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March 25, 1988 DOCKETED  
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UNITED STATES OF AMERICA  
-- NUCLEAR REGULATORY COMMISSION  
Before the Atomic Safety and Licensing Appeal Board

OFFICE OF SECRETARY  
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BRANCH

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

GOVERNMENTS' RESPONSE TO LILCO'S MOTION FOR EXPEDITED DECISION  
AND POSSIBLE ADVANCEMENT OF ARGUMENT ON LILCO'S APPEAL  
OF LBP-87-3

In response to the Board's telephonic request of March 23, 1988, the Governments (Suffolk County, the State of New York, and the Town of Southampton) hereby respond to LILCO's "Motion for Expedited Decision and Possible Advancement of Argument on Appeal Concerning the Scope of Initial Offsite Emergency Preparedness Exercise Issues," dated March 22, 1988 (hereafter, the "Motion").

- In its Motion LILCO asks the Board:
- (1) to "attempt to render at least a summary decision on the merits of this appeal by about mid-May," and
  - (2) to advance the presently scheduled argument date of April 28 to the extent necessary to accomplish this goal, suggesting that a date during the week of April 11-15 might be practical.

The Governments oppose the proposed advancement of the scheduled

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oral argument date. While it is up to the Board to decide when it will issue a decision and what form the decision will take, the Governments note their disagreement with the premise underlying LILCO's request for an expedited decision. Furthermore, the Governments urge the Board to issue a complete decision containing a full statement and explanation of the bases and rationale for the Board's eventual ruling on LILCO's appeal, rather than some sort of "summary decision."

**1. Advancing the April 28 Oral Argument Date Would Severely Prejudice the Governments**

LILCO's suggestion that the presently scheduled oral argument date of April 28 be advanced, perhaps even to the week of April 11-15, should be rejected. Any such advance would severely prejudice the Governments for the following reasons.

First, the Governments' brief on LILCO's appeal of LBP-88-2 must be filed on Monday, April 18. Counsel for Suffolk County and for the State of New York who will be participating in the oral argument on LILCO's appeal of LBP-87-32 will be working on that brief until it is filed. Accordingly, they will be unable to begin preparation for the oral argument on the appeal of LBP-87-32 until after April 18. <sup>1/</sup>

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<sup>1/</sup> Such preparation will take more time than in some instances because the NRC Staff filed a brief in support of LILCO's appeal. While the Governments anticipated that the Staff would support LILCO, the Staff's brief raised some arguments not explicitly addressed in the Governments' brief. These arguments must be assessed and evaluated against the record on Contentions Ex 15/16.

Second, counsel for the County and the State who are involved in both of LILCO's exercise appeals also have major responsibilities in the pending proceedings in the OL-3 and OL-6 dockets. Filing and related obligations in those proceedings would make it impossible for them to begin preparation for the oral argument on the LBP-87-32 appeal until after April 20, at the earliest.

Specifically, testimony is due to be filed on April 13 on three separate remand issues (LILCO's new EBS system, its new proposal for evacuation of school children, and the evacuation of hospital patients), with motions to strike due April 20, and responses due April 27. In addition, discovery is scheduled to end on April 15 in the separate remand proceeding on the legal authority contentions, with testimony due in that proceeding on April 29. In the OL-6 proceeding on LILCO's request for a 25% power license, a reply brief (responding to briefs due April 1) is due to be filed on April 20.

In light of counsel's obligations in the OL-3 and OL-6 proceedings, which are highly concentrated during the weeks of April 11 and April 18, and the time required to complete the brief due April 18 on the appeal of LBP-88-2, advancing the LBP-87-32 oral argument from the presently scheduled date of April 28 would severely prejudice the Governments. <sup>2/</sup>

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<sup>2/</sup> In addition, on or about April 13, counsel involved in the exercise appeals must also file a reply brief in the U.S. Court of Appeals for First Circuit, in the case challenging the NRC's new emergency planning rule.

## 2. Comments on LILCO's Request for an Expedited Decision

It is up to this Board to determine how quickly it can issue a decision on LILCO's appeal. The Governments merely note the following with respect to LILCO's argument about the need for a decision on its appeal of LBP-87-32 by mid-May. First, after the issuance of LBP-87-32 and the filing of its Notice of Appeal, LILCO requested that FEMA schedule an exercise "as soon as possible." LILCO never suggested that an exercise should await the resolution of LILCO's appeal of the Licensing Board's decision, even after the Appeal Board declined to grant LILCO's initial request for expedition. Thus, LILCO sought an exercise with full knowledge that it could well take place long before the issuance of a decision on its appeal of LBP-87-32.

Second, to the Governments' knowledge, FEMA has not yet finally determined that it will conduct another exercise of the LILCO Plan, much less actually scheduled an exercise for the week of June 13. <sup>3/</sup> In fact, FEMA has barely begun a plan review of the latest version of the LILCO Plan -- Revision 9. According to FEMA, the completion of that review, and a conclusion that the review revealed no major impediments to the conduct of an exercise, are both prerequisites to an exercise. See Attachment to LILCO's Motion. Thus, the premise of LILCO's request for an

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<sup>3/</sup> Indeed, by letter dated March 15, 1988, the Governments advised FEMA that to conduct an exercise of the LILCO Plan, as LILCO and the NRC have requested, would be unlawful and inappropriate for several reasons.

expedited decision -- that a decision is necessary by mid-May because an exercise will occur in mid-June -- is speculative.

Third, except for vague generalities, LILCO never explains why an Appeal Board decision is necessary before a new exercise is completely planned or even held. LILCO admits that it is possible to proceed with an exercise "in accordance with the guidelines prescribed by the Licensing Board's decision . . . ." LILCO Motion at 2. LILCO never explains how it is prejudiced by doing precisely that -- that is, assuming that LBP-87-32 is good law and proceeding accordingly.

### 3. The Board Should Not Issue a "Summary" Decision

Again, it is up to this Board to determine the nature and contents of its decision, whenever issued. In the Governments' view, however, the practice of issuing "summary" decisions is both problematic and potentially prejudicial; it should be avoided.

In recent weeks, the OL-3 Board has on several occasions announced "bottom line" rulings, without providing any discussion, explanation, bases, or rationale for such rulings; instead, the Board has stated its intention to provide in the future opinions presumably containing such bases and explanations. <sup>4/</sup> It has proven to be very difficult for the

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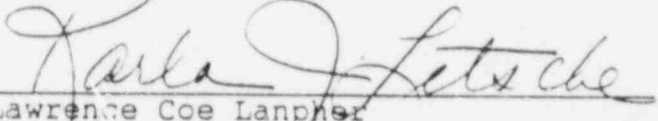
<sup>4/</sup> For example, the parties are still awaiting opinions providing the bases for that Board's rulings on five of LILCO's realism summary disposition motions (the "bottom line" denial of the motions was announced on February 25), even though the discovery period in the realism remand proceeding is scheduled to  
(continued...)

parties to proceed with litigation, or even to decide how they should proceed, without a full understanding of the rulings which are supposed to guide them in such proceedings.

LILCO's appeal of LBP-87-32 is not an instance, like that presented by a motion for a stay or other extraordinary relief, in which a quick "summary ruling" is all that would be required to guide the parties in their actions. The appeal and the parties' briefs present several legal and factual issues which require and deserve in depth analysis and discussion. Accordingly, the Governments urge that when this Board decides LILCO's appeal of LBP-87-32, it follow its standard practice and issue a complete decision which sets forth a discussion of the parties' arguments, and a basis and rationale for the Board's decision.

Respectfully submitted,

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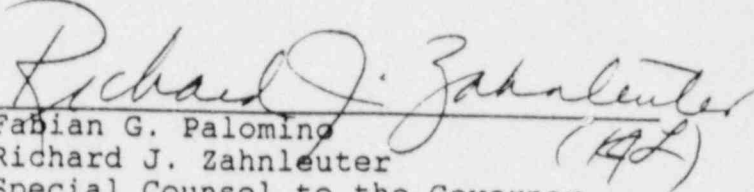
  
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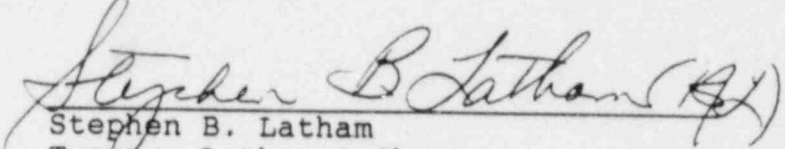
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CERTIFICATE OF SERVICE

I hereby certify that copies of GOVERNMENTS' RESPONSE TO LILCO'S MOTION FOR EXPEDITED DECISION AND POSSIBLE ADVANCEMENT OF ARGUMENT ON LILCO'S APPEAL OF LBP-87-3 have been served on the following this 25th day of March, 1988 by U.S. mail, first class, except as otherwise noted.

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