UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

SUFFOLK COUNTY AND STATE OF NEW YORK REPLY TO LILCO'S ANSWER AND NRC STAFF RESPONSE TO MOTION TO ADMIT NEW CONTENTION, LILCO'S REQUEST FOR CERTIFICATION TO THE COMMISSION, AND LILCO'S REQUEST FOR SEVERANCE OF NEW ISSUES

Suffolk County and the State of New York reply below to the major arguments made in "LILCO's Answer to 'Motion of Suffolk County and New York State to Admit New Contention' (Including a Request that the Issue be Certified to the Commission and that the New Issues be Severed from the Rest)," dated March 11, 1985 (hereinafter, "LILCO's Answer"), and "NRC Staff Response to 'Motion of Suffolk County and New York State to Admit New Contention,'" dated March 12, 1985 (hereinafter, "Staff Response").

1. NRC Staff Is Barred from Responding to the Merits of the Motion

The Staff's three-page "Response" in fact is no response at all to the merits or substance of the County/State Motion. Indeed, after suggesting that the Board "defer ruling" on the

motion, the Staff presumptuously "asks that it be granted the opportunity to respond to the merits of the motion" at some later date. There is no basis in the regulations for this request, nor does the Staff cite any.[1/] Responses to motions must be filed by the Staff within 15 days. 10 CFR § 2.730(c). In failing to respond to the merits of the County/State Motion in the time set forth by the regulations, the Staff has waived its right to do so.[2/] Any future attempt by the Staff to discuss the merits of the County/State Motion is therefore barred, and this Board must presume conclusively that the Staff does not oppose the merits of the motion or the admissibility of the proposed contention.

2. LILCO and the Staff Seek to Delay this Licensing Proceeding

Both LILCO and the Staff urge this Board to delay this proceeding by denying the County/State Motion as "premature," holding it in abeyance, or otherwise deferring a ruling on it. All such procedural alternatives would result in delaying necessary discovery, preparation and submission of testimony, a hearing and a decision on the merits of the proposed contention. It is

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1/ See also the Appeal Board opinion in Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ___ NRC ___ (February 13, 1985) slip op. at 1-2, n. 1 ("Notwithstanding several contrary Licensing Board decisions . . . the preferred practice . . . is to tender any substantive response along with one's opposition to a motion for leave to file.")

2/ See, e.g., this Board's ruling denying LILCO's request for additional time to file a motion to strike, which was filed instead of the substantive strike motion, ("When LILCO elected . . . to seek additional time and not to file a motion to strike, it did so at its peril.") Tr. 12,829-31.

unseemly for LILCO and the Staff to adopt dilatory tactics as a means to avert the immediate impact of an adverse ruling on the merits of the County/State contention. For the reasons set forth in detail below, there is no basis for finding the Motion "premature" or for deferring a ruling on it.

This Board must recognize two facts with respect to this deferral issue raised by the Staff and LILCO: (1) the County and State are ready to go forward immediately with discovery and litigation on their proposed contention according to the NRC's regulations; and (2) the motion was filed quickly following the issuance of the GUARD decision precisely to avoid the kind of delay now being urged by LILCO and the Staff. Thus, any Board order, which would hold the motion in abeyance or otherwise defer proceedings on the issues raised in the contention, would be solely to accommodate the request of LILCO and the NRC Staff to delay this case. Any such order should explicitly so state.

Furthermore, contrary to the implication in LILCO's Answer (at 3, n. 2), any such "deferral" at the request of LILCO and the Staff cannot subsequently be used to justify the imposition of "expedited procedures" at whatever later date LILCO and the Staff deign to consider appropriate for proceeding on this issue. LILCO's and the Staff's self-serving delay request cannot later be used as a bootstrap justification for procedural shortcuts or time constraints that prejudice the County and State. The County and State are ready and willing to go forward right now --

according to the rules -- to resolve the issues raised in the proposed contention. There is no basis, other than inappropriately to serve whatever private interests the Staff and LILCO may have on this issue, to delay the progress of the litigation.

3. LILCO's Technical Argument About Issuance of the Mandate Is No Basis for Delay

LILCO's argument that the County/State Motion is "premature" because the Court of Appeals' mandate has not yet formally been issued (LILCO Answer at 2-3), provides no basis for denying the motion or delaying the required further proceedings on the new contention. LILCO's argument is premised only on unfounded speculation that: (1) a motion for rehearing will be filed with the Court; and (2) the motion will be granted, resulting in a different decision on the merits; or (3) the Court will sua sponte change its decision before the March 29 filing deadline for rehearing motions. This Board cannot properly base a decision on such speculation, particularly when, as here, it is without any credible basis.

First, in its Response the Staff makes no mention of an intention to request rehearing by the Court. Indeed, it refers to the Office of General Counsel's preparation of a "discussion" with the Commission about "possible options . . . concerning implementation" of the Court's decision, not about options to have that decision reheard or changed. See Staff Response at 3 (emphasis added).

Second, LILCO's implicit suggestion that the Court of Appeals' actions concerning issuance of the mandate in the GUARD case are in some way unusual (e.g., "The Court on February 12 issued a sua sponte order staying issuance of the mandate in the GUARD case until 7 days after disposition of any timely filed motion for rehearing," LILCO Answer at 2) is wrong. Rule 14(b) of the Rules of the D.C. Circuit expressly states:

> [T]he Court will ordinarily include as a part of its disposition an instruction that the Clerk withhold issuance of the mandate until the expiration of the time for filing a petition for rehearing or a suggestion of the appropriateness of rehearing en banc and, if such petition or suggestion is timely filed, until seven days after disposition thereof.

Thus, the Court's action cited by LILCO is routine.

Third, it is clear that unless another hearing is requested and the request granted by the Court, the mandate which, according to LILCO, will issue on March 29 or April 5, will be "a certified copy of the judgment and a copy of the opinion of the Court . . . and any direction as to costs." Fed. R. App. Pro. Rule 41(a). Since the Court's opinion is already available to the parties and the Board, there is no substantive reason to await the pro forma issuance of the mandate to begin to pursue the issues raised in the proposed contention.

4. The Argument that a Ruling on the Motion Should Be Deferred Pending Possible Generic Action Must Be Rejected

The Staff asserts that after considering some "discussion of possible options . . . concerning implementation of the GUARD decision," which the Staff believes to be forthcoming from the Office of General Counsel, the Commission may -- at some future time -- address on a generic basis some or all the issues raised in the proposed contention. See Staff Response at 3. Again, this is nothing but pure speculation which cannot support a refusal by this Board to act upon the pending motion. First, the Commission is clearly under no obligation to take any action, generic or otherwise, as a result of the GUARD decision. 10 CFR § 50.47(b)(12) is on the books, in plain words. Like many of the NRC's regulations, Section 50.47(b)(12) was applied by licensing boards during the period before a generic interpretation of it was provided by the Commission. Thus, while the Commission may decide in the future to issue a new generic interpretation of Section 50.47(b)(12), it is just as likely that it will not do so.

Second, there has been no reason presented to this Board for expecting that any such generic action by the Commission -- if it were to occur at all -- would or could affect the litigability of the Shoreham-specific issues presented in the proposed contention, or that such Commission action would take place within a time frame that would make it applicable to this litigation.

Third, since an admissible contention must have a basis in the regulations, every contention accepted for litigation is subject to precisely the kind of speculation which forms the sole basis for the Staff's deferral argument in this case. The Commission may make generic pronouncements, or case-specific rulings with generic implications, at any time; thus, any proposed contention "may or may not be litigable in its present form once the Commission has acted on [the] generic matter," as the Staff argues here. Staff Response at 3. The fact that a proposed contention refers to an issue which, at some unknown future time, may be the subject of a Commission action with generic implications, does not render that contention non-litigable.

LILCO's similar argument -- that because the proposed contention is one "about a generic issue, one affecting, presumably, all the nuclear plants in the country" the Board's ruling on the County/State Motion should be held in abeyance (LILCO Answer at 8, 10) -- must be rejected for the same reasons.

5. LILCO's Request for Certification Is Procedurally Improper and Substantively Irrelevant

LILCO's request that this Shoreham Licensing Board certify to the Commission two questions that were presented in the San Onofre case[3/] (LILCO Response at 8-9) is procedurally and substantively out of order. This Board has the authority to certify its own rulings to the Commission, not abstract questions which

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3/ See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-27, 16 NRC 883 (1982).

arose in the context of other proceedings, or on which an applicant wishes to have the Commission's views. See 10 CFR § 2.730. This Board should reject LILCO's effort, in the guise of a response to the County/State Motion, to make a procedurally improper request concerning matters outside the scope of this Board's jurisdiction and authority. LILCO's purported request for certification should be denied as out of order and not pertinent to the proceeding over which this Board presides.

6. LILCO's Argument that the Proposed Contention Is Inadmissible Is Semantic Nonsense and Without Rational Basis

LILCO's argument in Section IV of its Answer boils down to the following absurd assertion: in litigating compliance with Section 50.47(b)(12) and NUREG 0654 Section II.L, one cannot discuss arrangements for (1) medical services for contaminated injured individuals, or (2) medical services of contaminated, or radiation-exposed, individuals should those medical services include procedures defined by LILCO as constituting "decontamination." See LILCO Answer, at 6-7. This argument, which forms the entire basis for all LILCO's discussion of the admissibility of the proposed contention, must be rejected out of hand.

First, the words of Section 50.47(b)(12), and their plain meaning, reveal that LILCO's argument lacks any rational basis:

> (b) The . . . offsite emergency response plans for nuclear power reactors must meet the following standards:

. . .

(12) Arrangements are made for medical services for contaminated injured individuals.

(Emphasis added.)

Moreover, in the portion of the Commission's San Onofre decision not before the Court of Appeals in GUARD, the Commission itself recognized that the class of "contaminated injured individuals" for whom medical services must be arranged includes those "exposed to dangerous levels of radiation." And, the Commission did not differentiate between medical services that involve "decontamination" as opposed to other medical procedures. See also NUREG 0654 Section II.L which refers to "hospital and medical services . . . adequately prepared to handle contaminated individuals," "medical services . . . able to radiologically monitor contaminated personnel," and "transporting victims of radiological accidents to medical support facilities."

Finally, it defies logic and common sense to argue, as LILCO does, that persons who are "contaminated but not injured" are in a class distinct from those "exposed to radiation." Clearly, one cannot be contaminated without having been exposed. Thus, there is no basis in Section 50.47(b)(12), the related NUREG 0654 Section II.L, or any common sense interpretation of either of them, for LILCO's argument that litigation of the adequacy of arrangements for medical services for contaminated injured

persons, or for persons who are contaminated but not injured, including the capability to perform medically necessary radiological monitoring or decontamination, is improper.

Second, LILCO's suggestion that its purported (but unidentified) "arrangements" for medical services for contaminated and injured persons were "already available for litigation," and "are as legally acceptable now as they ever were" is incorrect and misleading. As noted in the County/State Motion (at 6, n. 2), all earlier efforts by the County and State to litigate matters relating to issues held to be within the Commission's San Onofre decision were objected to by LILCO on the basis that they were barred by the San Onofre case, and the Phase I and Phase II Emergency Planning Licensing Boards so ruled. Thus, whatever "arrangements" LILCO refers to, as a practical matter, have never been available for litigation. Their adequacy has never been examined by a licensing board, much less determined to be "legally acceptable." Third, LILCO's suggestion that portions of the proposed contention that refer to "decontamination" are improper because Section 50.47(b)(10), NUREG 0654 Section II.J.12, and the relocation center issues also refer to, or use the words, "monitoring and decontamination" is specious. Many emergency planning requirements, issues, and facts overlap and are related to one another. However, the fact that monitoring and decontamination will occur at relocation centers, according to LILCO, does not address the separate Section 50.47(b)(12) and

NUREG 0654 Section II.L requirement that there be adequate arrangements for medical services for contaminated individuals. Clearly, those services must include, but would not be limited to, decontamination and radiological monitoring. Thus, the overlap referenced by LILCO is mandated by the regulations. However, a finding that relocation center provisions are adequate -- assuming arguendo that such a finding could be made in this case -- says nothing about the adequacy of arrangements for medical services, which is addressed in the proposed contention.

Fourth, for the reasons already discussed, LILCO's proposed changes to the proposed contention (see LILCO Answer at 7) make no sense. For ease of reference, the all-inclusive term "contaminated individuals" was used in the proposed contention as a shorthand for the "contaminated injured individuals" covered by Section 50.47(b)(12). This was done with the understanding that the Commission had defined that term to include both individuals who are exposed to radiation (a subclass of which is those who are contaminated by that radiation), and those who are contaminated and injured. Thus, the intention throughout the proposed contention was to refer to both contaminated injured individuals and those exposed to radiation (whether they be contaminated on their skin surfaces by radioactive particulates or contaminated internally as a result of an inhalation dose).

Accordingly, in subpart A of the contention, if every group were to be separately identified, the term "contaminated individuals" would be changed to "contaminated injured and radiation exposed individuals." In subpart C, the same change would be necessary twice, and the term "contaminated injured individuals" would be changed to "contaminated injured and radiation exposed individuals."

Finally, there is no basis -- nor does LILCO even offer one -- for striking the second sentence of subpart B as asserted by LILCO. LILCO Answer at 7. The statement in the contention is:

> In addition, Intervenors contend that medical staff preparedness is deficient because there has been inadequate training with respect to proper decontamination procedures and treatment.

Given the straightforward requirements of NUREG 0654 Section II.L, this clearly is an appropriate allegation with a specific statement of basis.

7. LILCO's "Request for Prompt Decision" Is Improper, Based on False Assumptions, and Should be Disregarded

In the final portion of LILCO's Answer, LILCO once again urges this Board to delay acting upon the County/State Motion pending before it. Its argument, in essence, is that prompt litigation of the issues raised in the new contention "would prejudice LILCO." See LILCO Answer at 10-12. For the reasons discussed in Sections 3 and 4 above, there is no basis for this Board to refuse to rule on the pending motion. An assertion that

to do so "would prejudice LILCO" -- because it might delay the rendering of a partial initial decision -- is no basis either. A refusal to rule on the motion and proceed promptly with litigation on the medical care issues would prejudice the State and County, who are entitled to prompt resolution of matters brought before the Board. Indeed, it would be prejudicial per se for the County and State to be precluded from obtaining a ruling on the subject contention because LILCO finds procedural delay to be to its momentary tactical advantage.

LILCO's presumptuous and self-serving "request" that the Board speed up its decision-making process on the issues which have been briefed is out of place in an answer to the pending motion. Such an abuse of the NRC's rules of pleading should be disregarded by the Board.

Furthermore, LILCO's repetitious urgings are based on several false premises and assertions. First, the suggestion that the need for a hearing on relocation center issues is one created by Intervenors [see LILCO Answer at 7 (Intervenors "try to reopen the relocation center issue") and 10 ("Intervenors have . . . mounted . . . major efforts to require this Board to conduct additional hearings . . . on the Nassau Coliseum reception center")] is patently false. LILCO, not Intervenors, sought reopening of that issue because the Board found that LILCO had failed to meet its burden of proof in its three prior attempts to do so. The need for a hearing is solely the result of LILCO's

decision to submit new evidence for the Board's consideration and the Intervenor's absolute legal right to challenge that evidence.

Second, LILCO's suggestion that resolving the issues raised in the proposed contention must await Commission action which may not occur for "a considerable length of time" (LILCO Answer at 10) is also false. The contention is admissible now in every respect. Other than unbridled speculation about possible future Commission action, absolutely no reason has been suggested as to why the parties cannot proceed now with discovery, testimony and a hearing on the issues raised in the contention. The GUARD decision gave rise to the filing of the proposed contention because the Court held "irrational" the Commission's interpretation that had barred litigation of medical care issues earlier. However, neither that decision nor speculation about potential future Commission actions has any impact upon the obligation or ability of the parties and this Board to get on with the resolution of the issues raised in the proposed contention.

Third, LILCO's assertion that the legal authority issues "are ripe for decision" (LILCO Answer at 11) and should be included in a partial initial decision "LILCO believes" should be rendered this month, is also false. See Answer of Suffolk County and the State of New York in Opposition to LILCO's Renewed Motion for Summary Disposition, dated March 19, 1985.

Fourth, the suggestion that a hearing on the issues raised in the proposed contention and the relocation center issues could be combined with the required hearing on the adequacy and results of a FEMA-sponsored exercise -- should such an exercise ever take place -- is ridiculous. See LILCO Answer at 11, n. 5. Given that the New York State Supreme Court has recently held LILCO's implementation of its Plan to be illegal, the County and State have made clear to the NRC Staff and FEMA that a graded exercise of LILCO's Plan would constitute the pursuit of an illegal objective. Such an exercise, therefore, should not and cannot legally take place.

Moreover, assuming arguendo that such an exercise were appropriate, the exercise would be intended to test the implementability of a plan that has already received Staff and FEMA approval. Clearly, in light of GUARD, LILCO's brand new relocation center scheme, and the State and County's proposed testimony on those issues, a FEMA review of whatever Plan provisions LILCO intends to rely upon for compliance with Section 50.47(b)(12), NUREG 0654 Section II.L, and the regulations pertinent to LILCO's relocation scheme is a prerequisite to any exercise of those provisions. To have a hearing on the adequacy of those provisions after an exercise would defy logic and be contrary to FEMA and NRC practice.

Fifth, LILCO's assertion that "the absence of a decision is already delaying planning for an exercise" is also false. No exercise of the LILCO Plan has been scheduled, and in the view of the State and County, never could lawfully be scheduled because LILCO's Plan is illegal. See recent State Court and U.S. District Court decisions recently served on the Board. LILCO's statement that "if the Board finds any deficiencies in the emergency plan, LILCO may need time to correct the problem" is merely wishful thinking by LILCO. LILCO's lack of legal authority, declared definitively by the New York State Supreme Court, is not something LILCO can "correct."

Thus, the issuance of a decision on the issues which have been briefed would move LILCO no closer to a full power license, or to an exercise. As a result, there is no need (a) tc delay the additional litigation required by LILCO's motion to reopen the record on relocation center issues and by the Court of Appeals' ruling on the Commission's interpretation of Section 50.47(b)(12) or (b) to issue decisions in a piecemeal fashion as suggested by LILCO.

CONCLUSION

The County/State Motion to admit the proposed contention should be granted. There is no basis other than LILCO's dilatory objectives and idle speculation for deferring a ruling on the motion. There is no legitimate reason for the Board to permit

LILCO to delay this proceeding. Intervenors are ready to go forward now with the appropriate discovery followed by litigation.

Furthermore, there is no basis for finding the proposed contention, any portion of it, or any particular words in it, inadmissible. The contention is specific, with stated bases, and its meaning and intent are clear. There is no reason to put off the process of addressing the merits of the issues raised by allowing LILCO's procedural, speculative, and semantic games.

Respectfully submitted,

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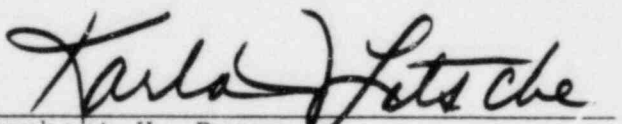

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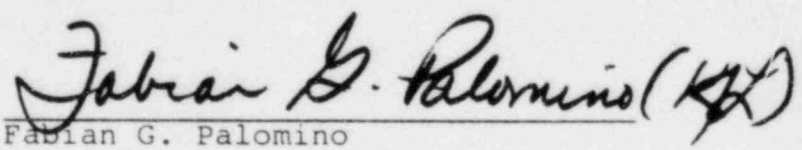

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