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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
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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)	)	

LILCO'S SUPPLEMENT TO ITS JUNE 15 BRIEF ON  
DISCOVERY SANCTIONS IN LIGHT OF SUBSEQUENT DEVELOPMENTS

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July 26, 1988

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I. INTRODUCTION

On July 19, at the end of four days of hearings, the Board requested the parties to supplement their June 15 pleadings on the appropriate sanctions to be invoked against Intervenor on the issue of abuse of the discovery process in this proceeding.

The Presiding Officer stated:

The board would request the parties to submit by July 26th, close of business July 26th, any additions to their prior filings which were dated June 15th relating to the proposed sanctions. Any submittals should be based on the record of these proceedings and relate solely to the issue of abuses concerning the discovery process.

(Tr. 22074 (Gleason, J.))

LILCO submits this brief in response to the Board's Order.

As of June 15, the County had only recently disclosed the existence of its basic emergency planning resource document, the Suffolk County Emergency Operations Plan (SCEOP). Intervenor had also refused to permit further discovery despite repeated Board orders. On June 10, the Board had indicated its intent (Tr. 20862) to dismiss the Intervenor's realism/best-efforts contentions as a sanction for their refusals to comply with Board discovery orders, and, out of concern that the integrity of the proceeding

might have been jeopardized by those refusals, requested the parties' views by June 15 on further discovery sanctions and proceedings.

In its June 15 paper LILCO, after outlining the recent history of discovery in this proceeding, supported the Board's determination to dismiss Intervenor's realism/best-efforts contentions. LILCO's arguments were premised both on the merits and on a sanction theory for Intervenor's systematic failure, already apparent, to comply with normal and even Board-ordered discovery.<sup>1/</sup>

During the month since, this pattern of resistance by Intervenor to discovery has continued, in a complex series of events requiring the Board to convene virtually weekly teleconferences, issue numerous orders and subpoenas, and finally convene four days of hearings which were in essence Board-supervised depositions.

Against the further background of these events and the information developed in them, LILCO believes that the Board's determination to dismiss the realism/best-efforts issues remains correct, and urges the Board to finalize that dismissal for the reasons outlined in LILCO's June 15 pleading, as amplified (on the sanctions front) by the events of the past month.

LILCO also urges the Board to dismiss Intervenor from this entire proceeding for long-standing and continuous violations of basic good-faith discovery norms. The events of the past month have required repeated motions, conferences and Board orders, and ultimately four days of the Board's and parties' time in hearings. The information developed during the past month, and the process required to elicit it, have also illuminated a systematic pattern of withholding information and deflecting inquiry over the course of this entire six-year proceeding. These matters, too recurrent to be characterized as inadvertence or exception, are ample against this background under NRC

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<sup>1/</sup> LILCO's Brief on the Appropriate Remedy for the Intervenor's Failure to Comply with Board Orders, June 15, 1988.

and federal court decisions to justify the severe discretionary sanction of dismissal of Intervenor<sup>2/</sup> from this entire proceeding.

This brief will proceed in five parts:

1. a distillation of recent events (primarily since June 15) involving discovery in this proceeding;
2. an analysis of the historical pattern of Intervenor's responses to discovery in this proceeding since 1982;
3. a listing and categorical analysis of specific discovery-related abuses by Suffolk County in this proceeding;
4. a listing and categorical analysis of specific discovery-related abuses by New York State in this proceeding; and
5. an analysis of the sanctions appropriate for the abuses described.

Attached to this brief will be five appendices:

1. a witness list from the hearings of July 11-19;
2. an exhibit list from the hearings of July 11-19;
3. an itemization of Suffolk County discovery abuses;
4. an itemization of New York State discovery abuses; and
5. a comparison of the nine fragments of the Suffolk County Emergency Operations Plan received by LILCO over the 1982-83 period with the updated composite document received by LILCO from Suffolk County counsel on July 9 (LILCO Disc. Ex. 10).

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<sup>2/</sup> On June 23, LILCO had urged the Board to consider dismissing Intervenor for the discovery abuses understood as of that time. LILCO's Response to Intervenor's Motion to Vacate (June 23, 1988), at 22-23. The Board, faced in a teleconference the next day with a new proposal from Intervenor -- presenting various witnesses (whom they had hitherto refused to produce) for Board questioning -- found itself "not ready at the present time to make a decision on" LILCO's June 23 request. Tr. 20923. LILCO believes that the events of the four weeks since merely substantiate and strengthen the correctness of LILCO's June 23 request.

## II. ARGUMENT

### 1. Intervenors Have Unwarrantedly Resisted and Complicated Recent Discovery in This Proceeding

The immediate posture of this proceeding involves three distinct, though related, sets of circumstances and events:

1. Intervenors' continuing refusal to accept this Board's orders of February 29 and April 8, 1988, applying the Commission's "realism" rule, 10 C.F.R. § 50.47(c)(1), 52 Fed. Reg. 42,078 (1987). Those orders, applying the realism doctrine, converted Intervenors' "legal authority" contentions into ones which presumed best-efforts response by Suffolk County and New York State to a radiological emergency at Shoreham, and instituted discovery to explore the nature of that response.

Intervenors' response to those orders, embodied first in an April 13, 1988 "Objection" which attached affidavits by officials from the County (Mr. Halpin) and State (Dr. Axelrod), involved the blanket assertions that they would not plan to respond to a radiological emergency at Shoreham; that they would not authorize LILCO to implement plans for such a response; that in the event of an emergency, they would not cooperate in any plan prepared by any entity other than themselves; and that, in the absence of such a "site-specific" governmental response plan for Shoreham, they could not identify, or "speculate" as to, any governmental resources that might be used to respond to an emergency at Shoreham.

LILCO's unsuccessful efforts to obtain that discovery<sup>3/</sup> led to the May 16 prehearing conference, at which the Board ordered Intervenors to answer LILCO's outstanding interrogatories, to make available certain persons noticed by LILCO for

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<sup>3/</sup> These are documented in LILCO's "Response to Government's Objection to Portions of February 29 and April 8 Orders in the Realism Remand and Offer of Proof." (April 22, 1988) and in LILCO's "Supplement to LILCO's Response to Governments' April 13 Objections . . ." (May 2, 1988).

deposition, and to produce all plans and planning materials for non-nuclear as well as radiological emergencies, within their possession. Tr. 19381-82. Intervenor's continued failure to comply in a timely fashion with this order, culminating in their June 9 "Notice" to the Board that its interpretation of the realism rule had "precluded continuation" of this proceeding,<sup>4/</sup> led to the Board's preliminary decision in a teleconference that day to resolve the realism/best-efforts issues adversely to Intervenor as a sanction. Tr. 20862. In that same teleconference the Board also solicited the parties' views on its proposed sanction, *id.* Those views are the June 15 pleadings which this brief supplements.

2. Suffolk County's production for the first time on May 25 (and again, in a current form, on July 9) of a composite document over 750 pages in length entitled the "Suffolk County Emergency Operations Plan" (SCEOP), without any explanation why it had never been produced earlier. Evidence developed in four days of hearings held between July 11-19 confirmed various matters already apparent on the face of the document and extrinsic records: that the basic structure and creation of the SCEOP originate with New York State, with multiple county-specific annexes and appendices; that one of its constituent parts, the Suffolk County Disaster Preparedness Plan (SCEOP Annex A Appendix 9), has existed since at least 1981, and the composite SCEOP has existed in approximately its current form and size since at least 1982 or 1983, when discovery in this proceeding began; that New York State officials knew of the SCEOP, which was tied to receipt of federal funding; that Suffolk County officials believed that they had provided the SCEOP to their outside attorneys in discovery in 1982 and 1983 in this proceeding; and that LILCO never received the composite SCEOP in formal discovery, indeed only received, in toto, about one-fifth of it in 8 or 9 unconnected fragments

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<sup>4/</sup> "Governments' Notice that the Board has Precluded Continuation of the CLI-86-13 Remand," June 9, 1988.

in 1982 and 1983.<sup>5/</sup> A last-minute attempt was made by Suffolk County to impute knowledge or possession of the SCEOP (admittedly outside formal discovery) to LILCO. While that attempt is irrelevant to the question whether the document should have been produced in formal discovery, the County never established anything beyond what LILCO admitted: that a LILCO employee, Norman Kelly, had received the "basic county plan" (apparently the 1981 Disaster Preparedness Plan) from a County acquaintance, Richard Jones, probably some time in the 1985-86 time frame.

3. Intervenors' continued foot-dragging on discovery even following the Board's May 10 and June 10 orders, involving refusals to produce witnesses for deposition notwithstanding Board orders and subpoenas, delays in answers to outstanding interrogatories, and production to LILCO of a substantial portion of Intervenors' relevant documents literally only on the eve of hearings (July 6 and 7 by New York State, July 7 and 9 by Suffolk County) (these are dates of receipt by LILCO/Hunton & Williams). This course of conduct, which had precipitated the Board's retention of jurisdiction on June 10 over issues relating to frustration of discovery and its potential effect on the integrity of the proceeding, required further orders and teleconferences on June 17, 24 and 29, and culminated in four days of Board-supervised depositions of 12 witnesses on July 11, 12, 14 and 19. These proceedings confirmed or revealed the existence of numerous classes of documents relevant to emergency planning which had not been turned over previously, and revealed a well coordinated effort by Suffolk County and New York State to apply different standards to Shoreham than to other nuclear power plants in New York State. They also revealed a consistently evasive attitude on the part of expert state and county witnesses on matters within their spheres of expertise, and a

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<sup>5/</sup> One of these, the County Disaster Preparedness Plan, is a 54-page document (plus attachments), often referred to as the "basic county plan." Tr.21317 (R. Jones), 21548 (Kelly).

continuation of the obstructionist tactics by County and State attorneys that had characterized earlier discovery.

2. Intervenors Have Frustrated Discovery Throughout This Proceeding by Misconstruction of Issues and Deflection of Legitimate Inquiry

A. Summary

The past few weeks merely illuminate what has come to be a consistent approach to this proceeding taken by Intervenors through their counsel ever since its inception in 1982: first, respond to discovery only in terms of the issues as they define them, whether or not that definition coincided with that of the Board; and second, even within that strained framework, resist or divert disclosure of anything important unless the sanction for refusal is perceived to outweigh the harm from disclosure. As the record now indicates, this approach led Suffolk County, for example, to withhold its composite Emergency Operations Plan (LILCO Disc. Exs. 9, 10) and abstain from even mentioning its name on this record for six years, until May 24, 1988. It led the County to avoid disclosure in this proceeding of other County documents, such as the County Resource Manual (produced only on July 9) (LILCO Disc. Ex. 13). It led the County to withhold from this proceeding important County personnel and resources ranging from the Division of Emergency Preparedness to the Planning Department to the Health Department, despite their responsibility, actual knowledge or involvement in fact in emergency planning for Shoreham. It led to repeated objection to all kinds of discovery.

This approach led New York State, with its "very careful" observance of the Governor's policy against Shoreham (Tr. 22066 (Davidoff)), to characterize documents, such as the State Disaster Preparedness Plan (LILCO Disc. Ex. 1), the State Radiological Emergency Preparedness Plan (LILCO Disc. Ex. 6), and its 1987 Guidance on Ingestion Exposure Pathway (LILCO Disc. Ex. 5), that are plainly as adaptable to Shoreham as to any other plant, as inapplicable. It led to the withholding of knowledgeable (and

potentially favorable) REPG personnel from further evaluation of the Shoreham Plan after political positions had shifted in early 1983, and to the nondisclosure of the major role played by SEMO in radiological response in New York State. It led to repeated objection to all kinds of discovery.

**B. Intervenors' Strategy and its Evaluation**

The Intervenors' objective throughout this proceeding has been, and remains, to prevent the NRC from issuing an operating license for Shoreham, professedly because they have concluded that emergency planning adequate to protect public health and safety is impossible for Shoreham. Tr. 21697-703 (Axelrod); Axelrod Dep. Tr. 30-32, 65-70, 96-97; Direct Testimony of Patrick G. Halpin on Behalf of Suffolk County (April 13, 1988) (Attachment 1 to the "Governments' Objection" dated April 13, 1988). They have pursued this objective by five principal means:

1. Refusing to engage in emergency planning for Shoreham.
2. Attempting to demonstrate that the planning standards of 10 C.F.R. § 50.47 have not been or cannot be met.
3. Concealing or mischaracterizing facts, plans, documents and policies that show that applicable emergency planning standards have been or can be met.
4. Purposefully obstructing LILCO from meeting applicable emergency planning standards.
5. Delaying the licensing proceedings by all means possible, including each of the above.

Intervenors have used each of these means in varying degrees throughout the course of this proceeding, since at least 1983. The first two means are within their lawful rights under federal law.<sup>6/</sup> As those means have progressively failed the

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<sup>6/</sup> The first means, however, is flatly contrary to state law under Article 2B of the New York Executive Law. That statute, as the recent hearings confirmed, requires a State disaster plan for dealing with, inter alia, radiological accidents at nuclear plants (sections 23, 20(2)(a)), see Tr. 21610-611, 21637-647 (Axelrod), and requires any county

(footnote continued)

Intervenors, however, they have relied increasingly on the third, fourth and fifth means, which are plainly illegitimate.

The third, fourth and fifth means have been manifested in the Intervenors' abuse of the discovery process within recent months. These abuses are summarized below, see sections 3, 4 infra, and Attachments 3 & 4 to this brief. Three of the more noteworthy examples by which Intervenors have concealed facts and obstructed LILCO from showing that it can meet the NRC's standards are (1) the Intervenors' failure to reveal the existence or details of the SCEOP, in order to prevent LILCO from showing that its Plan can be successfully interfaced with a governmental emergency response; (2) the Intervenors' refusals to "speculate" as to any governmental resources that might be used to respond to an emergency at Shoreham; and (3) the State's deliberate disconnection of the RECS lines between Shoreham and the State, on the advice of counsel in order to argue in this proceeding that planning standards were not met, despite the DPC Chairman's recommendation that they be reconnected in 1985, Tr. 21710-718 (Axelrod); LILCO Discovery Ex. 41 (admitted, Tr. 21718).

The core of the Intervenors' position throughout this proceeding, which has manifested itself in recent discovery abuse, is quite simple. And it has remained constant since at least 1983. It is that the Intervenors have tried to preempt the NRC by arrogating to themselves the authority to make the binding determination as to whether emergency planning at Shoreham can adequately protect public health and safety. This core position has progressed through several incarnations since 1983, and it is the key to understanding the discovery abuse of the past several months.

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(footnote continued)

plans submitted under that statute (section 23) to do the same, see Tr. 21654-656 (Axelrod). Such plans must, among other things, identify the resources, public and private, available for emergency response and provide for their coordination. Id. N.Y. Exec. Law § 22, 23.

The first incarnation of the Intervenor's claim of preemptive authority over the NRC appeared early in 1983. The County moved to terminate the Shoreham licensing proceeding because the County had determined that emergency planning adequate to protect public health and safety was impossible for Shoreham and, thus, that the County would adopt no plan for Shoreham. The Board correctly ruled that it would proceed to evaluate the LILCO Plan.

The second incarnation was the Intervenor's contentions, and ensuing lawsuit in New York state court, that LILCO lacked the "legal authority" to implement its plan; that Intervenor, based on their judgments about radiological safety, would not adopt a plan; and thus, again, that their judgments as to radiological safety prevented the NRC from issuing an operating license for Shoreham. This incarnation stalled the licensing proceeding for years and spawned extensive litigation outside the NRC. It was finally overcome by the NRC's remand in CLI-86-13 based on the realism doctrine (that the State and County would in fact respond to an emergency at Shoreham), the NRC's realism rule (that state and local governments will respond using best efforts, and will follow the utility plan unless they proffer plans of their own or identify the resources and timing they would use for an emergency response), and the New York Court of Appeals' reversing and vacating of lower court rulings adverse to LILCO on its "legal authority" to implement its plan.

The third incarnation of the Intervenor's claims of preemptive authority over the NRC was their repeated statements that they would not, under any circumstances, implement the LILCO plan or coordinate with LILCO in responding to an emergency. They claimed that they had so decided definitively, and that neither the NRC nor anyone else could question or second-guess their decision. This was stated repeatedly and became the sine qua non of their position in this remand proceeding.

When the Board rejected this position, in its rulings of February 29 and April 8, 1988, yet another incarnation was born. The Intervenor asserted that, because they had no "site-specific" plan for Shoreham, they could not and would not "speculate" as to whether any State or County resources might be available to respond to a Shoreham emergency. See, e.g., Governments' Objection and Offer of Proof, dated April 13, 1988; Governments' Notice That the Board Has Precluded the Continuation of the CLI-86-13 Remand, dated June 10, 1988. They even went so far as to say that they were precluded by their own laws and policies from making deponents available, in response to repeated Board orders, to testify as to facts within their knowledge. Teleconference of June 10, 1988, Tr. 20854-857. Intervenor did this to avoid having to admit the existence of State and County resources capable of responding to a Shoreham emergency. And their laws and policies, again, were the State's and County's own "determinations" that emergency planning adequate to protect public health and safety is impossible for Shoreham. See, e.g., id.

Thus, the recent discovery abuse is only symptomatic of a deeper disease. The core problem remains the Intervenor's insistence, by one means or another, that they, not the NRC, be in fact the final judges of safety issues for Shoreham.

3. Suffolk County Has Systematically Thwarted Legitimate Discovery Throughout This Proceeding

A. County Discovery Abuses Have Not Been Limited to Nonproduction of the Emergency Operations Plan

The County's abuse of the discovery process in the Shoreham proceeding extends far beyond their late production of the Suffolk County Emergency Operations Plan on May 25, 1988 — nearly six years after LILCO first requested that the County provide "all . . . documents pertaining to the County's plan or plans for dealing with emergencies that do not involve nuclear power."<sup>7/</sup> Indeed, from the beginning of this

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<sup>7/</sup> See LILCO's First Request for Production of Emergency Planning Documents (June 2, 1982). The Licensing Board, rejecting the County's objection that such requests

proceeding, the County appears to have viewed discovery as being less the fact-finding process envisioned by the Commission's regulations than as another tool to be used to help implement Intervenor's policy that there will be no approved emergency plan for Shoreham.

The County's abuse of the "realism" discovery process has manifested itself in several different ways over the course of the past few months. This pattern of obstructionism can be traced most clearly in the County's:

(1) months-long recalcitrance in producing County personnel noticed for deposition by LILCO, up to and including deliberate defiance of Board-ordered subpoenas;

(2) disingenuous designation of Suffolk County Executive Patrick Halpin as the person "most knowledgeable" of the County's emergency response capabilities for Shoreham emergency, and the County's subsequent obstructionist conduct during the Halpin deposition;

(3) misleading and untimely approach to "answering" LILCO's realism interrogatories;

(4) objections, on relevance grounds, to LILCO's requests for production of documents, objections which, in light of prior Board rulings clearly establishing the relevance of such requests, cannot be considered to have been made in good faith; and

(5) tactic of producing, virtually on the eve of the recent hearing in Bethesda, and nearly two months after the Board's May 10 order compelling production, numerous documents responsive to LILCO's discovery requests, including the current version of the County Emergency Operations Plan, as well a 373-page County Resource Manual.

Specific instances of such abuses, to the extent they can be itemized, appear in

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(footnote continued)

were "irrelevant" to the scope of the emergency planning proceeding, ordered the County to produce all documents responsive to LILCO's requests. See Prehearing Conference Order (Phase I - Emergency Planning) (July 27, 1982). The history of discovery during the Phase I, Phase II, and "realism" phases of the Shoreham proceeding has been previously documented in LILCO's Response to "Suffolk County Response to Licensing Board Discovery Inquiries" (June 1, 1988).

"Specific Instances of Discovery Abuse by Suffolk County," which is Attachment 3 to this Supplement. A general description of the nature of each category of discovery abuse follows.

(1) Refusal to Produce Deponents

The history of the County's response to LILCO's attempts to depose knowledgeable persons on the matter of the County's "best efforts" response to a Shoreham emergency (and, later, on the issue of the non-production of the SCEOP) is one that can be described as, at best, calculated footdragging. The chronology of the County's efforts to stonewall legitimate, Board-ordered depositions is long and complex; highlights of that chronology are provided in Part II.A of Attachment 3.

While the chronology may be complicated, the bottom line is simple. With respect to the "best efforts" issues, LILCO had, as early as April 5, 1988, noticed the depositions of five County witnesses (in addition to County Executive Halpin). Only three of those depositions ever took place, and then only after the Board was twice forced to order the County to produce those persons. One result of this studied defiance on the part of the County was that LILCO was never given the opportunity to explore the substantive depth of knowledge of two critical figures in any expected County response to a Shoreham emergency: Dr. David Harris, the Commissioner of the Department of Health Services, and William Regan, the Director of Emergency Preparedness.<sup>8/</sup>

The County's obdurate refusal to produce these two men for "best efforts" deposition gives rise to the strong inference that their testimony would have lent credence to LILCO's prima facie case on realism and supports LILCO's position that the Board, in dismissing the realism contentions, should rule in LILCO's favor on the merits. See

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<sup>8/</sup> Mr. Regan retired on or about June 1. He was thereafter summoned as a witness by the Board in the four days of July hearings, but on the subject of failures to comply with the discovery process (particularly as related to the SCEOP) but not on his substantive knowledge of emergency planning.

Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 498 (1978), rev'd on other grounds, CLI-78-14, 7 NRC 952 (1978), quoting International Union (UAW) v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972); see also Kerr-McGee Chemical Corporation (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 86 (1986) ("While the issues raised by the [intervenors] are of great importance, the [intervenors'] recalcitrance [in complying with discovery orders] leads to the inference that they do not have anything of importance to contribute to the resolution of these issues.").

Similarly, the County's pattern of behavior with respect to producing persons in connection with LILCO's notices of deposition on the issue of the non-production of the Emergency Operations Plan has also been one of defiance, even in the face of Board orders. The chronology of the County's action in this matter is given in Part II.B of Attachment 3.

The bottom line is once again simple: despite the Board's ruling during the June 17 teleconference, Tr. 20892-93, that the Intervenors had to comply with the deposition schedule which LILCO had requested,<sup>9/</sup> none of the nine County deponents ordered to appear were ever produced. Intervenors, apparently recognizing no law but their own, chose instead to directly challenge the Board's ruling by filing Governments' Motion to Vacate June 17 Order (June 20, 1988).

The County's refusal to honor the Board's June 17 ruling was particularly egregious in the case of Richard Roberts and William Regan, whose appearances the Board had commanded through the issuance of subpoenas on June 16, 1988.<sup>10/</sup> The County

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<sup>9/</sup> LILCO had proposed the deposition schedule in LILCO's Brief on the Appropriate Remedy for the Intervenors' Failure to Comply with Board Orders (June 15, 1988) at 26.

<sup>10/</sup> LILCO was forced to seek subpoenas for Messrs. Roberts and Regan due to their retirement from County employment at the end of May, 1988. LILCO was not informed by the County of Messrs. Roberts' and Regan's retirements until after the fact, despite LILCO's then-outstanding notices of deposition for the two men.

unilaterally cancelled the Roberts and Regan depositions on June 21, 1988; only on that same day did the County file a motion to quash the subpoenas. As was noted in LILCO's Response to Motion to Quash Subpoenas (June 22, 1988) at 1, the mere filing of the motion to quash did not itself suspend the Board's subpoenas; under 10 C.F.R. § 2.720(f) the subpoenas remained enforceable until further order of the Presiding Officer of the Board or the Commission. The chronology of the County's defiance of Board-issued subpoenas is presented in Part II.C of Attachment 3.

(2) Designation of County Executive Halpin as "Knowledgeable"  
And Obstructionist Conduct by Counsel During Deposition

LILCO has already described the obstreperous conduct in which counsel for Suffolk County engaged during the deposition of Suffolk County Executive Patrick G. Halpin on April 19, 1988, a deposition which was arbitrarily terminated by the County after only two hours. See Supplement to LILCO's Response to Governments' April 13 Objection and Motion in the Alternative to Compel Discovery (May 2, 1988) at 14-20 (hereinafter "May 2 Supplement"). The Board, in ordering the reopening of the Halpin and Axelrod depositions, itself took note that "the performance of Attorneys Brown, Zahnleuter and Lanpher during the Halpin and Axelrod depositions, based on their degree of persistency that was noted, amounted to what appeared to be almost a deliberate obstruction effort of the discovery process . . . ." Prehearing Conference (May 10, 1988) (Tr. 19381).

A less blatant but equally significant abuse of the discovery process was the County's disingenuous representation of Mr. Halpin as the one County official able to

    speak, knowledgeably, authoritatively, and on behalf of the Governments on the matters at issue. Further, since the matter at issue here is the intended actions of the Governments, the Governments are entitled to designate the persons to appear and speak on their behalf in a legal proceeding such as this, and this Board must respect that right.

Letter from Lawrence Coe Lanpher to the Licensing Board (April 15, 1988) at 2-3

(footnote omitted) ("April 15 letter"). Similarly, in the Intervenor's Answers and Additional Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10 (April 22, 1988), in response to LILCO Interrogatory No. 119, which asked "who in the Suffolk County government are most knowledgeable about how the . . . County would respond to a Shoreham emergency with respect to each of the [realism] functions," the County answered that "Suffolk County Executive Patrick Halpin has been designated to testify regarding the County's response."

As LILCO noted in its May 2 Supplement at 17-20, despite this representation of Mr. Halpin as the person "most knowledgeable" about the County's emergency response capabilities, Mr. Halpin's answers throughout his deposition betrayed an almost abject ignorance of any County emergency plans that could be adapted, and County resources that could be utilized, in responding to a Shoreham emergency. In light of the later revelations about such County documents as the Emergency Operations Plan and the Resource Manual, certain portions of Mr. Halpin's deposition testimony are particularly curious. For instance:

Q. [by Mr. Sisk] Does the County have a general contingency plan for emergencies?

A. I don't know.

...

Q. Are you aware of any other standard documents or plans or procedures which you would look to follow in responding to any type of emergency as County Executive?

[Objection omitted]

THE WITNESS: The answer is no.

Halpin Deposition at 11-12. The emergence in this proceeding of the SCEOP, which assigns an authoritative role to the County Executive in responding to emergencies in Suffolk County,<sup>11/</sup> would seem to cast a shadow on either the veracity or the

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<sup>11/</sup> For example, SCEOP, Annex A, Appendix 4 at 2 states that the "County Executive is responsible for: a. Conducting natural and man-made disaster and nuclear attack emergency operations."

competence of Mr. Halpin's deposition testimony. Either choice, in turn, calls into question the candor of counsel for the County in representing to the Board in the April 15 letter that Mr. Halpin could speak "knowledgeably" and "authoritatively" on such matters (and, that, as a consequence, the depositions of the other County employees noticed by LILCO were unnecessary).

As a related matter in light of the now recognized importance of the SCEOP to emergency preparedness in Suffolk County, the County's refusal ever to identify personnel from its Department of Fire, Rescue and Emergency Services (or its predecessor, the Department of Emergency Preparedness), or the role of this agency, was as misleading as its failure to produce the SCEOP and other documents.

(3) **Misleading and Untimely Approach to  
Answering LILCO's Realism Interrogatories**

On March 24, 1988, LILCO filed its Second Set of Interrogatories and Requests for Production of Documents Regarding Contentions 1-2, 4-8, and 10 to Suffolk County, New York State, and the Town of Southampton (hereinafter "March 24 discovery requests"). Through these interrogatories and requests for documents, LILCO sought generally to (1) discover the factual bases, if any, for the Intervenors' expected assertion that they could not "generally follow the LILCO Plan"<sup>12/</sup> in a manner that would satisfy applicable NRC regulations; (2) explore the nature and adequacy of any County and State response to a Shoreham emergency not involving the use of the LILCO Plan;<sup>13/</sup> and (3) examine the bases for certain statements made in affidavits submitted in

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<sup>12/</sup> See 10 C.F.R. § 50.47(c)(1)(iii).

<sup>13/</sup> In structuring its discovery requests with respect to these first two purposes, LILCO relied upon the guidance given by the Board in its February 29, 1988 Confirmatory Memorandum and Order, where it stated, that a "determination [by the Intervenors] 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." Confirmatory Memorandum and Order at 4.

opposition to LILCO's December 18, 1987 summary disposition motions on the "realism" contentions. Under 10 C.F.R. § 2.740b(b), the Intervenor's answers to LILCO's March 24 discovery requests were due on April 7, 1988.

On April 6, 1988, the Intervenor's filed their Motion for Extension of Time to Respond to Realism Discovery Requests, and to Extend Discovery Schedule (hereinafter "April 6 Pleading"). In this pleading, made one day before answers were due, the Intervenor's asked for a three-week extension to reply to LILCO's March 24 discovery requests.

In retrospect, the April 6 pleading was the first intimation that the County and State had no intention of participating in the "realism" discovery process in the meaningful and illuminating way that the Board had envisioned (indeed, had mandated) in its February 29, 1988 Confirmatory Memorandum and Order.

Moreover, in retrospect, it becomes clear that in asking for more time to respond to LILCO's March 24 discovery requests, the Intervenor's misled the Board as to the County's and State's future intentions with respect to "realism" discovery. In citing one alleged justification for the requested extension, the Intervenor's, claiming that "LILCO's Second Discovery Requests are lengthy and complex," stated that "[r]esponding to these interrogatories would clearly require substantial time and effort . . . ." April 6 pleading at 6. The clear implication of the April 6 pleading was that substantial, considered responses to LILCO's requests would be forthcoming if only the Board would grant the Intervenor's more time.<sup>14/</sup> It soon became apparent, however, that, even as the Intervenor's were requesting more time to respond to LILCO's "lengthy and complex" March 24 discovery requests, they were preparing, instead of answers, a

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<sup>14/</sup> The Board, in a subsequent teleconference ruling on April 11, 1988, did give the Intervenor's an extension: to April 20 to file objections and to April 22 to file substantive responses.

pleading that was to change the course of the realism proceeding dramatically: their 57-page Objection to Portions of February 29 and April 8 Orders in the Realism Remand and Offer of Proof (April 13, 1988) (hereinafter "April 13 Objection").

As LILCO described in detail in its May 2 Supplement at 6-13, when the Intervenor did finally submit (on April 20 and 22) their objections and answers to LILCO's March 24 discovery requests, they provided virtually no substantive information.<sup>15/</sup> In fact, in response to every LILCO interrogatory designed to elicit information on the nature and adequacy of a County and State "best efforts" response to a Shoreham emergency, the Intervenor "answered" by making direct reference to the position expressed in their April 13 Objection:

The Governments object to the Interrogatory on the ground that it calls for speculation by the Governments. Notwithstanding this objection, the Governments state that, for the reasons set forth in their April 13 Objection and Offer of Proof, they have not adopted any plan, or otherwise trained or planned for responding to a Shoreham emergency. Accordingly, they are in no position to provide further responsive information.

See, e.g., Governments' Answers and Additional Objections (April 22, 1988) at Interrogatories 9-10, 13-17, 19-26, 28-31, 35-38, 40-43, 45-47.

In sum, the conclusion is nearly inescapable that when the Intervenor moved on April 6 for more time with which to respond to LILCO's March 24 discovery requests, they had no intention of providing the sort of substantive information that they implied would be forthcoming. They wished instead to use the time requested to first finalize their April 13 Objection and then use that pleading as the basis for the meaningless answers which they subsequently provided in response to LILCO's legitimate

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<sup>15/</sup> In addition, apart from a single-page police notification procedure for the County Executive's office, the Intervenor provided no documents, in stark contrast to the literally thousands of pages of documents which the Intervenor produced in the months after the Board ultimately overruled their "relevance" objections.

interrogatories. This approach to "answering" LILCO's March 24 discovery requests was misleading to both the Board and to LILCO and further evidences the appropriateness of severe sanctions.

(4) **Bad Faith Relevance Objections  
to LILCO's Requests for Documents**

In its March 24 discovery requests LILCO asked for, among other things, a

copy of any and all existing plans and procedures for responding to emergencies, whether radiological or nonradiological, affecting Suffolk County, including, but not limited to, chemical spills, fires, hurricanes, explosions, and earthquakes. Please include any and all plans for dealing with accidents involving shipments of radiological materials to Brookhaven National Lab, the Shoreham Nuclear Power Station, hospitals and other medical facilities, and industrial facilities.

See LILCO's March 24 discovery requests at Interrogatory No. 120. In their response to this and 60 other requests for emergency plans and procedures (most of which dealt with ingestion pathway response for nuclear power plants in New York other than Shoreham), the Intervenor's objected

to the extent that they seek information about emergency planning for nuclear power plants other than Shoreham, the actions of governments other than the Governments, emergency plans other than the LILCO Plan, and emergencies other than a radiological emergency at Shoreham. The requested information is not relevant to the issue before the Board, which concerns only the nature of a "best efforts" response to a Shoreham emergency.

See Governments' Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10 (April 20, 1988) at 2.<sup>16/</sup> During the May 10, 1988 Prehearing Conference the Board overruled the Intervenor's relevance objections and ordered the production of responsive State and County plans and procedures (Tr. 19382-83). Thereafter, on May 25, 1988, two months after LILCO had first propounded its document

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<sup>16/</sup> A full description of the Intervenor's Objections to LILCO's Second Set of Interrogatories is given in LILCO's May 2 Supplement at 6-10.

requests (and nearly three weeks after LILCO had filed its realism testimony) the County produced its Emergency Operations Plan, the SCEOP.

In its objections to LILCO's realism discovery requests, the County's good faith is called into question. Objections to interrogatories and document requests are of course contemplated under 10 C.F.R. §§ 2.740b(b) and 2.741(c). In the Shoreham proceeding, however, prior Licensing Board rulings had already established unequivocally the relevance of the County's plans and procedures for non-Shoreham emergencies. The pattern of the County's objections to discovery requests on relevance grounds -- and the Board's repeated rejection of those objections -- are traced in Part I.C of Attachment 3.

In short, the County's insistence on revisiting the "relevance" issue, and to thus delay and impede LILCO's discovery rights, further indicates that the County considers itself, and not the Board, to be the arbiter of first instance in this case. Given its recidivist tendencies, it is evident that the County simply will not comply with the NRC's discovery processes absent direct and repeated Board intervention. This is a course of conduct incompatible with responsible participation in an important case.

(5) Late Production of County Emergency Plans

On Saturday morning, July 9, 1988, virtually on the eve of the recent hearing in Bethesda, LILCO received from Suffolk County additional documents responsive to LILCO's March 24 discovery requests. Included in this shipment of documents was what counsel for the County termed in the accompanying cover letter as a "somewhat updated version" of the Emergency Operations Plan (LILCO Disc. Ex. 10). The letter further stated that counsel for the County had only become aware of the existence of this "updated version" during meetings held on Long Island that same week. See Letter from Lawrence Coe Lanpher to K. Dennis Sisk (July 8, 1988). Also produced to LILCO for the first time was a 373-page document which counsel for the County represented to be the Suffolk County Resource Manual (LILCO Disc. Ex. 13).

The County's July 8 production of documents followed by just two days another shipment of over twenty different emergency plans and procedures which the County had apparently had in its possession for a considerable period of time.<sup>17/</sup> A list of the documents which were provided to LILCO under cover of letters dated July 6 and July 8, 1988 is given in Part I.B of Attachment 3.<sup>18/</sup>

In a vacuum, tardy production of responsive documents during the discovery process can sometimes be excused as an oversight. Certainly, in undertaking extensive searches involving a considerable number of documents the County might be entitled to the benefit of the doubt. Given its history of discovery abuses, however, whether the County is now entitled to such consideration is open to question.

Of particular significance is the County's failure to produce until now that portion of the Resource Manual consisting of the Emergency Broadcast System (EBS) Procedures for the Nassau and Suffolk Counties New York EBS Operational Area. LILCO does not contend that it did not have prior access to this particular document. To the contrary, the EBS procedure for the Nassau and Suffolk Operational Area was submitted as a portion of Attachment 4 to LILCO's Second Motion for Summary Disposition of the EBS Issue (June 20, 1988). What is important is that it is now certain that the County has long had access to a copy of the EBS procedure and has even taken steps to update

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<sup>17/</sup> Counsel for the County, in the letter accompanying the July 6 (received July 7) shipment, stated that the documents were being produced, "[i]n accordance with the Board's Order on June 29." See Letter from Lawrence Coe Lanpher to K. Dennis Sisk (July 6, 1988). LILCO had, of course, first sought these documents (in the current proceeding) on March 24; the Board had first ordered the County to produce responsive documents during the May 10 Prehearing Conference; and LILCO was forced to seek further Board intervention in order to ensure the County's full compliance with that Order. LILCO's Response to June 24 Teleconference Order (June 28, 1988) at 5.

<sup>18/</sup> Certain of the documents provided to LILCO on July 6 had already been produced during Phase I and Phase II discovery. While LILCO has not made a definitive comparison of the documents produced on July 6 and those previously provided, the list given in Part I.B of Attachment 3 is intended to represent only documents not previously produced by the County.

information in it, including the twenty-four hour newsroom phone number for WCBS in New York City, the primary relay station which LILCO now relies upon, under the "best efforts" principle, in its own Revision 10 EBS procedures.

During the July hearings, the County sought to downplay the importance of the Nassau-Suffolk Operational Area EBS procedure:

MR. LANPHEI: Mr. Jones, this document which Mr. Spivey has sought to have introduced, I'd like you to look at that document. Has this document ever been approved as the Suffolk County [EBS] plan?

THE WITNESS: No, sir.

MR. LANPHER: And you testified it's not part of the Suffolk County Emergency Operations Plan, correct?

THE WITNESS: No, it's a resource for our resources. The purpose of this thing is just so he has a list of radio stations that he could call. We don't have an official EBS station in Suffolk County.

MR. LANPHER: Okay. I have no further questions, then. I oppose the introduction. It's not pertinent to the discovery issues which are the focus of this proceeding, and it's not part of the plan. I don't understand why it should be admitted in evidence.

Tr. 21422-23. The County's argument, disputing the value of the Nassau-Suffolk Operational Area procedure because it had not been formally "approved" as the County's EBS plan, is representative of the Intervenors' longstanding policy to deny that preexisting plans and resources could ever be used for a Shoreham emergency. Given its failure to produce, until July 1988, the most updated version of the Emergency Operations Plan, and its last-minute production of literally hundreds of pages of other emergency plans and procedures, including the County Resource Manual, the County appears to have allowed that policy to color their compliance with LILCO's discovery requests and with the Board's orders.

B. The Suffolk County Emergency Operations Plan  
Was Never Produced to LILCO Before May 1988

The Suffolk County Emergency Operations Plan (SCEOP) first appeared in this proceeding under cover of a May 24, 1988 letter from Lawrence Coe Lanpher, one of Suffolk County's counsel, to LILCO's counsel. Mr. Lanpher's letter contained the following agnostic recitation:

I have received from the County a document entitled 'County of Suffolk Emergency Operations Plan. I am informed that it is about 750 pages in length -- I have not attempted to count. At any rate, it contains a variety of documents, including one entitled 'County of Suffolk Disaster Preparedness Plan,' which I presume to be item 2(c) mentioned in your May 10 letter.

The Disaster Preparedness Plan, a 54-page document (plus some 45 pages of documentary attachments and a 10-page Brookhaven township plan appended), was a document known to LILCO from 1982-83 discovery. LILCO's May 10 letter had sought a more updated version of that document, if one existed, than the circa 1981 version possessed. What emerged was a document nearly an order of magnitude larger, containing annexes, appendices, directories and resource listings for every major component of the Suffolk County government.

LILCO informed the Board in open hearing on May 27 (Tr. 20537-42) of the existence and emergence of this composite document, and stated that it had never before been produced in this proceeding and was of obvious significance to the resolution of the realism/best efforts issue. LILCO counsel also stated that LILCO had never been informed of the existence of this document in this litigation through the discovery process.<sup>19/</sup> While LILCO could not establish at that time exactly when the document had

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<sup>19/</sup> A history of LILCO discovery requests dating back to 1982 which were intended to have unearthed documents such as the SCEOP, and reasonably should have in the liberal discovery framework contemplated in NRC proceedings, is set forth in Part I.A of Attachment 3.

come into existence in what form, it was evident that the document had been in existence in toto since at least 1985, and that most of it appeared to have existed as far back as the late 1970s. LILCO counsel stated LILCO's belief that LILCO and the process of development of the realism issue had been significantly prejudiced by the non-disclosure of this document, which revealed both the existence and the results (of varying degrees of currency) of a countywide planning process integrated to some degree with State requirements. Tr. 20829-31.

Subsequent events have merely confirmed LILCO's initial perception of the nature and significance of the SCEOP, and of its absence from this proceeding. Indeed, subsequent process and analysis have disclosed that the document appears to have existed in virtually complete present form by 1983, when the "Phase II" discovery in this proceeding took place, and perhaps in 1982 as well when the "Phase I" discovery took place. LILCO's records indicate that it never received the composite 750-page document; and that what it received in 1982-83 amounted to a total of about 160 pages, scattered among over a half-dozen unrelated fragments with no suggestion that a composite document even existed. Subsequent inquiries have also disclosed that New York State knew of the SCEOP and was directly involved in its periodic review and update.

Suffolk County's responses, by contrast, have been of a confession-avoidance-and-diversion nature, and have shifted with time. From Mr. Lanpher's initial letter of disclosure, the County conceded that the SCEOP existed but asserted that the County believed it had been turned over in discovery in 1982-83 (the County had no discovery records). The County then shifted ground to attempt to cast doubt on the size and scope of the SCEOP as of 1982-83. Finally, the County has attempted to divert the focus from its own discovery default by suggesting, irrelevantly (and, as it turns out, incorrectly), that LILCO had actual possession or at least notice of the existence of the full SCEOP before the present time. By contrast with LILCO, the County cannot document any of its arguments.

The overwhelming preponderance of the evidence suggests that the SCEOP existed as a composite document in present or virtually present form and substance as of 1982-83; that it was never turned over to LILCO in formal discovery notwithstanding orders to do so; and that whatever may have been received informally at some point by a person within LILCO, it was not the complete SCEOP and the ultimate recipient was not even necessarily involved in the Shoreham emergency planning litigation. These matters are specified below.

(1) The SCEOP Existed in Virtually Its Present Form and Substance in 1982-83

The evidence that the SCEOP existed as of 1982-83 in present or virtually present form (subject to updatings of names, addresses and telephone numbers) is overwhelming.

A. Examination of the SCEOP, either as produced in late May 1988 or on the eve of hearings on July 9 (LILCO Disc. Exs. 9, 10), reveals a document over 750 pages long. Of these only about 117 pages bear dates later than 1983; of these, some 76 indicate that they are updates rather than original, later-added material.<sup>20/</sup> Thus the

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<sup>20/</sup> Perusal of the version received by LILCO in May 1988 (LILCO Disc. Ex. 9) indicates the following pages to bear date legends later than 1983:

- \*Annex A, App. 2 Att. D: Lines of Succession, 34 pp. updated 4/85
- \*Annex A, App. 2 Att. E: Command and Control, 3 pp. added 7/85
- \*Annex A, App. 3, EP Channels, 5 pp. updated 7/85
- \*Annex A, App. 7, Emergency Directory, 34 pp. updated 5/84
- \*Annex A, App. I, Brookhaven Personnel, 3 pp. added 3/83
- \*Annex A, App. 11, EOC Hurricane Procedure, 7 (of 17) pages added 7/85
- \*Annex C, App. 2, CAP Automatic Command Succession, 1, page updated 7/85
- \*Annex C [app unspecified] CAP Locator List, Directory, 2 pp. (of more) updated 7/85
- \*Annex F, App. 3, Health Services, 7 pp. added (?) 3/85
- \*Annex H, Police Services, 21 pp. added (?) 11/84, updated 4/85

The totals indicated are as follows: total pages apparently added after 1983, 41; pages updated, 76; pages unchanged since 1983, about 640. These totals are probably not precisely accurate; but their general levels are.

(footnote continued)

irrefutable evidence of the document itself bespeaks its existence in 1982-83 in substantially if not exactly present form and size.

B. The version of the SCEOP received by LILCO on July 9 (LILCO Disc. Ex. 10) contains a four-page Table of Contents. The first page of that Table bears the date 1/82. The latter three pages are in a different typescript and bear no date. Even the first page, however, covers the basic New York State plan and Annex A, Appendices 1 through 10 -- over 1/3 of the current bulk of the entire present SCEOP. It is difficult to imagine that every subsequent Annex and Appendix in the SCEOP was not added until after that period, given the early (1982 and earlier) dates on most of the subsequently listed material. In any event, despite the irrefutable proof of the existence of these portions of the SCEOP as of 1982, not even all of them were turned over to LILCO in 1982-83 discovery. See Attachment 5.<sup>21/</sup>

C. The testimony of the various witnesses who, as Suffolk County officials, had had custody of one version or another of the SCEOP corroborated that it had grown substantially since 1980 (Tr. 21570, 21583 (Kelly)), but none denied that it had been in current form as of about 1982-83. Mr. R. Jones, who took over custody of the SCEOP in 1984, stated that the only changes between the SCEOP as of 1984 and its update in 1985 involved updatings of names, addresses and telephone numbers, but no other substantial changes in form or content (Tr. 21377-79, 21389-90); he also confirmed that the plan in

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(footnote continued)

The totals for the currently effective versions of the SCEOP (LILCO Disc. Ex. 10) are comparable. While the 17-page Hurricane Procedure (Annex H, Appendix 4) was apparently updated after Hurricane Gloria in October 1985, all other differences between the changes to LILCO Disc. Exs. 9 and 10 appear to be ministerial.

<sup>21/</sup> Additionally, as a matter of logic, the existence of "Annex A" (as contrasted with plain "Annex") presupposes the existence of further annexes B, C and so forth. Thus the type faces for Table of Contents do not limit the 1982 contents of the SCEOP to the New York State basic plan plus Annex A.

1984 was "pretty much the one that was in use" in 1982 and 1983. (Tr. 21383). Mr. Regan, the head of the Division of Emergency Preparedness from 1982 until June of 1988, after initial memory lapses, confirmed that the contents of the SCEOP "were all general plans per se when I even got there in 1980." Tr. 21901-03, 21904 (July 19, 1988). He became even more specific:

Q: Having looked at this document [LILCO Disc. Ex. 10, the SCEOP] can you say that all the plans that are in front of you now were there in some form in 1980, in January 1982?

A: I would say so.

Id. The SCEOP existed as a recognizable document, in largely its current form and substance (save for miscellaneous updates) probably in 1982, and certainly in 1983.

(2) The SCEOP Was Not Provided to LILCO  
in Discovery in the 1982-83 Time Period

Mr. Lanpher's May 24 letter suggests nothing as to either the date of origin of the SCEOP or as to whether he believed it had ever been produced before. But against all of the County's post hoc circumstantial protestation of belief that the SCEOP had been previously produced there remain two stark questions: Why, if the County had engaged in massive document production and produced the SCEOP in 1982 and 1983, did it voluntarily produce it again in 1988? And why if the County thought it had produced the SCEOP earlier, did Mr. Lanpher's very carefully worded May 24 letter make no such suggestion? The only plausible answer is that it had not been produced earlier, as the following paragraphs show.

A. Not one of Suffolk County's own witnesses has a positive recollection of production of the SCEOP in 1982 or 1983. Suffolk County's witnesses (Messrs. R. Jones, Bilello, F. Jones and Regan) each testified that a document search had been performed in 1982 and again in 1983. Messrs. R. Jones, Bilello and Regan think that the SCEOP was gathered for production at each of those times. Messrs. R. Jones, Bilello and Regan all believed that the document was transmitted to Mr. F. Jones. But none of them has

any specific recollection of gathering or copying the SCEOP itself (Tr. 21320 (R. Jones), 21449, 21451, 21472 (Bilello) Tr. 21887 (Regan)), despite its centrality to the work of the Division of Emergency Preparedness and its maintenance in a one-of-a-kind looseleaf notebook in the Suffolk County EOC. Mr. R. Jones was not even responsible for custody of the SCEOP until 1984 and does not know what was produced before that time (Tr. 21371-72). Mr. F. Jones recalls forwarding all the documents he received to counsel, but has no specific recollection of forwarding the SCEOP (Tr. 21841).

B. Suffolk County's counsel have no records substantiating their document production in 1982 and 1983. Those records were apparently returned to the County in 1985 and have not been recovered or located since. Tr. 21304-05 (Letsche).

C. LILCO has the only records known to exist on the extent of discovery in 1982-83. These consist of two indexes prepared in the normal course of business under the supervision of counsel, listing each individual document received by LILCO in discovery in 1982-83. Each document is identified by separate Bates Stamp marking systems employed by counsel for LILCO and for Suffolk County. These indexes were described in an affidavit submitted by one of LILCO's counsel, James N. Christman, Esq., as Attachment 2 to LILCO's June 23, 1988 Response to Intervenors' Motion to Vacate. The indexes, and a document search to verify them, were provided to all parties and the Board voluntarily by LILCO under cover of a letter from K. Dennis Sisk, Esq., one of counsel to LILCO, on July 9. Those indexes and document search, described in Mr. Christman's affidavit, confirm that the composite SCEOP was never produced to LILCO in discovery in the 1982-83 period.

D. The LILCO document indexes contain among their entries each of the fragments received from Suffolk County. These were initially summarized in and attached to Mr. Sisk's July 9 letter (they were later introduced as Suffolk County Discovery Exhibits). They were more precisely summarized in an attachment to a July 18,

1988 letter from Donald P. Irwin, Esq., one of counsel to LILCO, to the Board. That attachment, which is reproduced as Attachment 5 to this brief, documents the following:

1. LILCO never received the composite SCEOP either as one document or as a series of fragments.
2. LILCO received 11 discrete portions of the SCEOP in 1982-83.
3. Three of these portions, including the "basic" Suffolk County Disaster Preparedness Plan (Annex A Appendix 9) were received in 1982. Two of these were received again in 1983. Eight of the 11 discrete portions were received only in 1983.
4. The 11 discrete portions total 161 pages, out of the 762 total in the current SCEOP (LILCO Disc. Ex. 10).
5. Despite the fact that the basic State plan and Annex A are shown by the Table of Contents of the SCEOP to have existed as of 1/82, not even all of them were provided in discovery in 1982-83.
6. The Suffolk County-originated Bates Stamp numbering sequences for those portions of the SCEOP do not follow any clear order, indicating that when the County (or its counsel) marked fragments of the SCEOP prior to disclosing them to LILCO, they did not mark them as portions of a discrete document.

**(3) LILCO Was Never Provided the Composite SCEOP by any Other Means Than by Formal Discovery, and Does Not Possess it Except as a Result of Document Production Since Late May 1988**

Suffolk County, as a last-minute means of deflecting attention from its own defaults, suggested that a LILCO employee, Mr. Kelly, received a covert copy of the entire SCEOP at sometime in 1985-86, at that he had acknowledged that receipt at a recent lunch. The County's assertions are baseless.

1. There is general agreement that Norman Kelly, a LILCO employee, requested and obtained, without any apparent difficulty, a copy of some portion of the SCEOP in the 1985-86 period from its County custodian, Mr. R. Jones.<sup>22/</sup> Beyond that

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<sup>22/</sup> Mr. Jones apparently provided Mr. Kelly with other materials from time to time upon request, despite the Shoreham litigation. Tr. 21550-51 (Kelly).

point, nothing is clear. The evidence conflicts as to whether Mr. Kelly obtained the entire plan or just the Disaster Preparedness Plan with potentially some attachments. Mr. Kelly cannot recall who asked him to obtain the document (Tr. 21566-67) or to whom he gave it, though it "might have been" either William Renz (former LILCO employee) or Charles Daverio (a present LILCO employee) (Tr. 21549, 21562, 21568). Mr. Kelly, though he works in the emergency planning area at LILCO, has never been involved in this litigation or discussed it with his supervisors. (Tr. 21557-58).

2. Mr. Kelly recalls requesting "just the basic plan" from Mr. R. Jones in 1985 or 1986 because of time pressure and Mr. Jones' statements that the plan would have to be copied and that, with annexes, the entire plan was "thick as a telephone book." Tr. 21548. Mr. Kelly picked up the portion of it he had requested the next day after it had been copied (Tr. 21548-49). The document was in a brown envelope, which Mr. Kelly examined briefly at the time. (Tr. 21549) Mr. Kelly had first examined the current version of the entire SCEOP in late June about two or three weeks before date of his testimony (Tr. 21559-60). Mr. Kelly was asked two separate times whether the material he had picked up from Mr. Jones in 1985 or 1986 had corresponded to the current version of the SCEOP. Each time he answered that, based on his contemporaneous examination of the document he had obtained in 1985 or 1986, the current SCEOP was substantially larger than what he had obtained in 1985 or 1986, which he recalled to have consisted of as just the "basic plan" with, perhaps, Annex A attached. (Tr. 21561-62, 21586-87, 21594-95).<sup>23/</sup>

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<sup>23/</sup> The current version of the SCEOP reviewed recently by Mr. Kelly was copied on both sides, making it relatively compact. It was never established whether the document actually obtained by him in 1985 or 1986 was copied on two sides or one. (Tr. 21595), though Mr. R. Jones of Suffolk County testified that the 10 copies he had had made in 1985 were two-sided. (Tr. 21380). If the 1985-86 document recalled by Mr. Kelly had been copied on only one side the disparity between the document and the current SCEOP would be all the greater.

3. LILCO has conducted a diligent search for the SCEOP in the company's files, and located nothing not otherwise already disclosed. There were projects at LILCO underway in the 1985-86 time period, unrelated to Shoreham, that could have involved a need for emergency planning information from Suffolk County. A thorough search of the records of the Shoreham files and of these other project files, and interviews with all present and former LILCO personnel who could be located, including Messrs. Renz and Daverio, has failed to unearth either documents or a request to Norman Kelly for them. The Affidavit of John A. Weismantle, submitted in signed and notarized form under cover of a letter from Donald P. Irwin dated July 21, 1988, addresses this issue.

4. Mr. R. Jones of Suffolk County testified that he had provided Mr. Kelly with one of the 10 copies he had made of the SCEOP for internal-review purposes, in 1985-86. (Tr. 21322, 21329). But Mr. Jones' apparent generosity with photocopying is inconsistent with both Mr. Kelly's recollection (See ¶ 2 immediately above and Tr. 21548-49) and with Mr. Jones' statements about the limited copying capacity of the Suffolk County Division of Emergency Preparedness. His organization, he stated, is "not in the publishing business, you know" and

to copy that EOC master copy is a monumental undertaking. For some folks, it's nothing, but for me with my little xerox machine -- and I didn't think it was necessary that they have the current updated one, you know, a copy of the plan as it existed on May whatever.

Tr. 21409.

Mr. Jones was also misinformed about the nature of Mr. Kelly's work at LILCO. He asserted that "one of [Mr. Kelly's] prime responsibilities is the maintenance and formulation of that plan." (Tr. 21327). In fact, Mr. Kelly is not involved in plan formulation at all, nor, except as to ingestion pathway, plan maintenance. (Tr. 21546-47, 21556-57).

On balance, the circumstances as well as the apparent relative degrees of credibility of the witness' testimony, support Mr. Kelly's version of the facts in this discovery issue.<sup>24/</sup>

4. New York State Has Systematically Thwarted Legitimate Discovery Throughout This Proceeding

A. The State Knew of, But Failed to Disclose the Existence of, the Suffolk County Emergency Operations Plan

New York State neither produced nor disclosed the existence of the SCEOP during discovery.<sup>25/</sup> Indeed, the State denied knowledge of the SCEOP at discovery depositions,<sup>26/</sup> at hearings before the Board shortly after the Plan was produced to LILCO,<sup>27/</sup> and even at the recent hearings before the Board.<sup>28/</sup> In his deposition, Donald DeVito, the director of the State Emergency Management Office (SEMO), testified that he had no knowledge of any general emergency plan for Suffolk County and that he doubted if anyone in SEMO would know. Dep. Tr. 7, 25 (DeVito). SEMO is the State agency responsible for overseeing and assisting localities with emergency plans for all types of emergencies except nuclear power plant accidents. *Id.* 24-25 (DeVito).

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<sup>24/</sup> The County's assertion of supposed acknowledgement by Mr. Kelly at a recent lunch of receipt of on SCEOP in 1985 or 1986 also bears on the relative credibility of the witnesses, Mr. Kelly's superior recall of the facts and circumstances of that event (Tr. 21532) combined with the corroboration by Mr. Regan, one of the County's own witnesses, of Mr. Kelly's denial of any discussion of his receipt of the SCEOP in 1985-86 (Tr. 21889), completely quells this baseless allegation and impugn Mr. Bilello's general credibility.

<sup>25/</sup> See Governments' Answers and Additional Objections to LILCO's Interrogatories (April 22, 1988) (LILCO Disc. Ex. 39); State's Answers to LILCO's Second Set of Interrogatories (June 3, 1988) (LILCO Disc. Ex. 8).

<sup>26/</sup> Tr. 21231-21234 (DeVito); DeVito Dep. Tr. 7, 25. See Axelrod Dep. Tr. 66.

<sup>27/</sup> Tr. 20549 (Zahnleuter) (denying knowledge of the SCEOP by anyone in the State government).

<sup>28/</sup> Tr. 21102 (DeVito); Tr. 21760-761 (Germano); Tr. 21660 (Axelrod). But see Tr. 21983 (Davidoff).

In fact, however, it is inconceivable that the State did not know about the SCEOP during the course of discovery. The indicia of that knowledge are numerous:

1. The SCEOP itself contains sections "prepared by the State." E.g., LILCO Disc. Ex. 9, pp. K00003-K00033. Indeed, those portions of the SCEOP that were "prepared by the State" reveal that the New York State Emergency Operations Plan (the asserted predecessor to the NY DPP) "will constitute the one basic document for State and local response to natural, man-made disasters, other emergencies of sufficient magnitude to require a coordinated effort, and nuclear attack;" that "[a]ssistance and advice will be provided to local jurisdictions through the District Offices [of the Office of Disaster Preparedness, the predecessor agency to SEMO] for the development of such Appendices to the Plan and its Annexes as may be required to reflect local conditions and procedures;" and that:

All such material developed by local jurisdictions and any revisions thereto shall be submitted to the Office of Disaster Preparedness promptly upon completion to facilitate State coordination of disaster operations and the rendering of assistance to stricken areas.

LILCO Disc. Ex.10, pp. K02243-K02244.

2. A pleading filed on behalf of the State and County on June 26, 1988 stated that SEMO personnel had known of the existence of the SCEOP "for years." See Tr. 21662 (Axelrod), 21226-227 (DeVito), 21760-761 (Germano). See also 21994-995 (Davidoff).
3. Suffolk County has received federal funding for emergency planning through SEMO for as long as anyone remembers. Tr. 21234-235 (DeVito), Tr. 21742, 21745-747, 21761 (Germano). This funding flowed through SEMO, and SEMO participated in various Comprehensive Cooperative Agreements by which those funds were allocated and earmarked to local governments. Tr. 21739-742 (Germano).

4. A member of SEMO's planning section, Jerry Horton, reviewed at least the Suffolk County Disaster Preparedness Plan in 1981, pursuant to Article 2B of the New York Executive Law. LILCO Disc. Ex. 15 (admitted Tr. 21907). Suffolk County witness Richard Jones identified the Suffolk County Disaster Preparedness Plan as the County's "basic plan", which appears as Annex A, Appendix 9 of the SCEOP produced to LILCO in 1988. Tr. 21306-307 (R. Jones). Mr. Regan could not say which parts of the SCEOP Mr. Horton had reviewed in 1981. Tr. 21913-14 (Regan). It is clear, however, that as of 1981, Article 2B required plans complying with it to cover radiological accidents at nuclear plants, Article 2B § 20(2)(a), though the 1981 Disaster Preparedness Plan purports not to cover such radiological accidents, LILCO Disc. Ex. 10, p. K02425, Tr. 21894-96 (questions by Judge Shon); that Mr. Horton found that the Suffolk County Disaster Preparedness Plan generally met the requirements of Article 2B, LILCO Disc. Ex. 35; and that the "basic plan" portion of the SCEOP that was "prepared by the State" does cover such radiological accidents, e.g., LILCO Disc. Ex. 10, p. K02248 (manmade disasters include nuclear facility accidents).
  
5. Mr. Davidoff stated that members of the REPG staff, as well as Suffolk County and LILCO representatives, took sections out of the SCEOP at times between approximately 1980 and 1982 as useful resource material for a draft Suffolk County Radiological Plan for Shoreham.<sup>29/</sup>

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<sup>29/</sup> LILCO has filed, and stands on, the affidavits of James N. Christman and John A. Weismantle as to when it first learned of the existence of the composite SCEOP. See Arguments 3.B.2, 3.C.3 above.

6. Mr. Davidoff verified a portion of the State's Answers to LILCO's Third Set of Interrogatories, stating that portions of the SCEOP were based on an outdated version of what later became the State Disaster Preparedness Plan.<sup>30/</sup>
7. The County's witnesses confirmed that SEMO personnel had long known of the existence of the SCEOP. Mr. Regan, in particular, referred to a SEMO representative in the Southern District office in Poughkeepsie, Mr. Salamone.<sup>31/</sup>
8. The State did not say whether it had looked for documents or made inquiries of personnel in its Southern District office. See Tr.21103-104 (DeVito); Tr. 21729-730, 21769 (Germano).
9. One of the principal roles of the planning section of SEMO is to assist counties with emergency plans. Tr. 21132, 21136-138, 21233-234 (DeVito), Tr. 21736-740; see Tr. 21613 (Axelrod).
10. A directory of SEMO personnel is contained in the County's Resources Manual referenced in the SCEOP. LILCO Disc. Exs. 13, 14; Tr. 21205-208 (DeVito). The 1987 Suffolk County Emergency Services Directory, which

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<sup>30/</sup> The "outdated" plan apparently was a document entitled, The New York State Emergency Operations Plan, though none of the State's witnesses, including Mr. Davidoff, could recall. LILCO Disc. Ex. 25, which is Annex K of the SCEOP, Tr. 21412-414(R. Jones), has a cover page which identifies it as Annex K to the "New York State Emergency Operations Plan", Tr. 21260 (DeVito). See also LILCO Discovery Ex. 10, p. K02243-44 (Introduction of the SCEOP refers to the State of New York Emergency Operations Plan). Mr. Davidoff made clear at the hearings that his verification of the State's answer did not verify the statements of the State's counsel in the hearing transcript pages referenced in that Answer. Tr. 22049 (Davidoff).

<sup>31/</sup> Tr. 21911-912 (Regan); LILCO Disc. Ex. 11; Tr. 21206-21211 (DeVito).

was not produced to LILCO in discovery (though earlier versions of that document are part of the SCEOP, see, e.g., LILCO Disc. Ex. 10, pp. K02380-K02411), also lists SEMO personnel and telephone numbers.

11. Some of the State's documents contain points of contact with Suffolk County emergency response personnel, including Mr. Robert Sheppard of the Suffolk County Health Department. See, e.g., LILCO Disc. Ex. 7.
12. When pressed, virtually all of the State's witnesses acknowledged that they would have been surprised if a county in New York the size of Suffolk County had not had an emergency operations plan, or that they generally assumed that Suffolk County had an emergency operations plan. Tr. 21660, 21663 (Axelrod); Tr. 21983 (Davidoff); Tr. 21760-761, 21765 (Germano); see also Tr. 21232-235 (DeVito). SEMO director DeVito also acknowledged that he receives periodic reports from his staff as to the status of planning for counties in the State. Tr. 21130 (DeVito).
13. Mr. DeVito knew in 1987 that Suffolk County's emergency planning would be reviewed in 1988 under the federal Emergency Management Assistance Program, in accordance with a Comprehensive Cooperative Agreement. Tr. 21234-235 (DeVito). Indeed, Mr. Germano stated that SEMO knew in 1985 that all counties in New York receiving or wishing to receive federal emergency planning funds must have their plans reviewed by SEMO by 1988 and brought into compliance. Tr. 21767 (Germano).
14. The SCEOP was apparently used by the State and County in responding to hurricane Gloria in the fall of 1985. See Tr. 21622-623, 21660-661 (Axelrod); Axelrod Dep. Tr. 92; DeVito Dep. Tr. 31-40 (Mr. DeVito

personally travelled to the forward EOC at the State office building in Hauppauge, in Suffolk County, during hurricane Gloria).

These facts are of record and speak for themselves. It is simply impossible for the State to credibly deny knowledge of the SCEOP until May 1988, whether or not anyone within the State physically had a copy of that plan. See the State's Answers to LILCO's Second Set of Interrogatories (June 3, 1988); Suffolk County's Answers to LILCO's Second Set of Interrogatories (June 3, 1988). The State's responses to discovery improperly concealed that knowledge. They also improperly concealed information on the role and functioning of SEMO, the agency responsible for reviewing the SCEOP.

**B. The State Failed to Disclose, or Attempted to Explain Away, State Resources Capable of Being Deployed for Emergency Planning and Response at Shoreham**

State plans, procedures, and resources for emergency response were of central relevance under the NRC "realism" rule, 10 C.F.R. § 50.47(c)(1), and this Board's decisions implementing that rule dated February 29, 1988 and April 8, 1988. Those plans, procedures and resources were thus the core issues in discovery in this remand proceeding. To avoid revealing facts and details concerning those resources, the State set up a complex chain of illogic which, as LILCO observed previously, caused the State (as well as the County) to go through the looking glass. LILCO's Brief on the Appropriate Remedy for the Intervenors' Failure to Comply With Board Orders (June 15, 1988), page 3. The State's reasoning, as articulated by Dr. Axelrod, went as follows: the State DPC "determined" at one of its meetings, "based on recommendations from staff," that emergency planning adequate to protect public health and safety at Shoreham is impossible, Tr. 21700-701 (Axelrod), Axelrod Dep. Tr. 29-32; therefore, the State has not adopted and will not adopt an emergency plan or engage in emergency planning for Shoreham, LILCO Disc. Ex. 34 (Axelrod prefiled testimony dated April 13, 1988), p. 3, and no County plan exists; the State will not implement the LILCO plan, coordinate

with LILCO, or apparently even talk to LILCO if an emergency occurs, LILCO Disc. Ex. 34, p. 3, and will not even recognize the existence of the LILCO Plan, Axelrod Dep. Tr. 65-68; therefore, there is no "site-specific" emergency response plan for Shoreham; and, therefore, it is "impossible" for even the Chairman of the DPC to "speculate" as to whether any of the State's resources, even those delineated in detail in State plans, could be used to respond to an emergency at Shoreham, Tr. 21648-650 (Axelrod); LILCO Disc. Ex. 34, p. 4; Axelrod Dep. Tr. 65-66, 93-103.

Each step of this convoluted chain of reasoning is flawed, and its conclusion is not credible. First, there was no DPC meeting at which the DPC "determined" that emergency planning adequate to protect public health and safety is impossible for Shoreham.<sup>32/</sup> Indeed, Dr. Axelrod filed an affidavit resisting discovery in this proceeding in 1984, in which he stated that the DPC never convened a meeting to consider any plan for Shoreham. Tr. 21705-706 (Axelrod). Further, the recommendations of the DPC staff as of that date were overwhelmingly positive, LILCO Disc. Exs. 51, 52, Tr. 22040-041 (Davidoff), and would have resulted in the transmission of the 1982 LILCO emergency plan for Shoreham to FEMA for review and acceptance, LILCO Disc. Ex. 53; see Tr. 22041-043, 22066-067 (Davidoff).

Second, the LILCO Plan does exist. It is patterned on the same federal regulations and standards upon which the New York State REPP and seven other county plans in the State are built. It contains the "site-specific" information of which the State professes ignorance. The State assertedly maintained its professed ignorance by

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<sup>32/</sup> The only DPC consideration of emergency planning for Shoreham which was proffered by the State consists of a few pages of the Stenographic Record of a DPC meeting on March 3, 1983, at which Dr. Axelrod read to the DPC members Governor Cuomo's and Suffolk County Executive Cohalan's positions on Shoreham emergency planning as of that date. The DPC apparently did not vote, made no "determination", and in fact made no response to Dr. Axelrod's reading of the position papers. LILCO Disc. Ex. 37, admitted at Tr. 22038.

throwing away copies of successive revisions of the LILCO Plan, except for litigation purposes. E.g., LILCO Disc. Ex. 34 (Axelrod prefiled testimony, Governor's Affidavit at pages 3-4).

Third, Article 2B requires the State to have a plan for responding to radiological accidents (§§ 20(2)(a), 22)) and requires that the plan (1) identify the resources, public and private, for responding to such emergencies and (2) provide for their coordination. See, e.g., Tr. 21636-21641 (Axelrod). The State has assertedly dodged these requirements of State law for Shoreham by claiming that it is not an operating plant. The State cannot dodge these requirements if Shoreham is licensed to operate.

Fourth, and perhaps most important, the State plainly has extensive resources and response capabilities that could be used for a Shoreham emergency. The State's plans and procedures identify those resources and response capabilities in broad detail; documents produced to LILCO at the eleventh hour prior to the hearing on sanctions, including detailed notification procedures, EBS plans and other matters, flesh them out; and additional documents and facts, such as state agency standard operating procedures applicable to Suffolk County, undoubtedly exist, see, e.g., Attachment 4 hereto. Dr. Axelrod acknowledged that the NYS DPP and the NYS REPP were issued pursuant to, and comply with, Article 2B, and that Article 2B requires detailed identification of State resources for emergency responses, see Tr. 21642, 21646-647 (Axelrod). Other documents, see, e.g., LILCO Disc. Ex. 5, as well as the working knowledge of State emergency planning and response personnel, can assist the deployment of these resources.

Finally, the State also failed to disclose, and attempted to deny, State emergency planning capability when a county fails to adopt an emergency plan or employ it in an exercise. The example of Rockland County shows that the State, when it wants to, can compensate for the nonexistence of a county radiological plan for a nuclear plant by

(1) preparing or completing the preparation of such a local plan and (2) executing it successfully in a federally observed exercise. See, e.g., Tr. 21615-620 (Axelrod); Tr. 21989-991, (Davidoff); Tr. 20997 (Papile). But see Papile, Czech, Baranski Dep. Tr. 88-107. The State REPP contains a section for doing just this, LILCO Disc. Ex. 6, pp. III-18 to III-19, but the State has denied that that section applies to Shoreham, Axelrod Dep. Tr. 86-89.

In short, the State's position in discovery, as well as on the merits, in this remand proceeding led it to deny, or attempt to explain away, facts that are or should be obvious to all.

C. The State Failed to Disclose, or Mischaracterized, Information That Was Inconsistent with The State's Position

The State has played an elaborate shell game, particularly with respect to the State's ingestion pathway and recovery and reentry emergency response capabilities. Messrs. Papile, Czech and Baranski of the State's REPG filed a lengthy and detailed affidavit, dated February 10, 1988. The Board, in its decision of February 29, 1988, memorialized in its memorandum of April 8, 1988, relied heavily on the REPG affidavit in denying LILCO's Motion for Summary Disposition of the realism issues in this remand proceeding. Discovery revealed, finally, that substantial portions of that affidavit were misleading.

In this instance, however, the "failure to disclose" consisted primarily of suggesting in the REPG Affidavit that detailed plans, procedures and policies existed outside the NYS REPP, when discovery later revealed either (1) that such plans, procedures and policies did not in fact exist or (2) that such procedures were generic, not site-specific, and had not been revealed to LILCO.<sup>33/</sup> This maneuver obviously

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<sup>33/</sup> The most striking example of the latter is the Germano memorandum on ingestion pathway guidance, LILCO Disc. Ex. 5 (admitted at Tr. 21031), which is a self-

deflected the course of this remand proceeding in a substantial way, to the prejudice of the Board and, obviously, LILCO.

The course of this shell game can only be charted, tediously, by tracing (1) statements in the REPG through (2) corresponding interrogatories in LILCO's Second Set of Interrogatories to (3) answers to those specific interrogatories in the State's Answers dated June 3, 1988, and often then comparing those answers to (4) other information not produced, or belatedly produced, to LILCO in discovery. See, e.g., Tr. 21669 through 21691 (Axelrod). This tracing is set forth in Attachment 4 to this Brief illustrated in some detail at the hearings and will not be repeated here.

The State, moreover, failed to put forward knowledgeable witnesses either in 1984, when it entered this proceeding, or in the remand proceeding in 1988. Several knowledgeable State witnesses, many of whom had reviewed a prior version of the LILCO Plan for Shoreham, were initially designated as witnesses for the State in 1984, but were abruptly withdrawn. See, e.g., Tr. 22013-020 (Davidoff). Mr. Davidoff's professed lack of recollection of those events is surprising, since he was REPG Director during the Shoreham plan review in 1982 and must have been consulted about testifying in 1984. See Tr. 21987-988, 22001 (Davidoff). Those witnesses were evidently withdrawn because their testimony, especially on cross-examination as to their review of the Shoreham plan and as to plans for other nuclear plants, would have undercut the State's arguments in the licensing proceeding.

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(footnote continued)

described "procedure" for all operating nuclear plants in or near New York State and capable of being incorporated as an annex to county emergency operations plans. LILCO Disc. Ex. 5, pages 1-2; Tr. 21776-777 (Germano). See Tr. 21689 (Axelrod). Even REPG Director Papile said that this procedure could be adapted for essentially any county in the State. Tr. 21028 (Papile).

In this remand proceeding in 1988, the State proffered only Dr. Axelrod's four pages of proposed testimony denying the existence of an emergency response plan for Shoreham, denying that the State would implement the LILCO Plan, and disclaiming any ability to identify any resources that might be used to respond to a Shoreham emergency. LILCO Disc. Ex. 34. The State proffered no other witnesses, despite the Board's previous reliance on the REPG Affidavit in denying LILCO summary disposition, and resisted producing any other State personnel (including the sponsors of the REPG Affidavit) even for depositions. The reasons have now become obvious.

D. The State Obstructed Discovery Procedurally

The Intervenors took the position, on the merits and throughout discovery, that their word was the final word as to all substantive issues, defined by them, in the realism remand. They also stated emphatically that their position (e.g., "the State will not implement the LILCO Plan or cooperate with LILCO in an emergency at Shoreham") was dispositive and not subject to question by the NRC or anyone else.<sup>34/</sup> The State

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<sup>34/</sup> "It is without dispute that New York State and Suffolk County have the exclusive and sovereign authority to decide how they will act in response to nuclear power plant emergencies. The NRC has no authority to mandate how such governments will act. The State of New York and Suffolk County have made their decision for Shoreham." Governments' Notice That The Board Has Precluded Continuation of the CLI-86-13 Remand (June 9, 1988) fn. 1 at 3. "The Governments' decision as to what their best efforts would be is not subject to dispute, second guesses, or rejection by this Board. Neither the Board nor LILCO can speak for or bind the Governments as to their response to a nuclear emergency or any other conduct within their sovereign powers. . . . [T]his Board has no authority to proclaim or otherwise decide that the Governments' response would be anything other than what the Governments and their duly elected Chief Executives say." *Id.* at 4. "And it would be inconsistent with the sovereign decision of the government for this proceeding to go forward in the context of the Board's structuring it to ignore the decision of the government." Tr. 20850 (Lanpher). "Our position is simply this, the position of the government of Suffolk County, and I believe the New York shares the same one, it's categorically that there will not be an interface with the Long Island Lighting Company. That there categorically, absolutely will not be an interface which has been expressed repeatedly in legally sustained documents upheld by NRC, the federal courts, Second Circuit Court of Appeals, the highest court of the State of New York. We cannot. We are categorically and inherently precluded from having witnesses sit on -- in a deposition or on a witness stand explaining how there will be such an

(footnote continued)

put forth only Dr. Axelrod, and stated that the State was entitled to designate only that witness, who could speak "knowledgeably, authoritatively, and on behalf of the [State]" as to the issues in the remand proceeding. Tr. 21706-708 (Counsel for LILCO, quoting from a letter by Intervenors to the Board dated April 15, 1988). Based on this posture, the State repeatedly obstructed discovery by various procedural means, including the following:

1. The State produced no documents, substantive answers to interrogatories, or deponents (other than Dr. Axelrod) until it was ordered to do so. Indeed, despite Board orders to the County in 1982 and 1983 and a Board order to the State in 1984, the State refused to produce any State emergency plans, or county plans possessed or by or known to the State, whether radiological or nonradiological. The State objected, across the board, to LILCO's Second Set of Interrogatories with respect to such plans. Even after the State was ordered on May 10, 1988, to produce such plans, it refused for weeks to verify or authenticate even the most basic documents: the NYS DPP and the 1987 revision of the NYS REPP; the State did so only on July 5, after being ordered specifically to do so. Despite LILCO's notices, no deponent, other than Dr. Axelrod, was proffered until the Board ordered additional depositions.

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(footnote continued)

interface and providing substance to the interface which categorically will not be." Tr. 20854-855 (Brown). See generally Governments' Objection To Portion Of February 29 And April 8 Orders In The Realism Remand And Offer Of Proof (April 13, 1988).

2. The State provided inadequate or late responses even after Board orders. The State sought an extension to answer LILCO's Second Set of Interrogatories. After obtaining an extension, the State then objected and provided practically nothing. When ordered to provide responses May 10, 1988, the State delayed responding until a specific date was ordered by the Board. When it responded, in accordance with that order, on June 3, 1988, many responses were still evasive. As to depositions, those taken were arbitrarily truncated by the State<sup>35/</sup> and were loaded with objections by both the County's and the State's counsel. The Board recognized this obstruction in its rulings of May 10, and May 24, 1988.
3. This conduct forced further delay in setting a date for a hearing on the merits and resulted in further Board discovery orders.
4. When further depositions were ordered, the State, along with the County, refused to proceed. On June 10, 1988, the State joined in the "Governments' Notice" which announced that the State could not and would not proceed with discovery on the merits. The Board, in the June 10 Teleconference, properly construed the County's position, and its adoption by the State, as a refusal to comply with Board discovery orders.

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<sup>35/</sup> Of the State deponents initially noticed, LILCO was able to complete the deposition only of Donald DeVito, who professed ignorance of practically every substantive matter.

5. After the Board determined to dismiss the realism contentions but to retain jurisdiction over discovery matters, the State joined in additional obstructive pleadings, including a "Motion to Vacate" and a "Motion for Stay." The State refused, in the interim, to comply with the Board's Order of June 17 to proceed with depositions.
6. The State then joined in the County's suggestion for a Board-conducted hearing. When the Board ordered such a hearing and ordered other specific items in connection with the hearings, the State engaged in a last-minute production of two large stacks of documents responsive to LILCO's Second Set of Interrogatories, evidently designed to avoid more severe sanctions. Thus, documents plainly responsive to LILCO's Interrogatories of March 24, 1988, were not produced until about July 6, 1988, after a long succession of Board Orders, aborted depositions, teleconferences with the Board, the Board's announcement that it had determined to dismiss the realism contentions, and LILCO's request for dismissal of the State entirely from the Shc. eham licensing proceedings. Why weren't these documents found and produced earlier? Mr. Germano, for example, testified to at least two separate document searches within SEMO headquarters in Albany, which apparently failed to reveal a copy of the SCEOP which had been in SEMO's possession at least since May 6, 1988. Tr. 21768-771 (Germano).

7. The State still failed to produce other documents in its possession which were responsive to LILCO's document request. These included (1) the SEMC guidance document for ingestion pathway responses prepared by Mr. Germano, LILCO Disc. Ex. 5, (see Attachment 4 to this brief); (2) the 1987 DOE Brookhaven National Laboratory Plan, LILCO Disc. Ex. 43; and perhaps standard operating procedures for various state agencies, including the Department of Health, if they exist, as the REPG Affidavit asserted, see Tr. 22,061-062 (Davidoff) (see Attachment 4 to this brief. LILCO does not know whether other responsive documents may not have been produced, since the State still maintains that the guidance document prepared by Mr. Germano is not responsive to LILCO's requests (in spite of what the document says, Dr. Axelrod's recognition of it as a generic procedure applicable to plants identified in LILCO Interrogatory No. 50, Tr. 21689 (Axelrod), and Mr. Papile's recognition that it applied to any county in the State, Tr. 21028 (Papile)).
8. The State's obstructionism continued at the hearings before the Board in Bethesda, Maryland. The State defied a Board order to bring Dr. Axelrod to the hearing, and produced him only under subpoena. The State lodged many objections, or supported objections by the County's counsel, during the course of the hearings. The Board commented on this obstruction at points in the hearing. E.g., Tr. 21091-092, 21615-616, 21631, 21711 (Chairman Gleason).

These procedural maneuvers substantially, and unwarrantably, deflected and delayed the course of the Shoreham licensing proceeding. They did so at a critical juncture in these proceedings, and at an even more critical time for LILCO. All of this warrants dismissal of the State from these proceedings.

E. The State's Policy On Shoreham Includes Preventing Emergency Planning in Compliance With Federal Health And Safety Standards

Dr. Axelrod attempted to maintain the position that the State had made a bona fide "determination", through its expert agency the DPC based on recommendations from the REPG staff, that emergency planning adequate to protect public health and safety is impossible for Shoreham. See, e.g., Tr. 21699, 21710 (Axelrod). This position, which was articulated in response to LILCO's inquiries in discovery concerning the State's resources under its emergency plans, led to unassailable proof that the State's policy has gone well beyond an act of judgment. It has involved affirmative steps to prevent effective emergency planning for Shoreham in compliance with federal requirements for the protection of public health and safety.

The State apparently destroyed or retrieved successive revisions of the LILCO Plan from recipients within the State government, solely so the State could argue that it had no knowledge of the LILCO Plan and thus could not implement it (though selected State witnesses knew enough to challenge its adequacy in these proceedings). See, e.g., Affidavit of Governor Mario M. Cuomo, pages 3-4, attached and made apart of Dr. Axelrod's proposed testimony in this remand proceeding, LILCO Disc. Ex. 34 (admitted Tr. 21635).

The State deliberately disconnected the Radiological Emergency Communication System (RECS) lines between Shoreham and the State. To prove that a LILCO/State communications interface was feasible, LILCO filed interrogatories asking, inter alia, whether the State would reconnect the lines or permit LILCO to do so. LILCO Disc. Ex. 29, Interrogatory No. 11. The State responded to the interrogatory by saying only

that it would not follow or implement the LILCO Plan or coordinate with LILCO in the event of an emergency. Governments' Answers and Additional Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8 and 10 (April 22, 1988); Tr. 21713-715. Dr. Axelrod attempted to explain that this was done because the lines were not needed since there was no plan for Shoreham. Tr. 21711-712 (Axelrod). When confronted, however, he could not deny that he prepared a memorandum in 1985, in response to a letter from LILCO, which (1) acknowledged that the RECS lines had been disconnected "on the advice of counsel" in connection with litigation with LILCO, (2) that the disconnection of the lines placed the State in a "vulnerable situation for emergency notification" as LILCO approached fuel loading and cold criticality testing, and (3) that Dr. Axelrod thus recommended that the RECS lines be reconnected. LILCO Disc. Ex. 41, admitted Tr.21718. The undeniable implications, which were not allayed by any redirect examination, are two-fold: first, that the lines would in fact be reconnected if Shoreham were licensed to operate at full power and, second, that the lines were disconnected on the advice of counsel solely for the purpose of arguing in this proceeding that LILCO could not communicate or coordinate with the State in the event of an emergency at Shoreham.

Finally, Mr. Davidoff acknowledged that the REPG staff was "cautioned to be very careful in our work on the license [sic] sites [i.e., on plans for licensed plants] not to take a position that would be contrary to the Governor's position on Shoreham." Tr. 22066 (Davidoff). This acknowledgment provides clear insight into why the State has so stolidly resisted producing information about emergency plans for nuclear plants other than Shoreham, and even plans for nonradiological emergencies. It reveals, as other facts have, the State's policy since 1983 to ward off an operating license for Shoreham by holding Shoreham to standards not present in federal regulations and not applied to any other nuclear plant in or near the State of New York. The February 10

REPG Affidavit, upon which the Board relied in denying LILCO Summary Disposition, and the disintegration of that affidavit through discovery, is yet another manifestation of that policy.

In sum, not only the State's means of avoiding discovery, but much of its underlying rationaliae, have come to the surface through these proceedings. They reveal an approach to litigation incompatible with responsible participation by a major government on a serious public matter.

5. Intervenors' Course of Conduct on Discovery Has Been Sufficiently Pervasive, Systematic and Serious to Commend Dismissing Their Realism Contentions on the Merits, But also Dismissing Them as Parties to This Proceeding

The Board is empowered by the Commission to enforce the good order and discipline of proceedings by any of a variety of means. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), (hereinafter, "Statement of Policy"). This includes the power to dismiss issues or contentions and, in severe cases, the power to dismiss parties from a proceeding. *Id.* at 454. As is demonstrated in this and preceding pleadings, dismissal of the "realism/best efforts" contentions is overwhelmingly supported in this record. In addition, LILCO believes that the history of concealment, denial, footdragging and diversion which have characterized discovery in this proceeding justify the severe sanction of dismissal of Intervenors Suffolk County and New York State from this proceeding.

As demonstrated in Parts 3 and 4, above, and as the Board has remarked (Tr. 19381), Suffolk County and the State of New York have engaged in a six-year long deliberate, systematic tactic of frustrating and defeating the legitimate discovery efforts of LILCO. This "deliberate tactical intransigence"<sup>36/</sup> flies in the face of the obligation of

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<sup>36/</sup> Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2d Cir. 1973). See, fn. 4 *infra*.

good faith that undergirds any discovery process<sup>37/</sup> and, indeed, in the face of express Commission policy. ("The Commission again endorses the policy of voluntary discovery. . . ." Statement of Policy, *id.* at 456.

The remaining question under the Statement of Policy, therefore, is the severity of the sanctions to be imposed. That determination is made by examining the Intervenor's conduct against six standards:

1. the relative importance of Intervenor's unmet obligations;
2. the potential of their defalcations for harm to the other parties;
3. the potential of their defalcations for harm to the orderly conduct of the licensing proceeding;
4. whether this occurrence is an isolated incident or a part of a pattern of behavior;
5. the importance of the safety or environmental concerns, and
6. the totality of the circumstances.

These will be briefly examined below, with references to their fuller initial treatment in LILCO's June 15 Brief on the Appropriate Remedy for Intervenor's Failure to Comply With Discovery Orders. The facts supporting the arguments here are set forth in the totality of this brief, and will not be repeated here in depth.

A. Unmet Obligations

The history of the Intervenor's discovery responses can charitably be described as recalcitrant, delayed, grudging, incomplete, artful and inaccurate. It has been a total and systematic failure to meet any obligation of discovery, much less one of good faith "voluntary discovery" encouraged by the Commission's Statement of Policy. This

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<sup>37/</sup> Hindmon v. National-Ben Franklin Life Ins. Co., 677 F.2d 617, 620 (7th Cir. 1982) and Asea v. Southern Pacific Transportation Co., 669 F.2d 1242, 1246 (9th Cir. 1981).

factor is central to the determination of appropriate sanctions. Here, where LILCO's ultimate emergency planning burden has involved, in varying forms, establishing the nature of the response of powerful, hostile governments to an emergency, the refusal of those governments to be forthcoming drastically effects the course of the proceeding. Indeed, the effect here is perhaps unique in NRC proceedings, since it is those governments, rather than the Applicant or the NRC Staff, that possess that information. Thus the abuse of discovery on this issue has an unparalleled potential to disrupt or destroy a proceeding. The fact that this proceeding has been in continuous litigation for six years -- three of them since the Licensing Board found no impediment to adequate emergency planning except governmental hostility, see LBP-85-32, 22 NRC 410, 427 (1985) -- vividly demonstrates the effectiveness of that opposition. Where that opposition has been abusive, as LILCO believes it has been, severe sanctions are warranted. See also LILCO's June 15 Brief at 12-13.

**B. Potential For Harm to the Other Parties**

Harm has already occurred. Had Suffolk County and New York State timely and properly disclosed the existence of the myriad of resources and documents demonstrating their ability to respond to natural and man-made disasters, years of expenses of time and money incurred by this Board, LILCO, FEMA and the Staff would have been dramatically pruned. The detailed facts necessary to present the realism argument persuasively would have been available years earlier. This proceeding might well have been long finished, and the subsequent political and financial controversy that has imperiled both the Shoreham plant and LILCO's corporate existence cut short years earlier. See also LILCO's June 15 brief at 13-14.

**C. Potential for Harm to the Board's Process**

Harm has already occurred. The efficacy of any tribunal depends on its ability to order its own processes and the good faith adherence to them by the parties to the

proceedings. The systematic intractability of the Intervenors makes mockery of these fundamental precepts and, if disregarded, will stand as a signal to others that desperate measures can succeed. See also LILCO's June 15 Brief at 14-15.

D. Pattern of behavior

The recitations in Parts 3 and 4 do not bear reiteration. Intervenors' conduct is no isolated occurrence. It is, as already noted, a pattern of unrelenting intransigence. Systematic misconduct requires different, more severe sanctions than do isolated infractions. See also LILCO's June 15 Brief at 15-17.

E. Importance of Safety or Environmental Concerns

It scarcely needs comment that demonstration of emergency preparedness is of utmost importance in this or any Operating License proceeding, and that compilation of an adequate record is central to that task. When discovery has been thwarted, particularly in the unique environment of this case, the entire process is imperiled. See also LILCO's June 15 Brief at 17-19.

F. Totality of the Circumstance

What has been revealed of late is the fundamental strategy of the Intervenors to delay the issuance of the operating license by all available means to the point of defeat, and thus prevent the operation of Shoreham.

In fashioning a sanction, the Statement of Policy indicates that the Board should respond in a measured fashion and tailor a sanction that would mitigate the harm and bring about improved compliance. The aspirations in such a policy for "improved compliance" by these Intervenors, after six years, must be regarded as forlorn. Improved compliance for them would mean nothing less than abandoning their entire strategy.<sup>38/</sup>

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<sup>38/</sup> An illustration of this point is the fact that during the four-day hearing concluded on July 19, 1988, Suffolk County made 225 separate objections over 1108 pages of transcript; the State of New York made 53. And the bulk of these objections were made in the face of repeated admonitions that they were unnecessary, ill-advised and offensive.

The relevant inquiry, then, is what sanction may be tailored to mitigate the harm that has been inflicted in the time, money and resources of this Board and the Commission tribunals, LILCO, FEMA and the Staff, as well as the harm that has been inflicted on the integrity of the Board processes.

Given the systematic egregiousness of the Intervenor's conduct, LILCO submits that dismissal of the Intervenor as parties is the only appropriate sanction. Though reversed on the issue of severity, the Appeal Board in Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400 (1982) left intact the Licensing Board's principle that:

Where a party's derelictions of duty concerning the furnishing of ordered discovery were a pattern of behavior rather than isolated incidents, such conduct resulted in the striking of all its contentions and its dismissal as a party. . . .

Commonwealth Edison Company (Byron Station, Units 1 and 2), LBP-81-52, 14 NRC 901, 902 (1981) (emphasis added).

The rationale for such a severe sanction -- the deterrence of others who "might be tempted to such conduct" -- was approved by the Supreme Court of the United States in National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976)<sup>39/</sup>

There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. . . . But here, as in other areas of the law, the most severe in the spectrum of sanctions must be available . . . in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

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<sup>39/</sup> Discovery under the NRC Rules of Practice is sufficiently similar to that under the Federal Rules of Civil Procedure to permit this Board to look to federal court cases for guidance. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565, 568 n.13 (1977). See, Dignan and Gad, NRC Practice and Procedure, Part II.B.1. (1987). See also Weisberg v. Webster, 749 F.2d 864 (D.C. Cir. 1984); Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2d Cir. 1979); and Dellums v. Powell, 566 F.2d 231 (D.C. Cir. 1977).

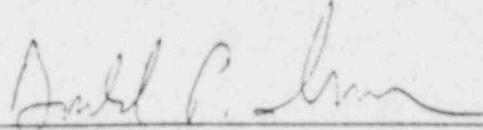
427 U.S. 639, 643.

If there has ever been an instance in this agency's history of institutionalized frustration of its process by entities which are responsible, powerful and determined, the six-year emergency planning conflict over Shoreham has been it. The intertwined refusals of Suffolk County and New York State either to plan for Shoreham or to reveal what plans and resources would or could be made available in fact if others were able to establish the basic feasibility of planning, has turned what is normally a cooperative effort (one in which the State and County cooperated in fact for over a decade) into a conflict which has stalemated an agency process, overthrown a local government, nearly bankrupted a utility company. The impropriety of these governments' refusals to provide this information is plain and inescapable. This disastrous scenario is capable of repetition any time a State and a locality decide, for whatever reasons, to oppose a nuclear power plant. While that opposition is not illegitimate, the less than candid approach of these parties to discovery in this proceeding, where they themselves held all the cards, is illegitimate. It should not be condoned. The only effective deterrence is shown by the ultimate sanction for failure to abide by the rules: dismissal from the proceeding.

CONCLUSION

For the reasons documented above and in the Attachments to this brief, the Board should reaffirm its dismissal of the realism/best efforts contentions. It should also dismiss Suffolk County and New York State as parties to this proceeding for systematic abuse of the Commission's discovery process.

Respectfully submitted,



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DATED: July 26, 1988

ATTACHMENT 1

LIST OF WITNESSESSUFFOLK COUNTY

Suffolk County presented the following witnesses:

<u>Witness</u>	<u>Position</u>	<u>Tr. Location</u>
John B. Bilello	Acting Director, Department of Emergency Preparedness, County of Suffolk	21443
Frank R. Jones	Supervisor, Town of Islip; former Deputy County Executive, County of Suffolk	21835
Richard W. Jones	Radiological Defense Officer, Division of Emergency Preparedness, County of Suffolk	21315
Frank R. Petrone	Acting Commissioner, Department of Fire, Rescue and Emergency Services, County of Suffolk	21503
William E. Regan	Assistant Director of Public Safety, Town of Brookhaven; former Director, Department of Emergency Preparedness, County of Suffolk	21877
Robert J. Sheppard	Radiation Control Officer, Department of Health, County of Suffolk; Liaison Officer, Department of Emergency Preparedness, County of Suffolk	21915

NEW YORK STATE

New York State presented the following witnesses:

<u>Witness</u>	<u>Position</u>	<u>Tr. Location</u>
David Axelrod	New York State Commissioner of Health and Chairman of the Disaster Preparedness Commission	21603
Donald Davidoff	Director, Field Operations Management Group, New York State Department of Health	21981
Donald A. DeVito	Director, State Emergency Management Office (SEMO), State of New York	21096
Anthony J. Germano	Chief of Staff, State Emergency Management Office (SEMO), State of New York	21729
James D. Papile	Director, Radiological Emergency Preparedness Group (REPG), State of New York	20962

LILCO

LILCO presented the following witness:

<u>Witness</u>	<u>Position</u>	<u>Tr. Location</u>
Norman Kelly	Associate Emergency Planner, Long Island Lighting Company	21544

ATTACHMENT 2

DISCOVERY EXHIBITS BY PARTY AND NUMBERLILCO

<u>Discovery Exhibit Number</u>	<u>Description</u>	<u>Identified at Transcript Pg.</u>	<u>Admitted at Transcript Pg.</u>
1	New York State Disaster Preparedness Plan (Revised 9/82)	20987	20990
2	Memorandum from Czech to Regan re Fisher's Island Plan (7/21/87)	20999	
3	Affidavit of James D. Papile, James C. Baranski and Lawrence B. Czech before the Atomic Safety and Licensing Board (2/10/88)	21003	previously admitted
4	Presentation on R.E. Ginna Ingestion Pathway Exercise by Burke, Czech and Watts (10/25/87)	21019	
5	Memorandum from Anthony J. Germano to County Emergency Managers re: Local Government Planning Guidance for Radiological Ingestion Exposure Pathway (8/27/76)	21026	21031
6	New York State Radiological Emergency Preparedness Plan for Commercial Power Plants prepared for the Disaster Preparedness Commission for the State of New York by the Radiological Emergency Preparedness Group (4/87)	21035	21793
7	Bureau of Environmental Radiation Protection (New York State Department of Health) Procedure for Radiological Emergencies (10/11/84)	21057	21063
8	State of New York's Response to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8 and 10 (6/3/88)	21083	21696
9	County of Suffolk Emergency Operations Plan (produced to LILCO 5/25/88)	21139	21144

<u>Discovery Exhibit Number</u>	<u>Description</u>	<u>Identified at Transcript Pg.</u>	<u>Admitted at Transcript Pg.</u>
10	County of Suffolk Emergency Operations Plan (produced to LILCO 7/8/88)	21146	21143, 21147, 21317*/
11	Suffolk County Emergency Directory, redacted (revised 8/87)	21154	21157, 21492
12	Suffolk County Emergency Directory (revised 3/80)	21160	
13	Suffolk County resource information concerning emergency patient air-lifts, contacts, emergency equipment, emergency broadcast procedures, telephone directory and other emergency information (various dates)	21205	
14	New York State Emergency Management Office's Emergency Operations Telephone Directory (2/1/87)	21211	21211
15	Letter from Jerry Horton to William Regan re: Comments by the ODP Programming and Planning Section about the 1/1/81 Suffolk County Disaster Preparedness Plan (5/1/81)	21212	21907
16	New York's Response to LILCO's Third Set of Interrogatories and Requests for Production of Documents Regarding Contentions 1-2, 4-8 and 10 to Suffolk County, New York State and Town of Southhampton (7/5/88)	21221	22050
17	Government's Response to Board Order of 6/24/88 (6/28/88)	21225	
18	Transcript of Deposition of Donald DeVito (4/29/88)	21231	

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\*/ Exhibit 10 was moved for admission into evidence by LILCO on June 11 (Tr. 21143, 21147), but Judge Gleason agreed with Suffolk County to wait for the testimony of Richard Jones on June 12. Tr. 21147. Mr. Richard Jones authenticated Exhibit 10 (Tr. 21317-325), but the document was inadvertently not admitted into evidence at that time.

<u>Discovery Exhibit Number</u>	<u>Description:</u>	<u>Identified at Transcript Pg.</u>	<u>Admitted at Transcript Pg.</u>
19	New York State Disaster Preparedness Commission Guide to Local Government Disaster Planning (undated)	21242	
20	Guide For Preparing A Comprehensive Emergency Management Plan in New York, SEMO (2/86)	21243	
21	The Basic Plan Component of A County Comprehensive Emergency Management Plan including Prototype of Standard Format in New York State, SEMO (2/86)	21243	
22	Annex B, Local Radiological Protection Annex to Exh. 21 (revised 12/86)	21250	
23	FEMA Guide for Development of State and Local Emergency Operations Plans CPG 1-8 (10/85)	21252	
24	FEMA Guide for Review of State and Local Emergency Operations Plans CPG 1-8A (10/85)	21252	
25	Radiological Intelligence Manual - Annex K to the Emergency Operations Plan of New York State (revised 8/76)	21260	21412-415*/
26	Emergency Communications Development Plan for the County of Suffolk, New York (submitted 10/25/78 and reviewed 11/2/78)	21264	
27	Letter from Jessine A. Monaghan to Karla J. Letsche re: Informal Discovery Requests (6/29/83)	21360	22074
28	Letter from Jessine A. Monaghan to John E. Birkenheier re: Informal Discovery Request of 7/21/83 (7/21/83)	21360	22074

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\*/ Richard Jones authenticated Exhibit 25 and testified that it is part of the Suffolk County Emergency Operations Plan (Exhibits 9, 10). Tr. 21512-415.

<u>Discovery Exhibit Number</u>	<u>Description</u>	<u>Identified at Transcript Pg.</u>	<u>Admitted at Transcript Pg.</u>
29	LILCO's Second Set of Interrogatories and Requests for Production of Documents Regarding Contentions 1-2, 4-8, and 10 to Suffolk County, New York State and Town of Southampton (3/24/88)	21396	22074
30	LILCO's Third Set of Interrogatories and Requests for Production of Documents Regarding Contentions 1-2, 4-8 and 10 to Suffolk County, New York State and Town of Southampton (6/7/88)	21396	22074
31	Emergency Broadcast System (EBS) Procedures For the Nassau and Suffolk Counties New York EBS Operational Area (no date)	21424	21424
32	Nuclear Incident Reports on Northeast Utilities Forms Concerning Millstone Units (various dates)	21440	21441
33	State of Connecticut's Radiological Emergency Response Plan, Annex V, 100 series (8/85)	21436	
34	Direct Testimony of David Axelrod on Behalf of the State of New York (4/13/88)	21626	21635
35	New York Executive Law Article 2-B, State and Local Natural and Man-Made Disaster Preparedness (no date)	21636	
36	Transcript of Deposition of David Axelrod (4/22/88)		
37	The Stenographic Record, Proceedings in the Matter of a Meeting of the New York State Disaster Preparedness Commission (3/2/83)	21702	22038
38	Affidavit of David Axelrod, M.D., Chairman of the New York State Disaster Preparedness Commission, in Opposition to LILCO's Motion to Compel Expedited Production of Documents by New York State (2/27/84)	21704	

<u>Discovery Exhibit Number</u>	<u>Description</u>	<u>Identified at Transcript Pg.</u>	<u>Admitted at Transcript Pg.</u>
39	Governments' Answer and Additional Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8 and 10 (4/22/88)	21713	
40	Letter from John D. Leonard (LILCO) to Dr. David Axelrod re: State and County Notification in the Event of an Emergency (12/21/84)	21716	
41	Memorandum from Dr. David Axelrod to Mr. Del Giudice re: LILCO Emergency Notification (1/6/85)	21717	21718
42	Letter from Donald A. DeVito to the Honorable Leslie Fitzwater (Yates County) re: Development of Emergency Plans and other Federal Requirements including Agenda for 6/18/87 Ingestion Pathway Public Awareness Meeting (6/1/87)	21801	
43	Brookhaven National Laboratory Emergency Response Plan (revised 7/87)	21807	
44	Letter from William E. Regan to Frank R. Jones re: Request from Patricia Dempsey for Emergency Planning Documents (7/23/82)	21897	21899
45	Memorandum from Mr. Robert Sheppard to Mahfouz Zaki, M.D. re: 9/5/81 Radiological Emergency Report (9/16/81)	21947	
46	Standard Operating Procedures for Suffolk NAWAS Warning Point (9/78)	21953	
47	Memorandum from Donald Davidoff to REPG Staff re: Assignments for Shoreham Local Plan Review (5/17/82)	22009	
48	Letter from Fabian G. Palomino to Donald Irwin re: List of REPG People Available to be Deposed (2/6/84)	22018	

<u>Discovery Exhibit Number</u>	<u>Description</u>	<u>Identified at Transcript Pg.</u>	<u>Admitted at Transcript Pg.</u>
49	Letter from Fabian G. Palomino to Donald Irwin re: Testimony on Group II Contentions (2/10/84)	22019	
50	Letter from William C. Hennessy to Matthew C. Cordaro, Ph.D. re: Receipt of 5/10/82 Letter and Staff Review of Local Plan (5/17/82)	22025	
51	Memorandum from Larry Czech to Donald Davidoff re: Status of Shoreham Local Plan as of 11/23/82 (11/24/82)	22040	22046
52	Disaster Preparedness Commission Review of Shoreham Offsite Emergency Plan (no date)	22040	22046
53	State of New York Motion to Dismiss on Grounds of Objections in Point of Law and accompanying Affidavit of Donald S. Davidoff (12/10/82)	22041	22046
54	Letter from Richard J. Zahnleuter to Dennis Sisk re: Response to Request for SEMO Internal Listing of Germano documents (7/18/88)	22071	22071

SUFFOLK COUNTY

<u>Discovery Exhibit Number</u>	<u>Description</u>	<u>Identified at Transcript Pg.</u>	<u>Admitted At Transcript Pg.</u>
1	Index of Suffolk County Documents Provided 8/2/82, Emergency Planning Documents List Provided - Phase II, 1/1/81 Suffolk County Disaster Preparedness Plan, 8/80 Flood Disaster Plan - Moriches Inlet Area, Activation Plan of County Emergency Operating Center, Emergency Preparedness Plan for Suffolk County Sheriff's Office, Hurricane Disaster Plan for Fire Island - Fire Service, 10/1/81 Emergency Operations Plan, Police Department of Suffolk County Emergency Plan, Procedures for Natural and Man-made Disasters and Nuclear Attack for Suffolk County, Suffolk County Emergency Directory	21333	21342

FEMA

<u>Discovery Exhibit Number</u>	<u>Description</u>	<u>Identified at Transcript Pg.</u>	<u>Admitted At Transcript Pg.</u>
1	FEMA Directory of Governors and State Officials Responsible For Disaster Operations and Emergency Planning, FEMA9 (5/88)	21726	

ATTACHMENT 3

SPECIFIC INSTANCES OF DISCOVERY ABUSE BY SUFFOLK COUNTY

I. Document Production

A. Nonproduction of Suffolk County  
Emergency Operations Plan

1. June 2, 1982: LILCO serves its First Request to Suffolk County for Production of Emergency Planning Documents. Request No. 19 asks for "all documents pertaining to the County's plan or plans for dealing with emergencies that do not involve nuclear power."
2. July 1, 1982: Suffolk County files its Response to LILCO's First Request to Suffolk County for Production of Emergency Planning Documents. The County objects to LILCO's requests as "irrelevant."
3. July 27, 1982: Prehearing Conference Order (Phase I -- Emergency Planning). The Licensing Board orders Suffolk County to produce all existing emergency documents, including non-nuclear emergency planning materials.
4. August, 1982: Suffolk County produces various emergency planning documents but not the integrated Emergency Operations Plan.
5. June 21, 1983: During "Phase II" discovery LILCO again requests "all documents pertaining to the County's organization for coping with emergencies that do not involve nuclear power."
6. August 22, 1983: Suffolk County objects to LILCO's June 21 discovery requests on relevance grounds.
7. September-October, 1983: Suffolk County provides various emergency planning documents but not the integrated Emergency Operations Plan.
8. March 24, 1988: LILCO files its Second Set of Interrogatories and Requests for Production of Documents Regarding Contentions 1-2, 4-8 and 10 to Suffolk County, New York State, and the Town of Southampton.
9. April 10, 1988: Suffolk County files Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10 and refuses to produce documents pertaining to non-biological emergencies.

10. May 10, 1988: At Prehearing Conference, Board orders Suffolk County to produce all documents responsive to LILCO's March 24 interrogatories.
11. May 24, 1988: Letter from Lawrence Coe Lanpher to K. Dennis Sisk informing LILCO that the County has provided counsel for the County a document entitled "County of Suffolk Emergency Operations Plan."
12. May 25, 1988: Letter from Lanpher to Sisk enclosing Emergency Operations Plan.

B. Late Production of Documents

1. July 8, 1988: Letter from Lanpher to Sisk enclosing copies of the following documents:
  - a. Updated version of the Suffolk County Emergency Operations Plan.
  - b. Suffolk County Resource Manual.
  - c. Corrected copy of Emergency Preparedness Operational Plan for Plum Island (1980).
2. July 6, 1988: Letter from Lanpher to Sisk enclosing copies of the following documents:
  - a. Annex B (Local Radiological Protection Annex).
  - b. Police Department Annex to Suffolk County Department of Emergency Preparedness Plan for a radiological disaster at specified sites (1975).
  - c. New York State Department of Health Standard Operating Procedures for Indian Point Site (1975).
  - d. New York State Department of Health Standard Operating Procedures for Nine Mile Point Site (undated).
  - e. New York State Department of Health Standard Operating Procedures for Ginna Site (1974).
  - f. Wayne County Radiological Emergency Response Plan (1977).

- g. Radiation Emergency Plan, Oyster Creek (Jersey Central Power & Light) (undated).
  - h. Oswego County Radiological Emergency Response Plan (1978).
  - i. Westchester County Radiological Emergency Response Plan (1977).
  - j. Emergency Preparedness Operational Plan for Plum Island (1980).
  - k. Northeast Utilities Nuclear Incident Reports for Millstone site (completed by personnel from Suffolk County Division of Emergency Preparedness) (1982-88).
  - l. Emergency Procedures for Nine Mile Point/J.A. Fitzpatrick sites (1972).
  - m. Table 401.2-C-1 (notification with respect to Waterford Emergency Communications Center) (1977).
  - n. Nassau County Emergency Plan, Annex E, Medical Service (1974).
  - o. Nassau County Disaster Control Procedure (1975).
  - p. Nassau County Emergency Plan (1963).
  - q. Monroe County Emergency Response Plan (1985).
  - r. Suffolk County Police Department Procedures for "Assemblages and Emergencies" (undated).
  - s. Proposed Changes to New York State Department of Health Standard Operating Procedures for Shoreham (1975).
3. June 1, 1988: Letter from Lanpher to Sisk enclosing the following documents:
- a. Annex K (Radiological Intelligence Annex) (1976).
  - b. New York State Department of Health Standard Operating Procedures for Brookhaven National Laboratory (1973).

C. Bad Faith Relevance Objections to Discovery Requests

1. Phase I Document Discovery

County Claims Irrelevance

Suffolk County's Response to LILCO's First Request to Suffolk County for Production of Emergency Planning Documents (July 1, 1982)

Board Compels Production

Prehearing Conference Order (Phase I -- Emergency Planning) (July 27, 1982)

2. Phase II Document Discovery

County Claims Irrelevance

Suffolk County's Response to LILCO's Informal Discovery Requests for July 21, 1983 (August 22, 1983).

Outcome

County produces documents after LILCO notifies Board on September 23, 1983 that it intends to move to compel.

Suffolk County's Responses to LILCO Requests of August 8, 1983 (August 31, 1983).

3. "Realism" Document Discovery

County Claims Irrelevance

Government's Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10 (April 20, 1988)

Board Compels Production

In Memorandum (April 8, 1988), the Board states that one of the "genuine issues" to be heard is the "relevance of emergency plans in other areas of other New York State nuclear facilities." Memorandum at 54.)

Prehearing Conference (May 10, 1988) (Tr. 19382).

4. Hearings on "Integrity of the Proceeding" Issue

In four days of hearings and 1108 pages of transcripts, there were 278 objections by Suffolk County and/or the State of New York. The vast majority of these objections were on the basis of relevance/outside the scope of the proceeding.

## II. Witnesses/Deponents

### A. Refusal to Produce Deponents on Realism Issue

1. April 5, 1988: LILCO notices five County employees for deposition.
  - a. Richard C. Roberts for 4/11/88.
  - b. Daniel P. Guido for 4/11/88.
  - c. Frank P. Petrone for 4/14/88.
  - d. David E. Harris for 4/15/88.
  - e. William E. Regan for 4/15/88.
2. April 6, 1988: County informs the Board that the five noticed deponents cannot be made available prior to week of 4/18/88. See Governments' Motion for Extension of Time to Respond to Realism Discovery Requests, and to Extend Discovery Schedule at 10.
3. April 7, 1988: LILCO moves the Board to compel depositions noticed on April 5. LILCO's Response to "Governments' Motion for Extension of Time to Respond to Realism Discovery Requests, and to Extend Discovery Schedule" and Request for Additional Relief at 12.
4. April 12, 1988: Board orders that "all persons previously or subsequently noticed by any party will be made available for deposition purposes in time for such discovery to be completed by April 22." Confirmatory Memorandum and Order at 2.
5. April 15, 1988: Letter from Lanpher to Board announces that the filing by Intervenor of their April 13 Objection and Offer of Proof "obviates" the need for LILCO to depose anyone other than Halpin and Axelrod. County formally requests that depositions of County deponents other than Halpin be cancelled.
6. April 18, 1988: Confirmatory Memorandum and Order states that the "[d]epositions of additional State and County witnesses, previously noticed by LILCO, are to be taken during the period of April 25-29. . . ."
7. April 21, 1988: Letter from Michael S. Miller to James N. Christman sets deposition schedule for Roberts, Guido, and Petrone but does not include Harris and Regan.

8. April 25 and 26, 1988: Depositions of County witnesses Guido, Petrone and Roberts occur as scheduled.
9. May 2, 1988: LILCO's Supplement to Governments' April 13 Objection and Motion in the Alternative to Compel Discovery requests reopening of the Halpin, Roberts, and Petrone depositions, as well as the ordering of Regan and Harris depositions.
10. May 10, 1988: Prehearing Conference. Board orders the reopening of Halpin deposition.
11. May 24, 1988: Board Ruling grants LILCO's request to reopen Roberts and Petrone depositions; orders depositions of Regan and Harris.
12. May 27, 1988: Letter from Lanpher to Sisk, making Halpin available for reopened deposition on June 13, 1988.
13. June 9, 1988: Governments' Notice that the Board has Precluded Continuation of the CLI-86-13 Remand is filed.
14. June 10, 1988: Teleconference. Intervenors indicate they will not go forward with the depositions ordered by the Board on April 12, April 18, and May 24. Board dismisses realism contentions. Depositions are never reopened or held.

B. Refusal to Produce Deponents on Issues Related to Document Production

1. June 1, 1988: LILCO notices the depositions of two additional County witnesses, in light of emergence of Emergency Operations Plan.
  - a. The "current Chief of Communications and Warning" (who turns out to be a G. Berkeley Bennett) for 6/7/88.
  - b. John Randolph for 6/7/88.
2. June 3, 1988: Letter from Lanpher to Sisk, presenting the County's preferred witnesses for deposition concerning the Emergency Operations Plan.
  - a. Frank Petrone for 6/13/88.

- b. David Harris for 6/14/88.
- c. Richard Jones for 6/15/88.
- d. John Bilello for 6/16/88.
- e. John Randolph (not scheduled).

Lanpher offers Jones and Bilello in place of Regan, who has retired. The deposition of Bennett is characterized as "redundant." Roberts, who has retired, is not offered.

- 3. June 6, 1988: Letter from Sisk to Lanpher and Richard J. Zahnleuter proposes tentative schedule for thirteen depositions of Intervenor witnesses.
- 4. June 7, 1988: LILCO notices depositions of two more County employees likely to have knowledge of the Emergency Operations Plan.
  - a. Robert Sheppard for 6/10/88.
  - b. Lee Koppleman for 6/10/88.
- 5. June 8, 1988: LILCO reissues notices of deposition for:
  - a. Regan for 6/14/88.
  - b. Roberts for 6/15/88.
- 6. June 9, 1988: Letter from Sisk to Board announces a discovery "impasse" and requests an immediate teleconference to resolve the dispute. Concurrently, Intervenor's file Governments' Notice that the Board has Precluded Continuation of the CLI-86-13 Remand.
- 7. June 10, 1988: Teleconference. Intervenor's refuse to go forward with depositions. Board therefore dismisses the realism contentions; Board retains jurisdiction over the issue of the non-production of the Emergency Operations Plan and other discovery abuses.
- 8. June 10, 1988: Letter from Lanpher to Sisk suggests that "any talk of depositions seems premature."
- 9. June 15, 1988: LILCO's Brief on the Appropriate Remedy for the Intervenor's Failure to Comply with Board Orders asks that the Board order depositions according to an attached schedule.

10. June 17, 1988: Teleconference. Board grants LILCO's June 15 deposition schedule.
11. June 18, 1988: Letter from Donald P. Irwin to Lanpher confirming the County's refusal to produce County witnesses for depositions. See Letter from Irwin to Board dated June 20, 1988 informing the Board of this refusal.
12. June 20, 1988: Intervenors file Governments' Motion for Licensing Board to Vacate June 17 Order and refuse to go forward with depositions pending Board action.
13. June 24, 1988: Teleconferences. Board requests briefs on County suggestion of a hearing on the "integrity of the proceeding" issue.
14. June 29, 1988: Teleconference. Board orders hearing on the "integrity of the proceeding" issue. Depositions are never held.

C. Refusing to Honor Subpoenas of Roberts and Regan

1. June 8, 1988: LILCO reissues notices of deposition for:
  - a. Richard Roberts for 6/14/88.
  - b. William Regan for 6/15/88.
2. June 15, 1988: LILCO files Application for Issuance of Subpoenas for Roberts and Regan.
3. June 16, 1988: Board grants LILCO's request for subpoenas and orders Roberts to appear on 6/22/88 and Regan to appear on 6/23/88.
4. June 21, 1988: Letter from Sisk to Lanpher confirms that LILCO has cancelled travel plans to Long Island due to Lanpher's representation over the telephone that day that Roberts and Regan will not appear.  
  
Suffolk County files Motion to Quash Subpoenas.
5. June 22, 1988: Letter from Irwin to Board informs the Board of County's actions in refusing to honor the subpoenas.

LILCO files Response to Motion to Quash Subpoenas.

6. June 29, 1988: Teleconference. Board orders hearing on the "integrity of the proceeding" issue. This has the effect of mootng the subpoenas for Roberts and Regan.
7. July 19, 1988: Regan testifies as a witness in the "integrity of the proceeding" hearing.

ATTACHMENT 4

SPECIFIC INSTANCES OF DISCOVERY ABUSE BY NEW YORK STATEI. Document ProductionA. Suffolk County Emergency Operations Plan: the State's Knowledge

Did the State have knowledge of the plan prior to May 1988? Was it responsive to LILCO's questions at depositions and interrogatories?

1. At his deposition, Donald DeVito said he did not know of a Suffolk County disaster plan and probably no one else in SEMO would know if there is one. DeVito Dep. Tr. at 7, 25 (LILCO Discovery Exh. 18); Tr. 21231-233 (DeVito). He was unable to explain the review of the Suffolk County disaster plan by Mr. Horton of SEMO in 1981, for compliance with Article 2B of the New York Executive Law. Tr. 21212-216 (DeVito). Mr. DeVito testified that SEMO got the SCEOP on May 6, 1988, Tr. 21103 (DeVito), as a result of a visit by Mr. Horton of SEMO to Suffolk County. Tr. 21129 - 130 (DeVito). See also Tr. 21148-152, 21196-197 (DeVito). The Governments' Response to the June 24 Board Order, dated June 28, 1988 (LILCO Discovery Exh. 17) states that "Mr. DeVito will testify that SEMO personnel have known for many years that Suffolk County, like other counties in New York, had a plan for dealing generally with emergencies." Mr. DeVito testified he was uncertain whether that statement was correct. Tr. 21226-227. He stated that to his knowledge no one at SEMO had a copy of any Suffolk County plan for dealing with emergencies prior to May 6, 1988. Tr. 21228 (DeVito). However, he acknowledged that he had known since at least 1987 that the County's emergency planning must be reviewed by SEMO in 1988 for compliance with federal standards, and a plan meeting those standards must be produced for the County to continue to receive funds. Tr. 21234-235 (DeVito).
2. Dr. David Axelrod testified that "[n]ot all counties have plans for emergencies," so he could not be sure whether the statement in the Governments' June 28, 1988 response regarding SEMO knowledge of a SC plan was correct. Tr. 21662 (Axelrod). He testified that his "expectation . . . when we were required to

respond to the Gloria situation was that a plan of some kind existed in a county of the size of Suffolk," although he had no personal knowledge of the nature or completeness of a plan. Tr. 21660, 21663 (Axelrod).

3. Anthony Germano testified that he had assumed that counties, including SC, had emergency plans but he had no specific knowledge. Tr. 21760-761 (Germano). Counties must commit to develop a plan in order to receive state/federal funds. Tr. 21,761 (Germano).
4. Donald Davidoff did not participate in the recent production of documents concerning LILCO's second set of interrogatories. Tr. 21983 (Davidoff). He was aware that SC for many years had a "generic type, all hazards type emergency preparedness plan." Id. He further testified that members of the REPG staff, as well as LILCO were aware of this plan. Tr. 21983-986, 22011-012 (Davidoff). Mr. Davidoff also said emphatically and repeatedly that such a general emergency plan is a good source of information for a county radiological plan. Tr. 22004, 22006, 22023, 22053-056 (Davidoff).

Prior to 1984 he was involved with production to LILCO of the NYS DPP, a prior version of the NYS REPP, and seven county radiological plans. Tr. 21992-993 (Davidoff).

5. Papile testified he knew nothing of the SCEOP until these hearings, Tr. 21040-041, 21045, although he assumed that all counties have an Emergency Operations Plan. Tr. 21045.

B. Planning Documents Not Produced to LILCO

1. Local Government Planning Guidance for Radiological Ingestion Exposure Pathway, SEMO (8/87) and Cover Memorandum from Anthony Germano to "County Emergency Managers" (collectively the "Germano document"; LILCO Discovery Exh. 5)
  - a. LILCO's Second Set of Interrogatories (LILCO Discovery Exh. 29) requested all plans and procedures, whether generic or specific, relating to ingestion pathway response. See LILCO

Discovery Exh. 29, Interrogatory No. 50. The Germano document, on its face is such a procedure. Tr. 21689 (Axelrod); LILCO Discovery Exh. 5, p. 2 (admitted to record, Tr. 21031). But see Tr. 21730-731 (Germano, denying what the document says on its face). The Germano document also is responsive to: Interrogatory No. 76 which asks for identification of all documents used by counties to prepare for and participate in the Girna Exercise and Interrogatory No. 123 which asks for the production of all identified documents; Interrogatory No. 68 asking for identification and production of all procedures used by counties in 10-mile EPZ for ingestion pathway; and Interrogatory No. 69 asking for identification and production of all procedures used by counties in 50-mile but not 10-mile EPZ for ingestion pathway.

As LILCO explained in its June 23, 1988 Response to Intervenor's Motion to Vacate, the Germano cover memorandum states the "planning guidance" was "developed to provide generic guidance for counties that are within the ingestion exposure pathway of operating nuclear power plants in the State and those bordering the State. It includes responsibilities of local, state and federal governments and the utility." (Emphasis added). LILCO Discovery Exh. 5 at 1.

- b. In its June 3 Response to this interrogatory, the State of New York stated in relevant part "whatever plans and procedures exist are contained within the New York State Radiological Emergency Preparedness Plan." LILCO Discovery Exh. 8 at 3.
- c. Letter from Zahnleuter to Sisk dated July 5, 1988 states at page 2:

"LILCO mischaracterizes the scope of its document requests and makes incorrect presumptions about the nature of the SEMO document. The SEMO document is not responsive to LILCO's Second Set of Interrogatories and Document Requests. In any event, LILCO admits

that it has had possession of the document 'from another source' and therefore, production of it would serve no purpose."

- d. Papile testified (Tr. 21026-029, 21078-079) that he had received a copy from Mr. Germano, Tr. 21027, and that someone in his office may have been involved in its preparation, Tr. 21079. He identified it as "a planning guidance" for County Managers in the 13 counties involved in the 1987 Ginna exercise. See Tr. 21027. Papile said he was unsure whether Mr. Germano intended the document to be used by other counties, but "will say that it could be used by any county in my estimation." Tr. 21028.
- e. Axelrod testified that he had never seen the document before the hearings, but confirmed when confronted with its provisions that it was a generic procedure applicable to the plants listed in Attachment 1 of the document, which includes all operating plants in New York, as well as the plants listed in LILCO Interrogatory No. 50. Tr. 21682, 21690-691 (Axelrod). Axelrod testified that the document applied to Yankee-Rowe, Millstone, and Oyster Creek. Tr. 21690 (Axelrod).
- f. Germano testified that the document is "[a]bsolutely not" a state plan or procedure, but "was intended as a guidance document." Tr. 21730-731 (Germano). He further stated that it is "absolutely not" a county plan or procedure." Tr. 21731 (Germano). It was "never intended for distribution state-wide." Id. He agreed that the document "provides generic guidance information." Tr. 21732 (Germano). Contrary to Axelrod, contrary to the text of the document, and contrary to Attachment 1 of the document, Germano testified that it was never intended to apply to Yankee-Rowe, Millstone, Haddam Neck, Vermont Yankee, or Oyster Creek. Tr. 21733 (Germano).

Germano testified that this document was not relevant to Suffolk County. Tr. 21814 (Germano). He could not deny, however, that

the document on its face was a "procedure" applicable to all the plants depicted on Attachment 1 of the document, Tr. 21776-777, and confirmed that Attachment 1 was copied from Procedure K of the NYS REPP, Tr. 21777, which is the generic State ingestion pathway procedure for all plants in or within 50 miles of New York State. Attachment 1 of the document shows that parts of Suffolk County are within the 50-mile EPZs of at least the Millstone and Indian Point plants.

2. Brookhaven National Laboratory Emergency Response Plan, Department of Energy, rev. 7/87 (LILCO Discovery Exh. 43)

- a. Interrogatory No. 120 of LILCO's Second Set of Interrogatories (3/24/88) (LILCO Discovery Exh. 29) at 39 states:

"Please provide a copy of any and all existing plans and procedures for responding to emergencies, whether radiological or nonradiological, affecting Suffolk County, including, but not limited to, chemical spills, fires, hurricanes, explosions, and earthquakes. Please include any and all plans for dealing with accidents involving shipments of radiological materials to Brookhaven National Lab, the Shoreham Nuclear Power Station, hospitals and other medical facilities, and industrial facilities."

- b. In its June 3 Response to this Interrogatory the State of New York responded "Copies of plans that may be responsive have already been provided to LILCO by the State of New York." LILCO Discovery Exh. 8 at 16.
- c. As LILCO noted in its June 15, 1988 Brief on the Appropriate Remedy For The Intervenors' Failure to Comply With Board Orders, New York State has not produced this plan to LILCO, and officials at the U.S. DOE have confirmed that a copy was sent in July 1987 to New York State to the attention of K. Rimawi. LILCO Brief at 14.

- d. Mr. Davidoff, Commissioner of the Department of Health to whom Mr. Rimawi reports, Tr. 22061, testified that he did not know whether Mr. Rimawi had a copy of the BNL Plan, and that he had not asked Mr. Rimawi whether he had a copy. Tr. 22061 (Davidoff).
- e. Letter from Zahnleuter to Sisk dated July 5, 1988 states at pages 2-3:

"Questions of responsiveness aside, Suffolk County produced this document to LILCO under cover of a June 1 letter from Mr. Lanpher so there was no need for the State of New York to produce it again. But with regard to responsiveness, LILCO mischaracterizes the scope of its document request (#120), which asked for 'any and all plans for dealing with accidents involving shipment of radiological materials to Brookhaven National Lab.' The plan that was sent to the State of New York does not deal with 'accidents involving shipments of radiological materials' to Brookhaven National Lab. In any event, it appears that LILCO already has possession of the document from the primary source (Brookhaven National Lab itself) and, therefore, production of it would serve no purpose."
- f. The "Brookhaven Plan" produced to LILCO by Suffolk County on June 1 is the New York State Department of Health procedures for Brookhaven Laboratory Site dated 10/73 — a very different "plan." The 1987 BNL Plan was not produced to LILCO by the State or the County, nor was it recognized by any of their witnesses. Suffice it to say that the BNL Plan contains details for emergency response roles by the State and Suffolk County with respect to the BNL Site, and was clearly responsive to LILCO's interrogatories.
- g. Germano stated that he had never seen the DOE BNL Plan before. Tr. 21808 (Germano).
- h. The State refused to make Dr. Rimawi available for deposition in response to LILCO's notices.

C. Inconsistencies Between REPG Affidavit and Interrogatory Responses

In December 1987, LILCO moved for summary disposition on the realism contentions on the basis that procedures in the LILCO Emergency Plan could be interfaced with the NYS REPP for adequate response to a Shoreham emergency, particularly with respect to ingestion pathway and recovery/reentry.

In opposition to LILCO's motion, the Governments filed several affidavits including the REPG Affidavit (LILCO Discovery Exh. 3). The REPG affidavit stated that there were detailed site-specific procedures in addition to the NYS REPP; therefore, Shoreham-specific procedures were required for an adequate response.

LILCO's Second Set of Interrogatories sought identification and production of such plans and procedures, but none were produced.

1. Item 1: Site-specific implementation procedures—State or County responsibility

a. REPG Affidavit (LILCO Discovery Exh. 3 at 10 ¶ 14)

"Returning to the example of ingestion pathway implementation, the New York State Plan leaves to various State agencies the responsibility of developing implementation procedures. Two major examples of a site-specific implementation procedures are (1) development of an adequate local communication network for use by the ingestion sampling teams, and (2) the establishment of an adequate operations base for the ingestion sampling teams."

b. LILCO Interrogatory No. 97 (LILCO Discovery Exh. 29 at 33)

"Page 10 of the REPG Affidavit cites two "examples" of site-specific implementing procedures that concern an "adequate local communication network for use by the ingestion sampling teams," and "an adequate operations base for the ingestion sampling teams." For

each county in New York State that is located in an ingestion pathway EPZ of a nuclear power plant, identify (1) the "site-specific implementation procedures" for these two "examples," (b) who is responsible for implementing these procedures, and (c) any training or drills that have taken place concerning these procedures. Provide copies of all documents relating to these procedures and the training involving these procedures."

c. June 3 Response, No. 97 (LILCO Discovery Exh. 8 at 13)

"(a) The "site-specific implementing procedures" are the responsibility of the counties. Counties work with state agencies, but the "site-specific implementing procedures" are actually developed by the counties. See General Objections 1, 2 and 3.

(b) Counties are responsible for implementing these procedures.

(c) Training has occurred in the Ginna area. The State used the New York State Plan and the counties utilized, upon information and belief, their "site-specific implementing procedures."

d. No county procedures were produced.

e. Germano document (LILCO Discovery Exh. 5 at 2)

"The material and operational data contained within this document reflect the current policies and criteria associated with the radiological ingestion exposure pathway from the operating nuclear power plants located within, as well as bordering the State. Attachment 1 depicts operating nuclear power plants for which this procedure has been developed."

f. Axelrod testimony: DOH utilizes specific sampling protocols. Tr. 21671 (Axelrod); implementation procedures would be left to state

agencies. Tr. 21672; specific implementing procedures would be "within the site specific plan . . . that are the appendices to the Radiological Emergency Plan." Tr. 21681; "Those are the only ones of which I am aware." Tr. 21682.

2. Item 2: Existence of detailed procedures beyond the State Plan and County Appendices

a. REPG Affidavit (LILCO Discovery Exh. 3 at 10 ¶ 14)

"LILCO fails to understand the nature of the New York State Plan, and therefore makes misleading statements such as the New York State Plan is composed of the generic plan and the County appendices. This ignores the reality that the State Plan depends on the development of detailed procedures — going beyond the generic Plan and county-specific addenda — which implement the tasks identified in the Plan. Returning to the example of ingestion pathway implementation, the New York State Plan leaves to various State agencies the responsibility of developing implementation procedures."

b. LILCO Interrogatory No. 98 (LILCO Discovery Exh. 29 at 34)

"The REPG Affidavit at 10 says there are "detailed procedures" which go "beyond the generic Plan and county-specific addenda . . . which implement the tasks identified in the Plan." Identify, on a county-by-county basis for each county in New York State that is located in an ingestion pathway EPZ of a nuclear power plant, these detailed procedures, and state which tasks in the State Plan they are used to implement. Provide copies of all such documents."

c. State June 3 Response, No. 98 (LILCO Discovery Exh. 8 at 13)

"The REPG Affidavit at 10 does not state that "there are 'detailed procedures' which go

beyond the generic Plan and county-specific agenda' [sic]." Rather, it states that the State Plan "depends on the development of detailed procedures — going beyond the generic Plan and county-specific addenda." These "detailed procedures" are developed by counties and retained by them. See General Objections 1, 2 and 3."

- d. No county procedures were produced.
- e. Germano document (LILCO Discovery Exh. 5 at 1)

"The procedures outlined in this document should be utilized in the event of a commercial nuclear power plant incident with a potential for a radiological release which could impact on the ingestion exposure pathway. The information contained within this document reflects the generic responsibilities of County Government as it relates to radiological response and recovery activities of the State and Federal Government, as well as the commercial nuclear power industry. This document can become an appendix to the County all hazard Comprehensive Emergency Operations Plan."

- f. Axelrod testimony: There are "a variety of procedures . . . identified within a radiological emergency preparedness plan in the development of subsequent documents to elaborate upon the plan itself." Tr. 21683-684 (Axelrod). This information "obviously takes the form of this material [Germano document, LILCO Discovery Exh. 5]." Tr. 21684 (Axelrod).

3. Item 3: Site-Specific plans and agency procedures

- a. REPG Affidavit (LILCO Discovery Exh. 3 at 4-5 ¶ 6)

"As a result, the State could not adequately respond to a Shoreham emergency without a detailed Shoreham-specific off-site plan appended to the State generic plan, without the training of State and local personnel

concerning those specifics, without the development of internal agency procedures, and without the evaluation of State and local personnel during exercises and drills."

- b. Alexrod Dep. Tr. (LILCO Discovery Exh. 36 at 91-92)

"A State plan for Millstone does not exist. A site-specific plan that involves portions of New York State have been submitted by the State of Connecticut to the State of New York identifying the needs for satisfying the site-specific requirements associated with Millstone."

- c. LILCO Interrogatory, No. 50 (LILCO Discovery Exh. 29 at 22)

"Identify all plans and procedures that New York State has and would use, follow, or otherwise rely upon to make ingestion pathway and recovery and reentry response to a radiological emergency at (a) the Yankee Rowe nuclear power plant (Massachusetts), (b) the Millstone nuclear power plant (Connecticut), (c) the Haddam Neck nuclear power plant (Connecticut), (d) the Vermont Yankee nuclear power plant (Vermont), and (e) the Oyster Creek nuclear power plant (New Jersey). Indicate which of the plans and procedures are site-specific rather than generic. Provide copies of all documents."

- d. State June 3 Response, No. 50 (LILCO Discovery Exh. 8 at 3)

"For subparts (a) through (e), whatever plans and procedures exist are contained within the New York State Radiological Emergency Preparedness Plan for Commercial Power Plants ("New York State Plan") which speaks for itself and needs no summarization."

- e. Germano document (LILCO Discovery Exh. 5 at 2, 19)

"The material and operational data contained within this document reflect the current policies and criteria associated with the radiological ingestion exposure pathway from the operating nuclear power plants located within, as well as bordering the State. Attachment 1 depicts operating nuclear power plants for which this procedure has been developed."

Attachment 1 includes each of the plants identified in LILCO Interrogatory No. 50.

"To provide effective public information releases to the general public, the New York State Emergency Broadcast System (EBS) can be employed as necessary. The primary means for accessing EBS for dissemination of protective action recommendations will be with the assistance of County officials, pursuant to existing procedures."

- f. Axelrod testimony: Site specific plans are all in the State Radiological Plan. Tr. 21685 (Axelrod). "I am not aware of any other information that would provide for site specific response to the plants that are identified in the interrogatory of March 24." Tr. 21688 (Axelrod).

4. Item 4: Detailed State and Local Government Drills Planning, Etc.
  - a. REPG Affidavit (LILCO Discovery Exh. 3 at 5-6 ¶ 8)

"It is implicit in LILCO's Motion — primarily via LILCO's silence — that LILCO assumes effective ingestion pathway and/or recovery and reentry activities could be implemented by State or local government personnel despite the fact that those personnel have not participated in Shoreham-specific drills and exercises. From experience at other sites in New York State, we have learned that the only way that State and local government personnel have been able to develop adequate site-specific response capabilities is through detailed planning, interfacing and personnel,

drilling, and exercising. Through detailed State and local government drills and exercises, government personnel have learned to work together and to prepare for unexpected events. Absent such site-specific training, the likelihood of an effective response is low."

- b. Interrogatory No.72 (LILCO Discovery Exh. 29 at 27-28)

"For each county listed in Interrogatory No. 68 and identified in your response to No. 69, identify, for each of the following sub-parts, each county that has participated in (a) an ingestion pathway exercise, (b) any drills of ingestion pathway plans and procedures, (c) any training of ingestion pathway plans or procedures, (d) an exercise dealing with recovery and reentry activities, (e) in any drills of recovery and reentry plans and procedures, and (f) in any training of recovery and reentry plans and procedures. For each subpart, identify the dates that that activity occurred, what plans and procedures were used, and who participated."

- c. State June 3 Response, No. 72 (LILCO Discovery Exh. 8 at 7)

"Wayne and Monroe Counties have participated in the activities set forth in subparts (a) through (f) in connection with an exercise on October 28 and 29, 1987. The New York State Plan, including the Wayne and Monroe County Plans, were used and the appropriate state and county officials identified in those plans participated. See also the chronology of events leading up to this exercise, which has already been produced to LILCO. See answer to Interrogatory No. 76."

[ Answer to Interrogatory No. 76 talks about counties' preparation for Ginna Exercise. ]

5. Item 5: Need for discussions between County and State to work out details of a response

- a. LILCO Interrogatory No. 103 (LILCO Discovery Exh. 29 at 35)

"At page 11 of the REPG Affidavit it states that the State Plan does not define responsibilities "since the precise details of how a county can respond are only worked out in discussions" about how the counties can assist the State in an ingestion pathway response. For each county in New York State in an ingestion pathway EPZ of a nuclear power plant, state when the State has had these "discussions," who attended these "discussions," and for each county, the "precise details" of the "assistance" that each county will provide the State in an ingestion pathway response. Identify when these "discussions" have been "refined" during "drills, table top exercises, and similar training sessions. . . ."

- b. June 3 Response No. 103 (LILCO Discovery Exh. 8 at 14-15)

"For a statement of when the State of New York had such discussions, who attended them and what was discussed, see the chronology of events regarding the Ginna Exercise. This document has already been produced to LILCO. For counties not involved in the Ginna exercise, no such discussions have occurred."

- c. LILCO Interrogatory No. 69 (LILCO Discovery Exh. 29 at 27)

"Identify, on a plant-by-plant basis, each county in the ingestion pathway EPZs, but not in the plume exposure EPZs, of each operating nuclear power plant in New York. For each county, identify all county plans and procedures that would be used, followed, or otherwise relied upon by that county for an ingestion pathway and a recovery and reentry response to a radiological emergency. If the county does not have plans and procedures, state how they would respond."

- d. June 3 Response No. 69 (LILCO Discovery Exh. 8 at 7)

[Counties are listed for Nine Mile, Ginna, Indian Point]

then . . .

"As explained in General Objections 1, 2, and 3, the State of New York is unable to speculate about what county plans and procedures would actually be "used, followed or otherwise relied upon by that county" or if a county does not have plans and procedures, "how they would respond.""

6. Testimony of state witnesses regarding the existence of plans and procedures other than the State Plan
- a. Papile testified about incident reports (or "courtesy notification") as related to emergency notifications or exercises or actual events at nuclear plants, Tr. 21050-053 (Papile), especially for Millstone. Tr. 21052-053 (Papile). He said that there is a notification listing of where people go during an actual emergency. Tr. 21074-075 (Papile).
- b. Devito was unsure whether any standard operating procedures exist. Tr. 21123-125 (DeVito).
- c. Axelrod testified that there were a variety of procedures or guidance information prepared by SEMO in collaboration with REPG. Tr. 21683-684 (Axelrod). See generally Tr. 21666-696 (Axelrod).
- d. Germano testified that there are agency-specific procedures developed and promulgated by state agencies. Tr. 21780 (Germano). He was "aware" that the Dept. of Health (DOH) has such procedures, but did not know their content. Tr. 21780-781 (Germano). LILCO Discovery Ex. 7 is one such procedure. Tr. 21818 (Germano). He did not have specific knowledge of other agency procedures. Tr. 21818 (Germano).

- e. Davidoff testified that the DOH has standard operating procedures, Tr. 22061-062 (Davidoff), and that they refer to all types of emergencies and are state-wide (including SC). Tr. 22062 (Davidoff).

D. Late Production of Documents

1. July 21, 1988: Letter from Richard Zahnleuter to K. Dennis Sisk enclosing copies of 19 title pages of component procedures for laboratory analysis of ingestion pathway samples (various dates from 4/73 to 4/88).
2. July 6, 1988: Letter from Richard Zahnleuter to K. Dennis Sisk enclosing copies of the following documents:
  - a. State Atlas of Community Water System Sources (1982);
  - b. New York State Department of Health Bureau of Environmental Radiation Protection, Sample Collection Procedures (undated);
  - c. New York State Emergency Sampling Kit (undated);
  - d. State Department of Health Specific Operating Procedures for Indian Point Station (rev. 7/75);
  - e. State Department of Health Specific Operating Procedures for Nine Mile Point Site (undated);
  - f. State Department of Health Specific Operating Procedures for Ginna Site (10/74);
  - g. Wayne County Response Plan Specific Operating Procedures, Emergency Radiation Incidents Ginna Site (11/77);
  - h. Oswego County Response Plan, Nine Mile Point Facilities, Specific Operating Procedures (5/78);
  - i. Westchester County Radiation Response Plan, Indian Point Facilities, Specific Operating Procedures (undated);

- j. Nine Mile Point Site Emergency Plan and Procedures (approx. 8/72);
  - k. Monroe County Emergency Response Plan (7/85); and
  - l. Proposed changes to State Department of Health Specific Operating Procedures - Shoreham Site (4/75).
3. July 5, 1988: Letter from Richard J. Zahnleuter to K. Dennis Sisk enclosing copies of the following documents:
- a. New York State Department of Health Procedure: RAD 320 (10/11/84);
  - b. Emergency Communications Development Plan State of New York, County of Suffolk (10/78);
  - c. Suffolk County Department of Emergency Preparedness, Emergency Directory (3/80);
  - d. Title III Planning Guide and Model Plan, New York State (4/88);
  - e. Brookhaven Spent Fuel Shipments Notification and Escort Procedure Checklist (2/6/85);
  - f. The Basic Plan Component of a County Comprehensive Emergency Management Plan (2/86);
  - g. Annex B, Local Radiological Protection Annex (12/86);
  - h. New York State Hazardous Materials Emergency Contingency Plan (1/23/86);
  - i. A Guide To: Local Government Disaster Planning (undated);
  - j. Guide for Preparing a County Comprehensive Emergency Management Plan in New York State (2/86);

- k. Guide for Counties, Hazardous Materials Response Planning (4/86);
- l. Letter from James Papile to Ihor Husar (6/2/88); and
- m. Memorandum from Lee Bates to Robert Trivision (2/6/85).

E. Late Authentication of State Plans

- 1. April 22, 1988: Deposition of David Axelrod
  - a. LILCO placed a copy of the generic portion of the New York State Radiological Emergency Preparedness Plan (NYS REPP) before the witness for identification. Dr. Axelrod was unable to confirm that the plan as presented represents the complete NYS REPP. Deposition Transcript of David Axelrod (April 22, 1988) (LILCO Discovery Exh. 36 at 52-57).
  - b. LILCO requested that the State produce either verification that this document is the current version or a current copy. LILCO received neither.
- 2. April 27, 1988: REPG deposition notice specifically requested true copies of the New York State Disaster Preparedness Plan (DPP) and NYS REPP.
- 3. April 28, 1988:
  - a. Letter from Sisk to Zahnleuter specifically requested that he "ensure that the documents in LILCO's deposition notices are available at the depositions."
  - b. LILCO's First Set of Request for Admissions, request No. 2 specifically asked the State to admit the enclosed document was a true copy of the NYS REPP and if not, to produce one.
- 4. April 29, 1988:
  - a. Deposition of Donald DeVito: LILCO again was unsuccessful in obtaining either a verification or production of a current copy of both the

NYS REPP and the New York State Disaster Preparedness Plan (NYS DPP). Deposition Transcript of Donald DeVito (April 29, 1988) (LILCO Discovery Exh. 18 at 9-11). No documents were produced.

- b. Deposition of REPG Panel: LILCO again was unsuccessful in obtaining either a verification or production of a current copy of the NYS REPP and the NYS DPP. Deposition Transcript of Lawrence B. Czech, James D. Papile, and James C. Baranski (April 29, 1988) at 7-16. No documents were produced, and none of the REPG panel members had even been asked by counsel to search files and bring responsive documents. Id. at 7-8.
5. At his deposition, James Papile said that he didn't know if he had a copy of the current New York State Disaster Preparedness Plan which the deposition notice had requested be produced. Papile Dep. Tr. at 11. At the hearing he testified he had a true current copy, Tr. 20986, but tried to explain the discrepancy by saying the he "wasn't sure" at the time of the deposition, but made sure he got a copy afterwards. Tr. 20992-993. Furthermore, he knew if he needed a copy he could get one from SEMO "across the hall." Id. See also 21067-068 (Papile).

Papile testified that counsel did ask him to verify that the copy of the NYS DEPP shown him at his deposition was the correct version. Tr. 21037. He then "drew up another copy of the plan and verified it." Id.

6. May 10, 1988:
- a. Governments' Objections to LILCO's First Set of Requests For Admissions at 2 objected to LILCO's First Request For Admissions on grounds of timeliness and refused to respond.
  - b. Board ordered the State to produce documents.
7. May 24, 1988:
- a. Letter from Zahnleuter to Sisk producing seven documents, none of which were the NYS REPP

or the NYS DPP for which LILCO sought verification and/or production of current copies.

- b. Board again ordered discovery with respect to "relevant responses to interrogatories."
8. June 3, 1988:
  - a. State of New York's Response to LILCO's Second Set of Interrogatories (LILCO Discovery Exh. 8) failed to produce verification or copies of plans.
  - b. Hearing: State indicated that part of the SCEOP was based upon the NYS DPP. Tr. 20822-826 (Zahnleuter)
9. June 8, 1988: Letter from Sisk to Zahnleuter requested verifications of plans.
10. June 29, 1988: Board ordered State to verify plans in its teleconference. Tr. 20934-935.
11. July 5, 1988: State produced verifications of the plans by Papile and DeVito.

F. Additional Problems with Verifications of Interrogatory Responses

1. April 22, 1988: Governments' Answers and Additional Objections to LILCO's Second Set of Interrogatories Regarding Conventions 1-2, 4-8, and 10 (LILCO Discovery Exh. 39) did not include verification of responses.
2. April 26, 1988: Letter from Leugers to Zahnleuter and McMurray requesting verification of the April 22 answers.
3. May 11, 1988: Letter from Ross to Leugers enclosing verifications of Petrone and Roberts for Governments' April 22 answers.
4. June 3, 1988: Letter from Zahnleuter to Sisk enclosing State of New York Response to LILCO's Second Set of Interrogatories (LILCO Discovery Exh. 8) stating that he would supply a signed verification next week.

5. June 15, 1988: Letter from Zahnleuter to Sisk enclosing verification of Papile to State's June 3 responses.
6. June 5, 1988: State of New York's Response to LILCO's Third Set of Interrogatories and Requests for Production of Documents Regarding Contentions 1-2, 4-8, and 10 (LILCO Discovery Exh. 16) including verifications by DeVito and Davidoff.
  - a. Davidoff verified three attached transmittal letters and the following portion of the State's responses to Interrogatory No. 124:

"The State of New York's response to LILCO's Interrogatory No. 124 is no different than what counsel for the State of New York stated at those places in the transcript: the State of New York provided LILCO with a copy of a successor (the New York State Disaster Preparedness Plan) of an outdated portion of the Suffolk County Emergency Operations Plan under cover of a letter from the State Radiological Emergency Preparedness Group to Donald P. Irwin, dated February 17, 1984, in response to LILCO's February 8, 1984 request for the New York State Disaster Preparedness Plan. Copies of this transmittal letter and two related transmittal letters are attached." Davidoff verification attached to LILCO Discovery Exh. 16.

At the hearings, Davidoff testified that he was not verifying the statements of counsel at Tr. 20549, 20822-20826 to which these sentences refer. Tr. 22049 (Davidoff).

G. Rephrasing and Limiting LILCO's Document Production Requests

1. Papile testified that he was asked to search for "[a]ny document having to do with Shoreham. . . and we were asked for documents such as out-of-state plans, we were asked for documents that referred to specifically other states having to do with ingestion pathway. That's a sample of what we were asked for." Tr. 20,968. He further testified that he only searched for documents he was particularly asked to search for. Tr. 20,970. He was unsure whether he

was asked to search for only state plans, or also for county plans. Tr. 21024-030. He testified he was never asked to search for the NYS REPP. Tr. 21036. See also Tr. 21064-067 (Papile).

2. DeVito testified that he was asked to search for the SCEOP on June 6, 1988. Tr. 21101 (DeVito). He also asked his staff to search for "anything and everything in all sections within the State Emergency Management Office for any documents that in any way shape or form could be construed as being involved in emergency planning and associated with Suffolk County, regardless of subject matter." Tr. 21103-104 (DeVito). See also Tr. 21120-124, 21217-218 (DeVito). Later Mr. DeVito testified that counsel had conveyed the text of Interrogatory 120 to him by phone. Tr. 21289-290 (DeVito).
3. Germano testified that SEMO was asked to search for "documents that from the emergency management perspective may affect Suffolk County," Tr. 21729-730, 21812, 21821 (Germano), but was not asked to search for documents like the SCEOP, Tr. 21768 (Germano).
4. Axelrod testified that he was not involved with the production of documents concerning this matter. Tr. 21606 (Axelrod). "[T]hose activities were carried out by Counsel along with the Director of the State Emergency Management Office and Radiological Emergency Preparedness Group." Id. See also Tr. 20968 (Papile); Tr. 21104 (DeVito).

#### H. Examples of Relevance Objections to Discovery Requests

##### 1. "Realism" Document Discovery

###### State Claims Irrelevance

Governments' Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10 (April 20, 1988)

###### Board Compels Production

Board Orders of May 10 and May 24, 1988.

##### 2. Depositions

Objections in depositions are too numerous and

pervasive to catalog. The Board reviewed the complete transcripts, for example, of the Halpin and Axelrod depositions, and found that the State's and County's counsel have engaged in obstruction of discovery.

3. Hearings on "Integrity of the Proceeding" Issue

In four days of hearings and 1108 pages of transcript, there were 278 objections by Suffolk County and/or the State of New York. The vast majority of these objections were on the basis of relevance/scope of the proceeding.

D. Witnesses/Deponents

A. Footdragging in Designating Witnesses

1. March 7, 1988: The Board set the hearing and discovery schedule on the "best efforts" issue, with the discovery period to end on April 5, 1988.
2. March 9, 1988: LILCO filed its First Set of Interrogatories asking who the Intervenors' witnesses would be.
3. March 23, 1988: The State responded to LILCO's First Set of Interrogatories saying that no witnesses had yet been identified.
4. April 5, 1988:
  - a. Letter from Sisk to Zahnleuter requesting identification of witnesses by 2 PM the same day.
  - b. LILCO's Motion to Impose Witness Designation Cutoff.
5. April 6, 1988: Government's Motion for Extension of Time to Respond to Realism Discovery Requests, and to Extend Discovery Schedule states that "the Governments have not yet decided upon or designated any witnesses on the realism issues, or even decided whether witnesses will be designated." See Government's Motion at 5.
6. April 7, 1988: Letter from Zahnleuter to Christman designating David T. Hartgen as a witness on immateriality issues, and stated that Dr. Hartgen would be available for deposition the week of April 18.

7. April 12, 1988: Confirmatory Memorandum and Order states that "witnesses must be designated in adequate time for discovery to be completed in connection with their testimony before [April 22]."
8. April 13, 1988: Governments' Objection to Portions of Feb. 29 and April 8 Orders in the Realism Remand and Offer of Proof attaching Direct Testimony of David Axelrod on Behalf of the State of New York.
9. April 18, 1988: Letter from Zahnleuter to Sisk advising that Dr. Axelrod would be available for deposition at 3 PM on April 22, and Dr. Hartgen from 9 AM - Noon the same day.

B. Refusal to Produce Deponents on Realism Issue

1. April 5, 1988: LILCO notices five New York State witnesses for depositions.
  - a. James C. Baranski, Lawrence B. Czech, and James D. Papile (all of REPG) for 4/12/88.
  - b. Donald DeVito for 4/13/88.
  - c. David Axelrod for 4/13/88.
2. April 6, 1988: Governments' Motion for Extension of Time to Respond to Realism Discovery Requests, and to Extend Discovery Schedule.
3. April 7, 1988: LILCO moves the Board to compel depositions noticed on April 5. LILCO's Response to "Governments' Motion for Extension of Time to Respond to Realism Discovery Requests, and to Extend Discovery Schedule" and Request for Additional Relief at 12.
4. April 7, 1988: Letter from Lanpher to Sisk, states that "no depositions are possible until after April 18."
5. April 12, 1988: Board orders that "all persons previously or subsequently noticed by any party will be made available for deposition purposes in time for such discovery to be completed by April 22." Confirmatory Memorandum and Order at 2.

6. April 15, 1988:
  - a. Letter from Irwin to Board summarizes status of depositions
  - b. Letter from Lanpher to Board formally requests that depositions of State deponents other than Axelrod be cancelled, stating that the filing of Intervenor's Objections "obviates" the need for LILCO to depose anyone other than Halpin and Axelrod.
7. April 16, 1988: LILCO formally notices depositions:
  - a. David T. Hartgen for 4/22/88
  - b. David Axelrod for 4/22/88 (second notice)
8. April 18, 1988:
  - a. Confirmatory Memorandum and Order states that the "[d]epositions of additional State and County witnesses, previously noticed by LILCO, are to be taken during the period of April 25-29. . . ."
  - b. Letter from Leugers to Zahnleuter requesting dates for depositions of REPG panel and DeVito, pursuant to April 18 Board Order.
9. April 22, 1988:
  - a. Letter from Zahnleuter to Irwin re availability of Axelrod and Hartgen.
  - b. Depositions of Hartgen and Axelrod occur as scheduled. Axelrod deposition is terminated by the State without LILCO's consent.
10. April 17, 1988: LILCO renotices depositions.
  - a. Donald DeVito for 4/29/88
  - b. Papile, Baranski, and Czech for 4/29/88
11. April 29, 1988: Depositions of DeVito and REPG panel occur as scheduled. REPG deposition is terminated by the State without LILCO's consent.

12. May 2, 1988: LILCO's Supplement to Governments' April 13 Objection and Motion in the Alternative to Compel Discovery requested reopening of Axelrod and REPG depositions.
13. May 10, 1988 Prehearing Conference: Board orders Axelrod deposition reopened.
14. May 19, 1988: Letter from Irwin to Zahnleuter requesting date for reopened Axelrod deposition.
15. May 24, 1988: Board Ruling orders REPG deposition reopened.
16. June 10, 1988: In Teleconference Board dismisses realism contentions; realism depositions never reopened or held.

C. Refusal to Produce Deponents on Issues Related to Document Production

1. June 1, 1988: LILCO notices depositions.
  - a. Donald B. Davidoff for 6/8/88
  - b. Anthony J. Germano for 6/9/88
  - c. Karim Rimawi for 6/8/88
  - d. Marvin I. Silverman for 6/9/88
2. June 3, 1988: Letter from Zahnleuter to Sisk provides dates for depositions:
  - a. REPG Panel 6/17/88 1PM
  - b. David Axelrod 7/7/88 2PM
3. June 6, 1988:
  - a. Letter from Sisk to Lanpher and Zahnleuter proposing deposition schedule for realism witnesses.
  - b. Letter from Zahnleuter to Irwin alleges that LILCO failed to provide the requisite notice for depositions of Davidoff, Rimawi, Germano, and Silverman. Further, Mr. Zahnleuter argues

that these depositions and the reopening of REPG are unwarranted due to the completion of the DeVito deposition and the reopening of the Axelrod deposition.

4. June 9, 1988: Letter from Sisk to Board announces discovery impasse and requests conference call on issue.
5. June 10, 1988:
  - a. Governments' Notice That The Board Has Precluded Continuation of The CLI-86-13 Remand objects to depositions.
  - b. Letter from Sisk to Board requests Board to order depositions on dates noticed by LILCO.
  - c. In a teleconference, the Board determines to dismiss realism contentions and retains jurisdiction over nonproduction of SCEOP and other plans.
6. June 15, 1988: LILCO's Brief on the Appropriate Remedy For the Intervenor's Failure to Comply With Board Orders asks the Board to order depositions according to the attached schedule.
7. June 17, 1988 Teleconference : Board grants LILCO's June 15 deposition schedule.
8. June 18, 1988: Letter from Irwin to Zahnleuter confirming the State's refusal to produce State witnesses for depositions. See letter from Irwin to Board dated June 20, 1988 informing the Board of this refusal.
9. June 20, 1988: Intervenor's file Motion to Vacate and refuse to go forward with depositions pending Board action.
10. June 24, 1988: In Teleconferences Board requests briefs on County suggestion of a hearing on the "integrity of the proceeding" issue.
11. June 29, 1988 Teleconference: Board orders hearing on the "integrity of the proceeding" issue; this ends the struggle over depositions.

D. Arbitrary Time Limits and Abrupt Halting of Depositions

1. Axelrod

- a. April 16, 1988: LILCO's deposition notice states that the deposition will continue from day-to-day until completed.
- b. April 18, 1988: Letter from Zahnleuter to Irwin proffering Dr. Axelrod only on April 22 beginning at 3 PM.
- c. April 20, 1988: Letter from Sisk to Zahnleuter informing him that LILCO objects to the late starting time for the deposition and intends to continue as necessary until completed.
- d. April 22, 1988: Mr. Zahnleuter noted that Dr. Axelrod would have to leave at 5 PM. Deposition Transcript of David Axelrod (April 22, 1988) (LILCO Discovery Exh. 36 at 5). Mr. Sisk stated his objection. Id. at 5, 106-07. The State ended the deposition at 5:12 PM (after 2 hours 12 minutes), despite Mr. Sisk's objection.

2. DeVito: State set a time limit of three hours. Deposition Transcript of Donald DeVito (April 29, 1988) (LILCO Discovery Exh. 18 at 4-5).

3. REPG: State set a time limit of four hours for the panel and 3-1/2 hours for Papile's portion. Deposition Transcript of Baranski, Czech, and Papile (April 29, 1988) at 4-5. Papile left at 4:30 PM. Id. at 141. Mr. Zahnleuter ended the deposition at 5:09 PM despite Mr. Sisk's insistence that the deposition be continued at this or a later time. Id. at 166-68.

E. Requiring Subpoena for Axelrod to Testify at Hearing

1. July 12, 1988:

- a. Mr. Zahnleuter asked the Board to reconsider its request that Dr. Axelrod appear on the 14th. Tr. 21532 (Zahnleuter).

- b. The Board refused to do so and ordered the State to produce Dr. Axelrod. Tr. 21533-534 (Gleason).
- c. Zahnleuter stated that "Dr. Axelrod declines the Board's request to appear." Tr. 21534 (Zahnleuter).
- d. Judge Gleason then issued a subpoena for Dr. Axelrod. Tr. 21534-535 (Gleason).

2. July 14, 1988:

- a. After Dr. Axelrod was sworn in, Judge Gleason said "You are appearing here, Doctor Axelrod, under a subpoena issued by the Board on the 13th, I believe." Tr. 21,606 (Gleason).
- b. In response, Mr. Zahnleuter said "I would also like to state that Doctor Axelrod is appearing here today on his own volition, rather than under the subpoena which was signed by you, Judge Gleason, on Tuesday because the State's position is that the subpoena was not properly served, and that there are other defects with the subpoena. In any event Doctor Axelrod is here under his own volition to respond to the Board's questioning and other parties." Tr. 21,603 (Zahnleuter).

F. Obstruction of Depositions and Hearing by Objections

1. Hearings

During four days of hearings and 1108 pages of transcript, the number of objections by Suffolk County and the State of New York were as follows:

- a. Suffolk County: 225 objections
- b. State of New York: 53 objections
- c. Of these 278 objections by Intervenors, 213 were overruled.

2. Depositions

- a. Axelrod: Objections on 35 pages of the 108 page transcript.
- b. DeVito: Objections on 43 pages of the 107-page transcript.
- c. REPG: Objections on 69 pages of the 168-page transcript.

G. Authority of David Axelrod to testify on behalf of New York State

Axelrod testified that his prefiled testimony (LILCO Discovery Exh. 34) contained material beyond his direct testimony, namely an affidavit of Gov. Cuomo and a statement by the Gov. Tr. 21627 (Axelrod). However, at page 3 of the testimony is a statement that "Governor Cuomo's affidavit is attached hereto and made a part of this testimony." Tr. 21627 (Axelrod). Axelrod tried to distinguish between his own "personal testimony" and that of the exhibits by saying that Governor Cuomo's testimony does not represent his statements, but are included because of references within his own testimony. Id. He was not "adopting" the position of the Governor. Tr. 21629 (Axelrod). Rather, in his role he would "carry out the directive and support the positions taken by the Governor." Id. He did recall stating in a deposition that statements made therein were on behalf of the Gov. and the State. Tr. 21629-630 (Axelrod).

H. Nonresponsiveness Regarding Radiological Emergency Communication System (RECS) Lines

1. March 24, 1988: LILCO's Second Set of Interrogatories (LILCO Discovery Exh. 29), No. 1 asked five questions with respect to the RECS lines to State offices:
  - "a. What is required to make the existing Shoreham RECS lines to the State operational and 'capable of functioning?' (see Affidavit of James D. Papile, May 11, 1987 at 3 ¶ 4.)
  - b. If Shoreham were to operate at 100 percent power, would the State permit the RECS lines to be made operational?

- c. Precisely how far is the nearest Shoreham RECS line drop from each of the following offices:
  - (i) REPG in Albany
  - (ii) the State Police Communications Center in Albany
  - (iii) the State EOC in Albany
  - (iv) the SEMO district office in Poughkeepsie?
- d. Will the State permit LILCO, at LILCO's expense, to relocate the RECS lines at each of the above four locations?
- e. Would the State permit LILCO, at LILCO's expense, to relocate the RECS lines to each of the above four locations if Shoreham were licensed to operate at 100 percent power?"

- 2. April 22, 1988: Governments' Answers (LILCO Discovery Exh. 39) stated responses to part of a and objected to parts b,d, and e as follows:

"The State objects to these Interrogatories on the ground that they call for speculation. Notwithstanding this objection, the State answers that, for the reasons set forth in the April 13 Objection and Offer of Proof, the State has not adopted any plan for Shoreham and will not cooperate with LILCO in developing or implementing any emergency plan or response. Beyond these facts, the State is unable to provide any further information. The County is unable to respond to these Interrogatories which are directed to the State."

- 3. July 14, 1988: Testimony of David Axelrod

- a. Axelrod testified that the RECS lines had been disconnected between Shoreham and State offices in Albany. Tr. 21711 (Axelrod). He did not know when or under what conditions. Tr. 21712 (Axelrod).

- b. On cross examination, Dr. Axelrod did not recall receiving a letter from Mr. John Leonard of LILCO requesting that the RECS lines be reconnected. Tr. 21715-716 (Axelrod).
- c. The December 21, 1984 letter from John Leonard to David Axelrod (LILCO Discovery Exh. 40) notified the State that "LILCO commenced fuel load in its Shoreham Nuclear Power Station and will proceed to cold criticality testing some three weeks thereafter." Mr. Leonard noted that in the event of an emergency, "LILCO is obligated to notify New York State and Suffolk County . . . [and] the . . . (RECS) would be activated for this purpose." Mr. Leonard further noted that if LILCO could not reach the State via the RECS, "LILCO intends to use commercial telephone as an alternate means of communication."
- d. LILCO Discovery Exh. 41 is a memorandum from David Axelrod to Mr. Del Giudice dated January 16, 1985 re: LILCO Emergency Notification. Dr. Axelrod stated:

"The attached letter from LILCO poses a dilemma for the State Emergency Management Office. We obviously do not wish to suggest any degree of compliance with LILCO for greater participation in their emergency preparedness activities. On the other hand, the lack of dedicated communication system places us in a vulnerable situation for emergency notification. The use of standard telephones is obviously not an acceptable route of communication in the event of a real emergency.

During the course of the recent litigation and with LILCO, we recognized that our dedicated RECS lines were still operative and disconnected them on the advice of counsel. Because of the potential need for emergency notification, I would suggest that we reconnect our RECS phones to enable us to receive timely notification of any emergencies which might occur during fuel load and cold criticality.

I will not respond to Mr. Leonard until I have received some indication from you."

- e. Dr. Axelrod testified that the signature on the memorandum is his. See Tr. 21716-717 (Axelrod).

I. State of New York's Refusal to Identify Resources

1. February 29, 1988: Confirmatory Memorandum and Order (Ruling on LILCO's Motions for Summary Disposition of Contentions 1-2, 4-8, and 10, and Board Guidance on Issues for Litigation) at 4. The Board made clear that to rebut the LILCO Plan, the State and County must either say what the "projected behavior of the Governments" would be, or if a response would be ad hoc they must "specif[y] . . . the resources available for such a response."
2. March 24, 1988: LILCO's Second Set of Interrogatories and Requests for Production of Documents (LILCO Discovery Exh. 29) sought inter alia identification of resources in the form of plans, procedures, and personnel.
3. April 6, 1988:
  - a. Letter from Leugers to Miller and Zahnleuter requested that responses to LILCO's Second Set of Interrogatories, due April 7, be sent to LILCO by federal express rather than U.S. mail.
  - b. Governments' Motion for Extension of Time to Respond to Realism Requests, and to Extend Discovery Schedule at 6: "LILCO's Second Discovery Requests are lengthy and complex, and would require the Governments' to expend substantial time and effort in responding."
4. April 8, 1988: Memorandum (Extension of Board's Ruling and Opinion on LILCO's Summary Disposition Motions of Legal Authority (Realism) Contentions and Guidance to Parties on New Rule 10 C.F.R. § 50.47(c)(1), LBP-88-9, 27 NRC \_\_\_\_, slip op. at 24-25. The Board again stated that "Intervenors . . .

must specify the resources that are available for a projected response. . . ."

5. April 11, 1988: In a conference call, the Board grants the Governments' Motion for an extension of time. See Confirmatory Memorandum and Order (April 12, 1988).
6. April 13, 1988: In written prefiled testimony, David Axelrod stated "I cannot speculate what specific actions the State would take, when they would be taken, or what resources might be available" if Shoreham were licensed and there were a serious accident. Direct Testimony of David Axelrod on Behalf of the State of New York (LILCO Discovery Exh. 34 at 4), Attachment 2 to Governments' Objections to Portions of February 29 and April 9 Orders in the Realism Remand and Offer of Proof (April 13, 1988). In Affidavit of Mario M. Cuomo, attached to and made a part of Axelrod's testimony, the Governor said "the State would not use LILCO's resources or turn over to LILCO any State resources, including the State emergency broadcast system." Cuomo affidavit at 4.
7. April 20, 1988: Government's Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10. The State of New York and Suffolk County formally objected to 62 of LILCO's 116 interrogatories. See Supplement to LILCO's Response to Governments' April 13 Objection and Motion in the Alternative to Compel Discovery (May 2, 1988) at 6-13 and Att. 14.
8. April 22, 1988:
  - a. Governments' Answers and Additional Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10 (LILCO Discovery Exh. 39). These answers were generally nonresponsive to the request for identification of resources. See LILCO's May 2, 1988 Supplement at 6-13 and Att. 14.
  - b. Deposition of David Axelrod: When LILCO inquired about the plans and resources available to New York State to respond to radiological emergencies, Dr. Axelrod was evasive and counsel interrupted with objections on grounds

of relevancy. Deposition Transcript of David Axelrod (LILCO Discovery Exh. 36 at 65-66, 93-103).

9. April 29, 1988:
  - a. Deposition of REPG: Papile could not speculate regarding whether the generic portion of the state plan identified resources that could be employed in responding to a Shoreham emergency. Deposition Transcript of Papile, Czech and Baranski at 85-86.
  - b. Deposition of DeVito: DeVito stated "absent a plan for the purpose, I have absolutely no idea what resource might be called upon to be utilized under a whole host of circumstances." Deposition Transcript of DeVito (LILCO Discovery Exh. 18 at 96-100).
10. May 2, 1988: Governments' Response to LILCO's April 22 Request for Dismissal of the Legal Authority Contentions. The State and County argue that because they have no plan for responding to a Shoreham emergency, "the Governments' cannot state what resources would be available or would be used to respond to a Shoreham emergency, how they would be used, or how long such a hypothetical response might take. Such data could be presented, if at all, only if the Governments had a plan detailing their response." Governments' Response at 4.
11. May 10, 1988: Prehearing Conference - Board reopened depositions of Halpin and Axelrod, and ordered responses to interrogatories requesting information about emergency plans of other nuclear facilities. Tr. 19381-382.
12. May 13, 1988: Governments' Response to "Supplement to LILCO's Response to Governments' April 13 Objection and Motion in the Alternative to Compel Discovery." "The Governments do not deny such relevance [of resources available for response to a Shoreham emergency] and to the extent such details are available, the Governments have provided them. However, the Governments reiterate that they cannot create 'details' and listings of 'the resources available for such a response'. . . [I]t is clear that a 'do

not know' answer is an adequate response under the NRC rules." Id. at 6.

13. May 24, 1988:
  - a. Letter from Zahnleuter to Sisk enclosing seven documents in response to the Board's May 10 Order, and stating that they are "continuing to search for responsive documents and will produce them as appropriate."
  - b. Board ruling grants LILCO additional discovery with respect to witnesses and relevant responses to interrogatories.
14. June 3, 1988: State of New York's Response to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10 (LILCO Discovery Exh. 8) in response to May 10 Board Rulings.
15. June 7, 1988: LILCO's Third Set of Interrogatories and Requests for Production of Documents to Suffolk County, New York State, and the Town of Southampton regarding knowledge and production of the SCEOP.
16. June 9, 1988: Governments' Notice That The Board Has Precluded Continuation of The CLI-86-13 Remand. Again, the Governments state that they will not "interface" with LILCO regarding resources available for a Shoreham emergency. Governments' Notice at 1-3.
17. June 10, 1988: Teleconference: Counsel states that there can be no interface with LILCO. Tr. 20854-855, 20861. State and County refuse to comply with discovery order. Tr. 20860-862. The Board decides to dismiss the realism contentions, but retains jurisdiction regarding discovery matters. Tr. 20862.
18. June 15, 1988: Governments' Response to Board Order of June 10, 1988, Concerning The CLI-86-13 Remand. The Governments again state that they would not interface with LILCO. Governments' Response at 2.

19. June 17, 1988: Teleconference: Board compels answers to LILCO's Third Set of Interrogatories by June 21, 1988.
20. June 20, 1988: Governments' Motion for Licensing Board to Vacate June 17 Order regarding discovery.
21. June 21, 1988: Letter from Sisk to Zahnleuter confirming a telephone conversation in which the State indicated it would make no further response to Interrogatories and document production requests during the pendency of its Motion to Vacate.
22. June 23, 1988: Governments' Motion for Stay of June 17 Order regarding discovery.
23. June 24, 1988: Teleconference wherein Board decided to hold a hearing on the "integrity of the proceedings." Tr. 20923-925.
24. June 28, 1988: Governments' Response to Board Order of June 24, 1988 regarding hearings.
25. June 29, 1988: Teleconference: Board compels the Governments to answer LILCO's Second and Third Sets of Interrogatories and Requests for Production of Documents, and to verify the NYS REPP and the NYS DPP. Tr. 20934-935.
26. June 30, 1988: Board Memorandum and Order (Ruling on Intervenors' Motions to Vacate and to Stay Licensing Board's June 17 Order) denying both motions.
27. July 5, 1988:
  - a. State of New York's Response to LILCO's Third Set of Interrogatories and Requests for Production of Documents.
  - b. Letter from Zahnleuter to Sisk enclosing 13 documents responsive to LILCO's Second Set of Interrogatories.
28. Testimony of State Witnesses Regarding Resources
  - a. Papile testified that his knowledge of resources the State possesses for use during a nuclear plant emergency are "[n]ot very thorough . . .

That is more the responsibility of SEMO." TR. 20978 (Papile). He has knowledge of radiological equipment but not personnel.

Tr. 20979 (Papile). He further testified that "we do not have resources in the State to send down there to take part in an exercise at this time." Tr. 21015 (Papile). "I am on the radiological part of, sir, and we do not have the resources for the radiological part. I will give that answer." Tr. 21016 (Papile).

b. DeVito testified that he had no recollection of even participating in a discussion or meeting regarding the ability of the State to respond to a Shoreham emergency. Tr. 21117 (DeVito). When referred to a statement in his deposition that he doesn't have the kind of expertise to identify State resources that could be employed to respond within the ingestion pathway of Shoreham and asked if it is still accurate, he responded that "I haven't gained any greater expertise as a result of these hearings, counselor." Tr. 21236 (DeVito). Within SEMO there is an REP group that would know about radiological matters. Tr. 21236-237 (DeVito).

c. Axelrod testified that the statement in his testimony that he could not speculate what actions the State would take or what resources might be available for a Shoreham emergency is still accurate. Tr. 21,630-631 (Axelrod). Axelrod was asked three times whether any of the resources in the NYS REPP (LILCO Discovery Exh. 6) and the NYS DPP (LILCO Discovery Exh. 1) could be used in responding to an emergency at Shoreham. Tr. 21648-650. Amid several objections, his response was:

"[I]n the absence of a site-specific identification, the resources, the plume modeling, all of the elements that are identified within each of the seven site-specific plans that are attached to the Radiological Emergency Preparedness Plan, it would be difficult to determine how such resources might be made available without clear indications of time, place, all of the elements that would relate to the site-specific issues that would address the Shoreham facility." Tr. 21648 (Axelrod).

- d. Germano testified that Procedure K to the NYS REPP contains a "list of maps, resources." Tr. 21778-779 (Germano).
  - e. Davidoff testified that the SCEOP (LILCO Discovery Exh. 10) is integrally related to the NYS DPP (LILCO Discovery Exh. 1). Tr. 22053 (Davidoff).
29. The DPC's "review" of LILCO's review of Shoreham Plan
- a. Axelrod testified that the DPC had never reviewed a plan for Shoreham, because "there has never been a plan, as far as the Commission was concerned." Tr. 21618 (Axelrod). If local plans were submitted for approval, SEMO would keep such records. Tr. 21658 (Axelrod). He later testified that the determination was made that no plan can be made for Shoreham. Tr. 21699 (Axelrod). This determination was made in 1983 based on expert information provided to the Governor and SC. Tr. 21699-700 (Axelrod). In Axelrod's deposition, he said the DPC did make such a determination "based on recommendations from staff," see LILCO Discovery Exh. 36 at 30, in a proceeding in which the DPC did evaluate a Shoreham plan. LILCO Discovery Exh. 36 at 29-32; Tr. 21701 (Axelrod). LILCO Discovery Exh. 37 (partial transcript of March 2, 1983 DPC meeting) constitutes the entirety of the DPC's deliberations and decisions on this matter. Tr. 21,703 (Axelrod). Then, Axelrod was confronted with his 1984 affidavit (LILCO discovery Exh. 38) which stated that the "DPC itself has never even convened a meeting for the purpose of discussing the work of the DPC Staff pertaining to Shoreham." Id. at 2; Tr. 21705-706 (Axelrod).
  - b. Davidoff testified that the REPG staff made an analysis of the LILCO Plan, but issued no finding or recommendations to the DPC. Tr. 22022 (Davidoff). He confirmed that the State REPG's analysis of the Shoreham plan was contained in LILCO Discovery Exhibits 51 and 52\_ (admitted Tr. 22046), e.g., Tr. 22065-067

(Davidoff), and could not deny that the evaluation was positive, e.g., LILCO Discovery Exh. 53 (admitted Tr. 22046).

ATTACHMENT 5

Suffolk County Emergency Operations Plan  
(Version Produced to LILCO on July 8, 1988)

<u>Section Title</u>	<u>Description; No. of Pages</u>	<u>Corresponding or Potentially Corresponding Document Produced to LILCO in 1982-83 Discovery</u>	<u>No. of Pages of Previously Produced Document</u>
Table of Contents	Four (4) pages		
A. General	1. Introduction - Prepared by State; Eight (8) pages		
A. General	2. Basic Plan - Prepared by State; Twenty-one (21) pages		
A. General	3. Legislative Authority - Legal Statutes Signed into Law; Sixteen (16) pages		
Annex A	Command and Control; Eight (8) pages		
Annex A Appendix 1	"Not applicable to the County"; One (1) page		
Annex A Appendix 2 Attachments a,b,c	"Not applicable to the County"; One (1) page		

<u>Section Title</u>	<u>Description; No. of Pages</u>	<u>Corresponding or Potentially Corresponding Document Produced to LILCC in 1982-83 Discovery</u>	<u>No. of Pages of Previously Produced Document</u>
Annex A Appendix 2 Attachment d	Succession to Command Lines of Succession to the Local Chief Executive and Officials; Thirty-four (34) pages	Emergency Operations Plan Annex A, App. 2, Att. D (for Police Department only); follows SC Bates No. 000090 (Produced in 1983)	One (1) page
Annex A Appendix 2 Attachment e	Local Law Establishing Lines of Succession; Ten (10) pages		
Annex A Appendix 3	Line of Authority; Six (6) pages		
Annex A Appendix 4	Local Executive Orders; Standard Operating Procedure for Use in the Event of Natural Disasters, Man-Made Disasters and Nuclear Attack; Twenty-one (21) pages	Standard Operating Procedure for Use in the Event of Natural Disasters, Man-Made Disasters and Nuclear Attack; SC Bates No. 000266 (Produced in 1982 and 1983)	Five (5) pages
Annex A Appendix 5	Jurisdictions; Four (4) pages		
Annex A Appendix 6	EOC Floor Plan; Four (4) pages		

<u>Section Title</u>	<u>Description; No. of Pages</u>	<u>Corresponding or Potentially Corresponding Document Produced to LILCO in 1982-83 Discovery</u>	<u>No. of Pages of Previously Produced Document</u>
Annex A Appendix 7	Division of Emergency Preparedness Emergency Directory; Thirty-one (31) pages	Department of Emergency Preparedness Emergency Directory; SC Bates No. 4060213 (Produced in 1982)	Thirty-seven (37) pages
Annex A Appendix 8	Increased Readiness and Attack Warning; Three (3) pages	Disaster Action for County, Townships, and Villages Governmental and Emergency Preparedness Personnel; follows SC Bates No. 000173 (Produced in 1983)	Two (2) pages
Annex A Appendix 9	County of Suffolk Disaster Preparedness Plan; Fifty-five (55) pages	County of Suffolk Disaster Preparedness Plan; Bates No. 4010022 (Produced in 1982 and 1983)	Fifty-five (55) pages
Annex A Appendix 9 Attachment a	Disaster Relief Act of 1974; Twenty-three (23) pages		
Annex A Appendix 9 Attachment b	Presidential Executive Order 11795; Three (3) pages		
Annex A Appendix 9 Attachment c	Federal Disaster Assistance Administration Regulations; Twenty-one (21) pages		

<u>Section Title</u>	<u>Description; No. of Pages</u>	<u>Corresponding or Potentially Corresponding Document Produced to LILCO in 1982-83 Discovery</u>	<u>No. of Pages of Previously Produced Document</u>
Annex A Appendix 9 Attachment d	I. Brookhaven Township Plan II. Brookhaven Staff Personnel; Twelve (12) pages	I. Brookhaven Township Plan II. Brookhaven Staff Personnel; SC Bates No. 000633 (Produced in 1983)	Nine (9) pages
Annex A Appendix 10	Activation of the County Emergency Operating Center; Ten (10) pages	Activation of the County Emergency Operating Center SC Bates No. 000863 (Produced in 1983)	Ten (10) pages
Annex A Appendix 11	EOC Operation; Thirty-four (34) pages	Emergency Operating Plan Annex A, Appendix 11; follows Bates No. 000863 (Produced in 1983)	Sixteen (16) pages
Annex A Appendix 12	Situation Reports; Five (5) pages		
Annex B	Administration Section; Nine (9) pages		
Annex C	Civil Air Patrol; Twenty-two (22) pages		
Annex D	Communications and Warning System; Fifty-one (51) pages		

<u>Section Title</u>	<u>Description; No. of Pages</u>	<u>Corresponding or Potentially Corresponding Document Produced to LILCO in 1982-83 Discovery</u>	<u>No. of Pages of Previously Produced Document</u>
Annex E	Fire Service; Six (6) pages	Hurricane Disaster Plan Fire Island, New York Fire Service; SC Bates No. 001227 (Produced in 1983)	Three (3) pages
Annex F	Health Service; Eleven (11) pages		
Annex G	Manpower Service; Ten (10) pages		
Annex H	Police Service; Thirty-six (36) pages	Police Service; follows SC Bates No. 000090 (Produced in 1983)	Sixteen (16) pages
Annex H-1	Sheriff's Department; Twenty (20) pages	Emergency Preparedness Emergency Operations Plan for Suffolk County Sheriff's Office Riverhead, New York; follows Bates No. 000938 (Produced in 1983)	Seven (7) pages
Annex I	Public Information Service Four (4) pages		
Annex J	Public Works Ser Ten (10) pages		

<u>Section Title</u>	<u>Description; No. of Pages</u>	<u>Corresponding or Potentially Corresponding Document Produced to LILCO in 1982-83 Discovery</u>	<u>No. of Pages of Previously Produced Document</u>
Annex K	Radiological Intelligence Section (not included with EOP) One-hundred and Sixty (160) pages		
Annex L	Rescue Service; Fifteen (15) pages		
Annex M	Resources Section; Nine (9) pages		
Annex N	School Service; Twenty-seven (27) pages		
Annex O	Social Services Section; Thirty-seven (37) pages		
Annex P	Community Shelter Plan - "See Volume 2" (not included with EOP)		
Annex Q	Crisis Relocation Plan - "See Volume 3" (not included with EOP)		
<u>TOTAL PAGES:</u>	762		161

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

I hereby certify that copies of LILCO'S SUPPLEMENT TO ITS JUNE 15 BRIEF ON DISCOVERY SANCTIONS IN LIGHT OF SUBSEQUENT DEVELOPMENTS were served this date upon the following by hand as indicated by one asterisk, by Federal Express as indicated by two asterisks, or by first-class mail, postage prepaid.

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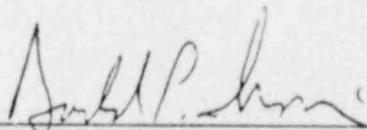
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