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LBP-88-9

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL-3 (Emergency Planning) (ASLBP No. 86-535-04-OLR) April 8, 1988

MEMORANDUM

(Extension of Board's Ruling and Opinion on LILCO Summary Disposition Motions of Legal Authority (Realism) Contentions and Guidance to Parties on New Rule 10 C.F.R. § 50.47(c)(1))

The Board herein furnishes its written opinion and amplifies its Confirmatory Memorandum and Order denying motions filed by the Applicant (LILCO) for summary disposition of Contentions 1, 2, 4, 5, 6, 7, 8 and 10. The Confirmatory Order was issued on February 29, 1988. Two LILCO summary disposition motions filed the same date, as those referred to here, December 15, 1987, have been considered in separate rulings.[1]

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1 See Board Orders of March 3, 1988 on LILCO's Summary Disposition Motion of Contentions 1-10 With Respect to 10 C.F.R. § 50.47(c)(1)(i) and (ii), and March 11, 1988 on Summary Disposition Motion of Contentions 1, 2 and 9--Immateriality.

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The basis supporting the motions for summary disposition of the legal authority contentions is the best efforts assumption embodied in the Commission's new rule, 10 C.F.R. § 50.47(c)(1). That regulation provides that where an applicant for a nuclear utility operating license initiates its own emergency plan as a result of non-participation by state and/or local governments, the NRC will make an evaluation of the plan's adequacy and "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," 10 C.F.R. § 50.47(c)(1)(iii).

I. History

The current motions were reviewed in the wake of a plethora of filings, arguments, and legal challenges concerning the Applicant's legal authority to exercise certain emergency activities. This was the third consideration of summary disposition of the contentions, the motions for which have been raised amidst related developments of a Court decision, Licensing Board rulings and orders, an Appeal Board decision, a Commission remand and regulatory changes. Since this Memorandum provides additional guidance to the parties on the Board's interpretation of 10 C.F.R. § 50.47(c)(1) and its applicability to the present proceeding, in addition to the rationale for our previously announced decisions on the summary disposition motions, we set forth,

preliminarily, in an abbreviated account, the evolution of the legal authority and realism issues.[2]

Ten contentions were filed originally by Suffolk County (Intervenors) challenging the legal authority of LILCO to carry out certain emergency planning functions.[3] In the first motion for summary judgment of these contentions (August 1985), LILCO argued their approval on grounds, inter alia, that in a real emergency, the State and County would respond (realism theory). In a declaratory action filed by the combined Intervenor Governments (New York State, Suffolk County and Town of Southampton), the New York State Supreme Court of Suffolk County on February 20, 1985 ruled that LILCO did not possess legal authority to carry out its proposed emergency plan functions. In a Partial Initial Decision, 21 NRC 644 (April 17, 1985), the Licensing Board rejected LILCO's realism argument on grounds, inter alia, that any governmental

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2 The term "legal authority" refers to LILCO's authority to implement certain elements of its plans and the word "realism" to LILCO's defense that in an emergency State and local officials would respond.

3 Two of the ten contentions, one dealing with posting traffic signs (Contention 3), and the other with dispensing fuel (Contention 9) have been previously resolved. The remaining contentions cover the following areas: Contention 1--directing traffic; Contention 2--traffic control including blocking roadways; Contention 4--removing obstructions from public roadways; Contention 5--activating sirens and broadcasting EBS messages; Contention 6--recommendations and decisions on protective actions; Contention 7--recommendations and decisions on ingestion exposure pathway; Contention 8--recommendations and decisions on recovery and reentry; and Contention 10--access control of EPZ perimeter.

response would be uncooperative, uncoordinated and ad hoc, the opposite of what is contemplated in an adequate emergency plan under the regulations. After an Appeal Board affirmance of the Licensing Board decision, the Commission reversed and remanded the "realism" issue. The Commission accepted LILCO's realism argument and indicated that flexibility was called for in considering a utility emergency plan and that since State and local governments would be obligated to assist in an emergency at the Shoreham facility, a "best effort" response by the Governments utilizing the LILCO plan could be assumed. The Commission stated, however, it would not assume that such a "best effort" government response would be adequate. The Licensing Board was directed to reconsider the matter in light of the Commission decision, taking additional evidence where necessary to augment the existing evidentiary record. See CLI-86-13, 24 NRC 22 (1986).

The Licensing Board, in again rejecting new summary disposition motions on the legal authority issues, interpreted the Commission's ruling in CLI-86-13 as not making indisputable what the participation of the government would be and leaving open to question whether the government response would meet regulatory requirements. LILCO's second summary disposition motion was denied on grounds of an alleged lack of familiarity by State and local government personnel with the emergency plan, a lack of legal authority in LILCO to carry out the contested emergency functions, and a void in the record of what the Governments response would be in an emergency. The Board did find on the basis of uncontested allegations of fact that the Governments possessed the

physical capability to respond, in the areas being contested, in the event of an emergency. See Board Memorandum and Order, September 17, 1987 at 44.

In denying a LILCO motion for reconsideration, the Licensing Board stated that (1) the Applicant was not able to rely at that time on the then proposed rule (which later became 10 C.F.R. § 50.47(c)(1)) stating the proposed rule was different than the law of the case set down by the Commission in CLI-86-13; (2) the Licensing Board had not improperly applied Cuomo v. LILCO which held, inter alia, that the government was prohibited from delegating its police power, and (3) the Governments 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. The Board indicated that it was not ruling at that time on which party carried the burden of proof on the question of the adequacy of the Governments' response. Board Memorandum and Order, October 29, 1987.

On the same date (October 29, 1987), the Commission issued the new rule amending 10 C.F.R. § 50.47(c)(1), which became effective December 3, 1987. The rule, intended to give effect to emergency planning provisions passed by Congress in 1980, provides a procedure for approving a utility-only emergency plan when state and/or local governments decline to participate in developing such a plan. The rule provides that where an applicant's non-compliance with regulatory

standards is the result of non-participation by state and/or local governments and where the applicant has made a sustained, good faith effort to achieve government participation, including furnishing of copies of the plan, and the applicant's plan is found to provide reasonable assurance that public health and safety are not endangered by the facility's operation, an operating license can be issued.

The Commission provided guidance in the new rule, that in an actual emergency, state and local officials would generally follow the utility plan. However, this presumption is rebuttable by, for example, a good faith and timely proffer of an adequate and feasible state and/or local emergency plan that would in fact be relied on in an emergency.

In connection with the issuance of CLI-86-13 and the new rule, the Licensing Board requested responses from the parties on the issues to be decided under the Commission's remand and the effect of the rule on that proceeding. See Board Memoranda and Orders to the Parties on October 8, November 9, and December 23, 1987. In the interim, LILCO filed yet another round of summary disposition motions on the remaining legal authority or realism contentions. The Board has communicated, through a telephone conference on February 25, 1988, our decision denying LILCO's motions and the foundation for this action is submitted below. We address herein our review of the various procedural responses requested

from the parties[4] and our interpretation of the new rule for purposes of amplifying previous guidance to the parties on the remaining realism contentions.

II. Guidance and Interpretation of New Rule

In a Memorandum issued on October 8, 1987, the Licensing Board requested, as indicated above, the parties specification of the issues and questions to be addressed under the Commission "realism" remand of CLI-86-13. The parties also addressed, pursuant to a Board Order of November 9, 1987, the effects of the new rule on the Commission's remand. The parties also filed responses to a Board request of December 23, which sought their interpretation of the word "may" in the phrase "may be presumed" as used in 10 C.F.R. § 50.47(c)(1)(iii) as well as the rule's applicability to Appendix E of 10 C.F.R. Part 50.

Section 50.47(c)(1) reads as follows:

> (c)(1) Failure to meet the applicable standards set forth in paragraph (b) of this section may result in the Commission declining to issue an operating license; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation. Where an applicant

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4 References are to responses received from parties on October 30, 1987, concerning views on Commission CLI-86-13 Remand (Responses), to supplemental briefs received on November 17, 1987 on the new rule (Supplemental Briefs), to replys on other parties' filings on November 27 and 30 (Replys) and to Briefs of January 15, 1988 concerning interpretation of the word "may" and applicability of Appendix E to the new rule (Briefs).

for an operating license asserts that its inability to demonstrate compliance with the requirements of paragraph (b) of this section results wholly or substantially from the decision of state and/or local governments not to participate further in emergency planning, an operating license may be issued if the applicant demonstrates to the Commission's satisfaction that:

(i) the applicant's ability to comply with the requirements of paragraph (b) is wholly or substantially the result of the non-participation of state and/or local governments.

(ii) The applicant has made a sustained, good faith effort to secure and retain the participation of the pertinent state and/or local governmental authorities, including the furnishing of copies of its emergency plan.

(iii) The applicant's emergency plan provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned. To make that finding, the applicant must demonstrate that, as outlined below, adequate protective measures can and will be taken in the event of an emergency. A utility plan will be evaluated against the same planning standards applicable to a state or local plan, as listed in paragraph (b) of this section, with due allowance made both for (1) those elements for which state and/or local non-participation makes compliance infeasible and (2) the utility's measures designed to compensate for any deficiencies resulting from state and/or local non-participation. In making its 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) 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.

In an effort to synthesize the varying positions as expressed in the filings on the new rule's impact, we set forth below the salient issues in the briefing papers, the respective views of the parties, and the Board's additional guidance for consideration in the forthcoming hearing on the remaining issues.

What effect does the new rule have on the remand of the legal authority or realism issues of the remaining contentions?

The Applicant believes the new rule essentially resolves the issue since the presumption of the rule that Intervenors would follow the LILCO emergency plan disposes, in its opinion, the legal authority related-issues. LILCO Supplemental Brief at 1. Accordingly, the previous flaws found by the Board (September 17, 1987 Order) concerning a lack of legal authority and non-governmental participation have been overcome. Government participation is assured by the rule's assumption that such officials will exercise their best efforts to protect the public in an emergency, the presumption is that they will follow LILCO's plan and State and County governments can also authorize LERO personnel to perform specific acts to protect the public, if it becomes necessary to do so.

According to Intervenors, the new rule essentially has no impact on the issues involved in existing contentions and the general scope of CLI-86-13 remains as previously identified by the Licensing Board in its September 17, 1987 Order. Intervenors' Brief at 5. The Commission has made clear in its discussion of the new rule that licensing boards will

judge, on a case by case basis, what form the best efforts of state and local governments would take and the Board in this case has already decided--in light of the Governments' denials--that it could not adopt the presumption that the LILCO plan would be followed. Intervenors' Brief at 7-8.

The Staff contends the new rule and further interpretations of CLI-86-13 remove any doubt that the remand is to focus on the best effort government implementation of the LILCO plan and not on an open-ended inquiry into what the Governments intend to do in an actual emergency. Staff Brief at 4-5. The Commission intends the presumption to be mandatory, that in the absence of a good faith and timely submission of another adequate plan by the Governments, the LILCO plan will be followed. Staff Reply at 11 n. 6.

Did the Commission intend the word "may" to be viewed as mandatory or permissive in the phrase in the new rule "it may be presumed that . . . in an . . . emergency, state and local officials would generally follow the utility plan"? And was it intended that the new rule override any conflicting requirements in Appendix E other than the "exercise" requirement specifically provided for by the rule?

a. The Applicant contends that, in both CLI-86-13 and the discussion of the new rule, the rationale of using a plan rather than responding ad hoc in an emergency is made clear by the Commission. Applicant's Brief at 2-3. The Commission, in its final version of the rule, abandoned language that indicated no assumptions were to be made on what actions the governments would take, such as following the

utility's plan. See SECY-87-257 at 21. Finally, the language used in the rule makes it evident that it refers to the alternate possibility for the presumption; that either LILCO's plan will be followed or the plan will be rebutted by a different plan submitted by the Governments. Applicant's Brief at 5-7.

The Applicant alleges additionally that compliance with the new rule is tantamount to compliance with Appendix E. A contrary assumption--that an Appendix E requirement could be a roadblock would undermine the regulatory structure cr ated by the new rule. Applicant's Brief at 8-10.

b. The Intervenors contend that the word "may" was intended to be used permissively by licensing boards since that is the plain meaning of the word. It must be recalled, in Intervenors' view, that the Licensing Board in its September 17, 1987 Order has already ruled against such a presumption. Therefore, it must not be mandatory. By referring specifically to subpart (b) of 10 C.F.R. § 50.47 at four different places, and by specifically referring to a provision on exercises in Appendix E, the Commission demonstrated an intention not to disburb compliance with the rest of Appendix E. The final version of the rule deleted a section included in the public comment version that specifically exempted non-compliance with Appendix E. Governments' Brief at 2-6.

c. The Staff agrees that the word "may" is intended by the Commission to be viewed as a mandatory and not discretionary instruction. The rule in the Commission's words, "amplifies and

clarifies" its decision in CLI-86-13 where the presumption of following the utility's plan was mandatory. It is also clear in the rule's Statement of Consideration that the Commission's sole purpose was to establish procedures for licensing in cases where state and/or local governments do not participate in emergency planning. "Guidance" to licensing boards in the rule's context is considered a binding procedural rule. Staff Brief at 4-7.

Appendix E requirements, according to the Staff, must be read in the light of the new rule. The provision in the rule for "due allowance" to be made both for those elements where compliance becomes infeasible due to governments' non-participation and for the utility's compensatory measures for any r ulting deficiencies provides standards that clearly show the Commission's intent not to have conflicting requirements. Staff Brief at 7-10.

To what extent can the existing record be relied upon?

a. The Applicant alleges that the new rule, as applicable to the record in this case, necessitates the conclusion that LILCO's emergency plan satisfies NRC's regulatory requirements, and, as a consequence, no additional evidentiary hearings are necessary. Applicant's Supplemental Brief at 1. It is contended that the Commission left it to the Board to supplement the record if necessary and since nearly all of the remaining issues are related to Intervenors' now untenable position that they would not follow the LILCO plan, the record requires no supplementation. Applicant's Supplemental Brief at 13-15. The generic questions in

reality raised by the Licensing Board in its September 17, 1987 Order are either answered by the record or are not substantial issues. These include questions of who will be in charge in an emergency, whether State and County officials will be able to use LILCO's plan, whether it is illegal for the State or County to use LERO's resources, and whether the State and County will be able to make timely decisions. Applicant's Supplemental Brief at 15-19.

b. In the Intervenors' view, the record compiled to date was developed long before CLI-86-13 was published and the new rule was issued and also prior to the time LILCO produced its realism argument. Since all prior hearings have proceeded under the assumption that only LILCO would be implementing the utility plan (State and County officials were not to be involved to any significant degree), the existing record, almost four years old, is likely to be of little use. However, LILCO should be required to designate specifically any parts of the record on which it intends to rely. Governments' Reponse at 7-9 and Reply at 66-67.

c. The Staff's outline of information still required in connection with the remaining contentions reflects that the record contains a number of material facts relevant to the remaining contentions, that require no further hearings. The existing record consists of the LILCO plan itself, prior findings by the Licensing Board, evidence in the hearing record and facts deemed admitted as a result of the Board's September 17, 1987 Order. Staff Response at 4-16 and Staff Reply at 11.

Assuming the record requires supplementation, which party has the burden of proof and the burden of going forward with the evidence?

a. LILCO alleges that, although under NRC rules the ultimate burden of proof is on the applicant, the Intervenors here, even without the new rule, have the burden of going forward with the evidence. NRC case law, (Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 340 (1980)), demonstrates that intervenors have the responsibility of going forward with prima facie evidence to support their contentions. In this case, only the Intervenors possess information on what their response will be in an emergency and also there is a presumption under the new rule that government officials will follow the utility plan and both State and County policy favors planning over ad hoc responses. LILCO Supplemental Brief at 4-6.

b. Intervenors allege that the subject matter of the CLI-86-13 remand is the affirmative defense of realism and the burden of proof and of going forward on an affirmative defense rests on the party asserting it. The new rule also emphasizes the applicant's responsibility to demonstrate the adequacy of its plan and compliance with the rule's provisions. Finally, the submission of sworn affidavits of the Governor of New York and the Suffolk County Executive is sufficient to satisfy any threshold burden of going forward on the nature of an assumed "best efforts" response. Governments' Reply at 29-34.

c. The Staff claims that Applicant has established a prima facie case by submitting a utility plan which accommodates participation by

the State and local governments. The evidentiary record cited as well as the material facts admitted demonstrate how a response will be conducted and also demonstrate the known capabilities of the governments to engage in protective actions in an emergency. Accordingly, it is Intervenors' burden to rebut Applicant's prima facie case that there is reasonable assurance that LILCO's plan with a best effort government response can be implemented. That burden cannot be met by a claim that Intervenors will respond but will not follow LILCO's plan since such a claim is precluded under § 50.47(c)(1)(iii). Staff Reply at 11-13.

Given the assumptions and presumptions of the new rule, what are the issues to be litigated, if any?

a. The Applicant claims there are no litigable issues since the LILCO emergency plan is a complete plan which is prepared to respond to an emergency. In addition, there are the expertise, manpower and communication resources that New York State and Suffolk County can produce to respond to an emergency. The only deficiency in LILCO's plan is a lack of legal authority which can be supplied at will by State and County governments. The only possible issue is whether the addition of government resources will damage the response and increase the hazard to the public as compared to LILCO's plan alone. Applicant's Supplemental Brief at 10-13.

b. The Intervenors contend that issues raised by LILCO's affirmative defense (realism), the Commission remand of CLI-86-13, the Board's September 17 Order and the Commission's new rule require new

contentions to supplement the legal authority contentions. LILCO, it is alleged, also has to outline how it will comply with the standards of sections (i) and (ii) of the new rule. In addition to addressing issues contained in CLI-86-13 and the Board's September 17 Order, Intervenors submit a number of "principal issues" or questions related to best efforts assumption which allegedly require hearing time. Governments' Reply at 48-66.

c. The Staff believes the hearing needs to focus on a narrow range of questions which relate to the Governments' implementation of the LILCO plan and the interface between LERO and responsible government officials. Staff Reply at 2. In addition to questions raised by the Board and the Commission in the remand, the Staff suggested several additional areas requiring exploration. These areas concern the adequacy of LILCO's plan's provisions for ad hoc best efforts response by State and County officials to the end that employing the evidentiary presumption that the LILCO plan will be followed, a determination can be made that the best effort response would be adequate. Staff Reply at 9-10.

In the circumstances of the Shoreham case, does the regulatory presumption that the Intervenors will follow the LILCO plan apply and has time run out for a proffer of a government plan for rebuttal purposes?

The Appplicant submits that Intervenors have had ample opportunity in the past to indicate what their responses would be in a emergency and declined to do so (a fact noted by the Board in its September 17, 1987

Order) and accordingly, any proffer now would not meet timely or good faith requirements of the new rule. LILCO's Supplemental Brief at 13. Intervenors' assertions that they would not follow any emergency plan offered by LILCO are contrary to the "best effort" assumption and to the new regulation. LILCO's Reply at 27. The Board's earlier reliance on Intervenors' statements that they would not follow LILCO's plan must, in light of the new rule, now be changed. LILCO Supplemental Brief at 4. The only issue remaining is whether New York State and Suffolk County, using their best efforts, would somehow detract from the safety provided by the LILCO plan. But, in LILCO's view, this issue was for resolution by means of summary disposition and not by litigation. LILCO Answer at 20. The new rule makes clear that if the presumption of following the utility plan is to be rebutted it cannot be by arguments that the governments' responses will be ad hoc but only by a timely, good faith proffer of a better government plan. The proffer of a worse plan would not be good faith. LILCO Answer at 26. In fact, Intervenors have repeatedly argued in this case that an ad hoc response is inadequate. LILCO Supplemental Brief at 6.

The Intervenors initially contend that the Licensing Board's September 17, 1987 Order dictates that the new rule presumption of following the utility plan cannot be applied in the present proceeding. This finding was based on affidavits in the record from Governor Mario Cuomo and Suffolk County Executive LoGrande that the LILCO plan would not be used by the State or the County. This ruling was confirmed by the Board's October 29 Order wherein it stated that it remained an open

question as to how the Governments would respond in an emergency. Governments Reply at 14-15. The new rule did not vacate CLI-86-13 or provide any basis for invalidating decisions (like the September 17 Order) made pursuant to it and the evidentiary record. In fact, the Commission's discussion of the new rule makes clear that decisions under it must be based on the facts and evidentiary record in each particular case. And the Board's previous rules were in fact based on the record. Since neither Governor Cuomo nor any other State or County official has expressed an intent "to refuse to act to safeguard the health and safety of the public" in the event of an emergency at Shoreham, the Commission's direction to the Board to reject any such claim has no relevance in this case. Governments Reply at 16-19. Any interpretation that the presumption in the new rule can only be rebutted by the one specific example mentioned--an adequate state and/or local plan--would essentially make the "rebuttal" presumption an "irrebuttable" one. Governments Reply at 23. Also, the Governments could not be barred on timeliness grounds from attempting to rebut the presumption, if they chose to do so, since the rule only became effective on December 3, 1987 and a rebuttal cannot be rejected before it is even proffered. Governments Reply at 23-24.

The Staff argues that Intervenors either must come forward with another plan which meet NRC planning standards or it is to be presumed they will generally follow the LILCO plan. They can no longer claim that they will respond but will not follow the LILCO plan since this conflicts with the new rule (Staff Reply at 13). The new rule and the

Commission's Statement of Consideration in adopting it make clear that the utility plan is presumed to be followed unless it is shown by the Governments that the best efforts will be based on another acceptable plan which would in fact be implemented. Staff Supplemental Brief at 4.

Board Guidance

The Commission's decisions in CLI-83-13 and CLI-86-13 collectively affirmed that a utility sponsored emergency plan offered in cases of non-participation by state and/or local governments must be evaluated for adequacy and that a best effort governmental response, also requiring evaluation, would materialize in the event of a radiological accident. In our previous consideration of motions for summary judgment, we indicated, as we do here, that LILCO was not entitled to a decision on the merits of the "legal authority" contentions, since the adequacy of the Governments' response in fulfilling regulatory requirements had yet to be determined. We stated there that the Commission expected the Board to determine what the Intervenors' response would be and, since the Commission did not specify completely the scope of issues to be heard, we requested comments from the parties on what question were to be answered, the extent to which the existing record can be relied on, and where additional evidence needed to be taken. Board Memorandum and Order, October 8, 1987. It is evident from the summary of the party's submittals, supra, that LILCO and Intervenors are far apart on their respective views, the one concluding the new rule satisfies any gaps in the record thereby justifying summary disposition

of the remaining issues and the other that the Governments' continued denials that they will follow LILCO's plan essentially leave the case where it was, with the new rule having little impact, if any.

In the new rule, the Commission not only incorporated the "best effort" or "realism" doctrine of CLI-86-13, but "amplified and clarified" the guidance provided in that decision. 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. See Commission Discussion of Final Rule 52 Fed. Reg. 42078. Except for that guidance and a rebuttable presumption, discussed below, that state and/or local governments will follow a utility's plan, the new rule basically confirms the remand directions of CLI-86-13 which were evaluated in the Licensing Board's September 17, 1987 Order.

We conclude therefore that the new rule reinforces our previously considered judgment that the Board's responsibility is to assure that the LILCO plan supported by a best efforts response meets the test of adequacy under the Commission's rules and regulations. In carrying out that responsibility, however, it 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. We are confident that the Commission did not intend to dictate to any state and/or local government what particular response it should devise to cover public emergency situations, but

neither did it contemplate that no emergency response would materialize. 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 circumstances 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.

The Commission has stated its conviction that state and local participation in emergency planning was not only desirable, but essential for maximum effectiveness. However, the absence of such participation cannot be viewed as an absolute impediment to licensing of substantially completed nuclear plants since that would result in a de jure veto power in the hands of state and local government officials over the operation of nuclear electric facilities. See Long Island Lighting Company (Shoreham Nuclear Power Unit 1), 17 NRC 608, 624 (1983). Accord Commission's Discussion of Final Rule, 52 Fed. Reg. 42080. The fundamental purpose of the new rule is to provide criteria for evaluating utility-prepared emergency plans in cases where, in fact, state and local governments do not participate in such planning. In providing specific guidance for evaluating the adequacy of the governments response and the utility's compensatory emergency plan, the rule provides, through the use of the word "may" a presumption that the utility's plan will be followed, a presumption rebuttable however by other responses, as for example, producing an adequate and feasible

government emergency plan that would be relied upon. 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 any emergency plan--or at all--during a radiological accident. Such an interpretation, as the Intervenors contend for here, would reduce any "best effort" 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. Assuming some detailed response will develop underlies the Commission's summary comments accompanying the publication of the new rule that the rulemaking record strongly supports the proposition that state and local governments believe a planned response preferable to an ad hoc one. 52 Fed. Reg. 42082. We are obligated therefore to view intervenor's 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. Id. (Emphasis supplied.) Further, we see no conflict between Appendix E and the new rule. It is an established method of statutory construction that provisions of complementary regulations should be read together where possible. And read in that vein here, it is clear that no conflict was intended by the Commission. The new rule provides that due allowance is required to be given where non-participation of state or local authorities makes compliance with 10 CFR 50.47(b) infeasible and since Appendix E supplements those standards, due allowance for compensatory measures is directed to be made for the requirements of Appendix E also.

Beyond that, the Applicant alleges in its brief that the planning requirements of Appendix E will be or have been satisfied by its emergency plan and its Revision 9. Applicant's Brief at 10.

A question can be raised on the Commission's intent in incorporating in the new rule a presumption that either the utility's emergency plan or, for example, some other adequate state or local response plan must be forthcoming to rebut its use. From the beginning of the concept of emergency planning surrounding nuclear plant facilities, state and local governments have been intricately involved in the Commission's deliberative processes. See NUREG 75/111. Prior to the adoption of 10 CFR 50.47 in 1980, the Commission, consulting with and receiving advice from a number of state and local officials on emergency planning, evidenced not only a consciousness of non-federal governmental responsibilities but considered those entities as valuable and necessary adjuncts in the Agency's planning process. Thus, in the Statement of Consideration accompanying the emergency planning rule in 1980, the Commission noted its belief that state and local officials would endeavor to provide fully (through emergency planning) for the public's protection. (See 40 Fed. Reg. 55402.) And it recognized in the new rule that for two hundred years, in actual emergencies, state and local (and Federal) officials had demonstrated their efforts in protecting the public. 52 Fed. Reg. 42082. Licensing boards were admonished accordingly not to accept any claim that state and county officials would refuse to act in a radiological emergency. The Commission has stated here again, as it did in CLI-86-13, that emergency

planning rules are flexible and the ultimate test to be applied is to assure that, whatever plan is used, adequate protective measures will be provided. It appears clear from the guidance set forth in the new rule, that the Commission had no intent to have specified in complex detail, what responsive measures a non-participating government--State or local--will provide in an emergency. However, whatever measures are planned, the Commission's rules do require that that plan be produced and evaluated for adequacy. Otherwise, it is to be assumed that the utility's plan will be utilized as the only available coordinated plan in existence.

This is not to say that Applicant's position is valid that the Intervenors, who have failed to reveal the nature of their responses in the past, have lost their opportunity to do so now. The Intervenors are still 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, and they can also produce a plan of their own which will also be evaluated for adequacy in meeting the NRC's standards. The timeliness and good faith criteria in the new rule cannot, in our view, be applied a priori and in the absence of any proposed response. Intervenors, however, can no longer raise 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 omissions applied.

It is apparent from the present LILCO motions for summary disposition that the Applicant believes that its plan is a complete plan and that with the best effort of State and County resources in terms of expertise, manpower and communication capabilities combining to fill any gaps in legal authority, a prima facie case has been made that its plan is adequate to meet regulatory requirements. The Intervenors argue that the fact that State and local governments are prohibited from delegating legal authority to LILCO has been recognized in prior decisions by the Board and has not been changed by CLI-86-13 or the new rule. This was the principal finding of the Cuomo v. LILCO decision recognized by the Board in its September 17 and October 29 Orders. The New York State Court of Appeals reversed Cuomo v. LILCO, February 17, 1988 on grounds that an advisory opinion was not a proper exercise of the State's judicial function. 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.

Under the present status of this proceeding, with the injunctions of CLI-86-13 and the new rule in mind, we believe the proper method of procedure calls for a restatement of the contentions so as to facilitate a resolution of the issues before the Board. Accordingly, since legal authority is no longer the focus of our deliberations, each of the contentions will reworded to frame the issue to be litigated as follows:

Contention 1

Whether LILCO's emergency plan and the best efforts response of the State and County governments will satisfy regulatory requirements concerning directing traffic.

Contention 2

Whether LILCO's emergency plan and the best efforts response of the State and County governments will satisfy regulatory requirements concerning blocking roadways, setting up barriers in roadways, and channeling traffic.

Contention 4

Whether LILCO's emergency plan and the best efforts response of the State and County governments will satisfy regulatory requirements concerning removing obstructions from public roadways, including the towing of private vehicles.

Contention 5

Whether LILCO's emergency plan and the best efforts response of the State and County governments will satisfy regulatory requirements concerning activating sirens and directing the broadcast and contents of emergency broadcast system messages to the public.

Contention 6

Whether LILCO's emergency plan and the best efforts response of the State and County governments will satisfy regulatory requirements concerning making decisions and official recommendations to the public as to the appropriate actions necessary to protect the public health and safety, including deciding upon protective actions which will be communicated to the public.

Contention 7

Whether LILCO's emergency plan and the best efforts response of the State and County governments will satisfy regulatory requirements concerning protective actions for the ingestion exposure pathway.

Contention 8

Whether LILCO's emergency plan and the best efforts response of the State and County governments will satisfy regulatory requirements concerning recovery and reentry.

Contention 10

Whether LILCO's emergency plan and the best efforts response of the State and County governments will satisfy regulatory requirements concerning access control at the EPZ perimeter.

We concur with the Staff's views that the forthcoming hearing needs to focus on the Intervenor Governments' implementation of the LILCO emergency plan and on the methods by which LERO and responsible government officials will coordinate responses. The Board raised a number of questions that had in its view no record foundation in its prior rejection of LILCO's summary disposition motions. Board Order September 17, 1987. 26 NRC 201, 217-223 (1987). The Commission has also raised several questions requiring further exploration in its remand decision. See CLI-86-13, 24 NRC 22, 31 (1988). Those inquiries may have been answered by LILCO's revisions to its emergency plan but they require evidentiary foundation in the forthcoming proceeding. We do not agree, however, that these matters require further amplification through a new contention process, an action argued for by the Intervenors. The current discovery process, which has been authorized on the restated contentions, offers ample opportunity for the parties to explore the additional positions of the litigants on these matters.

The parties disagree over the validity of the current record to support findings by the Board on the adequacy of LILCO's plan supplemented by a best efforts response. We see no benefit to any prolonged discussion of this matter since the record, consisting of the LILCO plan, prior findings of the Licensing Board and evidence in the hearing record will speak for itself at the proper time. We have directed the Applicant to submit, in an evidentiary format, those parts of the existing record which allegedly support its claim for a favorable ruling on the issues from the Board. We intend to restrict our forthcoming hearing to take only "additional evidence where necessary" as directed by the Commission and will use the existing record to the maximum extent possible. Id. at 32.

The parties have provided us with their differing views on the burden of proof with regard to the forthcoming hearings of these issues and we conclude that the burden of going forward in the proceedings will have shifted to the Intervenors after the Applicant submits its prima facie case--that LILCO's emergency plan supplemented by the best efforts activities of State and local government officials will meet the required regulatory standards so that adequate protective measures with respect to the functions called for in the remaining contentions can and will be taken in the event of an emergency. It is assumed in this shifting of the burden of going forward that the presentation to be made by LILCO will have answered questions previously raised by the Board or Commission in its remand decision.

All matters not referred to herein that have been advanced by the parties in their briefs have been reviewed and are not considered essential to the Board's guidance on the forthcoming hearings.

III. Board Opinion on Summary Disposition Motions

LILCO's latest series of motions for summary disposition on the so-called "legal authority" issues included: LILCO's Motions for Summary Disposition of Contentions 5 and 6 (Making Decisions and Telling the Public) (Decisions Motion); Contentions 1 and 2 (Directing Traffic) (Traffic Motion); Contention 10 (Access Control at the EPZ Perimeter) (Access Control Motion); Contentions 4 and 9 (Tow Trucks and Fuel Trucks) (Trucks Motion); and Contentions 7 and 8 (Ingestion Pathway and Recovery and Reentry) (Ingestion/Reentry Motion). The filing also included an introductory document styled Introduction: Memorandum of Law on LILCO's Motion for Summary Disposition of Contentions 1-2 and 4-10 (Introduction).

Denial of LILCO's summary disposition motions on the Decisions Motion, the Traffic Motion, the Access Control Motion, the Trucks Motion (except for Contention 9, disposed of on immateriality grounds), and the Ingestion/Reentry Motion was announced in a telephone conference call on February 25, 1988 and confirmed in a Confirmatory Memorandum and Order issued February 29, 1988. In that Order we promised a clarifying written opinion.

All of the motions to be treated here are predicated upon the Applicant's interpretation of the "realism" principle, a principle

introduced into this case by the Applicant. As indicated, supra, the Commission issued a revised version of 10 CFR 50.47(c), incorporating and modifying the realism principle that in an emergency, state and county governments would respond, and the rule is directed at clarifying the proper procedures and applicable requirements where, as here, the state and local governments in the regions around a nuclear power plant have declined to participate in emergency planning for that plant. The Applicant's new motions are predicated on its belief that the provisions of the Commission's new rule now make summary disposition available. Indeed, the "Admitted Facts" upon which these motions rely are, in the main, those of the March 1987 Motion. It is only the applicability of those facts which the Applicant sees as different now that the Commission's new rule is in place.

LILCO's Position

LILCO believes that all of the contentions under consideration are resolvable by applying the "best efforts" principle enunciated by the Commission in its new rule. Introduction at 2. Although conceding that legal authority for the eight functions addressed by Contentions 1-2 and 4-10 reside (sic) with the State and County, (Id. at 3), LILCO believes that that fact means merely that the LILCO organization, LERO, would have to get permission from the local authorities to perform the required functions. Id.

LILCO further alleges that the new rule "creates a presumption that 'state and local officials would generally follow the utility plan'",

and that the "only appropriate way to rebut that presumption is the one expressly mentioned in the rule: 'a good faith and timely offer of an adequate and feasible state and/or local radiological emergency plan that would in fact be relied upon in a radiological emergency'." Id. at 10. LILCO further cites the statement of considerations accompanying the new rule, in which the Commission said that the rulemaking record "strongly supports the proposition that a planned response is preferable to an ad hoc one." Id., citing 52 Fed. Reg. 42082. This chain of citations leads LILCO to the conclusion that the "follow-the-utility plan" presumption simply cannot be rebutted by allegations that the authorities would respond ad hoc and ignore an approved plan. Id.

Thus LILCO alleges that "[a]bsent specifics, the Intervenors'claim that they 'would not use the LILCO plan' is meaningless. The plain truth is that the authorities would do either what the LILCO plan calls for or something better. If they would do what the plan calls for, then the response has already been litigated. If they would do something better, then a fortiori it would meet NRC standards." Id. at 12.

This logic ignores the fact that the plan has not already been litigated (both in this proceeding and in the exercise proceeding there are still bars to complete approval).

It is this syllogism: the LILCO plan is acceptable; the local authorities would use the LILCO plan or something better; ergo, the local authorities would use something acceptable or better; which runs as a thread through the entire set of motions for summary disposition.

LILCO also characterizes the Governments' position as "based on the proposition that Intervenors will never 'implement' the LILCO Plan because they, not the NRC, have decided the plan is inadequate". Id. at 18. And LILCO cites various Board and Commission opinions to the effect that some parts of the plan have already been approved, thus presumably making the adequacy of the plan the law of the case. Id. at 16-18. Here we would agree only to the extent of confirming that, as LILCO repeatedly points out, it is for the NRC to decide whether the LILCO plan is adequate; it is not for the Governments to decide.

In the Decisions Motion, LILCO analyzes the manner in which, it believes, decisions would be made to sound the alarms and warn the public. LILCO avers that the "best efforts" principle of the new rule compels the conclusions that: (1) the County would agree to sound the sirens LILCO has provided (Decisions Motion at 2, 12-13); the County Executive would allow the use of the LILCO EBS system to broadcast either LILCO's messages or his own (Id. at 16-17); either the State (Id. at 6) or the County (Id. at 19) would assume command and control (See also Introduction at 4); the actions of those in charge would be taken in coordination and communication with LILCO and LERO (Decisions Motion at 19-24).

LILCO appends to its Decisions Motion a "Statement of the Material Facts as to Which There is No Genuine Issue to be Heard on Contentions 5 and 6". The Statement comprises twenty-two separate assertions, some with subparts. Of these, Nos. 1, 2, 12, 13, 15, 16, 19, and 20 set forth details of LILCO's OPIPs or EPIPs that concern the manner in which

LILCO employees are to communicate with the governments in an emergency. Those numbered 4, 6, 7, 8, and 21 describe features of the New York State Radiological Emergency Preparedness Plan or the New York Emergency Management Office. Numbers 9, 10, 11, and 22 describe details of the so-called "Vorhees" Plan developed for (but rejected by) the County. Numbers 5, 14, 17, and 18 concern the features of plans for other New York counties. And the statement numbered 3 quotes the FEMA Post Exercise Assessment of the February 13, 1987, exercise as saying that LERO demonstrated an ability to coordinate with FEMA simulators of state and local officials. Id. at Att. 1.

The Traffic Motion asserts that the "best efforts" principle dictates that the Suffolk County police would implement traffic control in the field. Traffic Motion at 2. It further indicates that the police would have the resources and knowledge requisite for implementation of the plan (Id. at 2-4), basing this allegation on the "Admitted Facts" submitted with LILCO's Second Renewed Motion (March 20, 1988) that there are a given number of officers available, that the police department operates 24 hours a day, and that it has a communications system. The Motion purports to find support for the notion that the Suffolk County Police Department will have sufficient resources to carry out the LILCO plan in a recently released guidance document, NUREG-0654, Supp.1, which "includes the reasonable assumption that" state and local officials will have sufficient resources available to implement a utility plan where necessary. Id. at 3. Finally the Motion states that the "best efforts" principle "forecloses the argument

that the police would drastically deviate from the LILCO plan, or simply ignore the advice of trained traffic guides, in favor of some spur-of-the-moment, ad hoc, response of their own." Id. at 8. Attached to the Motion is a list of eleven matters alleged to be . . . Material Facts as to Which There is No Genuine Issue to be Heard . . . . Id. at Att. 1. "Fact" number 1 asserts that Suffolk County has the resources to direct traffic during an evacuation. Fact 2 says the Suffolk County Police Department has responded to calls from the Shoreham facility. Id. citing the Crocker Affidavit. The others merely list and describe the OPIP sections that instruct LILCO personnel in procedures for coordinating with local authorities.

The Access Control Motion divides the notion of access control into two time frames: short term control, or control during an evacuation and long term control, or control after the evacuation has been completed. Access Control Motion at 3, 4. LILCO argues that the short term control proposed has already been approved, citing our Partial Initial Decision, 21 NRC 644, at 804-5. Id. at 3. That decision did indeed approve the methodology of the control proposal (which was to be implemented by LERO Traffic Guides). Read in context, however, it did not approve, or even speak to, the question of whether the plan could indeed be implemented assuming a best efforts State and County response.

As to long term control, LILCO invokes the "best efforts" principle in conjunction with an assertion of adequate police resources in much the same fashion as it did in the Traffic Motion. Access Control Motion at 4-8. Finally, LILCO pleads that this portion of Contention 10 merely

duplicates other contentions and refers us to its treatment of Contentions 7 and 8 in the Ingestion/Reentry Motion. Id. at 8. The Access Control Motion includes a "Statement of Material Facts as to Which There is No Genuine Issue to be Heard . . ." with three numbered statements.

The first of those statements says that the Suffolk County police would provide access control. It cites our Special Prehearing Conference Order (Ruling on Contentions and Establishing Schedule for Discovery, Motions, Briefs, Conference of Counsel, and Hearing) of August 19, 1983. LILCO misreads our order. In that order we refused to admit a contention which alleged the absence of letters of agreement with the police to assure the police would maintain security within evacuated areas. We relied on the assumption that police departments would perform their normal duties. Controlling access to the EPZ is not a day-to-day police function. Indeed, the EPZ perimeter is a hypothetical boundary that is largely ignored in routine life. Whether the police could or would mobilize to control it in an emergency is scarcely a matter "as to which there is no genuine issue". "Fact" 2 says the police have adequate resources, a statement vigorously disputed by the County. "Fact" 3 says the police know which intersections would have to be controlled. Id. citing County's testimony following Tr. 2260. That may well be. The police deny that they would or could control them.

That portion of the Trucks Motion which deals with Contention 9 has been mooted by our Order of March 11, which granted summary disposition

of Contention 9 on grounds of immateriality. We still have before us the Trucks Motion to the extent it seeks disposition of Contention 4, dealing with tow trucks. The Motion, in essence, simply asserts that, as with the other contentions dealt with here, the County (or if not the County, the State) would simply allow LERO to use its trucks to remove obstacles from the roads in a radiological emergency. Trucks Motion at 1, 5-6. That would, LILCO believes, constitute a "best efforts" response by the Governments. Id. at 6. In that hypothesis LILCO offers an argument not unlike that offered in the Decisions Motion. Id. at 5. Here, however, LILCO also offers the affidavits of Charles A Daverio and Jay Richard Kessler to show that LILCO routinely cooperates with local authorities in matters requiring LILCO to remove road obstructions or reroute traffic around them. Id. at 2, 5; Accompanying Affidavits. LILCO also appends to this Motion a "Statement of Material Facts as to Which There is No Genuine Issue on Contentions 4 and 9". Two of these (Nos. 3 and 5) pertain to Contention 9, and hence are moot. One (No. 1) simply asserts that the LERO road crews have radios. The other two, however, assert that Suffolk County lawfully could, and would, direct or permit LILCO crews to remove obstacles from the roadways in an emergency under the conditions imposed by a "best efforts" response. Id. at Att. 1. That notion is clearly disputed by the Governments.

In the Ingestion/Recovery Motion, LILCO tells us that there is, in effect, a dichotomy of responsibilities at most power plants for the ingestion pathway, recovery, and reentry functions in an emergency. Ingestion/Recovery Motion at 1, 18, 20, 24. The State takes a major

role described by a generic State plan, the counties take roles described by appendices that contain the plans developed by the counties themselves; the one for Suffolk County, of course, is lacking. Id. at 2. LILCO sets forth its hypotheses in considerable detail (Id. at 3-26) describing how State and County would interact, always assuming that the County, at least, would be constrained by the "best efforts" principle to follow the LILCO plan in the absence of a County plan. Id. passim. LILCO stresses that the State would have no difficulty in responding and coordinating with the County in matters regarding the ingestion pathway EPZ at least since the County is within the ingestion pathway EPZ for other reactors for which State plans exist. Id. at 19. Again, as with motions concerning the other contentions and in the Introduction, LILCO repeatedly tells us that the force of the new rule compels us to assume that the local authorities, where they have no plan of their own, will use the LILCO plan.

LILCO also appends a "Statement of the Material Facts as to Which There is No Genuine Issue to be Heard on Contentions 7 and 8". These comprise fifty-five statements generally outlining features of the New York State Radiological Emergency Plan, plans for counties other than Suffolk, and LILCO plan features, all of which are alleged by LILCO to be descriptive of what the State would do in a "best efforts" response to an emergency. Two statements (Nos. 54 and 55) note that FEMA tested the ingestion pathway response for the Ginna plant and provided New York's plan with favorable comments.

The Governments' Position

On February 10, 1988, the Governments submitted their replies to the Motion. These included their Overview Memorandum in Support of Governments' Opposition to LILCO's Motions for Summary Disposition of Contentions 1-2 and 4-10 (Overview), and separate documents opposing LILCO's Summary Disposition motions on Contentions 5 and 6 (Decisions Answer); Contentions 1 and 2 (Traffic Response); Contention 10 (Access Control at the EPZ Perimeter) (Access Opposition); Contentions 4 and 9 (Trucks Response); and Contentions 7 and 8 (Ingestion Pathway and Recovery and Reentry) (Ingestion/Reentry Response). Attached to these documents were affidavits as follows: Affidavit of Mario M. Cuomo, Governor of the State of New York, Feb. 8, 1988 ("Cuomo Affidavit"); Affidavit of Patrick G. Halpin, Suffolk County Executive, Feb 9, 1988 ("Halpin Affidavit"); Affidavit of Richard C. Roberts Suffolk County Police Department, Feb. 9, 1988 ("Roberts 1988 Affidavit"); Affidavit of Richard C. Roberts Suffolk County Police Department, Sept. 25, 1984 ("Roberts 1984 Affidavit"); Affidavit of James E. Papile, James C Baranski, and Lawrence B Czech, New York State Radiological Emergency Preparedness Group, Feb. 10, 1988 ("REPG Affidavit"); Affidavit of James E Papile, New York State Radiological Emergency Preparedness Group, May 11, 1987 ("Papile Affidavit"); Affidavit of Karla J. Letsche Kirkpatrick & Lockhart, Feb. 10, 1988 ("Letsche Affidavit"); and Affidavit of Richard J. Zahnleuter, State of New York, Feb 10, 1988 ("Zahnleuter Affidavit").

Governments' Overview first lists three statements which it deems "reasons" for denying LILCO's Motion. First, the Governments allege that LILCO's interpretation of the new 50.47 (c)(1) is erroneous. They believe that LILCO interprets the new rule as eliminating any requirement for fact-finding on the nature of a "best efforts" response. The Governments see LILCO's treatment of "best efforts" as simply a plea for us to accept LILCO's hypotheses concerning the Governments' response to a radiological emergency without further inquiry. (Overview at 5-6). They cite the rulemaking for the notion that the Commission did not intend that the nature of a "best efforts" response would be accepted without examination. Indeed, the Commission said that the licensing of a plant would depend upon "the record developed in a specific adjudication . . . ." Overview at 6, citing 52 Fed. Reg. 42081. We agree. But we caution again that the need to develop a record does not (and we amplify this below) mean that the Governments, by blocking the development of a record, can indefinitely postpone a decision. The Governments further point out that the uncontroverted sworn statements of their responsible officials indicate that they would not use the LILCO plan or cooperate with LILCO. We intend to find out what it is that they would do.

Second, the Governments argue that LILCO's "realism" and "best efforts" concepts assume the Governments would "permit" or "authorize" LILCO to perform police power functions itself. This, they believe, is contrary to New York law and to the law of the case. They argue that in both our PID and our order of September 17, 1987, we accepted the notion

that Coumo v. LILCO precluded such an assumption. Overview at 8-9, citing 21 NRC 644, 911; 26 NRC 201.

Third, the Governments see the recent Decision of the OL-5 Board (Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1) LBP-88-2, __NRC___ (Feb. 1, 1988)) as "compel[ling] summary rejection of the LILCO Motions". In essence, the Governments' reasoning is that, since the cited decision found "fundamental flaws" in the implementation of the communication and training portions of the plan, the Board is precluded from finding that a response that relied upon the plan could ever be adequate. Overview at 9-10. We cannot accord this chain of logic much weight. While our colleagues did indeed find that fundamental flaws in the plan were revealed by the exercise, they did not suggest that those flaws were uncorrectable. Quite the opposite: they specifically rejected the notion (there put forward by LILCO) that a fundamental flaw would perforce require a substantial effort to correct. LBP-88-2, __NRC__, Slip Op. at 9-10. We reason, therefore, that, while the present plan may be flawed, such flaws would present no bar to its use if they were corrected.

The Governments correctly point out that the primary difference between the present Motion and the Motions previously denied seems to be LILCO's belief that the new rule, standing alone, entitles LILCO to a summary ruling without further inquiry. That idea is grounded upon LILCO's interpretation of the "best efforts" provisions of the rule, and that interpretation in turn rests on LILCO's view of the presumption that "state and local officials would generally follow the utility

plan", a presumption that LILCO views as mandatory and Governments view as optional. Overview at 10-13. The Governments argue that accepting such an assumption would require us to ignore the sworn statements of the Governor of New York and the Suffolk County Executive. The Governments also disagree with LILCO's position that the only way to rebut the assumption mentioned in the new rule is to offer an adequate State and County plan.

The Governments then assert that LILCO's assumption that an ad hoc response would be "guided" or "defined" by the litigation of the Plan that has occurred in this proceeding is "a variation on the . . . LILCO argument that the Plan has been 'approved'". Overview at 13-14.

The Governments also assert that the defense LILCO has raised against this series of contentions is an affirmative defense, and they cite extensive case law to support the notion that the burden of going forward rests with the proponent of an affirmative defense. Overview at 33-41. We have put the burden of presenting the assembled prima facie evidence upon LILCO.

And the Overview would have us consider the Motions barred by the doctrine of res judicata. That attack upon LILCO's Motions is founded on the earlier status of Coumo v. LILCO and our previous rulings based upon it. Overview at 41-49. The fact that the New York Court of Appeals has vacated the Cuomo decisions considerably lessens the force of that argument. We believe the case has proceeded beyond these considerations, and we intend to pursue the case in its present posture against the background of the revised rule.

In a separate section of the Overview, the Governments expand upon their assertion that the February 1, 1988, Decision of the OL-5 Board requires rejection of the LILCO Motions. Overview at 49-63. They point out that that Board found fundamental flaws in the LILCO plan, and they therefore argue that there exists no approved LILCO plan and there can be no finding of adequacy by assuming that the Governments would follow the LILCO plan. That is correct as far as it goes. But, as we have noted above, fundamental flaws are by no means uncorrectable flaws. And of course no finding of adequate protection of the public health and safety could be made until the flaws are corrected, regardless of whether it might be LILCO or the local governments who implemented the plan.

The Governments also address a handful of other LILCO arguments they see as erroneous. They are at considerable pains to assure us that their conviction that a 10-mile EPZ is insufficient and their differences with the Commission's result concerning the possibility of orderly evacuation are not challenges to the Commission's regulations. Overview at 63-66 Quite so. We will not allow them to be. 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." Overview at 66.

The Governments offer the affidavits of Governor Cuomo and County Executive Halpin as evidence that they would not be compelled by Article 2B of New York State law to rely upon or work with LILCO. Overview at 66-67. We are, of course, no longer convinced of the accuracy of any

party's interpretation of State law. As far as the current status of the case is concerned, we are directed not to take seriously any government officials' statements that they would not take action during an emergency.

The Overview challenges LILCO's reliance on comparisons with the plans for other plants, especially in connection with the Ingestion/Reentry Motion and the Decisions Motion. Overview at 67-72. We deal with the Governments' answers to those Motions below.

The Governments would also have us ignore the newly issued Draft NUREG-0654, Rev. 1, Supp. 1, a document upon which LILCO places considerable reliance. Overview at 72-73, citing LILCO Memorandum (Introduction) at 11; LILCO Motion (Access Control) Att.1, Fact 2. The Governments are particularly exercised by the assumptions of that document (set forth at page 2 thereof) to the effect that:

> In an actual radiological emergency, State and local officials that have declined to participate in emergency planning will:
>
> a) exercise their best efforts to protect the health and safety of the public.
>
> b) cooperate with the utility and follow the utility offsite plan; and
>
> c) have the resources sufficient to implement those portions of the utility offsite plan where State and local response is necessary.

The Governments argue that the document is only a draft, that it is not to be applied until the process of public comment is completed, that

the second and third assumptions have already been clearly rebutted by the Government officials' affidavits, and that FEMA itself has said it could not defend these assumptions. Overview at 72-76, citing the affidavits and a letter from FEMA official D. McLoughlin to S. Chilk, (April 28, 1987) at 4.

Finally, the Overview characterizes the Motions as "premature", noting that they are based upon LILCO's Revision 9 to the Emergency Plan. The Governments complain that they have not had the opportunity to review that revision. This argument, as we state below, is adequate, in and of itself, to support a denial of the motions for summary disposition.

In their Decisions Answer the Governments assert that LILCO's Motions repeats arguments already rejected by this Board and the Commission by ignoring significant questions pointed out by both tribunals. Decisions Answer at 5-12,; 18-22. It is evident, as we noted above, that LILCO believes that the presence of the new rule, particularly the new rule's language concerning the presumption about state and local participation, gave the LILCO arguments a validity they did not previously have. The Governments also take issue with LILCO's assumption that "permission" or "authorization" to perform the functions would be readily granted. Decisions Answer at 13-15. Here the Governments' reasoning is heavily dependent upon the earlier decision in Cuomo v. LILCO. The Governments also question the notion that LILCO's plan has already been litigated and found adequate. Decisions Answer at 15-18.

The Decisions Answer also argues, not without some redundancy, that LILCO's hypotheses as to the behavior of New York State and Suffolk County are without basis. In particular the existence of a generic State plan for other facilities, and the existence of a previously drafted (but rejected) plan for Suffolk County, do not, in the Governments view, constitute the existence of acceptable plans for those governmental entities. Decisions Answer at 22-34. We are, of course, ordering a hearing simply because we are uncertain what the Governments would do.

Nor do the Governments concede the existence of proper communication facilities between themselves and LILCO. Decisions Answer at 34-38. We agree that this is one of the matters that must be settled at a hearing.

In general, the Governments see no support for the hypotheses LILCO adduces concerning the manner in which the plan would be implemented. Decisions Answer at 38-50. And they attach a list of no fewer than forty-one ". . . Material Facts as to Which There Exists a Genuine Issue to be Heard . . . ."

In the Traffic Response, as in the Decisions Answer, the Governments argue that the OL-5 Board found flaws in LILCO's plan and training. Traffic Response at 3, 6, 22-27. They again disagree with LILCO's interpretation of the new rule, (Id. at 4-6; 15-19) and they assert that there is nothing in the record to support LILCO's position that the resources of New York State or Suffolk County are sufficient to accomplish traffic guidance. Id. at 3-4. They again cite Cuomo v.

LILCO and the Board and Commission decisions following from it. Id. at 9-11. They repeat their claim that the Motion is premature since the Governments have not had the opportunity to study Revision 9 of the plan. Id. at 12-15. They reiterate that they have neither the authority nor the intent to follow LILCO's plan or to authorize LILCO to do so. Id. at 20-22; 27-28. And they deny any substantial familiarity with the plan. Id. at 35-37, citing their attached affidavits.

Finally, the Governments categorically deny each of LILCO's eleven allegedly undisputed "material facts", offering statements in their attached affidavits of Roberts (1988), Halpin and Cuomo. Id. at 39-46.

In their Access Opposition the Governments urge us to reject the "short term-long term" dichotomy of access control which LILCO presses upon us. Access Opposition at 7, 9, 13 n.7. They dispute LILCO's assertion that the short term phase has already been decided in LILCO's favor, pointing out (as we ourselves pointed out above) that the focus of the present dispute is quite different from that dealt with in our PID, centering now on the interaction of State, County and LILCO rather than on the proposed methods to be used by LILCO Traffic Guides. Id. at 9-11. They characterize access control as essential to compliance with the regulations, (Id. at 11-13, citing 50.47(a)(1) and NUREG-0654 II J.10.j) and they assert that numerous issues of fact still exist, issues which are not resolved by the "best efforts" principle and which include matters pointed out by this Board in its September 17, 1987, Order. Id. at 5, 13-22. The Governments append a list of sixteen ". . . Issues of Material Fact in Dispute", some of which (Nos. 6, 8, and 9) repeat

questions raised by this Board in its September 17 Order, others of which relate directly to the strategies, training , resources and familiarity which the Suffolk County Police Department could bring to bear on the access control problem, and the last three of which question the overall adequacy of a "best efforts" response by the Governments. Id., Attachment.

The Governments' Trucks Response challenges as "false and unsupported" the Motion's assumption that LERO personnel would obtain permission from the Suffolk County authorities to remove road obstructions. Trucks Response at 1. The Governments further assert that they are prohibited by law from giving such permission, and that they would not do so (Id. at 2, 6-10); and they state that "The Anecdotal Information In LILCO's Affidavits are (sic) Irrelevant to the Issue at Hand". Id. at 10-12. They point out issues of fact previously found unresolved by this Board, and allege that the new rule does not affect the status of those issues. Id. at 12-15, citing Overview at Section III. They append a "Statement of Material Facts as to Which There Exists a Genuine Issue to be Heard on Matters Raised by LILCO's Motion for Summary Disposition of Contentions 4 and 9". Id. at Attachment. These sixteen numbered items are, in fact, questions which the Governments view as being still in dispute. Some of them repeat this Board's own questions, propounded when we denied summary disposition in our September 17, 1987 Order. Others simply raise issues concerning the nature and effectiveness of a "best efforts" response.

The Governments' Ingestion/Reentry Response urges us to deny the Ingestion/Reentry Motion for two primary reasons: first the Governments allege that LILCO has not dealt with the issues we identified in our Memorandum and Order of September 17, 1987; second they allege that LILCO grossly underestimates the complexity of the activities required on the part of the State and County in the event of a radiological emergency. Ingestion/Reentry Response at 1, 2. The Governments particularly stress the need for preplanning, training, drills and exercises. Id. at 2, 9, 10, 12, 17, citing REPG Affidavit. They allege that the New York Plan cited by LILCO in its Motion does not contain, as alleged, detailed procedures. Id. at 8, 12, 17, citing REPG Affidavit. And they see far larger requirements on the part of the County than LILCO sees. Id. at 8, 13, 19, citing REPG Affidavit. And they view the fact that Suffolk and Nassau Counties are within the ingestion EPZ for other plants as irrelevant, since they consider ingestion EPZ planning to be plant-specific. Id. at 16.

The REPG Affidavit addresses each of LILCO's fifty-five "material facts" in turn. A dozen (Numbers 3, 13, 29, 31, 36, 37, 38, 42, 44, 45, 46, and 55) they label "Agreed". REPG Affidavit at 17-27. The bulk of these are simply quotes from the New York Plan which the REPG witnesses accept as accurate. Interestingly, the one agreed fact that does not fit that description is number 55, which alleges that New York State did well in a FEMA-graded exercise at Ginna.

Another 15 (Numbers 6, 7, 8, 9, 11, 12, 14, 24, 25, 28, 30, 40, 47, 48, and 51) the witnesses also agree are accurate quotes from the State

plan or from LILCO's plan, but they disagree in some measure with the LILCO interpretation.

Twenty-two "facts" (Numbers 1, 2, 4, 5, 10, 15, 16, 19, 20, 21, 22, 23, 26, 27, 32, 33, 39, 41, 49, 52, 53, and 54) the witnesses label "Denied" or "Disagree". In the main, these denials are of the nature of disagreements with the LILCO interpretations of certain features of the New York State Plan and the manner in which that plan interacts with the plans of individual counties. Generally speaking, the New York REPG witnesses see the parts taken by individual counties in recovery, reentry, and ingestion planning as much more complex than LILCO sees them. The witnesses also see such things as police actions in an emergency as quite different from day-to-day police actions. Hence they believe that proper response cannot be assured without preplanning and drills.

A handful (Numbers 17, 18, 43, and 50) the witnesses label "irrelevant". Their relevance (or lack of it) seems to the Board to constitute a matter in dispute. As to the two final facts (numbers 34 and 35), the REPG witnesses agree they represent provisions of the LILCO plan, but they doubt LILCO's ability to carry them out.

NRC Staff Position

On February 10, 1988, the NRC Staff filed four responses to the LILCO Motions: On Contentions 5 and 6 (Making Decisions and Telling the Public), (Staff Decisions Response); on Contention 10 (Access Control at the EPZ Perimeter), (Staff Access Control Response); on Contentions 4

and 9 (Tow Trucks and Fuel Trucks), (Staff Trucks Response); and on Contentions 7 and 8 (Ingestion Pathway and Recovery and Reentry), (Staff Recovery/Reentry Response). Staff filed no reply to LILCO's Traffic Motion.[5]

In essence, the Staff supports LILCO's Motions. In the Staff Decisions Response, the Staff asserts that the "best efforts" principle "essentially renders moot" LILCO's lack of legal authority to activate the prompt notification system and to make protective action recommendations to the public. Staff Decisions Response at 2. Further, the Staff sees in the present record answers to the questions posed by the Commission in CLI-86-13 and by the Board in its September 17, 1987, Memorandum and Order. Id. at 2-3. The Staff would have us grant summary disposition. Id. at 8.

The Staff's reasoning is that where means exist for alerting and notifying the public (and they do here), the "best efforts" principle means that local authorities will use these means unless they have some other adequate and feasible system. Id. at 4-5. The Staff grants that there remains the question of delay that could be caused by lack of familiarity with the plan or a cumbersome decision-making process, but

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5 On February 23, 1988, the Governments filed Governments' Response to NRC Staff Support of LILCO's Legal Authority Summary Disposition Motions. That response recognizes (and dismisses in a footnote) questions raised by the Staff concerning rapidity of emergency response and certain details of the Staff Ingestion/Reentry Response. It then disclaims any intent on the part of the Governments to present further substantive pleading.

for that question the Staff indicates that its review of Revision 9 of the plan and the coordination procedures therein is still ongoing. If the Staff means that the Board should leave to its (and FEMA's) analysis questions such as delays that might occur, Id. at 5, we are not inclined to follow that procedure.

The Staff notes that protective measures would by advised by the utility under any circumstances, and sees in that fact (and the "best efforts" principle) assurance that "[t]his situation is no different from that which might happen were there to have been County participation in planning." Id. at 5-7.

The Staff's Access Control Response would have us grant LILCO's Motion with respect to Contention 10. Staff Access Control Response at 2, 5. The Staff does not address LILCO's reasoning splitting the matter into "short term" and "long term" components, but its analysis parallels LILCO's. Our earlier PID is cited for the idea that LILCO's plan is adequate with respect to access control. Id. at 2-3, citing 21 NRC 644, 804-5. As we observed, supra, we do not believe that the PID, read in context, settles the matter. The Staff also says, with LILCO, that the Suffolk County Police Department has the resources and familiarity with the plan necessary to carry the plan out. Id. at 3-5. The SCPD's denial of both these points seems to us to be good reason to assume there is a material fact in dispute.

In the Staff Trucks Response the Staff gives LILCO qualified support. Recognizing that the OL-5 Board found a fundamental flaw related to communications and realizing that removal of road

obstructions might well involve communications, the Staff urges only that we find"that all facts material to summary disposition . . . except those facts concerning the adequacy of internal LERO communications, should be deemed established". Staff Trucks Response at 9. We are told that the assumption that State and County authorities would generally follow the LILCO plan removes the defect of lack of legal authority (Id. at 2); that the Board's questions as to how obstructions would be removed, who would remove them and how their removal would be coordinated are all resolved by previous findings on the plan and by the "best efforts" assumption. Id. at 3. These things are true, the Staff says, because under the presumption mandated by the new rule it is the LILCO plan that will be implemented. Id. at 5. Questions of timeliness in implementation are, the Staff believes, settled by the record, which establishes that some SCPD officers are familiar with the plan and that the plan provides for coordination with the SCPD. Id. citing testimony of Roberts et al. foll. Tr. 2180; OPIP 3.6.3, Att.15.

The Staff Ingestion/Reentry Response supports summary disposition of both Contentions 7 and 8. Staff Ingestion/Reentry Response at 1, 9. With regard to the ingestion pathway contention, Contention 7, we are told that our ruling in our September 17, 1987, Memorandum and Order was simply wrong; that our concern as to whether the two entities, LILCO and the Governments, might work at cross-purposes was, even then, unfounded, since "[a]ny conflict between the State and LILCO response is prevented by the LILCO Plan itself". Id. at 3-4, citing 26 NRC 201, 222; OPIP 3.6.6.

We are also told that the regulatory presumption of the new rule mandates that the Governments will either follow the LILCO plan or some other plan that is "adequate". Id. at 5.

Contention 8, we are told, involves only questions that are already answered in the record. The plan provides that LILCO will defer to and support the State in connection with the ingestion pathway, and State authorities can be quickly familiarized with the specific needs of the Shoreham ingestion EPZ. Id. at 7-9. The last, of course, is a notion with which the State REPG authorities strongly disagree. Vide supra.

Board Analysis

We believe that the posture of this case is such that the actual "legal authority" point in these contentions is no longer at issue. In order to more closely conform the contentions themselves to the points in dispute, we directed in our Confirmatory Order of February 29, 1988, that the contentions were to be reformulated and we set forth reformulated versions of each in this Memorandum.

After careful consideration of all the filings submitted in this matter, we declined to grant summary disposition on Contentions 1, 2, 4, 5, 6, 7, 8, and 10. We conclude there have been a number of material facts raised relating to genuine issues to be heard on the adequacy of LILCO's emergency plan assuming a best efforts response from the State and the County; the state of knowledge concerning details of the plan and questions related to the availability of State and County resources. Specifically, there are denials of LILCO's ability to communicate with

responsible State and County officials in an emergency, alleged failure in requirements for a site specific Shoreham emergency plan, questions concerning past emergency response performances of LILCO personnel, and failures to designate responsible County officials to act in an emergency, issues connected with LILCO's traffic control plan, the adequacy of police resources, and a lack of flexibility in response plans; the necessity of prior training and relevance of emergency plans in other areas of other New York State nuclear facilities. Additionally, and not of minor significance to this decision, is Intervenors' affidavits from counsel representing Suffolk County and the State of New York concerning the lack of opportunity to review and analyze Revision 9 of the LILCO plan. There is no argument that the plan's revision was received by the parties on January 25, 1988 and that the revision plays a fundamental role in LILCO's emergency plan and the proposed best effort response by State and County governments. In light of Intervenors' response to a very substantial filing of LILCO's summary disposition motions being due and submitted on February 10, 1988, and, in view of other filing requirements concerning this and related proceedings, the Board is unable to conclude that the Governments' claim for lack of time to review and analyze the changes and revisions is unwarranted. Accordingly, the application of 10 C.F.R. 2.349(c), to Applicant's motion for summary disposition forms a part of our denial here. We again point out to Intervenors the uselessness of their continued submission of presumed statements of material facts under the format of questions on their perception of unresolved issues.

If it were not for the affidavits of Papile, Roberts, the REPG group and counsel representing New York State and Suffolk County, the margin for denying the motions for summary disposition would have been more narrow.

THE ATOMIC SAFETY AND
LICENSING BOARD

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 8th day of April, 1988.