basis' references to "vague," "nondescript," and "incomplete" information and to a LERO representative who appeared "very shook up" are overly vague.

[53] We regard basis H as being overly vague.

[54] *See* ALAB-903, *supra*, 28 NRC at 506.

it.[55] Rather, they argue that, while not explicit, such factual underpinning is implicit in the contention.[56]

The bases contain three references to the plan. All three of these provide citations to plan provisions that require certain actions that the bases allege were not accomplished. Intervenors have extensive knowledge of the plan. It is not unreasonable to require more than mere argument on this point, and to deny admission to any contention that does not provide factual allegations concerning the plan provisions that must be revised or reassessed and why. Moreover, ALAB-903 (28 NRC at 506) made it clear that such is required:

> Any contention alleging that an exercise revealed a fundamental flaw in the emergency plan must address both of these factors in order to satisfy the Commission's requirement that "the bases for each contention [be] set forth with reasonable specificity." 10 C.F.R. § 2.714(b). *See* CLI-86-11, 23 NRC at 581.

Although they sought to amend their contentions, and although they have extensive knowledge of the plan, Intervenors did not seek permission to add factual bases to their contentions on this point. Contrary to their assertion, the significant changes that they believe are necessary to the plan are not implicit in the bases given. Consequently, this contention is denied.

CONTENTION 5: FUNDAMENTAL FLAWS RELATED TO NOTIFICATION

This contention alleges that a fundamental flaw was demonstrated in that LILCO was unable to promptly notify the public as required by 10 C.F.R. §§ 50.47(b)(5) and (b)(7) and Appendix E, ¶ IV.D.3. The contention is supported by the following bases:

Basis A alleges that during the exercise, when the sirens were activated to test the public alerting capabilities, fifty-seven of a total of eighty-nine failed.

Basis B alleges that LILCO did not follow the provisions of the plan when confronted with this failure in that it did not notify the governments or dispatch route-alert drivers.

Basis C alleges that LILCO did not comply with the regulatory standards governing timely notification to the public of PARs.

Basis D alleges that in several instances, route-alert drivers assigned to notify the deaf were unable to identify the homes of the deaf or the routes they were to drive.

---

[55] *See id.* LILCO and Staff argue that Contentions 4-20 should be dismissed for this reason. *See* LILCO's Motion at 5-8; Staff's Response at 7.

[56] *See* Intervenors' Opposition at 16.

LILCO responds that the siren failure presents a minor *ad hoc* problem which can be dealt with through additional testing, that the siren failure was overridden by a controller message that stated that only three sirens had failed and that the response to that failure was appropriate, that the assertion that LILCO did not comply with the standards governing the timing of public notification is based on an erroneous view of those standards, and that the alleged problem concerning notification of the deaf is a minor *ad hoc* occurrence. Staff agrees with LILCO with respect to bases B, C, and D, but appears to regard basis A concerning siren failure as a matter that is not relevant to the exercise. Intervenors maintain that LILCO's and Staff's interpretation of the regulations concerning the timing of public notification is erroneous and that their other objections raise questions of fact.

Applying the ALAB-903 standards to the amended contention reveals that Intervenors have adequately alleged that there was a failure in a major element of the plan, but once again have failed to allege that specific portions of the plan require significant revision or reassessment as a result.

Contention 5 cites §§ 50.47(b)(5), (b)(7), and Appendix E, ¶ IV.D.3, as the elements that are implicated by the contention. We agree that the first and last citations are relevant to the allegations stated in these bases. They both concern prompt notification of the public.[57] Further, we believe that the factual allegations of the bases are sufficiently specific and establish a sufficient foundation to warrant further inquiry. While LILCO and Staff may be correct in their positions with regard to such matters as the siren failure and the dispatch of route-alert drivers, those positions invite us to make factual findings prematurely.[58]

However, the bases provide no factual allegations whatsoever concerning which provisions of the plan might require significant reassessment or revision as a result of the above failure. While the statement of contention does provide general references to provisions of the plan in order to demonstrate LILCO's recognition of the need for prompt public notification, these provisions are lengthy and complex. Thus the unsupported assertion that they must be revised is too vague to put LILCO and Staff on notice as to what is to be litigated or to permit us to determine whether a fundamental flaw has been alleged. Consequently, this contention must be denied.

---

[57] However, § 50.47(b)(7) principally concerns information materials distributed in advance of an emergency, as well as the coordinated dissemination of information to the public, matters that are not called into question by this contention.

[58] Whether the siren activation was a part of the exercise and whether FEMA overrode the actual failure with a message that required a different assumption are questions that appear to be amenable to a resolution at this juncture if the FEMA Report were clear on these points. It is not.

CONTENTIONS 6-10: FUNDAMENTAL FLAWS CONCERNING PUBLIC INFORMATION

These contentions raise matters that are similar to those heard in the litigation concerning the 1986 exercise. Following that hearing, we found that fundamental flaws were demonstrated with regard to some aspects of the public information program, and that they were not demonstrated with regard to others. While we will apply the ALAB-903 standards to these contentions, the similarity of these contentions to those litigated previously cannot be ignored. Therefore, where a contention raises matters that are not materially different from those decided in LBP-88-2 and where ALAB-903 does not require a different result, we will be guided by LBP-88-2 to the following extent:

> First, we will deny allegations that do not materially differ from facts found not to constitute a fundamental flaw; and
>
> Second, we will admit allegations that do not materially differ from facts found to constitute a fundamental flaw even if Intervenors have failed to allege that significant plan changes are required to remedy the alleged flaw. In this situation, we believe that the possible persistence of a fundamental flaw from one exercise to the next amply supports the inference that a significant reassessment of the plan is necessary in order to remedy the situation.

Contention 6: EBS Messages

This contention alleges that the EBS messages "broadcast" during the exercise were confusing, inaccurate, inconsistent, untimely, and poorly organized. It alleges that the fundamental flaw that we found to have been revealed by the 1986 exercise has not been corrected and additional fundamental flaws exist. It is supported by basis A, which provides six examples of allegedly incorrect information; basis B, which provides ten examples of the alleged omission of important information; basis C, which provides five examples of allegedly poor organization; and basis D, which provides thirteen examples of allegedly confusing and vague aspects of the messages.

The contention cites 10 C.F.R. § 50.47(b)(6) as that planning element which is implicated, and argues that ALAB-900 and LBP-88-2 both support the conclusion that the EBS messages constitute a major element. We agree. There can be no doubt that the EBS messages are a major element of the plan.

LILCO points out that the EBS messages have been litigated twice before, citing LBP-85-12, 21 NRC 644, 660-63, 669-71, 687-91, 698 (1985), and LBP-88-2, *supra*, 27 NRC at 168-74. LILCO argues that LBP-88-2 found only three significant problems, despite allegations that the messages were

inaccurate, vague, and confusing, which, together with other problems in the public information area, contributed to a fundamental flaw.[59] Intervenors argue that prior litigation does not shield the EBS messages from scrutiny. They take issue with the conclusion that only three significant problems were found in LBP-88-2.

In this connection they argue that the first significant problem cited in LBP-88-2 is similar to the examples given in bases C.2 and D.8. That problem concerned statements in the same EBS message that a minor release had occurred and that a release was not imminent.[60] The first, but not the second,[61] example in basis C.2 and the example in basis D.8 are indeed similar.

Similarly, Intervenors draw a parallel between the second and third significant problems, concerning statements about the thyroid dose at 10 miles, and bases D.10, D.11, and D.12. We agree that these similarities exist. We also agree that these problems formed a part of the overall problem that LBP-88-2 found with the EBS messages, that the overall problem was not limited to the three examples cited by LILCO.[62]

LILCO next argues that the bases given in support of Contention 6 all state minor, *ad hoc* problems or planning problems. Staff takes a similar position with respect to bases C and D. Intervenors disagree.[63] We have reviewed the bases in the light of ALAB-903 and have concluded that bases A.1, A.4–A.6, B.1–B.10, C.1, C.2 (first example only), D.2, D.7, D.8, D.12, and D.13 collectively allege a failure in the EBS messages. The remaining bases allege trivial or planning matters which do not add any substance to the alleged failure.

Finally, LILCO argues that bases A, C, and D allege minor problems similar to those that were previously litigated and found insignificant, that basis B has no regulatory foundation, and that many of the alleged problems are not EBS problems at all, but decisionmaking issues. Intervenors disagree.[64] LILCO's arguments raise issues that may be appropriately addressed at hearing. The first two arguments are not sufficiently specific to be addressed now, and the third raises factual matters that require an evidentiary record.

---

[59] *See* LILCO's Response at 32-33.

[60] *See* LBP-88-2, *supra*, 27 NRC at 171. Intervenors somewhat misstate the record in that the Board did not make a finding that this was significant because LILCO conceded that the error was not trivial and could be confusing.

[61] The second example in basis C.2 does not appear to constitute an inconsistency in the message.

[62] *See* Intervenors' Reply at 108-11.

[63] *See* LILCO's Response at 33-36; Staff's Response at 47. Staff does not object to bases A and B; Intervenors' Reply at 112-16, 119-20.

[64] *See* LILCO's Response at 37; Intervenors' Reply at 116-19.

Contention 7: Emergency News Center

This contention alleges that LILCO was unable to provide timely, accurate, consistent, and nonconfusing information to the news media. It focusses on the operations of the ENC, which, it is alleged, demonstrate a failure in the planning elements embodied in §§ 50.47(b)(6) and (b)(7).[65] It is supported by basis A, which alleges that the organization and management of the ENC and the skill of the spokespersons were inadequate; basis B, which alleges that the first press briefing at the ENC was tardy; basis C, which alleges that the spokespersons would be unable to control the press briefings in a real emergency; basis D, which alleges that information that conflicted with EBS messages then being broadcast was disseminated; basis E, which alleges that information was not made available at the ENC on a timely basis; basis F, which alleges that in a real emergency the tardiness of the EBS messages would create major confusion among the media and the public; basis G, which alleges that there was inadequate coordination between LERO and LILCO; and basis H, which alleges that the fact that only fifty-seven of eighty-nine sirens sounded on request was kept from the media.

LILCO and Staff oppose the admission of this contention, while Intervenors argue for its admission.[66] The former regard basis A as stating trivial matters, while the latter assert that it asserts that the ENC did not provide timely information and cites LBP-88-2, *supra*, 27 NRC at 167, for the importance of this function. While it is true that in LBP-88-2 we regarded the tardy provision of EBS messages to the media to be significant, this basis does not raise any issue of similar import. Rather, it faults the Emergency News Manager for failing to adhere to the scheduled starting time of certain news conferences, cites "LILCO/LERO spokespersons joust[ing] with reporters" and failing to respond properly to the latter, and complains of a failing to post a knowledgeable spokesperson, in addition to a technical advisor who was available, between briefings. Even when considered with the rest of the bases supporting this contention, this basis raises only minor, *ad hoc* problems.

LILCO and Staff correctly assert that facts not materially different from those alleged in basis B were rejected in LBP-88-2, 27 NRC at 153. While Intervenors have, as they point out, framed this contention in terms of the time that elapsed between the activation of the ENC and the first press briefing, as opposed to their earlier complaint that the ENC was not activated promptly enough following the

---

[65] We agree that these elements are implicated by this contention.

[66] *See* LILCO's Response at 37-42; Staff's Response at 52, Response to LILCO's Motion at 11; Intervenors' Reply at 121-30.

Alert at the plant, the fact remains that, according to this basis, approximately 2.5 hours elapsed between the Alert and the first press briefing, while in LBP-88-2, we found that a span of 3 hours between those events was not unacceptable. Basis B is rejected.

Moreover, Intervenors' position to the contrary notwithstanding, we agree with LILCO and Staff that bases C, D, and G are speculative, lacking foundation in the events of the exercise, and fail to adequately set forth the facts sought to be litigated. We disagree with their position that basis H is inadmissible for the same reason given with respect to Contention 5.B.

Bases E raises the question of whether the media were promptly provided with EBS messages. In LBP-88-2, we agreed with "FEMA's assessment of a deficiency with regard to the failure to promptly provide the EBS messages to the media, and regard that failure as an integral part of the . . . fundamental flaw" concerning the failure to promptly provide the Call Boards with these messages.[67] Therefore, we find that this basis adequately alleges a failure in the cited planning elements in order to be admitted.

Basis F must be similarly treated. When stripped of speculation, this basis alleges that confusing information was being promulgated by LILCO/LERO. In LBP-88-2, we found that another integral part of the fundamental flaw relating to public information was the fact that some confusing information was included in the EBS messages and also noted the importance of providing the media with accurate information.[68] Consequently it too adequately alleges a failure in the cited planning elements.

Contention 8: Rumor Control

Intervenors candidly admit that this contention raises problems that are essentially the same as those that were reviewed in LBP-88-2 and found not to rise to the level of a fundamental flaw.[69] They argue, however, that the fact that these problems persist dictates the conclusion that LILCO's inability to institute effective rumor control procedures must be viewed as a fundamental flaw. We disagree. The mere passage of time is not an element to be considered in determining whether a fundamental flaw exists. This contention is denied.

---

[67] *See* 27 NRC at 157.

[68] *See* LBP-88-2, *supra*, 27 NRC at 172 and 151, respectively.

[69] Although Intervenors attempt to distinguish the 1988 Rumor Control contention from its 1986 predecessor in their reply to LILCO's opposition (at 130-34), they have not cited any material differences between the two which could lead to a different result.

Contention 9: The Public Would Reject LILCO's Flawed EBS Messages as a Primary Source of Information

The title of this contention neatly sums up its content. LILCO, Staff, and Intervenors argue over whether the contention alleges a fundamental flaw, with Intervenors pointing out that it does because it alone alleges that the public would not accept the EBS messages as a source of information.[70] However, the contention furnishes no bases for this assertion other than those furnished in other contentions. Indeed, because the public did not participate, it is unlikely that the exercise would have furnished any information concerning the public's reaction which might support this contention. Consequently this contention cannot be admitted.

Contention 10: Evacuation Shadow Phenomenon

Here, Intervenors put forward the proposition that, because the public information made available during the exercise was not clear and unambiguous, a substantial evacuation shadow would develop. It is based on a conclusion reached in LBP-85-12, *supra*, 21 NRC at 670, that conflicting information would have that result. LILCO and Staff oppose.[71]

In LBP-88-2, we concluded that conflicting information had been provided to the public in the 1986 exercise. Accepting the conclusion reached in LBP-85-12 as the law of the case, we also concluded that a fundamental flaw was demonstrated in that, in those circumstances, "a controlled evacuation . . . probably could not be achieved."[72] There is no reason why Contention 10 is essential in order to permit us to reach the same conclusion again. So far as we are aware, the conclusion reached in LBP-85-12 remains the law of the case. If Intervenors once again demonstrate that conflicting information was furnished to the public, the conclusion that we reached in LBP-88-2 would appear to be warranted. Contention 10 is denied.

Rulings on Contentions 6-10

We have identified a number of bases for Contention 6,[73] concerning EBS messages, which collectively adequately allege a failure in those messages. We have also identified bases E and F of Contention 7 which adequately allege failures relating to the ENC. However, Intervenors have provided no bases that

---

[70] *See* LILCO's Response at 43-45; Staff's Response at 56; Intervenors' Reply at 134-38.
[71] *See* LILCO's Response at 45-47; Staff's Response at 57; Intervenors' Reply at 138-43.
[72] LBP-88-2, *supra*, 27 NRC at 173.
[73] Specifically, bases A.1, A.4–A.6, B.1–B.10, C.1, C.2 (first example only), D.2, D.7, D.8, D.12, and D.13.

would support the proposition that correction of these alleged failures would require significant revisions to the plan. The problems alleged in these bases are, however, sufficiently similar to the problems that we found following the 1986 exercise to justify the conclusion that earlier problems have not been corrected, and that significant plan changes, if not required before, are indicated now.

The only other bases that we have identified as adequately alleging a failure is basis H to Contention 7, concerning an alleged withholding of information from the media at the ENC. No similar problem was identified in LBP-88-2; consequently, there is no reason to infer that this alleged failure might require significant plan changes.

CONTENTIONS 11-12: PROTECTIVE ACTION RECOMMENDATIONS

At the outset, it should be noted that none of the allegations of these contentions relate to a fundamental flaw that was identified in LBP-88-2.

Contention 11: Ingestion Pathway PARs

This contention alleges that the exercise revealed failures with respect to the elements embodied in 10 C.F.R. §§ 50.47(b)(6), (b)(7), (b)(9), (b)(10), and Part 50, Appendix E, ¶ IV.F.1. It is supported by basis A, which alleges that LILCO should not have waited until Day 3 of the exercise to issue ingestion pathway PARs; basis B, which alleges that prior to issuing a PAR on Day 3, LILCO knew that it would become necessary to issue PARs for the ingestion pathway but took no action to warn residents; basis C, which alleges that the EBS messages improperly sought to minimize the hazard in the ingestion pathway; basis D, which alleges that LILCO never issued ingestion pathway PARs to those persons who chose not to evacuate; and basis E, which alleges that certain PARs that are to automatically issue following a Site Area Emergency and a General Emergency were unjustifiably delayed. We agree with Intervenors that subsection (b)(10) is clearly implicated, and that subsection (b)(9) may be implicated. The other citations seem of dubious relevance to this topic.

LILCO opposes bases A and B on the grounds that they state minor, *ad hoc* problems, and that the FEMA Report does not support Intervenors' claim that there were sufficient data available on Day 1 to justify the issuance of ingestion pathway PARs. Intervenors counter that the problems alleged are not minor, *ad hoc* ones in terms of the provisions of the plan, and LILCO is again arguing

the merits of the contention.[74] Because these allegations concern the issuance of PARs, we believe that Intervenors are correct that they adequately state a failure in the elements covered by the implicated regulations. Moreover, we find that LILCO's opposition does indeed raise factual issues which are not appropriate for resolution at this time.

LILCO opposes basis C by defending the statements that this basis calls into question and asserting that the complaints stated in this basis are trivial. Staff agrees with the latter point. Intervenors urge that this basis should be considered with the others, and not in isolation.[75] Because its substance concerns supposedly confusing information, basis C does not appear to allege a failure of an element related to PARs at all.[76] LILCO opposes basis D by contradicting the facts alleged. Intervenors argue correctly that LILCO's opposition raises merits considerations.[77] Moreover, we agree that this basis adequately alleges a failure in the implicated elements.

Both LILCO and Staff oppose basis E on the ground that the alleged 35-minute delay in issuing the PAR related to milk-producing animals, which is automatically required following a Site Area Emergency, does not violate any regulatory requirement, citing Appendix E, ¶ IV.D.3. Again, Intervenors assert that this argument improperly raises the merits.[78] While we cannot categorically rule out the possibility that the facts alleged by this basis state a failure in the implicated elements, it seems unlikely that they do. A determination that a failure is demonstrated by these facts will depend upon whether Intervenors can show that the exercise events required the virtual immediate issuance of this PAR to the public.[79]

Contention 12: Plume Exposure Pathway PARs

This contention alleges that "LERO personnel were untimely in making PARs for the plume exposure pathway, made inappropriate recommendations in violation of 10 C.F.R. § 50.47(b)(6), (7), (9), and (10) . . . , failed to amend

---

[74] *See* LILCO's Response at 48-49; Intervenors' Reply at 144-46. Staff does not oppose these bases; Staff's Response at 61-62 and response to LILCO's Motion to Dismiss at 12-13.

[75] *See* LILCO's Response at 49; Intervenors' Reply at 146-47. Staff did not oppose this basis originally (*see* Staff Response at 61-62), but did oppose it in its Response to LILCO's Motion (*see id.* at 11-12).

[76] Indeed, basis C is very similar to Contention 6.A.2, which was denied because it raises a trivial matter which does not add any substance to the failure alleged by the other bases of that contention.

[77] *See* LILCO's Response at 49-50; Intervenors' Reply at 147-48. Staff does not oppose this basis. *See* Staff's Response at 61-62; Staff's Reply to LILCO's Motion at 12-13.

[78] *See* LILCO's Response at 50; Staff's Response at 61-62; Intervenors' Reply at 149-50.

[79] Appendix E, ¶ IV.D.3 provides in part that "[t]he use of [the 15-minute] notification capability will range from immediate notification of the public (within 15 minutes of the time that State and local officials are notified that a situation exists requiring urgent action) to the more likely events [sic] where there is substantial time available for the State and local government officials to make a judgment whether or not to activate the public notification system."

emergency broadcasts containing PARs in a timely manner, and failed to satisfy EOC Objective 18. It is supported by basis A, which alleges that a delay on Day 1 from 09:37, when the LERO EOC was notified of the EOF's evacuation and sheltering recommendations, until 10:20, when the EOC decided to accept them, and then until 10:26, when the public was notified, was unjustified; basis B, which alleges that LERO's PAR issued to schools at 06:13 on Day 1 to implement early dismissal was inappropriate and contrary to the plan; basis C, which alleges that LERO delayed issuing a PAR for those persons who did not follow the recommendation to evacuate from 10:26 on Day 1 until 11:35 on Day 2; basis D, which alleges that LERO delayed for 1 hour after determining that evacuees should report to reception centers before advising the public to do so; basis E, which alleges that LERO was tardy in issuing advice to the public concerning road impediments; and basis F, which alleges that LERO did not issue any PARs to residents of special facilities. We agree with Intervenors that the elements embodied in § 50.47(b)(10) are implicated by this contention, but we disagree as to the other subsections cited. Further, we note that Appendix E, ¶ IV.D.3 is also implicated.

LILCO and Staff oppose bases A and B as being "without basis" in that they fail to allege a violation of any regulation. LILCO also asserts that they are duplicative of Contention 5. Intervenors believe that litigable factual disputes exist.[80] While these bases do not appear to overlap Contention 5, basis A does present the same controversy as basis 11.E, delay in issuing PARs, and is governed by the same rationale, and basis B the same controversy as Contention 6.A.3, which was rejected as alleging a trivial matter.

LILCO asserts that basis C raises the same issues as those presented by Contention 11.D. Intervenors point out that this basis alleges a failure to issue plume EPZ PARs for those who did not evacuate, while Contention 11.D concerns ingestion EPZ PARs.[81] While basis C does not specify which PARs should have been issued, we will accept Intervenors' explanation and treat it in the same way as Contention 11.D.

LILCO opposes basis D on the grounds that it fails to tie the alleged failure to adequately advise evacuees to report to reception centers to a regulatory standard, it is contrary to the facts recited by FEMA, and it does not allege facts that show that the public health and safety would have been threatened. Intervenors counter that the basis does allege a failure in a planning element and that LILCO's opposition improperly raises factual issues.[82] We agree with Intervenors.

---

[80] *See* LILCO's Response at 51; Staff's Response at 64, Staff's Response to LILCO's Motion at 13-14; Intervenors' Reply at 151-53.

[81] *See* LILCO's Response at 51; Intervenors' Reply at 153-54.

[82] *See* LILCO's Response at 52-53; Intervenors' Reply at 154-56.

LILCO opposes basis E on the grounds that it has no factual basis and does not concern PARs. Intervenors correctly point out that the basis is adequately supported with specific factual allegations and that it does allege a failure in the PAR concerning evacuation.[83]

LILCO opposes basis F on the grounds that it alleges that LERO followed the plan in not broadcasting separate PARs for special facilities. Intervenors' argument to the contrary amounts to an assertion that the plan should be changed.[84] This basis clearly raises a planning issue not appropriate for this proceeding.

We find that Contentions 11.A, 11.B, 11.D and 12.C, 11.E and 12.A, 12.D, and 12.E adequately allege failures in planning elements. Once again, however, Intervenors have failed to allege that a significant plan revision or reassessment is necessary as a result of these failures. However, although they implicate different planning elements, many of these failures are duplicative of matters admitted under Contention 6. Therefore it is necessary to consider whether it is appropriate to consolidate these failures with the latter on the assumption that the former will not entail the expansion of the planning elements on which proof is required. Because these failures are not independently admissible under the standards set out in ALAB-903, it would be inappropriate to consolidate them with admissible allegations if to do so would expand the scope of the hearing substantially. Thus, these alleged failures should not be admitted if to do so would require LILCO to defend against matters that it had successfully opposed at the contention stage. But where their consolidation with properly admitted matters does not require LILCO to mount a defense that is substantially different or expanded from that which would be required by the admissible matters, we believe that the public interest weighs in favor of consolidation.

We have compared the above bases with the admitted portions of Contention 6 and find that Contentions 11.A and 11.B, which concern an alleged delay in issuing ingestion EPZ PARs and a failure to warn residents of the ingestion EPZ of the possibility that such might be necessary, respectively, properly may be consolidated with Contentions 6.A.4 and 6.A.5, which concern the same subjects. Similarly, Contentions 11.D and 12.C, which both concern the issuance of PARs directed to residents who remained in zones that had been recommended to evacuate, may be consolidated with Contention 6.B.3. And Contentions 11.E and 12.D may be consolidated with Contentions 6.B.4 and 6.B.2, respectively. The first set concerns an alleged delay in issuing a mandatory PAR for dairy animals, and the second a delay in issuing appropriate recommendations concerning the need to report to a reception center. Contention 12.E concerns delays in advising the public concerning three traffic impediments. It may be consolidated with

---

[83] *See* LILCO's Response at 51; Intervenors' Reply at 157.

[84] *See* LILCO's Response at 53; Intervenors' Reply at 157-58.

Contentions 6.B.7 and 6.B.10.[85] Finally, there is no counterpart for Contention 12.A in Contention 6; consequently it is not consolidated and is denied.

CONTENTIONS 13-17: FUNDAMENTAL FLAWS RELATING TO IMPLEMENTATION OF PROTECTIVE ACTIONS

Contention 13: Medical Services

This contention alleges that the plan fails to satisfy 10 C.F.R. § 50.47(b)(12) in that the hospitals participating in the exercise did not properly handle contaminated injured individuals. It is supported by basis A, which alleges that the radiation safety officer (RSO) at Brunswick Hospital used improper techniques to monitor patients; basis B, which alleges that contamination control was inadequate; basis C, which alleges that LILCO failed to provide sufficient RSOs; basis D, which alleges that, no one having played the role, there was no demonstration of the ability to transport a contaminated injured individual; and basis E, which alleges that the ambulance driver who simulated transport of such an individual did not know the proper entrance to the hospital, and hospital personnel were not present to receive him.

LILCO, relying on the FEMA Report, maintains that none of the problems cited by these bases rise to the level of a fundamental flaw,[86] and that Intervenors have provided no basis to discredit the FEMA Report in this regard. Staff takes a similar position but would admit basis C. Intervenors maintain that LILCO may not properly rely on the FEMA Report in order to deny admission to the contention and that they are entitled to present evidence in an attempt to substantiate their claims.[87]

We agree with LILCO that bases A, B, and E state matters that, if true, do not rise to the level of a fundamental flaw. Moreover, we do not need to consider the FEMA Report in order to reach this conclusion. Basis C, however, states a matter that is litigable in that it alleges that the exercise revealed a failure with respect to the planning element embodied in § 50.47(b)(12) in that the plan does not provide for sufficient RSOs.

Basis C is not related to a fundamental flaw found in LBP-88-2, and Intervenors have provided no support for the allegation that basis C, if substantiated,

---

[85] Contentions 6.B.7 and 6.B.10 omit one of the impediments treated in Contention 12.E. We suspect, however, that the proof that LILCO would offer on the two that are included in Contention 6 will not be significantly expanded by the inclusion of the third and therefore have consolidated it as well. LILCO is free to seek relief from this ruling if this assumption is in error.

[86] LILCO maintains that basis D is in error, citing the FEMA Report at 98.

[87] *See* LILCO's Response at 53-55; Staff's Response at 55-56; Intervenors' Reply at 158-61.

would require significant plan revisions.[88] Consequently, this basis must be denied. Basis D raises a scope issue which is embodied in admitted Contention 1.I and is consolidated with that contention.

Contention 14: Schools

This contention alleges that the exercise revealed a failure in the essential planning element related to schools, citing § 50.47(b)(10) and ALAB-900, *supra*, 28 NRC at 296-97. It is supported by bases A through H.

Basis A alleges that so-called "assignment packets," which the school bus drivers must have in order to carry out their assignments, were not available at many school bus companies and bus yards, while *basis G* asserts that in some instances, buses were not available at the yards. LILCO opposes this basis on the ground that, as recited in LBP-88-24, *supra*, 28 NRC at 340, 344, 150% of required bus drivers are mobilized in order to ensure the evacuation of schoolchildren in one wave. Thus, argues LILCO, if an assignment packet or bus was not available to a driver, it was because that driver was surplus to the needs of the day. Staff opposes basis A on the ground that it fails to allege that a bus route was not run because of the lack of an assignment packet, and basis G on the ground that it does not cite a source of facts.[89]

Intervenors contradict LILCO's explanation of bases A and G. They point out that Staff's assertion as to basis A is incorrect and that there is no requirement for them to cite a "source of facts" for basis G.[90] We agree with Intervenors that the parties' arguments raise factual issues unsuited for resolution now and that these allegations state a failure of an essential planning element.

Basis B alleges that the fact that LILCO implemented protective actions for children who attend school outside of the EPZ, but reside within it, illustrates the need for planning on this subject. LILCO argues that Intervenors have failed to show how the implementation of these unplanned protective actions in any way compromised the health and safety of the students, while Staff asserts that this is a planning issue. Intervenors' reply appears to be that the fact that *ad hoc* measures were taken demonstrates that planning is needed and thus a fundamental flaw exists.[91]

We denied Contention 1.C, which asserted that the plan's provisions for these schoolchildren were not adequately tested, on the ground that it raises matters

---

[88] Indeed, their argument in the amended contentions is that overall, the contention shows that significant retraining of personnel is required. Moreover, it is hard to imagine that one could mount an effective argument that the addition of personnel possessing particular skills required a significant reassessment or revision so long as such personnel were reasonably available.

[89] *See* LILCO's Response at 55; Staff's Response at 68-69.

[90] Intervenors' Reply at 162-64, 175.

[91] *See* LILCO's Response at 58; Staff's Response at 68; Intervenors' Reply at 165-66.

that are outside the literal scope of the regulations. This basis must be denied for the same reason. Its allegations simply do not implicate a major planning element embodied in § 50.47(b)(10).

Basis C alleges that a significant number of bus drivers deviated from their assigned routes out of the EPZ. LILCO believes that no fundamental flaw is alleged because the deviations were few and easily corrected through additional training. Staff points out that there is no allegation that the deviations affected the public response. Intervenors reply that LILCO improperly raises factual arguments and that Staff's response is not comprehensible.[92] We find that this basis adequately alleges a failure of an essential planning element.

Basis D alleges numerous problems associated with the implementation of protective actions for the Rocky Point School District. LILCO raises numerous objections to it, many of which invite our attention to exercise documents that are not properly before us at this stage of the proceeding. Intervenors, needless to say, take issue with these objections.[93] We find that Intervenors have adequately alleged a failure in an essential planning element.

Basis E alleges that the exercise revealed that not all school buses are equipped with two-way or AM/FM radios, and *basis F* that LILCO did not demonstrate how schoolchildren at relocation centers would be cared for. LILCO objects that these bases raise planning issues, while Staff points out that there are no such regulatory requirements. Intervenors take issue with both assertions.[94] We agree with both LILCO and Staff as to basis E. The absence of radios certainly was known prior to the exercise. Moreover, we find that these allegations do not demonstrate a failure in an essential planning element. Basis F raises an issue that is within the scope of and is consolidated with admitted Contention 1.D, alleging that the exercise omitted major portions of the plan related to schools.

Basis H alleges that the maps provided to bus drivers were inaccurate. LILCO points out that there is no allegation that the inaccuracies in any way interfered with the drivers' response. Intervenors regard this argument as raising factual issues.[95] LILCO is correct. While we may not consider the merits of the bases advanced by Intervenors, Intervenors nonetheless have an obligation to allege facts that would demonstrate a failure in a planning element and that establish a sufficient foundation to warrant further inquiry.[96] They have not done so with respect to this basis.

---

[92] *See* LILCO's Response at 59; Staff's Response at 68; Intervenors' Reply at 166-68.

[93] *See* LILCO's Response at 56-57, 59; Intervenors' Reply at 168-72. Staff does not object to this basis.

[94] *See* LILCO's Response at 57-58; Staff's Response at 68-69; Intervenors' Reply at 172-74.

[95] *See* LILCO's Response at 59-60; Staff appears to agree with LILCO (*see* Staff's Response at 69); Intervenors' Reply at 175-77.

[96] ALAB-903, *supra*, 28 NRC at 506.

In summary, we find that Intervenors have alleged failures in the relevant planning element with respect to the availability of bus driver assignment packets, buses, and the propensity of drivers to deviate from their routes. Once again, Intervenors have offered no basis for their position that these alleged failures require significant revision or reassessment of the plan. Nor does it seem likely that these kinds of failures would require such action.[97] Although there was some demonstration "of the organizational ability and resources necessary to effect an orderly evacuation of the schools within the plume EPZ" in the 1986 exercise, no contention survived to hearing which challenged the results of that demonstration.[98] Thus there was no fundamental flaw found with respect to these matters. In this situation, this contention must be denied.

Contention 15: Traffic Impediments

This contention alleges that LERO remains unable to adequately respond to traffic impediments. It is supported by three bases. *Basis A* asserts that it took 1 hour and 15 minutes for road crews to respond to an overturned truck on Granny Road. *Basis B* points to the misdirection of traffic by a Traffic Guide and alleges that LERO remains unable to adequately reroute traffic around impediments, and *basis C* raises the delays in advising the public of the impediments alleged in Contention 6. LILCO asserts that the first two bases raise only minor, *ad hoc* problems and that the third should be considered under Contention 6. Staff agrees. Intervenors disagree.[99] We agree with LILCO and Staff that the allegations of bases A and B represent minor, *ad hoc* problems and do not demonstrate a failure in a planning element. Basis C will be considered under Contention 6. Contention 15 is denied.

Contention 16: Access Control

This contention alleges that LILCO's plan makes inadequate provision for access control and that, as a result, access control over evacuated areas was not established on a timely basis, apparently was not in place to protect that portion of the population that were "unsheltered" on Day 2, and LERO personnel displayed inadequate knowledge of whom should be allowed access. It is not supported by specific factual allegations. Essentially, the parties' arguments

---

[97] However, as discussed *infra*, we believe the implications for the training program of these failures is another matter.

[98] *See* LBP-87-32, *supra*, 26 NRC at 495-96; LBP-88-2, *supra*. However, our determination that the scope of that demonstration was inadequate was affirmed. *See* ALAB-900, *supra*, 28 NRC at 296-97.

[99] *See* LILCO's Response at 60-62; Staff's Response at 70, Reply to LILCO's Motion to Dismiss at 14; Intervenors' Reply at 177-81.

focus on whether this contention is too vague to be admitted.[100] We agree with LILCO and Staff that it is. The contention simply provides no factual allegations that would permit us to determine whether a failure in a planning element may have occurred that would warrant further inquiry. Therefore, it is denied.

Contention 17: Monitoring and Decontamination of Public and Emergency Workers

This contention alleges a failure with respect to the ability to provide timely and effective monitoring and decontamination for the public and emergency workers which is required by § 50.47(b)(10). It is supported by two bases. *Basis A* alleges that LILCO failed to properly advise the public to report to reception centers for monitoring and possible decontamination. Both LILCO and Staff point out that this basis is redundant of Contention 6.B.2. Intervenors acknowledge that fact but argue that the same facts may support more than one contention.[101] Contention 6.B.2 has been admitted. The facts alleged in the two bases are not materially different, and the legal conclusion to be drawn from those facts, if they are substantiated, does not differ between the two contentions. Both allege a failure in the planning element embodied in § 50.47(b)(6), while Contention 17 concerns § 50.47(b)(10). This basis does not support this contention; consequently there is no reason to separately admit it.

Basis B provides four examples in which LERO personnel allegedly followed incorrect monitoring and decontamination procedures. These focus on the Roslyn, Hicksville, and Bellmore reception centers, and on the Emergency Worker Decontamination Facility (EWDF). LILCO and Staff argue that they present only isolated instances which, either singly or in combination, do not amount to a fundamental flaw. Intervenors recognize that, while singly these examples do not amount to a fundamental flaw, together they demonstrate a pervasive problem that does reach that level.[102] While we agree with Intervenors that a sufficient number of the type of problems alleged in this contention could demonstrate that a failure has occurred with respect to this planning element, we do not believe that the allegations of basis B reach that level. They are essentially isolated and unrelated instances which do not show a pervasive pattern. Contention 17 is denied.

---

[100] *See* LILCO's Response at 62-63; Staff's Response at 71; Intervenors' Reply at 181-84.
[101] *See* LILCO's Response at 63; Staff's Response at 72-73; Intervenors' Reply at 184-86.
[102] *See* LILCO's Response at 64; Staff's Response at 73; Intervenors' Reply at 186-87.

CONTENTIONS 18-19: FUNDAMENTAL FLAWS RELATED TO COMMUNICATIONS

Contention 18: Equipment and Reception Failures

This contention alleges that, pursuant to § 50.47(b)(6), LILCO has installed a communications system that was shown by the exercise to be unreliable. It is supported by bases A through G. *Basis A*, which asserts that some radios failed and were replaced, does not allege a failure with respect to this planning element. *Bases C and D*, which rely on the FEMA Report in alleging that inadequate radio coverage hindered communications with respect to two traffic impediments, quote that report out of context and hence do not provide any reason to inquire further. *Basis F* repeats allegations concerning the lack of radios on school buses, which were denied in connection with Contention 14. *Bases B, E, and G* concern the adequacy of the communications system itself and present different considerations. LILCO argues that these bases are inadmissible by contradicting them on the merits. Staff asserts that all of the bases taken together do not allege a fundamental flaw, and that basis G is too vague.[103] Intervenors defend these bases.[104] We may not properly consider LILCO's arguments at this stage of the proceeding, and we believe that these bases do allege a failure with respect to this planning element which requires further inquiry.

The failure alleged in these bases does not correspond to a fundamental flaw found in LBP-88-2. Therefore, we must consider whether Intervenors have provided a factual basis for their argument that significant plan revisions may be necessary. In contrast with the other instances in which this consideration has arisen thus far, bases B, E, and G themselves indicate that, should they be substantiated, a significant reassessment of the communications methods and resources provided by the plan will be necessary if reliable communications are to be provided.[105]

Contention 19: Failure to Communicate Information

This contention alleges that the exercise demonstrated that LERO is "unable to obtain, identify, process, communicate, and transmit essential information and data effectively, accurately and appropriately, and on a timely basis. . . ."

---

[103] Despite Staff's assertion, which on the surface appears to be well taken, LILCO's response indicates that it understands the import of this basis.

[104] *See* LILCO's Response at 64-66; Staff's Response at 74; Intervenors' Reply at 187-92.

[105] This appears to be so largely because these bases concern a hardware problem, as opposed to an organizational problem where specific remedies are not necessarily obvious.

thus demonstrating a failure with respect to the planning element embodied in § 50.47(b)(6). It is supported by five bases which, to a very large extent, rely on the allegations of other contentions for their support.

LILCO opposes bases A and E, which allege inadequate briefings and communications associated with Staging Areas and inadequate guidance and maps issued to some emergency workers, respectively, on the ground that they are too vague and lack the seriousness of a fundamental flaw. Staff opposes basis E, but not basis A, on the ground that it is too vague. LILCO opposes bases C and D, which allege communications problems in the ENC[106] and EOC, respectively, on the ground that they are redundant of other contentions. It opposes basis B, which alleges communications problems between the EOC and ENC, on the ground that it is not supported by any of the contentions that it cites. Staff opposes bases B, C, and D on the ground that there is no nexus between the factual bases of the contentions to which they refer and their allegations. Intervenors assert that the allegations do demonstrate a fundamental flaw and that they may rely on the same facts to support more than one contention.[107]

We find that basis A is too vague in all particulars except its reference to the failure to advise the EOC of the lack of assignment packets for school bus drivers. Although basis B cites Contentions 5-9 for its support, a quick review of the bases of those contentions reveals only one relevant isolated allegation. Because basis C and the relevant portions of Contentions 6-9 on which it relies both allege failures with respect to § 50.47(b)(6), this basis adds nothing new. Basis D, however, concerning LILCO's alleged inability to communicate with the affected governments, does implicate different planning elements than Contention 4, which does provide factual support. Therefore it adequately alleges a failure with respect to § 50.47(b)(6). We agree with LILCO and Staff that basis E is too vague.

Thus only basis D provides reason for further inquiry. However, Intervenors have not alleged facts that would indicate that the alleged failure would require significant plan revisions. Thus this basis can be admitted only if it is sufficiently related to a flaw found in LBP-88-2 to justify the inference that such is indeed the case.

In LBP-88-2, we found flaws related to communications in four specific areas, only one of which was related to the EOC.[108] That area concerned the failure of the Evacuation Route Coordinator to inform his superiors and coworkers of traffic impediments. It seems obvious that any plan revisions that would have been occasioned by that failure are quite different from those that would

---

[106] Problems concerning the provision of timely advice to the media concerning the status of the emergency will be considered under Contentions 7.E and 7.F.

[107] *See* LILCO's Response at 67-69; Staff's Response at 76-77; Intervenors' Reply at 192-97.

[108] *See* LBP-88-2, 27 NRC at 213.

be occasioned by the failure alleged in basis D. We find that basis D is not sufficiently related to justify its admittance.

CONTENTION 20: FUNDAMENTAL FLAWS IN LILCO'S TRAINING PROGRAM

This contention alleges that the exercise revealed a failure with respect to 10 C.F.R. §§ 50.47(b)(14) and (b)(15) in that it demonstrated that LILCO's training program has not been effective. It points out that in LBP-88-2, *supra*, we found that the 1986 exercise revealed a fundamental flaw in the training program. Intervenors assert that virtually every error made by a LERO player reflects adversely on the training program. The contention is supported by bases A through I which refer generally to other contentions and to specific portions of the FEMA Report for their factual statements.

LILCO mounts an attack on the admissibility of a training contention in this proceeding as a general proposition. LILCO finds support for its position in LBP-88-2, which pointed out that, following the 1986 exercise, FEMA found a significant number of training problems and did not find that the plan could be satisfactorily implemented with the training program then in effect. LILCO also relies on LBP-88-2's conclusion that, because of the fundamental flaws found in the training program, a finding of reasonable assurance would have to await a demonstration in another FEMA graded exercise that these flaws had been corrected. Pointing to the FEMA Report, LILCO asserts that this condition has now been met and, consequently, Contention 20 must be denied in its entirety.[109]

LILCO's position overlooks the fact that Intervenors have clearly alleged a failure in the training program required by §§ 50.47(b)(14) and (b)(15), and that they are clearly entitled to challenge FEMA's conclusions. Consequently, LILCO's position must be rejected.

Staff takes a different position. It also cites LBP-88-2, but for the proposition that the standard to be followed in evaluating the training program is whether a systemic problem or pattern of defects has been shown in LERO's performance.[110] Pointing to the fact that Intervenors have not provided specific factual allegations in the bases to this contention, but rather have generally referenced groups of contentions, Staff argues that Intervenors have failed to allege a systemic problem or pattern of defects and have failed to satisfy the basis and specificity requirements of 10 C.F.R. § 2.714.[111]

---

[109] *See* LILCO's Response at 69-72, *citing* LBP-88-2, 27 NRC at 174, 212.
[110] *See* LBP-88-2, 27 NRC at 177.
[111] *See* Staff's Response at 79-80.

Staff's argument is correct. The very general references provided by the bases to this contention are insufficient to allege a pervasive or systemic problem or to meet the basis and specificity requirements.[112] For example, basis B, which alleges that the training program has not prepared LERO personnel to adequately respond to unanticipated and unrehearsed events, states: "Exercise actions and events which support this contention subpart are described in Contentions 4-8, 14-15." The referenced contentions cover sixty-three pages in Intervenors' amended statement of contentions and deal with such diverse topics as access control, rumor control, EBS messages, and monitoring and decontamination. This is the quintessential example of a basis for a contention that fails to adequately inform the board and the parties of its subject matter.

Staff overlooks the fact that, in addition to the general references, Intervenors have also provided references to specific portions of the FEMA Report. We have reviewed these and the performance contentions that we have admitted, as well as those that we have not admitted solely because they did not provide any factual basis on which to conclude that significant plan changes might be required to correct them. Together, these are adequate to permit us to review the bases in order to determine whether a systemic problem or pattern of defects is revealed which implicates the training program.

Basis A alleges that the training program has not prepared LERO personnel to interact with the governments in a timely and effective manner. No specific facts are cited. Contentions 4.A, 4.B, 4.C.1–4.C.3, 4.C.6, 4.C.8, 4.C.9, 4.D, 4.G, and 19.D were all found to adequately allege a failure in the planning element related to interaction with the governments, but were excluded because they did not provide a factual basis for the proposition that significant plan changes were required as a result. They also adequately allege that the training program has failed in this respect.

Basis B is denied for the reasons given above.

Basis C alleges that the training program has not successfully taught LERO personnel the terms of and the necessity to follow the plan. It cites sixteen ARCAs. These all concern school or general-population bus drivers with the exception that two ambulette crews, an EOC communicator, route spotter, traffic guide, radiation monitor, and Radiation Safety Officer each received one ARCA.[113] Additionally, Contention 5.D, which asserts that route-alert drivers could not always identify the homes of the deaf whom they were to alert, raises a similar problem. While the ARCAs pertaining to the EOC communicator, radiation monitor, and Radiation Safety Officer, appear to be isolated events,

---

[112] Intervenors' argument that Staff is in reality attacking the merits of the contention is clearly incorrect. *See* Intervenors' Reply at 202-03.

[113] It is interesting that one of the fundamental flaws found in the training program in LBP-88-2 concerned the basic knowledge of traffic guides and bus drivers.

the remainder may, if substantiated, indicate a systemic problem or pattern of defects with respect to the category of workers represented by bus drivers, ambulette crews, route spotters, and traffic guides. Thus, they allege a failure with respect to this aspect of the training program.

Basis D alleges that the training program has failed to teach LERO personnel to communicate adequately among themselves and with the public. It cites three ARCAs, two of which appear to be isolated instances of inadequate internal communications. The third concerns inaccurate information in EBS messages 4-7. This, when coupled with the contentions we have admitted concerning communications with the public,[114] could demonstrate a systemic problem, and thus alleges a failure in this aspect of the training program.

Basis E alleges that the training program has failed to teach LERO personnel to exercise good judgment and use common sense. It cites three ARCAs which concern three unrelated events and thus does not adequately allege a failure with respect to this aspect of the training program.

Basis F alleges that the training program has failed to teach LERO personnel to deal with the media. It cites Contentions 6 and 7 as its support, the admitted portions of which have been accepted under basis D. Consequently, basis F is consolidated with basis D.[115]

Basis G alleges that the training program is insufficient in the areas of dosimetry, exposure control, potassium iodide (KI), and radiation terminology. It recognizes that a similar contention concerning the 1986 exercise was not successful,[116] and cites ten ARCAs as its support. With the exception of the last ARCA cited, these all raise the question whether a systemic training problem exists, particularly with regard to KI. Thus this basis adequately alleges a failure in this aspect of the training program.

Basis H relies solely on general citations to the contentions and is denied.

Basis I alleges that those LERO personnel who participated in the exercise demonstrated that they lacked the training to implement the plan. This is too general an allegation to be litigated and is denied.

We find that bases A, relating to interaction with the governments, C, relating to the training of bus drivers, ambulette crews, route spotters, and traffic guides in the plan's procedures, D, relating to communications with the public, and G, relating to dosimetry, exposure control, KI, and radiation terminology adequately allege a failure in the planning elements related to training. The question remains whether the contention adequately alleges that a significant plan revision or

---

[114] These are Contentions 6.A.1; 6.A.4 and 6.A.5, with which 11.A and 11.B are consolidated; 6.A.6; 6.B.1–6.B.10 (11.D and 12.C are consolidated with 6.B.3, 11.E is consolidated with 6.B.4, 12.D is consolidated with 6.B.2, and 12.E is consolidated with 6.B.7 and 6.B.10); 6.C.1; 6.C.2 (first example only); 6.D.2; 6.D.7; 6.D.8; 6.D.12; 6.D.13; 7.E; and 7.F.

[115] This consolidation does not expand the evidentiary inquiry as defined under basis D.

[116] *See* LBP-88-2, *supra*, 27 NRC 204-05.

reassessment is needed. Similar to the situation with respect to Contention 18 concerning communications systems and equipment, we believe that the possible existence of a systemic problem or pattern of defects in an aspect of the training program in itself states a need for a significant revision or reassessment. If, for example, bus drivers are not following plan procedures, a significant reassessment of their training program will be necessary to determine why and correct the problem. Consequently, Contentions 20.A, 20.C, 20.D, and 20.G are admitted.

SUMMARY OF RULINGS ON CONTENTIONS

The following summary lists the admitted contentions. The summary of each contention is given for convenience only and is not intended to supercede the rulings contained in the discussion of each contention and its bases. Contentions that have been consolidated with a given contention are listed with the latter.

1.A	Public notification system was insufficiently tested. Sirens were not tested, nor was there a test of the EBS.
1.B	School preparedness was inadequately tested. Only one school district participated; this participation was limited to one school with enrollment of 170 students. There are eight other school districts and twenty-three parochial and private schools within the 10-mile EPZ that were not contacted during the exercise.
1.D	Exercise omitted major portions of the emergency plan relating to school evacuations. Includes 14.F (Failure to show how children taken to relocation centers would be cared for).
1.E	School evacuation plans were inadequately tested. There was no demonstration of how bus passengers would be directed after disembarking, only 30 out of 613 drivers were dispatched to the bus yard, and no demonstration of how the buses would be directed at relocation or reception areas, or how potentially contaminated children would be monitored and decontaminated.
1.F	Evacuation of special-facility residents was inadequately tested. During the operation of the exercise, none of the special facilities participated. None of the special facilities were contacted, either within or outside of the 10-mile EPZ.
1.G	The exercise failed to test evacuation of homebound disabled population residing within the EPZ. During the exercise, two

	ambulances were dispatched to zones B and C, but no actual persons were transported.
1.H	The reception hospitals did not participate in the exercise, and no capability to implement selection of hospitals at the time of emergency was demonstrated.
1.I	Testing of evacuation of contaminated injured individuals was inadequate. One ambulance was dispatched to test the ability to transport the injured individuals, while only one radiation officer was present during medical drills designed to test ability to care for injured individuals.
1.O & 1.P	An insufficient number of bus and ambulance companies participated in the exercise.
1.Q	The communications network in the plan was not tested sufficiently.
6.A.1	EBS Nos. 4-7 erroneously stated that doses were below EPA guidelines for protective actions.
6.A.4	EBS No. 10 incorrectly advised that no action need be taken in areas outside the 10-mile EPZ.
6.A.5	EBS No. 16 advised that no action need be taken in areas outside the 10-mile EPZ even though certain doses had been found to be above EPA guidelines and the same EBS contained a dairy animal PAR for those areas.
	11.A and 11.B consolidated with 6.A.4 and 6.A.5 (Delay in issuing ingestion pathway PARs when aware of "hot spots" and increased radiation risk, failure to warn persons outside the 10-mile EPZ).
6.A.6	EBS Nos. 4 and 5 incorrectly advised of the location of Rocky point schoolchildren who were enroute for monitoring and possible decontamination.
6.B.1–6.B.10	Important information was not disseminated in a timely fashion.
6.B.1	Incorrect advice was disseminated by EBS regarding a release of radiation into the air.
6.B.2	PAR directing persons in evacuated zones to go to reception centers was untimely and confusing. Includes 12.D (Untimely broadcast of information to report to reception centers).

6.B.3	PARS were not issued to those choosing to remain in evacuated areas. Includes 11.D and 12.C (No announcements regarding ingestion pathway precautions to those choosing not to evacuate; untimely broadcast of PARs for persons remaining in evacuation zones).
6.B.4	EBS announcement of the PAR for dairy animals was untimely. Information released at the ENC conflicted with EBS messages. Includes 11.E (Delayed EBS announcement to place dairy animals on stored feed).
6.B.5	Broadcast of EBS message regarding evacuation of children residing in EPZ from schools outside the EPZ was delayed.
6.B.6	EBS information regarding pickup and evacuation of children attending schools outside the EPZ but residing inside the EPZ was confusing.
6.B.7	EBS announcement of traffic impediments was delayed. Includes 6.B.10 and 12.E (Delay in advice regarding road impediments which could lead to delays in evacuation).
6.B.8	Announcement regarding extension of ingestion PARs for dairy animals was delayed.
6.B.9	EBS information regarding contaminated milk and vegetables was delayed and inaccurate.
6.C.1	Road impediment information was placed at the end of EBS messages.
6.C.2	New information placed into EBS messages was not in context and thus confusing (first example only).
6.D.2	There was no EBS announcement of altered LIRR service for means of evacuation.
6.D.7	EBS gave inconsistent advice to the same group.
6.D.8	EBS gave inconsistent messages juxtaposed against one another leading the listener to believe that the people "in charge" did not know what was happening.
6.D.12	EBS gave inconsistent information regarding ingestion PARs.
6.D.13	EBS gave confusing information regarding ingestion PARs.
7.E	EBS messages for the news media at the ENC were not timely posted.

7.F	The untimeliness of EBS messages would create confusion for the media and the listening and viewing public.
18.B	Loss of radio contact between LILCO and field workers delayed receipt of and response to messages.
18.E	Heavy radio traffic resulted in a potential for delay of priority messages.
18.G	RECS (dedicated) telephone system did not function correctly at times.
20.A	Personnel lacked sufficient training to interface in a timely manner with state and local government officials.
20.C	Training programs ineffective in instructing bus drivers, ambulette crews, route spotters, and traffic guides to follow the plan.
20.D	Personnel were ineffectively trained in communicating and acquiring data and information or recognizing the need for information, resulting in an inability to communicate emergency information in a clear and timely manner. Includes 20.F (Personnel not effectively trained to deal with the media to provide timely nonconflicting information).
20.G	Training was deficient regarding use of KI.

ORDER

In consideration of the foregoing, it is hereby ORDERED:

1. The contentions enumerated above are admitted for litigation in this proceeding; and

2. Pursuant to 10 C.F.R. §§ 2.718(i) and (m), the rulings contained in this Memorandum and Order are certified to the Atomic Safety and Licensing Appeal Board.

THE ATOMIC SAFETY AND
LICENSING BOARD

Frederick J. Shon
ADMINISTRATIVE JUDGE

Dr. Oscar H. Paris
ADMINISTRATIVE JUDGE

John H Frye, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
January 3, 1989

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Helen H. Hoyt, Chair
Glenn O. Bright
James H. Carpenter

In the Matter of **Docket No. 50-224-OLA**
(ASLBP No. 87-574-07-OLA)

UNIVERSITY OF CALIFORNIA,
BERKELEY
(Research Reactor) **January 5, 1989**

ORDER
(Dismissing the Proceeding)

This Board has before it the joint pleading filed on November 25, 1988, by Intervenor City of Berkeley and the University of California, Berkeley, Licensee, petitioning for dismissal of the petition to intervene and request for hearing. In addition, on December 7, 1988, the Board received the NRC Staff Response for Support of Joint Motion for Dismissal of Hearing Procedures.

The Board has considered the joint motion and the Staff response. Accordingly, the Board grants the request and dismisses this proceeding.

THE ATOMIC SAFETY AND
LICENSING BOARD

Helen F. Hoyt, Chair
ADMINISTRATIVE JUDGE

Glenn O. Bright
ADMINISTRATIVE JUDGE

James H. Carpenter
ADMINISTRATIVE JUDGE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Chairman
Dr. Richard F. Cole
Dr. Jerry R. Kline

In the Matter of

Docket Nos. 50-443-OL
50-444-OL
(ASLBP No. 82-471-02-OL)
(Offsite Emergency Planning)

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, *et al.*
(Seabrook Station, Units 1 and 2)

January 30, 1989

MEMORANDUM AND ORDER
(Review of Quebec Earthquake)

On December 5, 1988, Elizabeth Dolly Weinhold ("Petitioner") filed a petition seeking review in several forms of the effect on the current license application of the so-called "Quebec" earthquake which occurred on November 25, 1988.[1] The Applicants and NRC Staff have filed responses in opposition to the petition.[2] No other parties have responded. On January 4, 1989, the

[1] The submission was titled "Petition for Nuclear Regulatory Commission Review and Evaluation of the 6.4 Magnitude Quebec, Canada Earthquake for the Express Purpose of Comparative Analysis with the Safe Shutdown Earthquake (SSE) of the Seabrook Units and the Evacuation Planning Report."

[2] Applicants' Answer, dated December 19, 1988; NRC Staff Response, dated December 30, 1988. The NRC Staff had also filed a preliminary assessment, dated December 15, 1988.

Petitioner filed a "Rebuttal" to the Applicants' Answer; and on January 11, 1989, the NRC Staff filed a response to the "Rebuttal."[3]

For reasons set forth below, we find that the petition fails in a number of ways to conform to NRC regulatory requirements and, additionally, sets forth no information that would warrant our undertaking the additional safety reviews that appear to be sought. Accordingly, we are denying the petition.

1. Background

As both the Applicants and Staff observe, the petition is not a model of clarity. What it apparently seeks is for this Licensing Board to (1) review and evaluate the Quebec earthquake with a view toward upgrading the Safe Shutdown Earthquake (SSE) for this facility to at least the level of the Quebec event, and (2) accept for litigation five contentions seeking to revise certain aspects of the emergency plan to take into account damage from an earthquake greater than the current Seabrook SSE. The petition, however, fails to define precisely the contours of the review that is sought; nor does it accommodate the procedural requirements of the various forms of review that may be sought. Nonetheless, we have attempted to discern whether any of the types of analyses apparently sought by the Petitioner should be made available, consistent with NRC procedures, given the information provided.

The Petitioner is not a party to the Seabrook operating license proceeding, although she has made a limited appearance statement on seismic matters.[4] She was a party to the Seabrook construction permit proceeding, raising seismic issues concerning the SSE for the Seabrook facility. Because the Petitioner has not yet become a party to this proceeding, at a time well after the initial period specified for doing so, her proposed participation in the operating license proceeding must be judged under the procedures governing late-filed intervention petitions set forth in 10 C.F.R. § 2.714(a) and must survive a balancing of the five factors set forth therein.[5] Although her petition itself includes no information or argument addressed to the factors governing late-filed intervention petitions, her "Rebuttal" does discuss one of the factors.

---

[3] As the Staff points out, under NRC Rules, Petitioner has no automatic right to file a "Rebuttal" (*cf.* 10 C.F.R. § 2.730(c)). She also has not moved for leave to do so. Nonetheless, the Staff offers no objection to our considering this "Rebuttal," and we have considered it, as well as the Staff's response thereto, in reaching our determination on the petition.

[4] This statement was made before the Licensing Board for the onsite proceeding (Tr. 229-32, September 29, 1986). Ms. Weinhold appeared as one of a panel of witnesses before this Board, on another topic (Tr. 8602-77, January 12, 1988).

[5] (i) Good cause, if any, for failure to file on time; (ii) The availability of other means whereby the petitioner's interest will be protected; (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (iv) The extent to which the petitioner's interest will be represented by existing parties; (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The Applicants have analyzed the petition in terms of (1) a motion to reopen the record, (2) a motion for late-filed intervention, and (3) a request for relief under 10 C.F.R. § 2.206. The Staff has analyzed it in terms of the first two of these options.

The section of the rules governing motions to reopen the record (10 C.F.R. § 2.734) is among those cited by the petition, and Petitioner's Rebuttal explicitly affirms that the Petitioner is seeking to reopen the record on seismic matters. Nonetheless, there conceptually is some difficulty in applying these procedures to the petition inasmuch as no seismic issues have ever been considered in the operating license proceeding and, accordingly, there is no record on this question to reopen.[6] We have considered the petition in terms of the reopening procedures only to the extent necessary to note that the affidavits required by 10 C.F.R. § 2.734(b) have not been furnished. Because of the generally inadequate factual support undergirding the petition, we would deny the petition as not meeting the reopening criteria if it were necessary to determine whether those criteria were satisfied.

We also do not view the petition, either through its terms or its apparent intent, as a request for a show-cause order pursuant to § 2.206 seeking to modify "the outstanding operating license."[7] In any event, we have no jurisdiction to entertain requests for show-cause orders pursuant to § 2.206 and thus will not further consider the petition as seeking such an order.

In short, we regard the petition as a request for late-filed intervention, seeking to litigate several new contentions, and we will consider it in that context.

2. *Standards*

Late-filed intervention requests not only must satisfy the lateness criteria set forth in 10 C.F.R. § 2.714(a).[8] They must also meet the general requirements for intervention, including a showing that the petitioner has standing to participate and has submitted at least one litigable contention. 10 C.F.R. § 2.714(a), (b). As for standing, the Petitioner states only that she is from Hampton, New Hampshire, and was an intervenor in the construction permit proceeding. Although this statement does not describe standing with the required particularity, no party has raised any question concerning standing. We will assume that the

---

[6] The construction permit and operating license phases of an application are considered separate proceedings. Subject to application of *res judicata* or collateral estoppel factors (*see* pp. 56-59, *infra*), similar types of safety issues may be considered in each proceeding. Seismic issues were considered in the construction permit proceeding, but we have no jurisdiction to reopen that separate proceeding. 10 C.F.R. § 2.717(a); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-381, 5 NRC 582, 591 (1977).

[7] Applicants' Answer, dated December 19, 1983, at 4, 9.

[8] *See* note 5, *supra*.

Petitioner possesses the requisite standing, based on the location of Hampton as within 50 miles of the reactor.

As for proposed contentions, we perceive two separate categories. The first, set forth as five separate contentions, attempts to litigate the effect of an earthquake similar to the Quebec earthquake on the emergency plan for the facility. The other more general contention seems to claim that the current SSE for the facility is inadequate based on the recent Quebec earthquake.

3. *Emergency Planning Contentions*

To the extent the petition seeks to introduce five new contentions concerning the effect of an earthquake such as the Quebec earthquake on emergency planning for the facility, we agree with both the Applicants and Staff that these proposed contentions are all of a type that may not be considered in a proceeding of this sort. The five contentions are each premised upon a severe reactor accident at Seabrook being accompanied by an earthquake of the magnitude of the Quebec earthquake. The Commission has held that this scenario need not be considered in the context of emergency planning, and its ruling in this regard has been upheld by the Court of Appeals for the Ninth Circuit. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-12, 20 NRC 249 (1984), *aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1305-09 (D.C. Cir. 1984), *aff'd en banc*, 789 F.2d 26 (D.C. Cir. 1986). *See also Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-81-33, 14 NRC 1091 (1981). Given these rulings, it is clear that we could not entertain the five proposed emergency planning contentions, even were all other requirements governing a late-filed intervention to be satisfied.

4. *Seismic Review*

The remaining matter sought to be litigated by the petition consists of a reevaluation of the Seabrook SSE, to determine whether it is sufficient to take into account the recent Quebec earthquake. The petition asserts that the Quebec earthquake is a magnitude 6.4, whereas the Seabrook SSE is only a magnitude 6.0. The Applicants, however, claim that the 6.4 magnitude stems from early newspaper accounts based on preliminary assessments and that the Quebec earthquake has been rated as 6.0 magnitude by the Geological Survey of Canada and 5.9 magnitude by the U.S. Geological Survey.[9]

[9] Applicants' Answer at 2 n.2.

To make the Quebec earthquake applicable to the Seabrook site, the petition seeks to have us find that it is included within the same tectonic province as that within which the Seabrook site is located. The petition fails, however, even to indicate the location of the epicenter of the earthquake. (The several responses are of no assistance in this regard.) For purposes of our discussion here, we shall assume that the earthquake occurred about 90 miles north of Quebec City (approximately 400 miles from the Seabrook site).[10]

The petition also seeks to have reconsidered testimony presented by Intervenors' witness, Dr. Michael Chinnery, at the construction permit stage but not relied upon by either the Licensing Board or the Appeal Board, concerning the maximum size earthquake that could occur at Seabrook. The petition apparently claims that the occurrence of the asserted 6.4 magnitude Quebec earthquake together with several smaller earthquakes validates the theories propounded by Dr. Chinnery.

The Applicants and Staff oppose our accepting this portion of the petition on a variety of grounds. We will deal with them *seriatim*.

a. Jurisdiction

First, although asserted with respect to a reopening of the record (which, as we have shown, is not here applicable), the Staff asserts that we lack jurisdiction to entertain a claim of this sort. The Staff, without citation to any authority, defines our jurisdiction to extend only to "proceedings relating to Applicants' off-site radiological emergency response plan."[11] (It claims that the onsite Licensing Board for this proceeding similarly lacks jurisdiction to entertain a claim of this sort, on the ground that its authority is limited to resolving certain specific issues remanded to it by the Appeal Board.) The Applicants make a similar assertion about our jurisdiction, also without citation.

In our view, we possess adequate jurisdiction to consider the seismic question, were it otherwise properly presented. As is reflected in the recent Notice that reconstituted the membership of this Board, this Licensing Board is the successor to the original Board for this proceeding and possesses jurisdiction to consider all issues within the scope of this proceeding, other than those specifically assigned to another Board.[12] The onsite Board was spun off in 1985 to resolve specified issues, and its jurisdiction is limited to those issues. That emergency planning issues are all that are currently pending before us is a fortuitous circumstance

---

[10] *See* issuance of the NRC Office of Nuclear Regulatory Research, "Items of Interest, Week Ending December 2, 1988," attached hereto as an appendix.

[11] NRC Staff Response, dated December 30, 1988, at 2-3; *see also* NRC Staff Response to Rebuttal, dated January 11, 1989, at 3.

[12] Notice of Reconstitution of Board, dated January 10, 1989, 54 Fed. Reg. 2009 (Jan. 18, 1989).

and does not serve to limit our jurisdiction to those issues — particularly where, as here, the seismic issue in question was never before raised or considered in the operating license proceeding. Accordingly, we have jurisdiction to entertain any new late-filed contentions that are otherwise properly within the scope of this operating license proceeding and are not among those assigned to the onsite Board.

b. Res Judicata

Second, the Applicants assert that the seismic review sought by the Petitioner is *res judicata*, based on questions that were raised by the Intervenors (including the Petitioner) and resolved during the construction permit proceeding. This claim is applied by the Applicants to the Petitioner's alleged assertion that the Seabrook site is in the same tectonic province as Quebec, and upon the validity of the so-called "Chinnery" theory of ascertaining the upper bounds of earthquake magnitude. Both of these questions are necessary elements of the petition and, according to the Applicants, were decided adversely to the Petitioner during the construction permit proceedings.[13] For the reasons that follow, we conclude that the Applicants' claim is meritorious and that Petitioner's contention that the Seabrook SSE should be reevaluated is barred as *res judicata*.

The doctrine of *res judicata* has long been held to be applicable in NRC licensing proceedings. *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, *remanded on other grounds*, CLI-74-12, 7 AEC 203 (1974). The doctrine must be applied "with a sensitive regard for any supported assertion of changed circumstances or the possible existence of some special public interest factors . . . ." *Id.*, ALAB-182, 7 AEC at 216. In that connection, however, we could not reject the proposed contention on *res judicata* grounds without affording the Petitioner an opportunity to be heard on the question. *Farley*, CLI-74-12, *supra*, 7 AEC at 204.[14] The Petitioner has had that opportunity in this instance.

For *res judicata* to preclude litigation of an issue, the individual or entity against whom estoppel is asserted must have been a party, or in privity with a party, to the earlier litigation (here, the construction permit proceeding); the issue to be precluded must be the same as that involved in the prior proceeding; the issue must have been actually raised, litigated, and adjudged; and the issue must

---

[13] *See* ALAB-422, 6 NRC 33, 54-64 (1977); ALAB-667, 15 NRC 421, 441 (1982).

[14] Licensing boards must provide an opportunity to respond to "any prospective intervenor whose contention is attacked by another party on *res judicata* or collateral estoppel grounds, prior to deciding the matter." Although the Applicants cited this opinion as subsequent history of the Appeal Board decision on which they relied, they neglected to advise us of the necessity of obtaining the Petitioner's views before deciding the question on *res judicata* grounds. In this instance, the Petitioner has addressed this question in her "Rebuttal" and, accordingly, the pleading requirements essential for us to consider the Applicants' claim of *res judicata* have been fulfilled.

have been material and relevant to the disposition of the first action. The doctrine must be applied with a sensitive regard for any supported assertion of changed circumstances. *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536-37 (1986). Here, unless it appears that the changed circumstances cited by the Petitioner — i.e., the Quebec earthquake and several smaller earthquakes — undercut the findings at the construction permit stage, all elements of *res judicata* appear to be satisfied.

In determining the admissibility of the proposed seismic contention, and before determining whether *res judicata* is applicable, we must accept the petition's classification (supported by a basis)[15] of the earthquake as having a 6.4 magnitude. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980). If that classification were correct, the earthquake would be of greater magnitude than the Seabrook SSE. This showing of changed circumstances, however, would be relevant to this proceeding only if such an earthquake would produce ground acceleration at the Seabrook site greater than the Seabrook SSE. Whether that is the case depends upon whether the Quebec earthquake is located in the same tectonic province as Seabrook. 10 C.F.R. Part 100, Appendix A, V(a).

At the construction permit stage, the tectonic province in which the Seabrook site was found to be located is not the same as the one in which the Quebec earthquake apparently occurred. The petition, however, seeks to demonstrate that the previous determination was incorrect and that one tectonic province governs both areas; i.e., that the province in which the Seabrook site is located is the "southerly extension of the Quebec, Canada, Seismic Tectonic Province." Petition at 6.

The Petitioner advances two theories to support this proposition. First, she attaches an earthquake epicenter map covering earthquakes that occurred from October 1975 through September 1986. This map is said to demonstrate (i) that seismicity appears to be evenly distributed throughout southern New Hampshire and eastern Maine; (ii) that the southern New Hampshire–eastern Maine seismic zone runs parallel to the Quebec seismic province; and (iii) an even distribution of major and minor seismicity has been instrumentally recorded during the period throughout the entire northeastern U.S. regions from Ottawa, Canada, due South, through the states of New York, New Jersey, and "due East," encompassing all of the New England States and extending through the St. Lawrence River Regions of Canada.

---

[15] The basis would be the "reports in local newspapers" on which the petition states it is based (Petition at 2; *see also* Applicants' Response at 2 n.2; Petitioner's Rebuttal at 2-3). We assume, because we have not been advised otherwise, that the reports themselves made no attempt to connect the earthquake to the Seabrook facility. We also note, although we are not premising our ruling on, precedent to the effect that "hearsay based on a newspaper article does not constitute the kind of evidence that can support a reopening motion." *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 n.2 (1986).

Our own examination of the attached map leads us to believe that these observations are mutually inconsistent; and that, rather than an even seismicity, there are several distinct belts of seismicity in the area covered. That map scarcely supports the theory advanced by the Petitioner. Nor does the theory appear to be based on anything more than pure speculation by the Petitioner; no scientific expert is cited as a basis for the claim. Indeed, Ms. Weinhold has conceded that she has no expertise in this field (Tr. 229, onsite proceeding). We conclude that the Petitioner's arguments on this point are not sufficient to undercut the application of *res judicata* to the determination of tectonic province.

Second, the Petitioner references an earthquake of 4.0 magnitude at Berlin, New Hampshire, on October 20, 1988, and an earthquake of 3.8 magnitude at Sumner, Maine, on November 15, 1988, and describes them as potential "pre-shocks" of the Quebec earthquake. Because of their location vis-a-vis the Seabrook site, the Petitioner asserts that, if they were "pre-shocks" of the Quebec earthquake, they would serve to expand the tectonic province in which the Quebec earthquake occurred to include the Seabrook site. She calls upon "the scientific community" to determine whether these two small earthquakes are indeed "pre-shocks" of the Quebec earthquake.

No scientific basis has been cited to support this theory. As noted, Ms. Weinhold admits that she herself is not a scientific expert in this field. We ourselves are aware of no scientific basis for this claim. Indeed, Ms. Weinhold appears to be using this claim to generate research support for her pre-shock theory, a process comparable to discovery which is impermissible under NRC rules to assist in the framing of contentions. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 192, *reconsideration denied*, ALAB-110, 6 AEC 247, *aff'd*, CLI-73-12, 6 AEC 241 (1973). Given these considerations, we find no basis supporting the Petitioner's pre-shock theory and no foundation for using that theory to demonstrate changed circumstances sufficient to modify the previous conclu ions with respect to the Seabrook tectonic province and thereby undercut the Applicants' claim of *res judicata*.

The Applicants would also apply *res judicata* to the Petitioner's claim that the Quebec earthquake and the seismicity map discussed above revalidate Dr. Chinnery's theory that an Intensity XII earthquake is a probable occurrence throughout the entire Northeastern United States Provinces. The Appeal Board concluded "that Dr. Chinnery's methodology has not been shown to be a credible means of predicting the intensity of seismic motion at a particular site." ALAB-667, *supra*, 15 NRC at 441. Ms. Weinhold has not provided a technical explanation of how the new information on which she is relying would even affect Dr. Chinnery's testimony, much less validate it. For lack of any basis for this claim, we do not accept it as defeating a claim of *res judicata* with respect to the Appeal Board's evaluation of Dr. Chinnery's testimony.

In sum, we find that two of the vital elements in Ms. Weinhold's petition are *res judicata* and that none of the information provided in the petition (or Rebuttal) serves to demonstrate changed circumstances that would undercut the applicability of that doctrine. Insofar as it seeks a reexamination of the Seabrook SSE, the petition is barred by the doctrine of *res judicata*.

c. Timeliness

Finally, both the Applicants and Staff claim that, even were litigable issues presented, the Petitioner has not carried her burden of demonstrating that the lateness factors favor admission of the proposed contentions. Given our rulings on the lack of merit of each of the proposed contentions, we need not even reach this claim. Nonetheless, to provide a record of our views on all the issues raised, we will record our agreement with the Applicants and Staff in this regard.

The petition itself makes no attempt whatsoever to address the requisite factors. The "Rebuttal" deals in some fashion with factor (v) (delay), but, as the Staff points out, a petitioner who fails to discuss the five factors in its original petition has no right to a second opportunity to do so later. *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 468 (1985).

Moreover, even were we to assume that factors (i), (ii), and (iv) weigh in favor of the Petitioner, factors (iii) and (v) do not and, in this situation, would be controlling. Most important, the Petitioner has made no showing that she could adequately assist in developing the record on complex questions such as she is attempting to raise. Indeed, her attempt to provide a basis for modifying the tectonic province is, as we have observed, founded upon sheer speculation. Moreover, she admits to lack of expertise but provides no basis for our concluding that she could or would obtain technical assistance in pursuing her contentions. As for delay, her observation that there will be little delay if the Applicants' assertion of the magnitude of the Quebec earthquake is correct ignores both the reasonable time needed to resolve legitimate differences of opinion or, alternatively, suggests a lack of basis for her claim that the Quebec earthquake is of magnitude 6.4. Although the delay engendered by the process of litigation would not be controlling were significant safety information warranting resolution by the Board presented, this is not the case here.

In short, we do not believe that our denying the instant petition will have any adverse effect on the public health and safety. In that connection, the NRC Staff, of course, routinely keeps track of developing information on earthquakes and, where warranted, may take enforcement action to make new information applicable to existing licensees.

For the reasons stated, it is, this 30th day of January 1989, ORDERED:

1. The Petition for Nuclear Regulatory Commission Review and Evaluation of the November 25, 1988 Quebec, Canada Earthquake, dated December 5, 1988, is hereby *denied.*

2. This Memorandum and Order may be appealed by the Petitioner to the Atomic Safety and Licensing Appeal Board, as provided by 10 C.F.R. § 2.714a. A notice of appeal with accompanying supporting brief must be filed within ten (10) days after service of this Memorandum and Order. Any other party may file a brief in support of or in opposition to the appeal within ten (10) days after service of the appeal.

Judges Jerry Harbour and Gustave A. Linenberger were members of the Board at the time the petition was filed and contributed to this decision. They agree with the result. Judge Jerry R. Kline did not participate in this decision.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Richard F. Cole
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland
January 30, 1989

APPENDIX

OFFICE OF NUCLEAR REGULATORY RESEARCH
Items of Interest
Week Ending December 2, 1988

Earthquake in Eastern Canada

A magnitude 6 earthquake occurred at 6:46 pm EST, Friday, November 25, 1988, about 90 miles north of Quebec City, Canada, which is an area of little or no historic seismicity. The epicenter is located at 48.14N and 71.22W, with a depth of 17 km. This location is 100 km north of the historically very active La Malbaie area on the St. Lawrence River.

A magnitude 4.5 foreshock occurred on Wednesday, November 23, and a 4.1 aftershock occurred on Saturday, November 26. There have been no aftershocks greater than magnitude 2 since Sunday, November 27.

The main shock was strongly felt at the Canadian Gentilly nuclear power plant approximately 215 km miles [sic] from the epicenter, but there was no seismic instrument to record the event as they are not required for Canadian plants. The only U.S. nuclear power plant that instrumentally detected the earthquake was Nine Mile Point Unit 1, about 675 km distance, where a seismic annunciator sounded for 2 seconds. The strong motion instruments were not triggered.

Seismologists and geologists of the Geophysics Division of the Geological Survey of Canada, with which the NRC-RES has a cooperative seismic agreement, have deployed portable instruments in the epicentral area to monitor aftershocks. They also are searching for evidence of ground surface deformation caused by the earthquakes, which may be difficult to find with the 12″ snow cover. Columbia University seismologists, an RES contractor personnel, are assisting the Canadians with additional portable equipment. They also operate an array of strong motion instruments in conjunction with the National Center for Earthquake Engineering. This array recorded a maximum acceleration of 0.6*g* approximately 210 km from the epicenter.

The earthquake was widely felt within the U.S., from Maine to Michigan with reliable reports of it being felt in the Washington, D.C. area.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Sheldon J. Wolfe, Chairman
Emmeth A. Luebke
Jerry Harbour

In the Matter of

Docket Nos. 50-443-OL-1
50-444-OL-1
(ASLBP No. 88-583-01-OL)
(Onsite EP Exercise)

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, *et al.*
(Seabrook Station, Units 1 and 2)

January 30, 1989

The Licensing Board denies certain Intervenors' motion to admit exercise contention, or, in the alternative, to reopen the record.

LICENSING BOARDS: JURISDICTION

A licensing board possesses the inherent right (indeed, the duty) to determine in the first instance the bounds of its jurisdiction. *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-591, 11 NRC 741, 742 (1980).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

Pursuant to 10 C.F.R. § 2.714(a)(1) and (b), any contention that is not filed within 15 days prior to the holding of a special prehearing conference or that is

not filed within 15 days prior to the holding of the first prehearing conference (if a special prehearing conference has not been held), is deemed to be late filed, and any request to file a nontimely contention may be granted based upon the balancing of the five factors.

ATOMIC ENERGY ACT: RIGHT TO A HEARING

Section 189a of the Atomic Energy Act does not provide members of the public with an unqualified right to a hearing, but rather the Act permits the establishment of reasonable threshold requirements for the admission of contentions, and the five-factor test in 10 C.F.R. § 2.714 represents a permissible exercise of that authority. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-47 (1983). In *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (1984), the Court of Appeals neither held nor implied that the Act either prohibits the establishment of reasonable threshold requirements, such as the five-factor test, for the admission of contentions, or precludes the application of standards to reopen a closed record under 10 C.F.R § 2.734.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

Good cause can be shown for failing to propose a contention in a timely manner if intervenors submit the contention promptly after receiving the pertinent document, and all that is required is that they state the reasons (i.e., the basis) for the contention by referring to that document, and set forth assertions and conclusions drawn therefrom. *See Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548-49 (1980).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

Once the institutional unavailability of a licensing-related document is removed, intervenors must promptly formulate their contentions. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

Absent good cause for late filing, a compelling showing must be made on the other four factors in § 2.714(a)(1). *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). However, favorable findings on some or even all of the other factors in the rule need not in a given case outweigh the effect of inexcusable tardiness. *Nuclear Fuel Services, Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

The second and fourth factors in § 2.714(a)(1) are accorded less weight than the three other factors. With respect to the third factor, a petitioner should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245-46 (1986).

RULES OF PRACTICE: MOTION TO REOPEN THE RECORD

Section 2.734 is a part of the adjudicatory process provided for under § 189(a)(1) of the Atomic Energy Act. In contrast, a 10 C.F.R. § 2.206 procedure can hardly be equated with the ability to litigate issues in an adjudicatory setting, accompanied by a right of appeal to the Appeal Board and an entitlement to petition for Commission review if dissatisfied with the appellate result. *Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1176 (1983).

RULES OF PRACTICE: MOTION TO REOPEN THE RECORD

A mere threshold showing is insufficient because it is well settled that a proponent of a motion to reopen has a heavy burden. 51 Fed. Reg. 19,535 (1986); *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 328 (1978).

RULES OF PRACTICE: MOTION TO REOPEN THE RECORD

Even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits

submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the proceeding. The questions whether the matters sought to be raised present significant safety issues and whether they present triable issues of fact are intertwined and will be so treated. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523-24 (1973).

LICENSING BOARDS: REVIEW OF NRC STAFF'S ACTIONS

Barren allegations that the NRC Staff has acted in bad faith will be ignored. The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, we presume that they have properly discharged their official duties. *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

RULES OF PRACTICE: MOTION TO REOPEN THE RECORD

Only facts raising a significant safety issue, not conjecture or speculation, can support a reopening motion. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1367 n.18 (1984).

EMERGENCY PLANNING: EXERCISE INSPECTION REPORTS

It is normal NRC procedure, when an exercise inspection report identifies "open items," for the Staff to conduct a followup inspection to determine whether those open items should be closed in a subsequent inspection report.

MEMORANDUM AND ORDER
(Denying Motion to Admit Exercise Contention or to Reopen Record)

Memorandum

I. BACKGROUND

On September 16, 1988, certain intervenors filed a motion to admit exercise contention or, in the alternative, to reopen the record.[1] An affidavit of Mr. Robert Pollard (hereafter Pollard Aff. 1) was attached to the motion. Applicants filed a response opposing the motion on September 28, 1988. Affidavits of Messrs. Gary Kline, James MacDonaid, and Gregg Sessler were attached to the response. On October 3, the Staff filed its response. On October 7, the Intervenors submitted a motion for leave to reply to the responses of the Applicants and the Staff. On October 12, the Staff and Applicants filed opposing responses.[2]

II. DISCUSSION

A. Jurisdiction

Intervenors urge that this onsite Board has jurisdiction to consider and to admit this new contention which alleges that serious defects and inadequacies exist in the Applicants' current onsite emergency response staff which result from an inadequate training program, and that said contention arises out of the June 27-29, 1988 exercise conducted at the Seabrook Nuclear Power Station, which included testing of Applicants' own *onsite* Seabrook Station Emergency Plan.[3] According to Intervenors, since this new contention is involved with the authorization to issue a low-power license, we have jurisdiction. Apparently, Intervenors request that we either admit the contention after holding that the record has not been closed or, in the alternative, if we find that the record has

---

[1] These intervenors are the Massachusetts Attorney General, the New England Coalition Against Nuclear Pollution, the Seacoast Anti-Pollution League, and the Town of Hampton, New Hampshire.

[2] We grant Intervenors' motion for leave to reply of October 7. Much that is discussed in their reply could have been filed in their original motion of September 16. However, as of October 7, our Memorandum and Order of October 12 (unpublished) had not been issued, which in footnote 2 stated that our patience was at an end and that thereafter we would deny any request to file a reply brief where it was clear that the matter therein should have been presented in the original motion.

[3] The June 1988 full-participation exercise, which simulated certain full-power operating conditions, also tested the *offsite* plans of the State of New Hampshire and the Applicants' plan for Massachusetts communities within the Seabrook EPZ.

been closed, we should reopen the record and admit the contention. Applicants argue that we are without jurisdiction because first, the issue concededly was not raised before this Board when it was exercising plenary jurisdiction over the proceeding,[4] and because, second, our jurisdiction is now limited to two remanded issues[5] — i.e., the coaxial cable issue[6] and the public notification issue, both of which we were considering pursuant to summary disposition procedures. The Staff does not question our jurisdiction.

We possess the inherent right (indeed, the duty) to determine in the first instance the bounds of our jurisdiction.[7] We conclude that we have jurisdiction because the Commission's decision of December 21, 1988, CLI-88-10, 28 NRC 573, reflected that, before a low-power licence may be issued, this Board must have resolved the instant motion to litigate additional onsite emergency planning issues and any litigation before it on *such* additional onsite issues.

B. Late Filing

At pages 4 through 7 of their motion, Intervenors argue that the onsite exercise contention was not late filed.[8] The short answer is that, pursuant to

---

[4] In our Partial Initial Decision, LBP-87-10, 25 NRC 177, 216 (1987), with respect to certain onsite safety and emergency planning contentions, we had found that there was reasonable assurance that Seabrook Station, Unit 1, could be operated up to 5% of rated power without endangering the public health and safety, and that the state of onsite emergency preparedness provided reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

[5] In support of the second argument, Applicants cite *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-526, 9 NRC 122, 124 (1979), and *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

[6] Since the filing of Applicants' response, the Board has issued a Memorandum and Order that granted Applicants' motion for summary disposition and dismissed the coaxial cable contention. LBP-88-31, 28 NRC 652 (1988), *aff'd*, ALAB-909, 29 NRC 1 (1989). To date we have not issued a ruling upon Applicants' motion for summary disposition of the public notification issue.

[7] *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-591, 11 NRC 741, 742 (1980).

[8] First, Intervenors apparently contend that, since the offsite Licensing Board had ruled (in a Memorandum and Order of August 19, 1988) that the deadline for exercise contentions was September 21, 1988, they relied upon or were somehow misled by the offsite Board and only decided to file the instant onsite contention a few days early because of increasing concern about the possibility of precipitous action resulting in low-power operation. (*See* Intervenors' Motion at 4 n.4.) As discussed in the text above, pursuant to 10 C.F.R. § 2.714, any contention not filed within a certain 15-day period is deemed to be late filed. (Even if we were to consider this argument as one being advanced under § 2.714(a)(1) to show good cause for failure to file in a timely manner after the June 1988 exercise, Intervenors have failed to make a good argument because, earlier in their motion, at 3 n.2, they state that the offsite Board had indicated in an Order of July 29, 1988, that its jurisdiction was limited to purely offsite emergency planning issues and did not extend to onsite emergency planning issues even if they had offsite planning consequences. Thus, even if this argument were to be advanced under § 2.714(a)(1), there is no good cause shown why Intervenors did not file the instant motion in a timely manner after July 29, 1988, instead of waiting until September 16 to do so.)

As their second argument, Intervenors apparently contend that any emergency planning exercise contention may not be deemed to be untimely filed and must be deemed to be timely filed because 10 C.F.R. Part 50, the Atomic Energy Act, and case law accord the Intervenors the right to fully litigate the onsite planning aspects of that exercise prior to low-power operation. However, obviously 10 C.F.R. § 50.47 emergency planning contentions, in order to be deemed to have been timely filed, must meet the 15-day requirement of § 2.714. Moreover, in *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-47 (1983), the Commission

(Continued)

10 C.F.R. § 2.714(a)(1) and (b), any contention that is not filed within 15 days prior to the holding of a special prehearing conference or that is not filed within 15 days prior to the holding of the first prehearing conference (if a special prehearing conference has not been held), is deemed to be late filed, and any request to file a "nontimely" contention may be granted based upon the balancing of five factors. As note 4 indicates and as the Commission has ruled, the record in this case is closed.[9] However, for the purpose of our discussion, since we would have to evaluate the five factors in Part II.D, *infra*, we assume that the record has not been closed with respect to the instant motion and with respect to the matters raised therein, and we proceed to discuss whether a balancing of the five factors in § 2.714(a)(1) weighs against admitting the late-filed contention which was filed on September 16, 1988.

C. Re the Motion to Admit the Contention

The five factors in § 2.714(a)(1) are:

(i) Good cause, if any, for failure to file on time.
(ii) The availability of other means whereby the petitioner's interest will be protected.
(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
(iv) The extent to which the petitioner's interest will be represented by existing parties.
(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

With respect to the first factor, the Intervenors argue that, even if the onsite exercise contention is deemed to be late filed, it was not until after receipt on July 15 of NRC Staff's Inspection Report No. 50-443/88-09 dated July 6 (hereafter Report 88-09) that they were made aware of an exercise weakness and the five examples identified thereunder but that, in and of itself, the inspection

---

has ruled that § 189a of the Atomic Energy Act does not provide members of the public with an unqualified right to a hearing, that rather the Act permits the establishment of reasonable threshold requirements for the admission of contentions, and that the five-factor test in 10 C.F.R. § 2.714 represents a permissible exercise of that authority. Finally, in *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), a case frequently cited by the Intervenors, the Court of Appeals neither held nor implied that the Act either prohibits the establishment of reasonable threshold requirements, such as the five-factor test, for the admission of contentions, or precludes the application of standards to reopen a closed record under 10 C.F.R. § 2.734. See further discussion in note 18, *infra*. As the Appeal Board noted in a *Catawba* decision, *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 78 (1985), the decision of the Court of Appeals focused upon a Commission rule to the effect that licensing boards need not consider the results of emergency preparedness exercises in a licensing hearing before authorizing the issuance of a full-power license and held that the rule violated § 189a(1) of the Atomic Energy Act of 1954, as amended, in that it denied a right to a hearing on a material factor relied upon by the Commission in making its licensing decisions.

[9] CLI-88-7, 28 NRC 271, 273 (1988).

report made little sense.[10] They urge that, had they filed a contention shortly after receipt of the Report on July 15, "it would have been attacked as lacking basis and specificity and failing to allege a fundamental flaw in the onsite plan." (Reply at 17.) Intervenors maintain that it was not until after they received in the week of August 15 and had the opportunity to review the Applicants' eight-volume exercise scenario documentation (the 1988 FEMA/NRC Graded Exercise) that they were provided with, *inter alia*, the objectives and the scenario sections for Applicants' Seabrook Station emergency exercise, which furnished the factual context for a proper technical understanding of Applicants' staff's actions and responses. (Motion at 9-10; Reply at 17.) We have read the "objectives" sections (§§ 2.1-0 through 2.2-14), and the "scenario" sections (§§ 5.0-1 through 5.0-4 and 6.1-1 through 6.3.4-29) of the Graded Exercise. We disagree that it was necessary that Intervenors had to have in hand and review the objectives and the scenario in the Graded Exercise before they could be in a position to properly and fully prepare a contention addressing the weakness and the five examples thereof. We conclude that Intervenors have failed to show good cause for failing to propose the instant contention in a timely manner after July 15, 1988, and instead delayed their filing until September 16. Promptly after receiving the Inspection Report on July 15, all that was required of the Intervenors was that they state their reasons (i.e., the basis) for their contention that serious defects and inadequacies existed in the Applicants' onsite emergency response staff and that these weaknesses reflected an inadequate staff training program. That responsibility would have been sufficiently discharged by their references to Report 88-09, and by their assertion that the NRC Staff had observed and concluded that Applicants' onsite emergency staff had displayed questionable engineering judgment and/or did not recognize or address technical concerns, and thus that Applicants' staff's actions or inactions represented a serious and unacceptable increased level of risk to the public under conditions

---

[10] The Inspection Report reads in pertinent part:

3.1 *Exercise Weaknesses*

The NRC identified the following exercise weaknesses which need to be evaluated and corrected by the licensee. The licensee conducted an adequate self critique of the exercise that also identified these areas.

1. The Technical Support Center (TSC) and Emergency Operations Facility (EOF) staff displayed questionable engineering judgment and/or did not recognize or address technical concerns (50-443/88-08-01). For example:
   - — Neither the EOF or TSC staff questioned a release of greater than 7000 curies per second with only clad damage and no core uncovery;
   - — Efforts continued to restore the Emergency Feedwater Pump after a large-break LOCA;
   - — A questionable fix for the Containment Building Spray system;
   - — A lack of effort to locate and isolate the release path; and
   - — No effort was noted to blowdown Steam Generators to lessen the heat load in containment.

[Three other exercise weaknesses were also identified but are not in issue.]

(Exhibit A attached to Intervenors' Motion of September 16, 1988.)

of low-power operation, and evidenced an inadequate staff training program.[11] Once the institutional unavailability of a licensing-related document is removed, intervenors must promptly formulate their contentions.[12] We weigh this factor against the Intervenors in failing to show good cause for their failure for a 2-month period to file a motion for leave to submit out-of-time this onsite contention. Absent good cause for late filing, a compelling showing must be made on the other four factors.[13] However, favorable findings on some or even all of the other factors in the rule need not in a given case outweigh the effect of inexcusable tardiness.[14]

The Applicants and the Staff concede that the second and fourth factors weigh in favor of the Intervenors, and we agree. However, these two factors are accorded less weight than the three other factors.[15]

With respect to the third factor, when a petitioner addresses this criterion, it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.[16] Although Intervenors knew better, having been long-time litigants in both the onsite and offsite proceedings, they failed to furnish the required information in the original motion. (*See* p. 68, ¶ (iii).) In their reply, which in our discretion we have permitted to be filed, they do identify their prospective witness as being the individual whose affidavit was attached to the original motion. In their reply, however, other than urging that in the original motion they had summarized proposed testimony and had attached the affidavit that was referenced in the proposed contention, they did not make any effort to comply with the requirements of this factor. Generalities, rather than precise issues, were presented, and we will not do Intervenors' homework for them by reading the affidavit and then summarizing the proposed testimony. Absent such a summary, we don't know with any degree of certainty that which will be the substance and extent of the proposed testimony. We weigh this factor against the Intervenors.

With respect to the fifth factor, Intervenors admit that the admission of the contention would broaden the issues. We need not go further in light of the disjunctive wording in the fifth factor. In any event, as reflected in note 6, *supra*, the only matter now pending before us pursuant to summary disposition

---

[11] *See Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548-49 (1980).

[12] *See Catawba*, CLI-83-19, *supra*.

[13] *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

[14] *Nuclear Fuel Services, Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

[15] *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986).

[16] *Id.* at 246.

procedures is the public notification issue. The public notification matter is now a full-power issue as to which we have jurisdiction. (*See* Notice of Clarification of October 12, 1988.) Obviously the admission of this late-filed contention and subsequent discovery would delay our proceeding. We weigh this factor against the Intervenors.

Overall, the Intervenors failed to demonstrate that they prevailed on the five-factor test. Much less did they make the compelling showing on factors two through five that was required to overcome their failure to demonstrate good cause, under the first factor, for their failure to file on time. Thus, we deny Intervenors' motion to admit the instant contention.

D. Re the Motion to Reopen the Record[17]

After reviewing the submissions of the parties identified in Part I, *supra*, and being made aware that the Staff had prepared a second Inspection Report (hereafter Report 88-10, which had been issued by the Staff on October 6, 1988, and which in part had been attached to Applicants' response of October 12), we concluded that additional briefing and affidavits were necessary with respect to that part of Intervenors' motion seeking to reopen the record and, in the Order of October 25, 1988 (unpublished), we directed that this be done. Applicants were specifically directed to show wherein Report 88-10 wholly confirmed the position taken in their original response and affidavits of September 28 and confirmed the lack of any significant safety issue. We stated that we would consider these additional submissions to determine whether a significant safety issue had been raised and whether a materially different result would be or would have been likely had the newly proffered evidence been considered initially. On November 8, Applicants submitted a response. On November 9, Intervenors submitted a memorandum to which was attached an affidavit by the same individual who had executed the affidavit attached to the Intervenors' original motion (hereafter Pollard Aff. 2). On November 28, the Staff filed a response to which was attached the joint affidavit of two of its employees, Messrs. Craig

---

[17] Section 2.734 provides in pertinent part:

> (a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:
>
> (1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
>
> (2) The motion must address a significant safety or environmental issue.
>
> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.
>
> * * *
>
> (d) A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.714(a)(1)(i-v).

Conklin and David Ruscitto.[18] On December 7, the Intervenors filed a motion for leave to respond to the Staff's response of November 28. On December 12, the Staff responded. Absent Staff's objection, we grant Intervenors' motion for leave.

Since we assumed, *supra*, that the record has not been closed and denied Intervenors' motion to admit the contention, we now proceed to consider whether the alternative motion to reopen the closed record addresses a significant safety or environmental issue.

Since we conclude in Part II.C, *supra*, that a balancing of the five factors in § 2.714(a)(1)(i-v) weighs against admitting the contention, obviously the motion to reopen to consider a contention not previously in controversy does not satisfy the requirement of ¶ (d) of § 2.734. Further, criterion (1) of § 2.734(a) has not been satisfied, since Intervenors do not allege and demonstrate that the proposed contention involves an exceptionally grave issue.

We now proceed to discuss criterion (2) to determine whether the motion to reopen addresses a significant safety or environmental issue in that the NRC Staff's Report 88-09 of July 6, 1988, reported that five examples reflected that Applicants' emergenc exercise staff displayed questionable engineering judgment and/or did not r gnize or address technical concerns. (*See* note 10, *supra*.) We will also addre criterion (3). We deem that affidavits submitted by the parties were given by competent individuals with knowledge of the facts alleged and/or by experts in the disciplines appropriate to the issues raised.

However, before discussing the five examples, we must address several matters. First, at pages 3 and 4 of their memorandum submitted on November 9, 1988, Intervenors argue that, in light of the Order of October 25, 1988, it appears that this Board improperly will resolve sharply disputed facts by means

---

[18] In light of the Board's Order of October 25, 1988, for the first time in its response of November 28, 1988, the NRC Staff discussed whether the Intervenors' alternative motion to reopen raised a significant safety or environmental issue. Previously, in its response dated October 3, 1988, in footnote 1, the NRC Staff had not discussed whether the Intervenors' alternative motion to reopen met the standards set forth in 10 C.F.R. § 2.734 because it agreed with Intervenors that the June 1988 exercise was "material" to the determination whether there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. In its response of November 28, 1988 at 2 and 3, the Staff cited *Union of Concerned Scientists*, *supra*, 735 F.2d at 1443-44, in support of its position. (However, in that response, it did proceed to discuss whether a significant safety or environmental issue had been raised in the alternative motion.) The Staff's position is without merit. The *UCS* decision vacated an amended regulation (10 C.F.R. § 50.47(a)(2)) to the extent that said regulation eliminated the emergency exercise as a prerequisite to authorization of a license and affirmed that a 10 C.F.R. § 2.206 request to initiate license amendment proceedings was not a § 189(a)(1) proceeding under the Atomic Energy Act of 1954, as amended. That decision is not apposite. First, since the issuance of the *UCS* decision, § 50.47(a)(2) has been revised to delete the last sentence which had provided that emergency preparedness exercises were not required for any initial licensing decision. 50 Fed. Reg. 19,323 (1985). Second, said decision did not preclude application of § 2.734 standards since ose standards were not issued until May 30, 1986, and were not effective until June 30, 1986 (51 Fed. Reg.). Finally, § 2.734 is a part of the adjudicatory process provided for under § 189(a)(1). In contrast a § 2.206 procedure can hardly be equated with the ability to litigate issues in an adjudicatory setting, accompanied by a right of appeal to the appeal board and an entitlement to petition for Commission review if dissatisfied with the appellate result. *Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1176 (1983).

of evaluating conflicting affidavits and render an inappropriate "on the merits" adjudication rather than, pursuant to § 2.734, determine whether a threshold showing has been made that the evidence, if assumed to be true, presents a significant safety issue. Intervenors err. A mere threshold showing is insufficient because it is well settled that the proponent of a motion to reopen the record has a heavy burden.[19] Further, as evidenced, *infra*, we do not resolve disputed genuine issues of material fact raised in conflicting affidavits and do not decide the merits of the contention set forth in the motion. Rather we have taken a hard look at all of the submissions to determine whether or not significant safety issues have been raised and whether or not unresolved genuine issues of material fact have been presented. Even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the proceeding. As is evidenced, *infra*, the questions whether the matters sought to be raised present significant safety issues and whether they present triable issues of fact are intertwined and are so treated. Our review and analysis follow the guidelines set forth in the case cited by the Intervenors at page 4 of their memorandum of November 9, 1988.[20]

Second, Intervenors suggest that the NRC inspectors, in issuing Report 88-10, acted in bad faith and contrary to their obligations in an effort to minimize the impact of the conclusions in the first report on the instant litigation (Memorandum of November 9 at 3, 7). They argue that, instead of sending *any* of the original team of inspectors that actually witnessed the exercise back to Seabrook, NRC officials replaced the inspectors that had criticized the Applicants' performance, and would have us infer that these officials had acted in bad faith. (Memorandum of November 9 at 6; Response of December 7 at 2.) We ignore these barren allegations and others of this ilk. The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, we presume that they have properly discharged their official duties.[21] Moreover, two of the members of the NRC inspection team, who had observed the exercise conducted on June 27-29, 1988, and documented their observations in Report 88-09, attest that they also performed the followup inspection resulting in Report 88-10. (Staff's Joint Aff., A.4, A.6, A.17.)

---

[19] 51 Fed. Reg. 19,535 (1986); *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978).

[20] *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523-24 (1973).

[21] *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

We are equally unpersuaded by Intervenors' speculations that the affidavits of Applicants' employees are not credible because these employees were not independent observers and were motivated by self-interest. (Memorandum of November 9 at 5.) Only facts raising a significant safety issue, not conjecture or speculation, can support a reopening motion.[22]

Finally, as stated in Part II.A, *supra*, the purpose of the exercise was to test, *inter alia*, Applicants' onsite Seabrook Station Emergency Plan, and note 10, *supra*, reflects that Report 88-09 identified the one exercise weakness (and the five examples thereof) which is the subject of the instant motion. It is undisputed that this one weakness (and the five examples thereof) was considered to be an "open item," which meant that an inspection followup was required, and it is undisputed that items opened in a NRC inspection report must be closed in a subsequent inspection report if corrected or resolved. (Staff's Joint Aff., A.16, A.18.) It is also undisputed that Report 88- concluded that Applicants' TSC/EOF staff "possesses adequate capabilities to protect public health and safety" and that this "open item is considered closed." (Attachment to Applicants' Response of October 12, 1988.) Drawing down from these undisputed facts, we conclude that the procedures followed in this case were not unique — i.e., it is normal NRC procedure, when an exercise inspection report identifies "open items," for the Staff to conduct a followup inspection to determine whether those opened items should be closed in a subsequent inspection report.

1. The First Example

With respect to the first example, the Intervenors asserted that this failure of both the Applicants' Technical Support Center (TSC) and Emergency Operations Facility (EOF) staffs to question a release of greater than 7000 curies per second (Ci/sec) with clad damage and no core uncovery indicated a seriously deficient knowledge of the relationship between the magnitude and rate of a radioactive release and the amount of core damage. Without a sound knowledge of the magnitude of releases under varying degrees of core damage, they asserted that Applicants' personnel may not recognize that their analysis, based partly on conflicting information, is incorrect, causing them to take incorrect actions or to fail to take corrective actions. (Pollard Aff. 1, ¶¶ 19-20, at 12-13.)

In response, Applicants' employee, who was the Emergency Operations Facility Coordinator during the June 1988 exercise, attested as follows: A review was made of this matter with both controllers and exercise participants. The lack of correlation between the 7000-Ci/sec release condition and core

---

[22] *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1367 n.18 (1984).

cooling indications was questioned and discussed by TSC emergency response personnel during the exercise. They accepted the information given by the controllers as being correct and proceeded accordingly. This complied with specific instructions or guidelines requiring the exercise participants to use information as supplied by an exercise controller. Applicants' personnel did as they were directed, but realized that it was necessary to introduce artificially high radioactive releases in order to fully exercise offsite responders. The implementation of other emergency procedures was not affected by this lack of correlation. This included all sampling and analyses required for the assessment of the magnitude of core damage. Accordingly, Applicants concluded that the above actions did not reflect questionable engineering judgment or an inability to recognize or address technical concerns, that the observation in Report 88-09 was inaccurate, and thus that Intervenors' motion did not establish the existence of a significant safety or environmental issue. (MacDonald Aff., ¶¶ 4-7, at 2-4; Response at 12.)

In Report 88-10 at 10, issued on October 6, 1988, and closing this item raised in Report 88-09, the NRC Staff stated that:

> The inspector reviewed the player and controller logs for selected TSC, EOF and engineering support center (ESC) staff. These logs revealed that several staff members did question and/or comment on the mismatch between the reactor coolant activity and the release rate. Subsequent discussions with the TSC and EOF controllers and players also indicated that they were aware of this mismatch. In actuality, the ESC staff made very accurate core damage assessments based upon the data supplied by the TSC. The EOF dose assessment staff made accurate dose projections based upon the release rate, as well as correlation of field data to the release rate. A review of previous drill comments, as well as the player instruction for this exercise, indicated that this level of activity is recognized to be an unrealistic number, which is required to provide the offsite dose rates necessary to exercise the entire emergency planning zone. The technical staffs had repeatedly identified and questioned these mismatches in previous drills and were told by the controllers that this high release rate was necessary to test the offsite plans, and that they should not challenge the data.
>
> Although NRC review of the specific scenario used for the exercise was acceptable, the above-described problem indicates that the licensee should place more effort in developing exercise scenarios where core damage and release rates are consistent.

Additional comments and information regarding the first example were submitted in the parties' responses to the Board Order of October 25, 1988. In a response of November 8, Applicants set forth the contents of Report 88-10 to the extent that the report addressed each of the five examples, and italicized those portions that they asserted particularly were in full support of positions taken in their response and affidavits of September 28.

Intervenors' principal assertion on this first example in their memorandum of November 9 was that the NRC inspection team that observed the exercise

presumably had access to the logs questioning the release rate, but reached an initial conclusion different from that presented in Report 88-10, and that the NRC Staff gave no explanation whatsoever for the difference between the two reports. In agreeing with the second paragraph of Report 88-10 on this example (*see supra*), Intervenors also questioned the validity of the exercise results to determine whether Applicants' staff met the exercise objective, since the instant exercise scenario postulated conditions that were mutually exclusive on technical grounds. (Memorandum at 11; Pollard Aff. 2, ¶¶ 27-30, at 9-10.) However, Intervenors ignored the Staff's qualification of its recommendation in Report 88-10 to the effect that the scenario used for the instant exercise was acceptable. They also ignored the other substantive statements in Report 88-10, in particular, that the unrealistic level of radioactivity was required to provide the offsite dose rates necessary to exercise the entire emergency planning zone.[23]

The NRC Staff's response of November 28 reflected the following: It should be first understood that a release rate of greater than 7000 Ci/sec was necessary to test the adequacy of dose projections and protective action recommendations for offsite response, and that a release of this magnitude is not possible given the conditions of the exercise scenario, i.e., clad damage with no core uncovery. Based on the information available to the NRC Staff when Report 88-09 was written, the first example was designated as a "weakness," because the NRC's observation team of inspectors expected the TSC/EOF staff to discuss and question the high radioactivity readings which would not be possible under conditions of the exercise scenario. The NRC inspectors did not discuss these matters, and Applicants did not offer information on this example at the exit meeting, and therefore the Staff marked it as a weakness. The Staff did observe at the exit meeting that the TSC/EOF staff had made prompt and correct dose projections and assessments and made appropriate protective action recommendations based upon the given 7000-Ci/sec release rate. (Staff's Joint Aff., A.9.) In the later followup postexercise conferences, Messrs. Conklin and Ruscitto, who were the same NRC inspectors who had observed the initial exercise, attested that exercise logs not previously made available or discussed by Applicants, showed that several TSC/EOF staff members indeed had questioned the mismatch between the reactor core condition, reactor coolant radioactivity, and the release rate. (Staff's Joint Aff., A.17, A.21; Report 88-10 at 10.) The NRC Staff also observed from previous exercise records that the radioactivity release rate used during the June 1988 exercise had been recognized as an

---

[23] We disregard Intervenors' assertion regarding the validity of using mutually exclusive technical conditions in the June 1988 exercise because that assertion is beyond the scope of the basis for the contention. That basis challenged the ability of Applicants' TSC and EOF personnel to analyze station conditions and parameter trends and to develop potential solutions for placing the reactor in a safe, stable condition. (Exhibit 1 to Motion of September 16.) It challenged neither the validity of the scenario used in that exercise nor the NRC Staff's use of the scenario in its determination of whether Applicants had met the stated objective.

unrealistic number by Applicants' TSC/EOF staff, but that they had been instructed by the rules of the exercise not to challenge these data. (Report 88-10, ¶ 4.e(5), at 10.) Staff also attested that had the above information been available at the time of the exercise (or at the exit meeting), it would not have designated this as a weakness in Report 88-09. (Staff's Joint Aff., A.21.)

Since it is clear that, but for the fact that certain information had not been available to the NRC Staff prior to the issuance of Report 88-09, the first example would not have been identified in that report as being an exercise weakness, we conclude that the motion to reopen does not address a significant safety or environmental issue or present a triable issue of fact. In light of our conclusion that the motion to reopen does not address a significant safety or environmental issue or raise a triable factual issue with respect to this example, we also conclude that a materially different result would not be or would not have been likely had the newly proffered evidence been considered initially.

2. The Second Example

With respect to the second example, Intervenors noted that the accident scenario called for a halt in the controlled shutdown when the second EFW pump failed, because continued shutdown of the plant would require the need to operate the emergency feedwater system. They opined that under these circumstances, trying to repair the EFW pump was a correct action. However, Intervenors claimed that Applicants' staff should have recognized that further efforts to repair the EFW system after the large-break LOCA were of little value. They claimed that such actions indicated a seriously deficient level of competence. They also averred that some of the Applicants' onsite staff occupied themselves with activities of little value in a postulated large-break LOCA. However, Intervenors concede that in the instant exercise, the Applicant's efforts to restore the EFW pump did not complicate the accident or exacerbate the consequences, but asserted that under other scenarios an inadequately trained staff could complicate the accident and exacerbate the consequences. (Pollard Aff. 1, ¶¶ 11-12, at 7-9.)

The Applicants responded in their submission of September 28 that, upon the occurrence of the LOCA in the exercise scenario, the activities of the TSC were reprioritized to respond to activities directly involving the LOCA, and that the continuing efforts to restore an inoperable EFW pump afterwards did not affect the response by TSC to the higher-priority activities involved with the LOCA. While TSC personnel recognized that the EFW system might not be needed to mitigate the consequences of a large-break LOCA, one reason given for continuing the efforts to repair the EFW pump was that the efforts should continue in order to ensure a backup heat removal method if it were needed, even if an immediate need was not perceived. Another was to demonstrate the technical assessment capability of the TSC team members. Applicants'

affiant attested that it was clear that if it appeared that these actions could affect accident-mitigating capabilities or actions, the EFW pump activities would have been terminated. (Kline Aff., ¶¶ 4-9, at 3-5.)

In Report 88-10 at 8, issued on October 6, 1988, and closing this item raised in Report 88-09, the NRC Staff stated that:

> The licensee correctly stated that the EFW pump would be required to operate to support steam generator cooldown in the recovery phase and continued repair efforts were prudent. The inspector agrees and determined that the stated activity did not detract from the overall recovery effort, nor did it diminish other high priority recovery action in progress or planned, and that TSC judgments were made with long-term recovery in mind.

The Intervenors, in their November 9 memorandum, asserted that the EFW pump repair would be of little, if any, use in either the short term or the longer term following a large-break LOCA and that, contrary to the claim in NRC Report 88-10, steam generator cooldown is not required during long-term recovery from a large-break LOCA.[24] However, Mr. Pollard admitted that efforts to restore the EFW pumps would be required in the very long term, i.e., during the months prior to resuming operation. Intervenors further asserted that neither NRC Report 88-10 nor Mr. Kline's affidavit explained or mitigated the NRC Staff's earlier conclusion in Report 88-09 that the continued efforts to restore the EFW pump were an example of questionable engineering judgment and/or the failure to recognize and address technological concerns. (Memorandum at 8; Pollard Aff. 2, ¶¶ 5-10, at 2-4.) Intervenors apparently proceeded to change their position in regard to whether continued efforts to repair the EFW pump detracted from other accident-mitigating activities during the exercise, asserting for the first time a link between the EFW repair efforts and the insufficiency of efforts to locate and isolate the release path (Pollard Aff. 2, ¶ 9, at 4). However, absent any showing of linkage between these two activities, we regard this claim as mere speculation.

The NRC Staff, in its response of November 28, stated that its original concern in regard to this second item in Report 88-09 was that efforts were being continued in an area that would probably be of little value in the near term, and not that other higher-priority items were overlooked as a result of this effort. The NRC Staff's affiant (Mr. Ruscitto) attested that he performed the followup inspection leading to closure of this example in Report 88-10. He also indicated that he was present during the earlier inspection and affirmed that he was familiar with the concern of the inspector who identified this example

---

[24] Intervenors argued in this regard that "[t]he steam generators would slowly cool down on their own by heat loss through the insulation." (Pollard Aff. 2, ¶ 8, at 4), which apparently conflicts with their arguments in respect to the fifth example on the asserted importance of, and necessity for, steam generator blowdown following a large-break LOCA.

(continuing EFW pump repair activities) in Report 88-09. (Response at 10; Joint Aff., A.10, A.22, at 6, 12.)

Clearly Intervenors' arguments that the TSC staff's efforts were "an example of questionable engineering judgment and/or the failure to recognize and address technical concerns" are bottomed upon the NRC Staff's first Report, 88-09, and upon their opinion that the second Report, 88-10, should be ignored as not being credible. We find no reason to doubt the credibility of the Applicants' or the NRC Staff's attestations and affirmations. Moreover, since Intervenors concede that the efforts to restore the EFW pump did not complicate or exacerbate the consequences, we conclude that Intervenors have failed to show that this specific effort evidences poor training or poor level of competence on the part of Seabrook Station personnel participating in the exercise. Indeed, we view Applicants' personnel's efforts to repair the EFW pump in order to ensure a backup heat removal method even if not immediately needed as evidencing that said personnel were well trained and competent. Thus, no significant safety or environmental issue has been raised by this example, and no issue of triable fact has been raised.

In light of our conclusion that the motion to reopen neither addresses a significant safety or environmental issue nor presents a triable issue of fact with respect to the continuing efforts to repair the EFW pump during the exercise, we also conclude that a materially different result would not be or would not have been likely had the newly proffered evidence been considered initially.

3. The Third Example

Intervenors, relying on Report 88-09, asserted that the action taken by the Applicants' onsite emergency staff to restore the Containment Building Spray (CBS) system gave rise to questions about the engineering judgment used. In the Intervenors' view, although the action was appropriate, it resulted in a "questionable fix," and, thus, was one action indicating a failure of the TSC staff to meet an objective of the exercise — viz., to demonstrate an "ability to analyze station conditions, parameter trends and develop potential solutions for placing the unit in a safe, stable condition." (Pollard Aff. 1, ¶¶ 14-15, at 10-11.)

In their submittal of September 28, Applicants responded that the "questionable fix" was in fact a contingency plan developed in case the normal flowpath of the CBS system could not be reestablished and that, contrary to the allegation, it was technically sound. They further attested that, if needed, the fix would not have been implemented without review by the NRC, a review not carried out because the normal CBS flowpath was reestablished. The TSC staff, along with other support groups, continued efforts, as a first priority, to restore or repair the normal CBS flowpath while developing the contingency plan for an alternate flowpath. The alternate flowpath concept was to use components

and systems not necessarily associated with the normal CBS flowpath to restore the containment spray function. Because the repair efforts for one of the CBS pump's electrical system were finally successful, and containment spray was initiated via the normal flowpath, the contingency plan never proceeded to the review/implementation stage. (Brief at 13; Sessler Aff., ¶¶ 4-11, at 3-6.)

In Report 88-10 at 9, issued on October 6, 1988, and closing this item raised in Report 88-09, the NRC Staff stated that:

> The inspector met with the Technical Support Manager and a Technical Support Engineer and discussed the rationale behind the corrective action taken to rig an alternative water source for the CBS system. Although the capability of the proposed modification to the system to reduce containment pressure was never proven due to the eventual repair of a CBS pump, the inspector determined, based on this additional information, that the engineering judgment and methodology involved in the proposed system and operating procedure changes were acceptable. The licensee actions were appropriate since this fix was considered to be a "last resort" measure after all prudent and subsequent extraordinary measures had failed to provide containment spray by other means due to additional scenario controller intervention.
>
> Additionally, the licensee had previously determined that the composition of the present TSC engineering staff, while adequate, could be enhanced by providing an augmented staff roster. NHY has committed to implement this initiative.

In their response to our Order of October 25, 1988, Intervenors asserted that neither Mr. Sessler nor "either of the two inspection teams" provided sufficient detail of the contingency plan to assess its adequacy, and that the two inspection reports are irreparably inconsistent in that the second report accepted the flowpath plan because it was a last resort, yet the "first inspection team," knowing it was a last resort, still rejected it. Intervenors further argue that the questionable engineering judgment of the TSC and EOF staff was not cured by relying on the NRC to prevent, in the end, the Applicants' inappropriate measures from being employed. (Brief at 9; Pollard Aff. 2, ¶¶ 11-14, at 4-5.)

In its response to our October 25 Order, the NRC Staff stated that, during the inspection, its inspector (Mr. Ruscitto) questioned the effectiveness of the proposed "fix" to provide any substantial pressure reduction in the containment building, because the discharge of the safety injection pump recirculation line would be rerouted to the containment spray nozzles.[25] Mr. Ruscitto also stated with respect to the isolation of the release path (*see* Fourth Example, *infra*) that Mr. Pollard's second affidavit implies that restoration of a CBS pump would not have stopped the release; but depending upon the location of the leak, the leak could be stopped by reducing containment pressure to atmospheric (the purpose of the CBS spray system). He further attested that it makes good engineering

[25] As stated in the Staff's Brief (at 10), the recirculation flow from one safety injection pump is about 40 gallons per minute (gpm), which is insignificant compared to the normal CBS spray pump flow of over 3000 gpm.

sense to repair those items most easily repaired and that in a real situation, repair of the CBS pump, if feasible (which it was), is the highest priority. (Brief at 10-11; Joint Aff., A.11, A.22, A.23, A.24, at 6-7, 12-13.)

Intervenors' argument that the two inspection reports are "irreparably inconsistent" will not lie. Both were prepared by the same inspector, Mr. Ruscitto, who provided his reasoning behind both. (Staff's Joint Aff., A.17, A.22, A.23, at 9, 12-13.) Based on the additional, postexercise information regarding the Applicants' contingency efforts, the inspector concluded in the second inspection report (88-10, *see supra*) that the engineering judgment and methodology involved in the proposed system and operating procedure changes were acceptable. As to the asserted inadequacy of the "fix," Staff's affiant attested that his concern during the exercise was, indeed, with the effectiveness of the rerouted safety injection pump recirculation flow to provide significant containment building cooling, if needed. However, Applicants' priority efforts to repair one of the CBS spray pumps, although not specified in the scenario, made good engineering sense and were successful, demonstrating their ability to analyze station conditions and to develop a potential solution for placing the unit in a safe, stable condition. The contingency plan was never required, or evaluated during the exercise. The issue of the contingency plan's implementation simply never arose during the exercise because of the successful and superior engineering solution that was realized. Thus, it cannot be said that Applicants were relying upon the NRC to prevent any inappropriate measures of the contingency plan from being employed. Neither have Intervenors demonstrated that the contingency planning effort, which they agree was an appropriate one, detracted from the CBS pump repair efforts, or from attainment of other exercise objectives.

For the reasons given above with respect to this example, we conclude that the motion to reopen does not address a significant safety or environmental issue, or present a triable issue of fact, and thus we also conclude that a materially different result would not be or would not have been likely had the newly proffered evidence been considered initially.

4. The Fourth Example

With respect to the fourth example, Intervenors termed the failure to expend any effort to locate and isolate the release path a significant and fundamental deficiency in the state of onsite emergency preparedness. They further asserted that, with respect to the issuance of a low-power license, the capacity of the onsite staff to prevent any radioactive release that would require offsite emergency measures is a critical aspect of an onsite radiological emergency plan. (Pollard Aff. 1, ¶¶ 17-18, at 11-12.)

In their submission of September 28, the Applicants stated that they did make an effort to locate and isolate the sources of the radiation leakage. The

source of the leak was initially located in the containment enclosure ventilation area. This included several subdivisions such as the electrical penetration area, the enclosure building annulus, the mechanical penetration area, the equipment vaults, and the charging pump cubicles. Efforts were continued to further localize the leak to one of these areas. Radiation monitoring and sampling data were used. Survey teams were dispatched to the areas that were accessible after the LOCA event. High radiation levels were encountered outside the door to the electrical penetration area, and a decision was made to postpone entry into these areas until radiation levels were reduced to acceptable levels. (Kline Aff., ¶¶ 11-14, at 5-6.)

In Report 88-10 at 9, issued on October 6, 1988, and closing this item raised in Report 88-09, the NRC Staff stated that:

> This apparent lack of effort was the result of licensee decisions not to pursue entry into the containment enclosure due to high radiation levels. Discussion with the licensee confirmed that indirect measures, such as remote temperature, pressure and sump level indications, were taken in a timely fashion to provide an alternate assessment of potential leakage paths. The inspector was unaware of these activities during the drill. The licensee decision to postpone entry into the containment enclosure was intentional, based upon other recovery efforts associated with depressuring the containment. Restoration of a CBS [Containment Building Spray] pump was imminent, and activation of this system would have stopped the release. CBS restoration was subsequently, and repeatedly, delayed by controller intervention so that the operators were prevented from effecting repairs. The licensee decisions in this regard were appropriate.

In their submission of November 9, 1988, Intervenors asserted that it was an overstatement for Applicants to claim that the release path was isolated to the containment enclosure ventilation area because this area included many subdivisions. Intervenors also claimed that locating and isolating the release path should have received a higher priority than attempting to restore the CBS pump and that the Applicants should have applied a greater effort. They also asserted that no explanation was offered as to why the original NRC inspection team did not notice the efforts claimed by the Applicants' team to locate and isolate the release path. (Pollard Aff. 2, ¶¶ 16-21, at 6-7.)

In its response of November 28, the NRC Staff reaffirmed the reasons and postinspection events that led to its closing out this example in its Report 88-10. That is, it learned that the emergency response team had in fact used measures in a timely manner, such as indications of remote temperature, pressure, and sump levels to determine a source for the potential leak paths. Moreover, while restoration of the CBS pump was imminent and its activation could have stopped the release, the exercise controller repeatedly delayed this repair work by Applicants' team in that the scenario did not allow for such repair. Staff's affiant attested that, in his belief, repair of the CBS pump in a real situation would be the highest priority. During the exercise, the Staff had been unaware

of these activities. If the Staff had known what it learned in the postexercise conference, this example would not have been marked as an open item and as reflecting questionable engineering judgment. (Staff Response at 11; Joint Aff. A.12, A.24.) As a result of the additional information made available during the postexercise conference, the NRC Staff concluded that Applicants' decisions were appropriate and closed out this example as an open item in Report 88-10.

Since it is clear that, but for the fact that certain information had not been available to the NRC Staff prior to the issuance of Report 88-09, this fourth example would not have been identified in that report as being an exercise weakness, we conclude that the motion to reopen does not address a significant safety or environmental issue, or present a triable issue of fact. In light of our conclusion that the motion to reopen does not address a significant safety or environmental issue or raise a triable factual issue with respect to this example, we also conclude that a materially different result would not be or would not have been likely had the newly proffered evidence been considered initially.

5. *The Fifth Example*

With respect to the fifth example, Intervenors asserted that failure to blow down the steam generators to lessen the heat load in containment indicates inadequate onsite staff training in that the operators do not have a sufficient level of knowledge of the potential solutions available to mitigate the onsite and offsite radiological consequences of an accident. In explanation, Intervenors stated that, following a large-break LOCA, a goal of the emergency response is to rapidly reduce containment temperature and pressure in order to reduce the amount of any radiological release. Since one source of heat in the containment is the heat stored in the (secondary side of) steam generators, blowing down the steam generators would reduce the heat load.[26] (Pollard Aff. 1, ¶ 13, at 9-10.)

Applicants responded in their submission of September 28 that control room operators and the TSC team recognized that the procedures called for a controlled depressurization of the steam generators, but that this step was temporarily postponed to assess its onsite radiological consequences, i.e., whether the action would lead to introduction of radioactivity to areas of the plant as yet unaffected. Applicants asserted that postponement to obtain analyses of secondary water samples would not delay further actions under the Emergency Operating Procedures because the plant operators could continue on to the next step. Applicants further attested that prior to completion of this assessment, Day 1 of the exercise ended. Subsequent to the exercise, Applicants assessed the effect that depressurization would have on the containment heat load and

[26] *See* note 24, *supra*.

concluded that the rate of heat transfer between the insulated steam generators and the containment atmosphere was insignificant when compared to the energy released to containment from the postulated accident. Applicants' postexercise review of the reason given by Westinghouse for depressurization of the steam generators showed that it was not to reduce containment heat load, but to permit further cooldown and depressurization of the (primary) Reactor Coolant System (RCS). But, since the particular accident sequence of the exercise simulation was a large-break LOCA, the RCS would already have been depressurized. Applicants concluded that steam generator secondary-side depressurization would have had no practical effect in reducing containment temperature and pressure; hence there would have been no real potential for reducing any radiological releases. Applicants accordingly averred that the Intervenors' claims that blowdown would have contributed to the goals of rapid reduction in containment temperature and pressure and to reducing radioactive release are either wrong or speculative. Applicants also concluded that the observations of the NRC Inspector were a result of the unavailability of information during the exercise. Based on the responses as summarized above, Applicants' affiant claimed that there is no issue with respect to postponement of steam generator depressurization during the exercise, much less a significant safety issue. (Sessler Aff., ¶¶ 12-21, at 6-10; *see also* Brief at 13-14.)

In Report 88-10 at 9-10, issued on October 6, 1988, and closing this item raised in Report 88-09, the NRC Staff stated that:

> This comment implied that S/G [steam generator] blowdown was appropriate. The actual concern was that a step in the emergency procedure required the S/G to be depressurized. This step was not performed because the TSC staff was unsure of the integrity of the S/G tubes because no sample was available due to blowdown system isolation. This TSC staff concern was expressed to the inspector when he questioned them during the exercise. The NRC position in this area is that improved guidance to the operator may be warranted and should be evaluated, however the decision not to vent or blowdown the S/Gs without sampling appears to have been reasonable and appropriate.

In their response to our October 25, 1988 Order requesting additional information pertinent to consideration of the alternative Motion to Reopen, Intervenors asserted that the explanations of the Applicants and Staff (in Report 88-10) fail for technical reasons. According to Intervenors, the only way to have radioactive material in the steam generators justifying postponing blowdown would be a significant leak in the steam generator tubes. From this, they reasoned that, in a large-break LOCA, this leakage path would cause leakage flow from the steam generator through the break in the tubes and out the large break to the containment, and if Applicants were concerned about the integrity of the tubes, blowdown would have been all the more important because it would have mitigated the hot secondary water leakage through the tubes, out the large

break, and into the containment. (Brief at 11, *citing* Pollard Aff. 2, ¶¶ 25-26, at 8-9.) Mr. Pollard also concluded that although tube leaks could raise concerns about the radiological consequences of steam generator blowdown during some accidents, tube leaks do not raise such concerns during a large-break LOCA. (Pollard Aff. 2, ¶ 25, at 9.)

The NRC Staff's response to our October 25 Order amplified Staff findings and rationales reflected in its Reports 88-09 and 88-10. In regard to failure to blow down the steam generators, the Staff's Inspector (Mr. Ruscitto) affirmed that his concern during the exercise was that he was unable to reach a conclusion as to the propriety of skipping the step calling for steam generator depressurization (not blowdown). The Inspector asserted that although the decisions made by the EOF and TSC staffs were understandable and adequate (in light of the postexercise information), he reaffirmed the Staff's position set forth in Inspection Report 88-10 that Applicants should clarify their procedures to provide better guidance as to when procedural step 15 may be omitted. (Joint Aff., Q&A 13, 25, at 7, 13-14; Brief at 11-12.)

We conclude, for the reasons stated by the Applicants, that even if the Intervenors' technical analysis is generally correct, postponement, during the exercise, of this procedural step in the emergency operating procedures neither indicates a lack of adequate training by the TSC or EOF staff, nor indicates that they lack a sufficient level of knowledge of the potential solutions available to mitigate the onsite and offsite consequences of an accident. It is uncontested that the station personnel were familiar with and followed the emergency operating procedures and the onsite emergency response plan. It is clear from the descriptions of their actions in the inspection reports and in the affidavits of both the Applicants and the NRC Staff that they were analyzing simulated station conditions and developing potential solutions, within the context of the exercise, to put the plant in a safe, stable condition. Indeed, the action to obtain a sample of secondary-side water prior to steam generator depressurization, even if questionable, reflects their analysis of station conditions and concern for their future ability to enter areas necessary to mitigate accident conditions and radioactive releases. Intervenors do not assert that, in the absence of significant secondary-to-primary leakage, postponement of steam generator depressurization would have any practical effect on the containment heat load. Their chief assertion is that station personnel postponed a step in the emergency operating procedures for the wrong reason, but they have not convinced us that, in the context of the exercise, Applicants' reasoning was faulty or that postponement detracted from other emergency operations. We agree that the NRC Staff's corrective action proposed in Report 88-10 is appropriate, i.e., that, after Applicants' evaluation, the emergency operating procedures be revised, if necessary, to provide guidance as to when the procedural step calling for depressurization of the steam generators can be omitted. Thus we find that

Intervenors have failed to demonstrate that there is a genuine issue of triable fact.

Even if it is Applicants' ultimate decision that steam generator depressurization should be called for in the case of *all* large-break LOCAs, our conclusion would not be changed. This is because an important purpose of any exercise is to correct observed shortcomings to improve station emergency plans and operating procedures. There is nothing to suggest that the NRC Staff's corrective action would be a major undertaking, and the only additional training that we can envision would be that required to familiarize station operating personnel with the new operating procedures, if any.

Therefore, postponement of steam generator depressurization during the exercise does not indicate a failure by the TSC or EOF staffs to meet the exercise objective, viz., to "[d]emonstrate the ability to analyze station conditions, parameter trends, and develop potential solutions for placing the unit in a safe, stable condition." Neither does it "indicate a fundamental lack of understanding of the behavior of the Seabrook Station during a large-break LOCA."

For the reasons given above with respect to this example, we find that the motion to reopen neither addresses a significant safety or environmental issue nor raises a factual triable issue, and thus we also conclude that a materially different result would not be or would not have been likely had the newly proffered evidence been considered initially.

Order

In light of the foregoing discussion,

1. Intervenors' motion for leave to reply submitted on October 7, 1988, and their motion for leave to respond submitted on December 7, 1988 are granted.

2. Intervenors' motion to admit exercise contention or, in the alternative, to reopen the record, filed on September 16, 1988, is denied.

3. The Director of Nuclear Reactor Regulation is authorized to issue a low-power testing license which shall be conditioned to allow Seabrook Unit 1 to operate at power levels not in excess of 5% and shall permit no more than 0.75 effective full-power hours of such operation without additional Commission approval. However, pursuant to the Commission's Decision, CLI-88-10, 28 NRC 573 (1988), in order to accommodate any party that might wish to seek a stay, the low-power license may not issue until 10 days after notice by Staff to the Commission that the decommissioning funding terms of CLI-88-10 have been satisfied or after issuance of this Licensing Board's decision disposing of

the motion to admit exercise contention or, in the alternative, to reopen the record, whichever event shall later occur.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Sheldon J. Wolfe, Chairman
ADMINISTRATIVE JUDGE

Jerry Harbour
ADMINISTRATIVE JUDGE

Emmeth A. Luebke
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,
this 30th day of January 1989.

*U.S. GOVERNMENT PRINTING OFFICE:1989-241-584:90014