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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)	

GOVERNMENTS' OBJECTION TO PORTIONS OF FEBRUARY 29 AND APRIL 8 ORDERS IN THE REALISM REMAND AND OFFER OF PROOF

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April 13, 1988

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The Governments (Suffolk County, the State of New York and the Town of Southampton) submit this filing for two reasons: (1) to state the Governments' objection to the portions of the Board's Orders of February 29, 1988 and April 8, 1988[1/] which appear to preemptively bar the Governments from filing full and truthful testimony in the CLI-86-13 remand proceeding on the Governments' Legal Authority Contentions; and (2) to submit the Governments' offer of proof, pursuant to 10 CFR § 2.743(e),

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1/ Confirmatory Memorandum and Order (Ruling on LILCO's Motions for Summary Disposition of Contentions 1, 2, 4, 5, 6, 7, 8 and 10, and Board Guidance on Issues for Litigation) (February 29, 1988) (hereafter, "February 29 Order"); Memorandum (Extension of Board's Ruling and Opinion on LILCO Summary Disposition Motions of [sic] Legal Authority (Realism) Contentions and Guidance to Parties on New Rule 10 C.F.R. § 50.47(c)(1)), LBP-88-9 (April 8, 1988) (hereafter, "April 8 Order").

consisting of the testimony they would file if they are not precluded from doing so by the Board's Orders. That testimony, sponsored by Suffolk County Executive Patrick G. Halpin and New York State Commissioner of Health David Axelrod, comprises Attachments 1 and 2, respectively.

The Board's interpretation of the new emergency planning rule cannot be squared with law. In essence, the Board's interpretation creates a Hobson's Choice: either the Governments will agree to create and implement their own emergency plan(s) for Shoreham, or the Board will deem that the Governments will implement LILCO's plan. As the Board would have it, therefore, the effect of the new rule is to force the Governments to implement plans for responding to a Shoreham emergency.

The law, however, takes a different view. Federal law denies the Board the power to require the Governments to prepare, submit to the NRC, or implement a response plan for a Shoreham emergency. While the idea of compelling state and local planning was considered by some members of Congress in 1980, it was rejected as an abridgement of state sovereignty. Similarly, federal and state courts have ruled that Suffolk County has acted rationally and within its rights by not adopting or agreeing to implement an emergency plan for Shoreham. While LILCO urged the courts to find the County's action preempted by federal law or inconsistent with State law, the courts held that it was neither. The inescapable conclusion, therefore, is that the Board cannot

force the Governments to prepare, submit, or implement any Shoreham emergency plan.

What the Board cannot do directly, it cannot do by indirection. This Board has sought to shape this proceeding by forcing the Governments -- under the veiled threat of "default" -- to explain how they would implement a response to a Shoreham accident using LILCO's plan. To do this, the Board has taken the extraordinary step of dismissing the sworn statements of the Governor of New York and the Suffolk County Executive that neither they nor their respective Governments would use LILCO's plan, reply on LILCO recommendations or advice, or coordinate with LILCO in responding to a Shoreham emergency. These statements, however, are the full and true representations of the Governments' position. Indeed, the Suffolk County statements are embodied in the Suffolk County laws which have been upheld by the courts. The Board's dismissal of these statements, the Board's disregard for Suffolk County's laws, and its insistence that the Governments present testimony which is categorically the opposite of the Governments' lawful position, are tantamount to requiring the Governor and County Executive to lie. This, they will not do.

The Board's apparent basis for dismissing the sworn statements of the Governor and County Executive is the claim that the statements are "simple protestations" of the Governments' refusal to use LILCO's emergency plan. "Simple protestations" the statements are surely not. They are extensive, reasoned

analyses of why the Governments would not use LILCO's plan, reply upon LILCO recommendations or advice, or coordinate with LILCO in a "best efforts" response to a Shoreham emergency. The Board's claim that the Commission "directed" it not to consider such statements is merely gratuitous. As discussed below, any fair reading of the new rule shows that the Commission's language does not reach the analytical and legally sound statements of the Governor and County Executive. Similarly, the new rule does not -- and could not -- supercede the Suffolk County laws which the Courts have upheld against LILCO's preemption challenges.

The Board's rulings clearly lack any legal basis. In light of those rulings, however, the Governments have no choice but to make a formal offer of proof of the full and true evidence of their lawful positions. The Governments seek to present the testimony of two high ranking government officials who can and do address the very issue posed by the CLI-86-13 remand, what would the Governments do in a Shoreham emergency. The Governments cannot and will not file false testimony -- the only other alternative afforded by the Board's ruling.

The Governments intend to exercise their rights as litigants in this proceeding. If the Board does not reconsider its rulings and bars the testimony proffered herewith, the Governments will proceed to cross-examine the testimony of other witnesses on the subject contentions and to challenge the adequacy of LILCO's "prima facie case." These are the Governments' rights as intervenors, underscored by Section 274 of the Atomic Energy Act.

I. INTRODUCTION

A. History of the Legal Authority Contentions Through October 29, 1987

The history of the litigation of the Governments' "Legal Authority Contentions" (Contentions EP 1-10), up to the end of September, 1987, was set forth in detail in this Board's Order of September 17, 1987,[2] and will not be repeated here. That Order followed and interpreted the Commission's CLI-86-13 remand of LILCO's so-called "realism defense" to the Legal Authority Contentions, and denied LILCO's March 29, 1987 motion for summary disposition of those contentions.

In the September 17 Order, the Board, then consisting of Judge Kline, Judge Shon, and the Chairman Judge Margulies, found that the issue presented by the CLI-86-13 remand was the nature, adequacy and regulatory compliance of LILCO's Plan, assuming a "best efforts" government response to a Shoreham emergency. The Board held unanimously, however, that in light of the sworn affidavits of Governor Cuomo and then Suffolk County Executive LoGrande which were in the evidentiary record of this proceeding, the Board could not find that the Governments would (a) implement, use, or follow the LILCO Plan, (b) authorize or permit

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[2] See Memorandum and Order (Ruling on Applicant's Motions of March 20, 1987 for Summary Disposition of the Legal Authority Issues and of May 22, 1987 for Leave to File a Reply and Interpreting Rulings Made by the Commission in CLI-86-13 Involving the Remand of the Realism Issue and Its Effect on the Legal Authority Question), LBP-87-26 (Sept. 17, 1987) (hereafter, the "September 17 Order") at 9-12.

LILCO to perform the response functions identified in Contentions 1-10, (c) rely upon LILCO recommendations or advice in an emergency, or (d) work "in partnership" with LILCO in responding to an emergency.3/

The Board as then constituted also found, again unanimously, that New York law prohibited the most basic premise of LILCO's Plan and its realism defense -- that the Governments would or lawfully could authorize or permit LILCO to perform emergency response functions -- and that LILCO lacked legal authority under New York law to perform those functions on its own.4/

In an October 29, 1987 Order denying LILCO's Motion for Reconsideration of the September 17 Order, the Board unanimously affirmed its September 17 rulings.5/

B. The New Emergency Planning Rule

On October 29, 1987, the Commission adopted its new emergency planning rule.6/ It was designed expressly to address the Shoreham situation, by providing "criteria for the evaluation . . . of utility-prepared emergency plans in situations in which

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3/ See, e.g., September 17 Order at 23, 25-27, 45. The Affidavits relied upon in the September 17 Order included an Affidavit of Mario M. Cuomo, Governor of the State of New York, dated May 6, 1987, and an Affidavit of Michael A. LoGrande, Suffolk County Executive, dated May 8, 1987.

4/ See, e.g., September 17 Order at 25-27, 45-46.

5/ Memorandum and Order (Ruling on Applicant's Motion of October 5, 1987 for Reconsideration and Other Relief), LBP-87-29 (Oct. 29, 1987).

6/ See 52 Fed. Reg. 42,078-86 (Nov. 3, 1987).

state and/or local governments decline to participate further in emergency planning."[7] The central feature of the new rule is the following provision:

> In making a determination on the adequacy of a utility plan, the NRC will recognize the reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public. The NRC will determine the adequacy of that expected response, in combination with the utility's compensating measures, on a case-by-case basis, subject to the following guidance. . . . [I]t may be presumed that in the event of an actual radiological emergency state and local officials would generally follow the utility plan. However, this presumption may be rebutted by, for example, a good faith and timely proffer of an adequate and feasible state and/or local radiological emergency plan that would in fact be relied upon in a radiological emergency.[8]

Despite this provision, the Commission emphasized that under the new rule, reviews and decisions on the required adequacy and reasonable assurance findings with respect to a utility's plan are to be made, case-by-case, based on the facts and evidence involved in each case-specific adjudication.[9]

7/ Id. at 42,078.

8/ Id. at 42,086.

9/ See, e.g., 52 Fed. Reg. 42,081 ("whether a utility could succeed in making [the] showing [required by the new rule] would depend on the record developed in a specific adjudication . . . ."); 42,082 (under the new rule judgments and evaluations, and uncertainties therein, are to be "addressed in the case-by-case adjudications on individual fact-specific situations"); 42,082 ("under the particular facts of an individual case it may be impossible for the NRC to conclude that a utility plan is adequate, as defined in this rule"); 42,084 (under new rule, NRC will "take into account the probable response of state and local authorities, to be determined on a case-by-case basis") (all emphasis added).

C. LILCO's Fourth Set of Summary Disposition Motions

On December 18, 1987, LILCO filed with this Board -- by then consisting of Judge Kline, Judge Shon, and the new Chairman Judge Gleason -- seven summary disposition motions, in its fourth attempt to obtain a summary ruling on the Legal Authority Contentions.[10] The Governments opposed the motions.[11] With

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[10] LILCO's Motion for Summary Disposition of Contentions 5 and 6 (Making Decisions and Telling the Public); LILCO's Motion for Summary Disposition of Contentions 1 and 2 (Directing Traffic); LILCO's Motion for Summary Disposition of Contention 10 (Access Control at the EPZ Perimeter); LILCO's Motion for Summary Disposition of Contentions 4 and 9 (Tow Trucks and Fuel Trucks); LILCO's Motion for Summary Disposition of Contentions 7 and 8 (Ingestion Pathway and Recovery and Reentry); LILCO's Motion for Summary Disposition of Contentions 1, 2 and 9 -- Immateriality; LILCO's Motion for Summary Disposition of Contentions 1-10 with Respect to 10 CFR § 50.47(c)(1)(i) and (ii); and Introduction: Memorandum of Law on LILCO's Motions for Summary Disposition of Contentions 1-2 and 4-10, all dated December 18, 1987 (hereafter, collectively, "LILCO's December 1987 Summary Disposition Motions"). The Board's statement in the April 8 Order that this was only the third time LILCO attempted to obtain a summary ruling on the Legal Authority Contentions is erroneous. See April 8 Order at 2. LILCO's three previous motions were filed August 6, 1984, February 27, 1985, and March 27, 1987.

[11] See Overview Memorandum in Support of Governments' Opposition to LILCO's Motions for Summary Disposition of Contentions 1-2 and 4-10 (hereafter, "Governments' Overview Memorandum"); Affidavits in Support of Governments' Opposition to LILCO's Summary Disposition Motions on Contentions 1-2 and 4-10; Answer of Suffolk County, the State of New York and the Town of Southampton to LILCO's Motion for Summary Disposition of Contentions 5 and 6; Suffolk County, State of New York and Town of Southampton Response in Opposition to LILCO's Motion for Summary Disposition of Contentions 4 and 9; Opposition of Suffolk County, the State of New York, and the Town of Southampton to LILCO's Motion for Summary Disposition of Contention 10 (Access Control at the EPZ Perimeter); Suffolk County, State of New York and Town of Southampton Response in Opposition to LILCO's Motion for Summary Disposition of Contentions 1 and 2; Suffolk County, State of New York and Town of Southampton Response to LILCO's Motion for Summary Disposition of Contentions 7 and 8 (Ingestion Pathway and Recovery and Reentry) (all dated Feb. 10, 1988); Opposition of

(footnote continued)

their opposition, the Governments submitted an additional Affidavit of New York Governor Mario M. Cuomo, an Affidavit of Suffolk County Executive Patrick Halpin, and Affidavits of other State and County officials.12/

The Governments' Affidavits stated that the Governments' "best efforts" response to a Shoreham emergency would not follow or use the LILCO Plan. The Affidavits set forth, in detail, why the Governments would not (a) follow or implement the LILCO Plan, (b) authorize or permit LILCO or its personnel to implement that Plan, or (c) rely upon LILCO recommendations or advice in a response to a Shoreham emergency, assuming the plant were licensed to operate. The Affidavits and other filings by the Governments were not "simple protestations that [the Governments] will not use LILCO's plan . . . ."13/ To the contrary, the Affidavits set forth in detail why the Governments could not and would not follow the LILCO Plan. The Affidavits of the Governor and the County Executive also explained why the Governments had determined in the lawful exercise of their police powers that it was not in the best interests of their citizens to engage in

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(footnote continued from previous page)
Suffolk County, the State of New York and the Town of Southampton to LILCO's Motion for Summary Disposition of Contentions 1, 2 and 9 -- Immateriality (Feb. 1, 1988); and Suffolk County, State of New York and Town of Southampton Response in Opposition to LILCO's Motion for Summary Disposition of Contentions 1-10 with Respect to 10 CFR § 50.47(c)(1)(i) and (ii) (Jan. 19, 1988).

12/ See Affidavits in Support of Governments' Opposition to LILCO's Summary Disposition Motions on Contentions 1-2 and 4-10 (Feb. 10, 1988).

13/ April 8 Order at 24.

emergency planning or to adopt or implement an emergency plan for responding to a Shoreham emergency.

D. This Board's February 29 and April 8 Orders

In the February 29 Order, this Board stated that it had denied LILCO's summary disposition motions on Contentions 1, 2, 4, 5, 6, 7, 8, and 10. The Board provided no explanation, basis, rationale or discussion of its rulings on those motions, however. The Board merely asserted: "Written opinion [sic] will be forthcoming as soon as possible."[14/] In the February 29 Order, the Board directed the parties to begin the litigation in the CLI-86-13 remand proceeding on LILCO's realism defense to the Legal Authority Contentions.

Although all parties had requested that the Board schedule a prehearing conference on the "realism" remand proceeding, the Board did not do so. Instead, in its February 29 Order the Board purported to interpret and apply the new rule to this proceeding. The Board ruled, in advance of the actual submission of testimony by the Governments, that certain evidence from the Governments would not be "accepted" in the litigation, that certain facts could not be "raised" in response to LILCO's Plan, and that certain Governmental "determinations" would be "acceptable" only if accompanied by specifically enumerated data and information.[15/] The Board also threatened the Governments with "default" if they

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14/ February 29 Order at 1.

15/ Id. at 4.

failed to submit testimony consistent with the Board's specifications.

In the February 29 Order the Board made the following statements:

> Under the new regulation, . . . [t]here is a presumption that the State and County response will follow the LILCO Plan, a presumption rebuttable only by timely evidence that the Governments will follow a different but adequate and feasible plan that can be relied on or by other evidence of like kind.16/
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> . . .
>
> [A] lack of legal authority cannot be raised under the regulation as a response against LILCO's Plan, nor can simple protestations that the State and County will not use LILCO's Plan. Acceptable rebuttals to the Plan must include positive statements of the projected behavior of the Governments. A determination to respond ad hoc would be acceptable only if accompanied by specification of the resources available for such a response, and the actions such a response could entail including the time factors involved. A failure on the part of the Governments to present a positive case for our analysis and evaluation could result in a finding of default and hence in an adverse ruling on the contention to which it applied.17/

On April 8, the Governments received a copy of the promised "written opinion" on LILCO's summary disposition motions. The April 8 Order essentially confirms, with some additional discussion, the February 29 Order's "guidance" concerning (a) the Board's interpretation and application of the new rule and

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16/ Id. at 1-2.

17/ Id. at 4.

(b) what evidence the Board deems "acceptable" in this proceeding.[18]/

E. The Governments' Response to the February 29 and April 8 Orders

In light of the many filings already made on the subject of the new rule and its application to this proceeding and to LILCO's realism defense, the Governments believe that the filing of a Motion for Reconsideration of the portions of the February 29 and April 8 Orders which address that subject would likely be futile. In addition, the Governments would not normally file objections or an offer of proof such as this until after the Board had held a prehearing conference during which the issues to be addressed in the upcoming proceeding were discussed and defined. The Board has failed to schedule such a conference in this proceeding, however.

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[18]/ In the April 8 Order, the Board stated as follows:

> Intervenors . . . can no longer raised the specter of a lack of legal authority as a response nor can simple protestations that they will not use LILCO's plan suffice. The Intervenors are required to come forward with positive statements of their plans and must specify the resources that are available for a projected response and the time factors that are involved in any emergency activities proposed. Lacking the presentation of a positive case for analysis and evaluation, a finding of default and an adverse ruling could result in connection with the contention to which such omission applied.

April 8 Order at 24-25.

Instead, the Board has made preemptive rulings which appear to bar the Governments from submitting evidence which would constitute a "full and true disclosure of the facts" relating to the Legal Authority Contentions, LILCO's realism defense to them, the LILCO Plan, and the Governments' "best efforts" response to a Shoreham emergency.

The Governments are prepared to participate fully in this proceeding. The Governments intend to participate first by the presentation of the testimony which is submitted herewith if the Board permits them to do so. The Governments also intend to participate through other means available under the rules, such as by presenting evidence through cross examination of the LILCO and Staff witnesses which will demonstrate, among other things, that LILCO has failed to present a prima facie case on the Legal Authority Contentions. Such participation is consistent with the Board's statement that the Governments are "entitled to challenge the adequacy of the LILCO emergency plan supplemented by a best effort response from the governments (State and/or local) in connection with the activities contemplated in the remaining contentions . . . ."[19/]

The February 29 and April 8 Orders suggest, however, that the Board would not "accept" the central content of the Governments' intended evidence -- the attached testimony of County Executive Halpin and State Health Commissioner Axelrod -- despite its clear relevance, materiality, and reliability. The Govern-

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19/ April 8 Order at 24.

ments are filing this objection and offer of proof now, in order to avoid any additional waste of the parties' resources and to make clear the Governments' position before this litigation proceeds further. The Governments hope that this filing will cause the Board to correct its prior erroneous rulings before the errors permanently taint this entire proceeding.

II. SUMMARY OF THE GOVERNMENTS' POSITION

The Governments cannot change the facts, whether they concern (a) the LILCO Plan, (b) determinations by the Governments about planning for or implementing a response to a radiological emergency at Shoreham, or (c) judgments and determinations by the Governments about the nature of a postulated "best efforts" governmental response to a Shoreham emergency. Any full and truthful testimony by the Governments in response to LILCO's realism defense to the Legal Authority Contentions would necessarily be based on such facts and include discussions about them. The Governments are prepared to submit the attached testimony in response to LILCO's realism defense to the Legal Authority Contentions, and will do so if permitted by the Board.

The February 29 and April 8 Orders, however, appear to preclude the filing of such testimony. The Governments hereby object to the portions of those Orders which comprise such preclusion, and submit, as an offer of proof, the attached testimony. The Governments take this action at this stage of the

proceeding to give the Board the opportunity to correct the errors which are manifest in its previous Orders.

Neither the NRC, nor this Board exercising powers delegated by the NRC, can disregard facts or the law. Consider for example the following: Resolution 456-1982 of Suffolk County established as Suffolk County law that the County will not implement any plan for responding to a Shoreham emergency unless it has received approval of the County Legislature; the federal courts have upheld Resolution 456-1982 as lawful and not preempted[20]; the County Legislature has not approved LILCO's Plan, and, indeed, in Resolution 111-1983, the County decided not to implement any response plan for Shoreham[21]; thus, no County personnel are permitted to devote any resources to the testing or implementation of LILCO's Plan. These facts are the law of Suffolk County. The Board may not agree with that law, but it has no lawful basis upon which to disregard it.

Yet, that is exactly what this Board has apparently chosen to do. The Board's orders disregard Suffolk County law in attempting to structure this proceeding to consider that which the law prohibits: "the Intervenor Governments' implementation of the LILCO emergency plan . . . ."[22] The NRC has no basis or authority to disregard the law or the facts. The Governments

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20/ Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, 604 F. Supp. 1084 (E.D.N.Y. 1985), aff'd, 813 F.2d 570 (2d Cir. 1987).

21/ Resolution 111-1983 was also upheld as lawful and not preempted in Citizens.

22/ April 8 Order at 27 (emphasis added).

seek to submit truthful testimony about those facts which are clearly relevant and material to the issues presented in this proceeding.

For the reasons set forth in Sections III and IV below, this Board is obligated to accept the Governments' proffered testimony.

First, the Board has improperly interpreted and applied the new emergency planning rule. Its interpretation and application, as set forth in the February 29 and April 8 Orders, violates the plain terms of the new rule, the NRC's direction and explanation of the new rule, and basic principles of res judicata.

Second, the facts about LILCO's lack of legal authority to implement the LILCO Plan, barred as "unacceptable" by the Board's Orders, remain relevant and material to this proceeding, given the provisions of LILCO's Revision 9 upon which its license application is premised. Moreover, in prior decisions the New York State Courts, as well as the Commission, the Appeal Board, and two members of this very Licensing Board, have acknowledged those facts as true and controlling. This Board has no authority and no basis to reverse those decisions.

Third, the Governments' determinations that they will not engage in emergency planning or implement a plan for a Shoreham emergency, barred as "unacceptable" by the Board's Orders, are the product of the exercise of the Governments' police powers. Federal and State Courts have held that such determinations are rational, lawful, and appropriate exercises of such powers, which

are not preempted by federal law. The Board's attempt to compel the Governments to engage in planning, to submit an "adequate and feasible plan" that they would follow, and to agree to implement either the LILCO Plan or some other plan, as well as the Board's effort to dictate tne contents of the Governments' testimony, ignore not only the County's law, but also the independence, authority, and sovereignty of the Governments in the field of emergency planning. They constitute an improper and illegal attack upon the Governments' lawful powers which far exceeds this Board's authority.

Fourth, the evidence apparently barred by the Board's Orders is relevant, material and reliable. Indeed, what could be more relevant than the Governments' intentions regarding implementation of LILCO's Plan? Under the NRC's regulations, the Governments have the right to submit this evidence in this proceeding. The illegality of LILCO's realism premise, and the Governments' determinations and descriptions of their "best efforts" response to a Shoreham emergency, barred as "unacceptable" by the Board's Orders, are truthful statements of fact and law. Indeed, they reflect the judgments of the State and County Governments and their highest officials about the actions of those very officials and the Governments they represent, made in good faith and with documented bases.

This Board has no basis for refusing to "accept" any of these facts, or testimony based upon them. Indeed, under the NRC's regulations and according to the Board's own description of

the purpose of this proceeding, the Board is required to consider them, and to base its decision on them.

Should the Board adhere to the rulings in its February 29 and April 8 Orders and refuse to accept the testimony proffered in this offer of proof, the Governments will nonetheless challenge LILCO's so-called "prima facie case," and will proceed by cross examination during the hearing on the Legal Authority Contentions. The Governments stress, however, that any such preclusion would taint the proceeding irrevocably. The Board should avoid that taint by ruling now that the Governments' proffered testimony is admissible.

III. THE GOVERNMENTS' OBJECTIONS TO THE FEBRUARY 29 AND APRIL 8 ORDERS

A. The Board has Improperly Interpreted and Applied the New Rule

1. The Board's Ruling that the Presumption is Mandatory and Irrebuttable in this Proceeding

In the February 29 and April 8 Orders, the Board purported to interpret the new emergency planning rule, and to apply it to this case. As noted above, the primary provision of the new rule at issue here is the following:

> In making a determination on the adequacy of a utility plan, the NRC will recognize the reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public. The NRC will determine the adequacy of that expected response, in combination with the utility's compensating measures, on a case-by-case basis, subject to the following guidance.

> In addressing the circumstance where applicant's inability to comply with the requirements of paragraph (b) of this section is wholly or substantially the result of non-participation of state and/or local governments, it may be presumed that in the event of an actual radiological emergency state and local officials would generally follow the utility plan. However, this presumption may be rebutted by, for example, a good faith and timely proffer of an adequate and feasible state and/or local radiological emergency plan that would in fact be relied upon in a radiological emergency.[23]

In its February 29 Order, the Board stated that under the new rule,

> [t]here is a presumption that the State and County response will follow the LILCO Plan, a presumption rebuttable only by timely evidence that the Governments will follow a different but adequate and feasible plan that can be relied on or by other evidence of like kind.[24]

Similarly, in its April 8 Order, the Board held:

> We are obligated therefore to view intervenor's [sic] obligation, in the context of this proceeding, as looking to the utility's plan to rely on in an emergency, or following some other plan that exists.[25]

The Board thus held that the new rule established a mandatory presumption -- which Licensing Boards must adopt in all cases -- that in an emergency the "best efforts" response of

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[23] 52 Fed. Reg. 42,086 (Nov. 3, 1987).

[24] February 29 Order at 2.

[25] April 8 Order at 22 (emphasis in original).

non-participating governments would be to follow the utility's plan.

Furthermore, the Board held that the presumption is essentially irrebuttable. In its February 29 Order, the Board held that the presumption is "rebuttable only by timely evidence that the Governments will follow a different but adequate and feasible plan."[26] The Board thus dictated that the only "acceptable" rebuttal is the submission of a governmental response plan, something which, as the Board well knows, the Governments are precluded by law and by their own police power determinations from doing so.

Similarly, in the April 8 Order, the Board held:

> The effect of the new rule then is to place a responsibility on state and local governments to produce, in good faith, some adequate and feasible response plan that they will rely on in the event of an emergency or it will be assumed in the circumstance of this case that the LILCO plan will be utilized by Intervenors here. In that event, the LILCO plan will be evaluated for adequacy alone.[27]

The Board ignored the fact that in the new rule the Commission provided the submission of a plan as but one example of how the presumption could be rebutted.

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[26] February 29 Order at 2 (emphasis added). The Board's ruling that "[a] determination to respond ad hoc would be acceptable only if accompanied by specification of the resources available for such a response, and the actions such a response could entail including the time factors involved," (id. at 4) is another way of saying the same thing.

[27] April 8 Order at 21.

In so ruling the Board ignored the Commission's use of the permissive "may" in providing guidance to Licensing Boards about the possible use of a presumption.28/ The Board also ignored the fact that the Commission expressly made its presumption rebuttable, and provided an example -- not an exhaustive list of all possibilities -- of how the presumption could be rebutted in specific adjudications. In addition, the Board ignored that neither the Board, nor the Commission, has the authority to compel sovereign governments to submit a plan, to implement any plan, to "penalize" them if they do not, or to presume, contrary to law and the sworn statements of the Governments' officials, that they will implement a particular plan which they have not adopted or agreed to follow. Finally, these rulings directly contradict, without basis, the unanimous rulings of this Board when chaired by Judge Margulies (see discussion in Sections A.3 and B.5 below), as well as the Commission's repeated direction that a Licensing Board's findings under the new rule must be based on the facts and evidence involved in each particular adjudication.29/

28/ Indeed, the Board illogically ruled that "may" means "will." See April 8 Order at 21 ("the rule provides, through the use of the word 'may' a presumption the utility's plan will be followed . . . .") (emphasis added).

29/ The Governments have explained several times, at length and in detail, precisely why the interpretation and application of the new rule reflected in the February 29 and April 8 Orders are clearly erroneous as summarized in the text. The most recent discussion of the subject was in the Governments' Overview Memorandum at 10-33. See also Governments' Reply to Views and Supplemental Briefs of LILCO and the NRC Staff Concerning the CLI-86-13 Remand Proceeding and the Impact of the October 29 Rule on that Proceeding (Nov. 30, 1987). The Governments do not
(footnote continued)

2. The Board's Interpretation of the Rule as Authorizing It to Dictate the Contents of Testimony

Moreover, the Board's interpretation and application of the new rule as requiring the Board to close its eyes to reality, and to reject as "unacceptable" truthful and factual statements and lawful determinations by sovereign governments and their officials, is bizarre as well as insupportable. The Board interpreted the new rule as authorizing the Board to dictate the contents of evidence in this proceeding, so as to enable the Board to make the findings required for licensing, even if such evidence and such findings are directly contrary to facts known by the Board to be true.[30] Such an interpretation is wholly without basis, and is contrary to repeated assertions by the Commission in the release adopting the new rule.

The following statements evidence the Board's interpretation to this effect:

> No fair reading of the new rule or the statement of considerations that accompanied it can result in a conclusion that the Commission expected or would permit its rule to be interpreted in such a manner as to lead to stalemate . . . .[31]

(footnote continued from previous page)
repeat those discussions here, but instead refer to their previous filings.

30/ Indeed, as discussed further below, the Board apparently intends to allow LILCO to submit any form of evidence it proposes, but to preclude the Governments from exercising their right to rebut that evidence.

31/ February 29 Order at 4.

* * *

> It is clear from the [new rule] that we are bound by regulation to affirmatively determine the adequacy of the expected response and that the obligation on us equally binds the parties to supply the critical information needed to make that determination in any future hearing if they want their views to be heard.32/

* * *

> [I]t would deprive any proceeding of a meaningful purpose if the rule was interpreted to permit any state or local government to successfully demonstrate a continuing non-participatory role.33/

* * *

> It is hardly credible that the Commission intended -- in light of the sole purpose of the rule itself -- that licensing boards could decide arbitrarily that state and local governments need not respond to [sic] any emergency plan -- or at all -- during a radiological emergency. Such an interpretation, as the Intervenors contend for here, would reduce any "best efforts" response at best to some indeterminate ad hoc responses, which in a fast moving radiological accident scenario could have a catastrophic effect on the public's health and safety.34/

In fact, the Commission described the intended operation of its new rule in terms which are directly contrary to the Board's interpretation. The Commission repeatedly emphasized that adjudications, findings and decisions under the new rule were to be based on the facts and evidence relevant to, and in the record

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32/ Id. at 4-5 (emphasis added, except emphasis in original on the word "determine").

33/ April 8 Order at 20.

34/ Id. at 22.

of, the particular case at issue. For example, the Commission stated as follows:

> [T]he proposed rule does leave open the possibility that state or local non-participation can indirectly block the operation of a nuclear plant. This is so because under the particular facts of an individual case it may be impossible for the NRC to conclude that a utility plan is adequate, as defined in this rule.[35]
>
> * * *
>
> Beyond a certain point, uncertainty as to underlying facts would plainly make a positive finding on "reasonable assurance" increasingly difficult. These are issues, however, which can be addressed in the case-by-case adjudications on individual fact-specific situations.[36]
>
> * * *
>
> [the rule] will not assure a license to any particular plant or plants. . . . Whether a utility could succeed in making th[e] showing [that emergency planning is adequate] would depend on the record developed in a specific adjudication. . . .[37]
>
> * * *
>
> the rule does not presuppose, nor does it dictate, what the outcome of [the required] case-by-case evaluation[s] will be.[38]
>
> * * *
>
> [the new rule] is not intended to assure the licensing of any particular plant or plants.[39]

35/ 52 Fed. Reg. at 42,083 (emphasis added).

36/ Id. at 42,082 (emphasis added).

37/ Id. at 42,081 (emphasis added).

38/ Id. at 42,085.

39/ Id. at 42,084.

3. The Board's Interpretation of the Rule as Compelling it to Reject the Facts

Furthermore, the Board's apparent belief that directions from the Commission authorize it to reject, rule "unacceptable," or otherwise ignore the sworn statements of Governor Cuomo and County Executive Halpin the laws of Suffolk County, or the testimony submitted herewith, is clearly incorrect. This belief is based on a misreading of the Commission's so-called "directions." Furthermore, the Board's conclusion mischaracterizes -- or worse, ignores -- the actual contents of the Affidavits. It also ignores the res judicata rulings of the Margulies Board, which two members of the present Board joined in making.

In its April 8 Order, the Board refers several times to so-called "directions" from the Commission as follows:

> We are directed to not only not accept statements of non-cooperation by governmental officials at face value, but in an evaluation of the adequacy of a utility's emergency plan, to take into account the probable response of state and local authorities.40/
>
> * * *
>
> Licensing Boards were admonished accordingly not to accept any claim that state and county officials would refuse to act in a radiological emergency.41/

40/ April 8 Order at 20, citing "Commission Discussion of Final Rule 52 Fed. Reg. 42078."

41/ Id. at 23, apparently citing 52 Fed. Reg. 42,082.

* * *

> [W]e are directed not to take seriously any government officials' statements that they would not take action during an emergency.[42]

The Board made these statements in connection with brief references to the Affidavits of Governor Cuomo and Suffolk County Executive Halpin which the Governments submitted with their opposition to LILCO's December 1987 Summary Disposition Motions. It is clear from the April 8 Order as a whole that this Board essentially ignored the contents of those Affidavits in ruling on LILCO's summary disposition motions, in "interpreting" the new rule, and in deciding what evidence it would "accept" in the upcoming proceeding on the Legal Authority Contentions.

In truth, however, the only "direction" on this subject contained in the Commission's Statement of Considerations accompanying the new rule is the following sentence, which is stated twice:

> The presiding Licensing Board should not hesitate to reject any claim that state and local officials will refuse to act to safeguard the health and safety of the public in the event of an actual emergency.[43]

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[42] Id. at 43.

[43] 52 Fed. Reg. 42,082, 42,085.

Clearly, in adopting the new rule the Commission said nothing about rejecting claims that Governments would not "co-operate" with a utility.44/

Even more important, none of the Governments' Affidavits presented to the Board have stated that the Governments "would not act" during an emergency, or that the Governments would "refuse to act to safeguard the health and safety of the public" in the event of an emergency. Indeed, the Governments have stated precisely the opposite.45/ The attached testimony is to

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44/ Moreover, with respect to the Commission's decision in CLI-86-13, the Margulies Board expressly held as follows:

> The Board recognizes that parties are capable of making self-serving statements. Also, that the Commission for the purposes of its decision in CLI-86-13 was unwilling to take at face value similar but unverified statements that the State and County would not cooperate with LILCO in implementation of its plan. . . .
>
> The Commission in its remand in CLI-86-13 expects the Board to determine what the Intervenors' response will be. We can only do that in hearing and weighing the positions of the parties on this disputed matter. It is evident that the Commission's refusal to take the prior statements of the Governor of the State of New York and the Suffolk County Executive at face value was not meant to be res judicata on this question.

September 17 Order at 26-27 (emphasis added).

45/ See, for example, Governor Cuomo's statements that "The State of New York could not effectively exercise its police power obligation to protect the health and safety of its citizens if the State were to rely upon LILCO's plan and personnel in a radiological emergency," and "Whatever I would do at the moment of an emergency would be for the public good." Affidavit of Mario M. Cuomo, Governor of the State of New York (Feb. 8, 1988) at 3, and Att. 1, Ex. A, p. 3. See also County Executive Halpin's statements that "giving LILCO . . . permission or ap-

(footnote continued)

the same effect. Thus, the Commission's "direction" has absolutely no relevance to the statements of the Governments which are before this Board.46/

Finally, when this Board included Judge Margulies, it acknowledged that "the State and County Governments do not deny that they would respond to an emergency with their best efforts."47/ The Board also accepted the Governments' Affidavits into the evidentiary record, and relied upon them as truthful and accurate statements of the Governments' intentions. For example, the Board held that:

> The "best efforts" assumption is of no assistance to LILCO in the face of sworn affidavits from Intervenors asserting that they would not and could not delegate their police powers to LILCO. Affidavit of Mario M. Cuomo, Governor of the State of New York. Affidavit of Michael LoGrande.48/

(footnote continued from previous page)
proval [to take various response actions] . . . would . . . be inconsistent with my responsibilities as the County Executive and would put into LILCO's hands the public's safety that I was elected to protect," and "[the County's] 'best efforts' would be exercised as described above -- acting on our own without regard to LILCO's Plan or personnel." Affidavit of Patrick G. Halpin (Feb. 9, 1988) at 4, 7.

46/ Similarly, the Board's suggestion that the Governments "contend for" a decision "that state and local governments need not respond . . . at all -- during a radiological accident" (April 8 Order at 22), is plainly wrong. The Governments have never made such an argument.

47/ September 17 Order at 45 (emphasis added).

48/ September 17 Order at 46. See also October 29 Order at 14 ("we took into account the evidentiary record in which the governments stated that they would not implement the LILCO plan, would not respond to a Shoreham emergency in concert or in partnership with LILCO, would not rely upon LILCO recommendations or advice, and would not authorize LILCO to perform the functions in Contentions 1-10").

The Margulies Board ruled correctly that the Governments' sworn statements could not be ignored:

> No one has more knowledge than the State and County on how they would respond to an emergency at Shoreham. By affidavit they dispute each claim LILCO makes as to how they would react.49/

The Board stated, further, that:

> Intervenors have established by sufficiently convincing direct evidence, i.e., the affidavits of State and County officials, that the material facts Applicant claimed to be without dispute [i.e., that the Governments would act in partnership with LILCO, would follow LILCO's advice and recommendations, and would implement the LILCO Plan or authorize LILCO to implement it] are in fact disputed and there exists a genuine issue to be heard.50/

Significantly, this Board actually acknowledged these res judicata holdings even though the April 8 Order violated them:

> [T]he Licensing Board stated that . . . the Governments [sic] assertions in the evidentiary record that they would not implement LILCO's plan, would not respond in an emergency in concert with LILCO, and would not rely on its recommendations or authorize it to perform contested functions made it an open question of how the Governments would actually respond and whether that response would be adequate.51/

49/ September 17 Order at 26. As this Board itself acknowledged in its April 8 Order, the Margulies Board "interpreted the Commission's ruling in CLI-86-13 as not making indisputable what the participation of the government [sic] would be . . . ." April 8 Order at 4 (emphasis added).

50/ September 17 Order at 27 (emphasis added).

51/ April 8 Order at 5.

There is nothing in the new rule or in the Commission's "directions" to justify this Board's recent determination that it can, much less that it must, ignore or reject the factual statements made by the highest officials of the State of New York and Suffolk County. Furthermore, the Board provides no other justification or rationale for its apparently very recent decision that it is entitled or authorized to conduct a proceeding, designed to establish facts, but based on rulings which call "unacceptable" and "inadmissible" the most basic facts of all.

The portion of the Board's interpretation and application of the new rule which has it rejecting or ruling "unacceptable" the factual and honest statements of the Governments' officials is clearly erroneous. Moreover, any proceeding which purported to address the adequacy of the Governments' best efforts response -- but which excluded the truthful testimony of the Governments' representatives concerning their intended response -- would be unlawful and a violation of the Governments' due process rights.

B. There is No Basis for the Board's Ruling that LILCO's Lack of Legal Authority Cannot be Raised as a Response to the LILCO Plan in this Remand Proceeding

1. The Board's Ruling

In the February 29 Order, the Board held that in this proceeding, the Intervenors must

> demonstrate that LILCO's emergency plan supplemented by a best efforts response does not meet the adequacy standards with respect to the mat-

ters at issue and that accordingly no reasonable assurance finding can be made.52/

It went on to hold, however, that "a lack of legal authority cannot be raised under the regulation as a response against LILCO's Plan . . . ."53/

Similarly, in the April 8 Order, the Board held that while "Intervenors are still entitled to challenge the adequacy of the LILCO emergency plan supplemented by a best effort response from the governments . . . in connection with the activities contemplated in the remaining contentions," the Governments "can no longer raise the specter of a lack of legal authority as a response."54/

There is absolutely no basis for this ruling, given the subject matter of this proceeding, the Board's own statements about the purpose of the proceeding, and the res judicata rulings in this case. The Board does not even purport to state a basis.

2. The Subject of this Remand Proceeding: The Legal Authority Contentions

This remand proceeding is supposed to be on LILCO's realism defense to the Governments' Legal Authority Contentions.55/ The

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52/ February 29 Order at 3.

53/ Id. at 4 (emphasis added).

54/ April 8 Order at 24 (emphasis added).

55/ See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Plant 1), CLI-86-13, 24 NRC 22, 32 (1986) (NRC "remand[ed] LILCO's realism argument to the Licensing Board for proceedings; . . . .) and 24 (Commission remand[ed] for further (footnote continued)

Contentions make the following fundamental allegation: the LILCO Plan cannot and will not be implemented as provided in that Plan -- thus precluding the reasonable assurance finding required by the regulations -- because LILCO lacks the legal authority to perform the essential emergency response functions identified in the contentions. Thus, the contentions allege that because actions set forth in the Plan to be performed by LILCO personnel are illegal, the necessary regulatory compliance findings cannot be made.

In the February 29 Order and again in the April 8 Order, the Board "reformulated" the Legal Authority Contentions in order to "incorporate" LILCO's realism defense. Apparently, the Board's intention was to eliminate the legal authority issue from the contentions, even though that clearly is their central focus. Thus, the Board asserted as follows:

> [S]ince legal authority is no longer the focus of our deliberations, each of the contentions will reworded [sic] to frame the issue to be litigated 56/

As reformulated by the Board, the Legal Authority Contentions now raise the issue of "whether LILCO's emergency plan and the best efforts response of the State and County governments, will satis-

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(footnote continued from previous page)
evidentiary hearings on issues raised by LILCO's so-called 'realism' and 'materiality' arguments); September 17 Order at 28, n.15 ("The matter for decision [pursuant to CLI-86-13] is whether the realism argument overcomes the LILCO [legal authority] disability.").

56/ April 8 Order at 26.

fy regulatory requirements concerning" the particular emergency response functions identified in the original contentions.57/

Setting aside for present purposes whether the Board was authorized to reformulate the Governments' admitted contentions by attempting to eliminate from them their central allegation, it is nonetheless clear that even as "reformulated," LILCO's lack of legal authority to implement the Plan remains relevant and material to a decision on Contentions 1-10. This becomes clear upon examination of LILCO's realism defense and the stated purpose of this proceeding.

3. LILCO's Realism Defense to the Legal Authority Contentions

The premise of LILCO's "realism" defense to the Legal Authority Contentions is that the uncontroverted illegality of LILCO's Plan is overcome by the "compensating measures" in the LILCO Plan and by the assumption of a "best efforts" Governmental response to a Shoreham emergency. The central premise of LILCO's realism defense is that in an emergency State and County officials would "authorize" or "permit" LILCO employees to perform the functions at issue in Contentions 1-10.

As part of its realism defense, LILCO has submitted Revision 9 of its Plan. Indeed, it is part of its "prima facie case" in this proceeding. In Revision 9 LILCO asserts, over and over again, that various LILCO and LERO personnel would perform the acts enumerated in the Legal Authority Contentions after having

57/ See February 29 Order at 2; April 8 Order at 26-27.

obtained permission or authorization to do so from State and County officials.

In Figure 2.1.2 of Revision 9, which is reproduced following this Section of text, LILCO summarizes its theory on how its plan would be implemented in an emergency, by "identif[ying] the various functions implemented as part of the emergency response and detail[ing] which people (by title) or organizations have a primary or support role in implementing that function."58/ A review of Figure 2.1.2 and the accompanying explanatory notes (also reproduced following Figure 2.1.2) makes clear that LILCO/LERO personnel are assigned "primary" responsibility to perform almost every listed emergency response function.59/ Thus, although LILCO hypothesizes that the Governments' "best efforts" response would be to follow the LILCO Plan, that Plan still provides that LILCO/LERO personnel would actually perform most of the actions involved in implementing the emergency response pursuant to the provisions in the LILCO Plan.

Furthermore, Figure 2.1.2 reveals that almost every function for which LILCO/LERO has primary responsibility "requires the authority/permission of a governmental official."60/ Indeed, the

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58/ LILCO Plan, Rev. 9 at 2.1-1.

59/ The only exceptions are "public health and sanitation," "social services," "fire and rescue," "traffic control -- Nassau," and "law enforcement."

60/ Fig. 2.1.2 at 2 (emphasis added). The only LERO primary functions which do not require governmental permission are "communications," "accident assessment," "emergency medical services," "transportation, gen. population and health related," and "radiological exposure control."

Figure and accompanying notes make clear that governmental "permission" is required for each of the response functions involved in the Legal Authority Contentions. Thus, "permission" is the critical prerequisite to implementation of Revision 9.

The Board has allowed LILCO to submit Revision 9 for inclusion in the record in this proceeding -- indeed, as part of the basis of this proceeding. Revision 9 includes the LILCO assertions that the Governments would provide the permission or authorization required to enable LERO and LILCO to implement the LILCO Plan. At the same time, however, the Board apparently intends to bar the Governments from submitting evidence to challenge and rebut those assertions. The Governments seek to submit truthful testimony that the Governments would not and could not give LILCO or LERO personnel the "permission" which is the premise for implementation of Revision 9. Clearly, a ruling which permits one party (LILCO) to submit evidence on a subject, but prohibits the opposing parties (the Governments) from submitting evidence to challenge it, is a gross violation of due process rights.

ORGANIZATIONS OR OFFICIAL TITLES	EMERGENCY RESPONSE FUNCTIONS																			
	COMMAND AND CONTROL	ALERTING AND NOTIFICATION	COMMUNICATIONS	PUBLIC INFORMATION (NOTE 1)	ACCIDENT ASSESSMENT	PUBLIC HEALTH AND SANITATION	SOCIAL SERVICES CONGREGATE CARE	FIRE & RESCUE	TRAFFIC CONTROL SUFFOLK (NOTE 2)	TRAFFIC CONTROL NASSAU	EMERGENCY MEDICAL SERVICES	LAW ENFORCEMENT	TRANSPORTATION GEN POPULATION	TRANSPORTATION HEALTH RELATED	TRANSPORTATION SCHOOLS	PROTECTIVE RESP. PLUME (NOTE 3)	PROTECTIVE RESP. INGESTION	RADIOLOGICAL EXPOSURE CONTROL	RECEPTION & RELOCATION CENTERS
SNPS (LILCO)		S	S		S											S	S		
DIRECTOR OF LOCAL RESPONSE (LERO)	P_A	P_A	P	P_A												P_A	P_A		P_A
SUFFOLK COUNTY EXECUTIVE	A	A	S	A		P_{SUF}	S		A							A	A		
NASSAU COUNTY EXECUTIVE	S	S	S			P_{NAS}	S												A
EVACUATION COORDINATOR (LERO)			S						P_A				P		S				S_A
HEALTH SERVICES COORDINATOR (LERO)			S		P						P			P				P	S_A
SUFFOLK POLICE			S						S			P_{SUF}							
NASSAU POLICE										P		P_{NAS}							S
STATE DEPARTMENT OF HEALTH (NOTE 4)	S			S	S	S	S									S	S	S	
SUFFOLK CTY DEPT OF FIRE RESCUE & EMERG. SERVICES								P											
FEMA (NOTE 5)											S					S	S		
DOE					S											S	S	S	
LIRR/FAA COAST GUARD		S		S					S										
HOSPITALS (NOTE 6)											S							S	
PRIVATE AMBULANCE CO.											S			S					
SCHOOLS															P	S			S
BUS CO.													S	S	S				
CONNECTICUT																	P_{CON}		
AMERICAN RED CROSS						S	P				S								

FIGURE 2.1.2

ORGANIZATIONAL MATRIX
WITH GOVERNMENTAL INTERFACE

PAGE 1 OF 2
SEE PAGE 2 OF 2 FOR LEGEND AND NOTES

REV 9

FIGURE 2.1.2
ORGANIZATIONAL MATRIX
(continued)

Legend:

A - Denotes government official with legal authority who provides authority/permission to LERO to implement the emergency response function.

P - Denotes person, by title, or organization with primary responsibility for actually implementing the emergency response fuction.

S - Denotes person, by title, or organization that either supports or performs only a portion of an emergency response function.

Subscript A - Denotes that implementation of the emergency response function requires the authority/permission of a governmental official.
i.e. P_A or S_A

Note 1: Public Information includes the activation of sirens and the issue of EBS messages.

Note 2: Traffic Control (Suffolk) includes: blocking roadways, directing traffic, posting traffic signs during an emergency, removing roadway obstacles, dispensing fuel and performing access control.

Note 3: Protective Response includes: the plume pathway, ingestion pathway, recovery and reentry and requesting Federal Assistance.

Note 4: Support Functions identified for New York State Department of Health are in accordance with the New York State Plan.

Note 5: FEMA coordinates additional federal response efforts as detailed in the Federal Radiological Emergency Response Plan.

Note 6: The hospital primarily providing treatment of contaminated injured is Brunswick with the V.A. Medical Center and Nassau County Medical Center as back up. Additional hospitals will provide relocation services for health care facility evacuees.

4. The Subject of this Proceeding Under the New Rule

The new rule requires this Board to determine the adequacy of the LILCO Plan, and whether that Plan provides reasonable assurance that adequate protective measures can and will be taken in the event of an emergency. This is one of the "regulatory requirements" included in the Legal Authority Contentions as "reformulated" by the Board. While the new rule includes an assumption of a "best efforts" governmental response, the new rule instructs Licensing Boards to "determine the adequacy of that expected response, in combination with the utility's compensating measures, on a case-by-case basis."61/

The adequacy of the particular actions which are proposed to be taken in response to an emergency is a key focus of the analysis required under the new rule. If the proposed actions are unlawful, that is, if the utility's "compensating measures" cannot in fact be carried out because they would violate the law, then those measures and that plan cannot be found "adequate." Thus, whether LILCO has the legal authority to carry out its proposed "compensating measures," is clearly relevant in this

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61/ 52 Fed. Reg. 42,086 (10 CFR § 50.47(c)(1)(iii) (emphasis added). See also April 8 Order at 24 ("Intervenors are . . . entitled to challenge the adequacy of the LILCO emergency plan supplemented by a best effort response from the governments . . . in connection with the activities contemplated in the remaining contentions.") (emphasis added).

proceeding.62/ There is absolutely no basis for this Board's ruling that "a lack of legal authority cannot be raised under the regulation as a response against LILCO's Plan."63/

5. The Relevance of the Lack of Legal Authority Issue is Res Judicata

Moreover, as this Board is aware, this Licensing Board, when chaired by Judge Margulies, has held on three occasions that the provisions of LILCO's Plan premised upon the Governments "authorizing" or "permitting" LILCO employees to perform response functions are illegal.64/ None of these rulings have been reversed by the Appeal Board or the Commission.65/ Nonetheless,

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62/ In their opposition to LILCO's December summary disposition motions the Governments discussed at length the illegality of LILCO's Plan and of its "realism" argument. They explained that the provisions of LILCO's Plan which assume that Governmental officials would give LILCO personnel "permission" to perform the various functions set forth in the LILCO Plan cannot and will not be implemented for three reasons: (1) the Governments are precluded by law from delegating their police powers to a private corporation or its employees; (2) the Governments would not, in any event, delegate their authority to LILCO or its employees, nor would they authorize or give permission to such personnel to perform the response functions at issue; and, (3) neither a private corporation such as LILCO, nor its employees, has the legal authority to perform the governmental police power functions at issue. See Overview Memorandum at 41-49.

63/ February 29 Order at 4.

64/ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644 (1985); September 17 Order; October 29 Order.

65/ See September 17 Order at 25; October 29 Order at 13; Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-818, 22 NRC 651 (1985); Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-86-13, 24 NRC 22, 30 (1986).

without meaningful discussion or explanation, this Board's rulings have, in effect, reversed these res judicata holdings.

The prior rulings of this Board are the law of this case. They are binding on this Board because they addressed the same "realism" defense which is the subject of this remand proceeding, and they addressed it in the context of CLI-86-13, which also remains the law of this case. As the Board apparently acknowledges, the fact that the New York Court of Appeals vacated Cuomo v. LILCO for non-justiciability (or as the Board put it, "on grounds that an advisory opinion was not a proper exercise of the State's judicial function" (April 8 Order at 25)), has no impact on the merits of the decision.66/ In addition, the new rule provides no basis to reverse the law of the case or, in light of the facts specific to this case, to eliminate the legal authority issue from this adjudication.

LILCO's March 1987 summary disposition motion and realism theory, which were the subject of the September 17 Order, were based on the following LILCO premise, as summarized by the Board:

> [R]ealism contemplates a partnership in which LERO would continue, with emergency approval,

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66/ The Court of Appeals never reached the merits of the merits of the legal authority issue. However, five other justices of New York Courts -- Justice Geiler of the Supreme Court in his February 20, 1985 decision (Consol. Index No. 84-4615) and Justices Thompson, Brown, Eiber, and Kunzeman of the Appellate Division in their February 9, 1987 decision (127 A.D.2d 626, 511 N.Y.S.2d 867 (1987)) -- all ruled that LILCO lacks legal authority to implement the Plan. Indeed, Justice Geiler stated (and the Appellate Division affirmed): "[A]ny attempted delegation of police power to LILCO would amount to an unlawful delegation of governmental powers." (Slip op. at 12-13.) The NRC, including this Board, is in no position to question the holdings of these justices on matters of New York law.

> to manage the emergency response, with the State and County providing legal authority and whatever resources they could provide on short notice. The utility's position was that the local governments could override a LERO decision, and that ultimate authority resided with the governments.[67]

Similarly, the Board stated that

> LILCO's realism argument before the Commission was that if LILCO lacked legal authority, the State and County would respond in a real emergency either by implementing the plan themselves or by deputizing LILCO personnel to implement the plan.[68]

This is precisely the position presented by LILCO in this realism remand and in Revision 9 of the LILCO Plan.[69]

The Margulies-chaired Board held as follows:

> This claim that the State and County's response would take the form of authorizing LILCO to act for them was previously rejected by this Board

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[67] September 17 Order at 14.

[68] Id. at 21 (emphasis added). The Margulies Board addressed this issue in the context of the Commission's direction in CLI-86-13 that the Board should assume a "best effort" governmental response to a Shoreham emergency, using the LILCO Plan "as the best source for emergency planning information and options." This is essentially the same Commission direction as that found in the new rule, since it postulates an unidentified "best efforts" governmental response, but instructs Licensing Boards to determine, on a case-by-case basis, the nature and adequacy of the best efforts response which would be forthcoming in each specific case. See, e.g., 52 Fed. Reg. 42,084.

[69] See, e.g., Plan, Revision 9 at 2.1-1a ("the Director of Local response, with permission of state or county government officials, initiates Protective Response actions"; "The Director of Local Response is responsible for allocating and directing, with permission as required from state or county officials, response personnel and equipment to mitigate the offsite consequences of an incident . . . ."") (emphasis added). See also Figure 2.1.2 in text above.

> in our partial initial decision on the basis of Cuomo v. LILCO, supra, which holds that applicant cannot be delegated the authority to perform the functions enumerated in Contentions 1-10. Nothing in CLI-86-13 alters the Cuomo decision which so far has been upheld on appeal. . . . Applicant's claim that the Governments' response will be on a basis of what has been found contrary to law is meritless.[70]

In addition, the Margulies Board held:

> We are also persuaded by Intervenors that LILCO's material facts do not resolve the question of how LILCO would acquire the legal authority to implement the actions specified in Contentions 1-10. The "best efforts" assumption is of no assistance to LILCO in the face of sworn Affidavits form Intervenors asserting that they would not and could not delegate their police powers to LILCO.[71]

Moreover, in the October 29 Order, the Board rejected the following LILCO argument:

> Applicant further alleges that the Board has improperly applied Cuomo v. LILCO . . . LILCO claims it cannot be seriously argued that any State or local government is prohibited by law from directing a private party to take actions that the government lacks the ability to perform and that are necessary to protect the public health and safety.[72]

In response, the Board held as follows:

> The Board did not improperly apply Cuomo v. LILCO . . . . In applying Cuomo to Applicant's motion for summary disposition, we did not change our prior interpretation of it. We

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70/ September 17 Order at 25.

71/ Id. at 46 (emphasis added).

72/ October 29 Order at 7.

> again stated, inter alia, it prohibits the government from delegating its police power. The board considered that structure along with how LILCO said it expected Intervenors will operate in an emergency. Further we took into account the evidentiary record in which the Governments stated that they would not implement the LILCO plan, would not respond to a Shoreham emergency in concert or in partnership with LILCO, would not rely upon LILCO recommendations or advice, and would not authorize LILCO to perform the functions in Contentions 1-10.[73]

In the April 8 Order, this Board acknowledged the prior rulings as follows:

> [T]he Licensing Board stated that . . . the Licensing Board had not improperly applied Cuomo v. LILCO which held, inter alia, that the government was prohibited from delegating its police power . . . .[74]

Clearly, however, the following statement in the April 8 Order is directly contrary to the September 17 and October 29 Board decisions:

> We did not intend then, or now however, to convey the belief that State and County officials could not, under emergency conditions, call upon private entities to assist in performing emergency functions on a temporary basis. And as a factual matter, it is our opinion the New York laws provide for precisely that set of circumstances. See New York State Executive Law, Article 2B, Section 20.1(a)(e) and Section 25.[75]

73/ Id. at 14.

74/ April 8 Order at 5.

75/ Id. at 25.

In fact, the September 17 and October 29 Orders quoted above twice conveyed an unambiguous ruling that State and County officials could not, lawfully, authorize private entities to perform emergency functions, even with "permission." Significantly, in so holding, the Margulies Board had before it LILCO's argument, rejected by the New York Courts, that the New York Executive Law authorized the delegation of authority upon which LILCO's realism defense is premised. This Board has provided no basis at all for its abrupt turn-about on this issue. In fact, no basis exists.

Furthermore, this Board's April 8 "opinion" on New York law is, as a practical matter, irrelevant to this proceeding. The question is: what would the Governments do? The answer is: they would not authorize or permit LILCO or LERO personnel to perform the functions assigned to them under the LILCO Plan, for several reasons, including the Governments' belief, shared by five New York State judges, that New York law precludes them from doing so.

The Board's previous rulings, based on the evidentiary record in this adjudication, are the law of this case. The affidavits submitted with the Governments' opposition to LILCO's December 1987 Summary Disposition Motions, and the testimony proffered herewith, are consistent with those affidavits. They provide details in addition to those in the evidence previously presented, however. Thus, they furtner establish that this Board's rulings, issued under the chairmanship of Judge

Margulies, are correct. The present Board cannot arbitrarily, and with no basis, reverse those rulings by (a) adopting a presumption which directly contradicts the evidence before the Board, or (b) excluding evidence which truthfully states the Governments' beliefs and intentions.

In determining the adequacy of "the utility's compensating measures," this Board cannot ignore the fact that the Plan which comprises such measures cannot be implemented because it is illegal. An unlawful plan, which cannot legally be implemented, cannot be adjudged "adequate" under the NRC's regulations, particularly in light of this Board's three prior rulings which are res judicata on that question.

Similarly, this Board cannot preclude the Governments from demonstrating that the LILCO Plan is inadequate, and that no reasonable assurance finding can be made because the LERO personnel assigned in the Plan to perform essential response functions at issue in this proceeding have no authority to perform them, the Governments cannot lawfully grant them such authority, and, accordingly, those functions cannot and will not be performed as set forth in the LILCO Plan.

6. The New Rule Does Not Render LILCO's Lack of Legal Authority Immaterial

Contrary to the implication in the February 29 and April 8 Orders, the new rule does not alter the law of this case, nor does it provide any other basis for the Board's ruling precluding the Governments from raising the lack of legal authority in

discussing the adequacy and regulatory compliance of LILCO's Plan.

The new rule does not purport to delegate the legal authority vested in a State or local government to a utility. Moreover, a review of the new rule reveals not one scintilla of evidence that the Commission intended to imply that LILCO, any other utility, or the Governments could be -- or by the rule were being -- authorized to take actions which are illegal under State law. Indeed, it is preposterous even to suggest that the NRC would have the authority to adopt such a rule.

NRC Chairman Zech confirmed this fact in Congressional testimony about the new rule prior to its adoption. He stated:

> It is important to stress what would not be changed under the proposed rule. . . . [I]t would not confer any new powers on utilities, nor would it presume the existence of powers that those utilities do not have. For example, the rule does not presume that utilities can direct traffic or order an evacuation. Nothing in this rule affects those powers.[76]

Accordingly, the portions of the February 29 and April 8 Orders which bar the Governments from presenting facts about (1) LILCO's lack of authority to implement the LILCO Plan, and (2) the Government's lack of authority to permit or authorize LILCO employees to perform functions assigned to them in the

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76/ Emergency Planning for Nuclear Power Plants, Oversight Hearing before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs, House of Representatives, 100th Cong., 1st Sess. (April 28, 1987), at 109 (Testimony of Lando W. Zech) (emphasis added).

LILCO Plan, are without basis, contrary to the law of this case, and clearly erroneous.

C. The February 29 and April 8 Orders Violate the Most Fundamental Principles of Federalism by Attempting to Force the Governments to Change their Lawful and Proper Police Power Determinations

The February 29 and April 8 Orders interpret the new rule as: (a) establishing a de facto irrebuttable presumption that the Governments would implement the LILCO Plan; (b) requiring the Governments to prepare and submit a plan for responding to a Shoreham emergency; and (c) authorizing the Board to dictate the specific planning information which "acceptable" Government testimony must contain. Indeed, the Board states that it will limit its hearing "to focus on the Intervenor Governments' implementation of the LILCO emergency plan and the methods by which LERO and responsible government officials will coordinate responses."77/ This interpretation constitutes an unlawful attack on the sovereignty of the State and the County which far exceeds the authority of this Board or the NRC.

It is established beyond question that State and local governments have the right and the authority to determine not to engage in emergency planning if in the exercise of their police powers they determine that such action would be in the best interest of their citizens.78/ It is similarly beyond question

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77/ April 8 Order at 27 (emphasis added).

78/ See, e.g., Citizens for an Orderly Energy Policy Inc. v. Suffolk County, 604 F. Supp. 1084, 1095 (E.D.N.Y. 1985), aff'd, (footnote continued)

that State and local governments have the authority to make independent judgments and determinations concerning how they would respond to an emergency. Indeed, this Board itself has held that State and local laws governing the exercise of police powers are not preempted by the Atomic Energy Act, and the Appeal Board affirmed that decision.79/

Suffolk County has acted within the sphere of acknowledged local government authority. In Resolution 456-1982, Suffolk County resolved as follows:

> Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been approved, after public hearings, by the Suffolk County Legislature and the County Executive.80/

In 1983, following extensive emergency planning efforts, the County resolved that

> the County's radiological emergency planning process is hereby terminated, and no local radiological emergency plan for response to an accident at the Shoreham plant shall be adopted or implemented; 81/

(footnote continued from previous page)
813 F.2d 570 (2d Cir. 1987); Prospect v. Cohalan, 65 N.Y.2d 867, 493 N.Y.S.2d 293 (1985).

79/ Long Island Lighting Co. (Shoreham Nuclear Power Station), LBP-85-12, 21 NRC 644, 900-09 (1985), aff'd, ALAB-818, 22 NRC 651, 662-73 (1985).

80/ Suffolk County Resolution 456-1982 (May 18, 1982).

81/ Suffolk County Resolution 111-1983 (Feb. 17, 1983).

As noted, the federal and state courts have upheld these resolutions.82/

Thus, it is the law of Suffolk County that the County will not adopt or implement any plan for responding to a Shoreham emergency. As made clear in Citizens, that law is not preempted by federal law. This Board must observe and respect that law.

Nonetheless, as already noted, the April 8 Order interprets the "effect" of the new rule as "plac[ing] a responsibility on state and local governments to produce, in good faith, some adequate and feasible response plan that they will rely on in the event of an emergency."83/ Similarly, it held that the rule could not be "interpreted to permit any state or local government to successfully demonstrate a continuing non-participatory role,"84/ that "the Commission's rules do require that [a non-participating government's] plan be produced and evaluated for adequacy,"85/ and that the governments' "obligation" is to "look[] to the utility's plan to rely on in an emergency, or [to] follow[] some other plan that exists."86/ And, in the April 8 Order, the Board held that:

82/ See Citizens v. Suffolk County, 604 F. Supp. 1084, 1095, and Prospect v. Cohalan, 65 N.Y.2d 867, note 78 above. Governor Cuomo has taken the same position on behalf of New York State. While LILCO has not sued the State on these matters, the principles of Citizens and Prospect make clear that the Governor's actions are likewise lawful.

83/ April 8 Order at 21.

84/ Id. at 20.

85/ Id. at 24.

86/ Id. at 22 (emphasis in original).

> The Intervenors are required to come forward with positive statements of their plans and must specify the resources that are available for a projected response and the time factors that are involved in any emergency activities proposed.87/

These rulings exceed this Board's authority and attempt to infringe upon the indisputable sovereign authority of State and local governments to exercise their police powers in the field of emergency planning and response. Since the Governments are not required by federal law to adopt or implement a plan (see Citizens), likewise there can be no basis for this Board to condition a proceeding on the Governments' providing evidence on how they allegedly would implement LILCO's plan.

Any proceeding which is premised on the Governments' "implementation" of LILCO's plan (April 8 Order at 27) would be premised on a falsehood. The law of Suffolk County is that the County will not implement LILCO's plan. The Board cannot make a condition of the County's participation in this proceeding that the County must present evidence on how the County would violate its own law. The Governments' proffered testimony is direct and truthful, and consistent with the Governments' laws. This Board cannot properly order the Governments to submit non-truthful testimony.

Clearly, the Board infringes upon the Governments' sovereign powers in threatening to penalize the Governments (through "default") unless those powers are exercised in the manner dictated

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87/ Id. at 25-26.

by the Board. This is simply a variation on the Board's unlawful attempt to compel the Governments (1) to engage in planning, despite their lawful determination not to do so, or (2) to agree to implement the LILCO Plan, despite their lawful determination that that Plan is inadequate, unworkable, and dangerous to their citizens.

This Board has no authority to tamper with the constitutionally and Congressionally mandated division of authority between State and local governments and the federal government.88/ Similarly, the Board has no authority either to instruct the Governments of the State of New York and Suffolk County on how they should exercise their sovereign powers, or to rule that past determinations and judgments made through the exercise of those powers are "unacceptable" to the Board.

This Board may disagree with the judgments and determinations made by the Governments on the subject of emergency planning for Shoreham. But, the Board cannot pretend that they do not exist. And, this Board may not disregard that the Governments' judgments have been found to be lawful and not preempted. Finally, this Board may not premise this proceeding on the Governments' pretended implementation of LILCO's Plan when the Governments' laws, sworn statements and proffered testimony preclude that. In a proceeding labeled "realism," it would be

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88/ See, e.g., ALAB-818, 22 NRC 651, 664 ("governmental response to public emergencies (including the implementation of any necessary evacuation), and control over the actions of corporations operating within the state, . . . fall well within the category of activities routinely subject to state supervision.").

most ironic -- and clearly erroneous -- for the Board to close its eyes to the fact that the Governments have lawfully resolved not to implement LILCO's Plan.

D. A Proceeding Conducted Pursuant to the February 29 and April 8 Orders Would Violate the NRC's Regulations

Under 10 CFR § 2.718, the presiding officer of this Board "has the duty to conduct a fair and impartial hearing according to law . . . ." Furthermore, this Board's initial decision in this remand proceeding must be "based on the whole record" and "supported by reliable, probative, and substantial evidence." 10 CFR § 2.760(c) (emphasis added). The decision must include "Findings, conclusions and rulings, with the reasons or basis for them, on all material issues of fact, law or discretion presented on the record." 10 CFR § 2.760(c)(1) (emphasis added).89/ The February 29 and April 8 Orders indicate that this Board does not intend to comply with these regulatory requirements.

Instead of basing a decision "on the whole record," this Board apparently intends to issue a decision which ignores facts, evidence, and law already in the record.

Instead of issuing a decision "supported by reliable, probative, and substantial evidence," this Board apparently intends (a) to exclude from this record the only reliable evidence, and the most probative and substantial evidence, about what the Governments' best efforts response would be to a Shoreham emergency;

89/ See also 10 CFR § 2.760a ("the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding . . .").

and, (b) to issue a decision based solely on unsupported and baseless presumptions and pretense, which are expressly contradicted by the evidence the Board has refused to accept.

Instead of issuing findings "on all material issues of fact [and] law," this Board apparently intends to issue findings which ignore those material issues of fact and law which are already in this record, but which the February 29 and April 8 Orders have ruled "unacceptable."

A proceeding held pursuant to the rulings in the February 29 and April 8 Orders would not be fair, impartial, or conducted according to law. Such a proceeding would violate the Governments' due process right to a fair hearing by precluding them from submitting the relevant, material, and probative evidence in the testimony proffered herewith.90/

Such a proceeding would violate fundamental principles of fairness by allowing other parties to file testimony of their own choosing, while dictating the precise contents of the only testimony deemed "acceptable" from the Governments.

Such a proceeding would violate the law of this case by ignoring binding rulings which are res judicata on material issues.

90/ Indeed, as noted in Section III.A.3 above, the Board's Orders apparently attempt to preclude the Governments from challenging or rebutting LILCO's evidence. For example, the effect of the Board's Orders is to preclude the Governments from contesting the Revision 9 provisions that the Governments would give permission to LILCO to perform the functions at issue in this proceeding.

And, such a proceeding would violate the Commission's mandate in the new rule that decisions on the adequacy and regulatory compliance of utility plans, even assuming best efforts governmental responses, must be based on the facts and evidence in the record of each particular adjudication.

IV. THE FEBRUARY 29 AND APRIL 8 ORDERS PRECLUDE THE GOVERNMENTS FROM SUBMITTING RELEVANT, RELIABLE, AND MATERIAL EVIDENCE REQUIRED FOR FULL AND TRUE DISCLOSURE OF THE FACTS

According to the NRC's regulations:

> Every party to a proceeding shall have the right to present such oral or documentary evidence and rebuttal evidence and conduct such cross-examination as may be required for full and true disclosure of the facts.

10 CFR § 2.743(a). In addition, the regulations provide that to be admissible, evidence must be "relevant, material, and reliable" and "not unduly repetitious." 10 CFR § 2.743(c).

The Board's February 29 Order violates these regulations. It denies the Governments their "right to present such oral and documentary evidence . . . as may be required for full and true disclosure of the facts," and it declares inadmissible evidence which is "relevant, material, and reliable."

A. Evidence on the Illegality of the Proposals in Revision 9 of LILCO's Plan is Relevant and Material

As noted in Section III above, the contentions at issue in the proceeding, even as reformulated by the Board, plainly raise the issue of whether the LILCO Plan is adequate and meets regula-

tory requirements. The new rule, and the Board's February 29 and April 8 Orders, also make plain that in this proceeding this Board must determine (a) whether LILCO's Plan is adequate, (b) whether it provides reasonable assurance that adequate protective measures can and will be taken in the event of a Shoreham emergency, and (c) whether the Governments' "best efforts" response, combined with LILCO's "compensating measures" in its Plan, meet regulatory requirements, including the reasonable assurance requirement.

It is difficult to imagine evidence more relevant or material to these issues than evidence that the personnel assigned by LILCO to perform the functions identified in the contentions at issue have no authority to do so. Evidence that LILCO's compensating measures and LILCO's Plan cannot be implemented because they are illegal, is clearly both relevant and material to the required reasonable assurance and other regulatory compliance findings which this Board has stated it intends to address in this proceeding.

Furthermore, the previous holdings of this Board discussed in Section III above emphasize the relevance and materiality of such evidence. This Board, when chaired by Judge Margulies, held that "[t]he matter for decision [in the CLI-86-13 remand] is whether the realism argument overcomes the LILCO disability" (the referenced "LILCO disability" was "that LILCO is prohibited from

performing the State and County roles as enumerated in the Legal Authority Contentions").91/

Accordingly, this Board's rulings which attempt to bar the Governments from filing testimony which demonstrates (a) that the personnel designated in LILCO's Plan to perform the functions in Contentions 1-10 lack the legal authority to do so, and (b) that the Governments lack the legal authority to delegate such authority to them by granting "permission" to perform such functions during an emergency, are clearly erroneous and a violation of the NRC's regulations.

B. Evidence that the Governments Would Not Follow the LILCO Plan, and Why They Would Not, is Relevant and Material

The new rule requires this Board to "determine the adequacy of th[e] expected [best efforts governmental] response, in combination with the utility's compensating measures, on a case-by-case basis . . . ."92/ Clearly, evidence describing the parameters of the Governments' best efforts response -- including the fact that it would not follow the LILCO Plan and why -- is relevant and material to the findings and determinations this Board is supposed to make under the new rule.

Indeed, the Board has itself acknowledged its obligation to consider evidence concerning the nature of the Governments' "best efforts" response. For example, in the February 29 Order the

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91/ September 17 Order at 27-28, n.15 (emphasis added).

92/ 52 Fed. Reg. 42,086.

Board stated that it is "bound by regulation to affirmatively determine the adequacy of the expected response . . . ."[93] Similarly, in the April 8 Order, the Board stated:

> [T]he Commission expected the Board to determine what the Intervenors' response would be . . . .[94]
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> * * *
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> [T]he Commission said that the licensing of a plant would depend upon "the record developed in a specific adjudication . . . ." We agree.[95]
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> * * *
>
> It is our intent to hold a hearing that will satisfy what the Governments themselves term the new rule's "call for a case-by-case adjudication to find out precisely how the Governments would respond."[96]

The Board's rulings which bar "protestations that the State and County will not use LILCO's Plan," and require "positive statements of their plans,"[97] are plainly inconsistent with the Board's obligations under the regulations, the new rule, the Commission's instructions, and the Board's own statements. The Governments' intentions concerning their "best efforts" response to a Shoreham emergency, stated to the best of the ability of the highest officials of the Governments, are set forth in the testi-

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93/ February 29 Order at 4 (emphasis in original).

94/ April 8 Order at 19.

95/ Id. at 39 (citations omitted).

96/ Id. at 42.

97/ February 29 Order at 4; April 8 Order at 24.

mony submitted herewith. They have also been stated in the Affidavits previously filed with this Board. They are truthful, and as full a statement of the facts concerning the nature of a "best efforts" Government response to a Shoreham emergency as the Governments are able to provide this Board. There is no legitimate basis for excluding them from evidence.

It must be noted that, contrary to the suggestion in the Boards' Orders, the Governments' statements are by no stretch of the imagination "simple protestations that they will not use LILCO's Plan."98/ They explain in detail precisely why the Governments could not and would not follow that Plan. The Governments acknowledge that in the event of a Shoreham emergency, assuming the plant were licensed, they would act to attempt to protect their citizens, by taking whatever actions they judged at the time to be best. They would not, however, use the LILCO Plan, rely on LILCO advice or assistance, authorize or permit LILCO or LERO personnel to perform emergency response activities, or respond "in cooperation" with the LILCO Plan.

The NRC's regulations require that the Board accept the Governments' proffered testimony. The facts in the testimony are relevant and material to the issue the Board purportedly intends to examine in this proceeding; and, the testimony is the most reliable statement on the subject of what the Governments would do in the event of a Shoreham emergency, particularly since these statements are consistent with Suffolk County laws which have

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98/ April 8 Order at 24.

been upheld by the federal and state courts. Furthermore, the Governments "have the right to present such oral or documentary evidence . . . as may be required for full and true disclosure of the facts." 10 CFR § 2.743(a).

V. THE GOVERNMENTS' OFFER OF PROOF PURSUANT TO SECTION 2.743(e)

Pursuant to 10 CFR § 2.743(e), the Governments submit the testimony attached hereto as an offer of proof, made in connection with the Board's orders excluding and rejecting the Governments' evidence. The Governments request that the Board admit the testimony for the reasons stated above. Should the Board decide to adhere to its prior decisions and its exclusionary rulings, however, the Governments request that the proffered testimony be marked for identification and made a part of the record, pursuant to Section 2.743(e).

Respectfully submitted,

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