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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

GOVERNMENT'S REPLY TO JULY 26 SUPPLEMENTS FILED BY LILCO AND THE NRC STAFF SEEKING IMPOSITION OF SANCTIONS

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This is the reply of Suffolk County and the State of New York (the "Governments") to "LILCO's Supplement to its June 15 Brief on Discovery Sanctions in Light of Subsequent Developments" (July 26, 1988) (hereafter, "LILCO Supplement" or "LILCO Supp."), and "Further NRC Staff Comments on Imposition of Sanctions" (July 26, 1988) (hereafter, "Staff Supplement" or "Staff Supp.").

I. Overview

Prior to the commencement of the recent hearing, the Board repeatedly stated its narrow and limited scope. The proceeding was to relate solely to the production of emergency plans in response to discovery requests, whether they should have been

produced earlier, and if they were not produced earlier, the circumstances for the non-production. Tr. 20884, 20892, 20904, 20924, 20935 (Gleason). See also Staff Supp. at 1, 2.

Both the Staff and the Governments complied with the Board's order, made at the close of the hearing, to file "submittals . . . based on the record of these proceedings" to supplement their June 15 filings. Tr. 22074 (Gleason). The Staff's Supplement and that of the Governments,[1] properly discussed the evidence in the record of the recent proceeding, and the matter at issue in that proceeding: whether the State or County failed to produce the Suffolk County Emergency Operations Plan ("EOP") or other plans in prior discovery, to the prejudice of LILCO, so as to justify the imposition of sanctions.

LILCO's Supplement, on the other hand, barely discusses the evidence or the narrow matter which the Board ruled was at issue in the recent proceeding. To the extent it even purports to do so, it distorts, mischaracterizes, and selectively edits the evidence.

For example, despite the undisputed evidence that Suffolk County made a good faith effort in 1982-83 to produce to LILCO the entire EOP as it then existed, LILCO accuses the County of a systematic six-year pattern of discovery abuse. See LILCO Supp.

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[1] Suffolk County and State of New York Supplement to June 15, 1988, Filing (July 26, 2988) (hereafter, "Governments' Supplement" or "Govts' Supp.").

at 2, 50. This allegation is blatantly false. Indeed, even the NRC Staff, which has sided so often with LILCO in this proceeding, agrees that there was no attempt to conceal documents during 1982-83 discovery. Staff Supp. at 5-6.

Similarly, LILCO continues to insist that it had no knowledge of the existence of the County EOP prior to May 1988. LILCO Supp. at 25. LILCO asserts that the Governments "fail[ed] to reveal the existence" of the EOP and "abstain[ed] from even mentioning its name" until May 1988. LILCO Supp. at 7, 9 (emphasis added). The evidence is overwhelming, however, that LILCO has known of the existence of the EOP since at least 1981, that the County produced documents to LILCO in 1982-83 that had "Emergency Operation Plan" written on them or referenced the EOP, and that in 1985, LILCO asked for and received a copy of the EOP from Suffolk County. Again, even the Staff has recognized this evidence, stating "it cannot be said that LILCO did not know of the existence of, or have the benefit of, the County operations plan for general disasters at the time it structured the Shoreham plan . . . ." Staff Supp. at 13.

Instead of the narrowly focused hearing-based supplement sought by the Board, LILCO's Supplement is a vitriolic tirade. It consists primarily of inflated, citation-less rhetoric, and revisionist, baseless characterizations and rehashings of irrelevant events from proceedings which ended years ago. In large part, the LILCO Supplement boils down to a temper tantrum; the

only appropriate response is to ignore it. Just a few examples are illustrative.

LILCO makes wild, sweeping, but undocumented accusations of serious malfeasance by the Governments and the Governments' officials. For example, LILCO accuses the Governments of:

-- "a total and systematic failure to meet any obligation of discovery, much less one of good faith "voluntary discovery" (LILCO Supp. at 51);

-- "a systematic pattern of withholding information and deflecting inquiry over the course of this entire six-year proceeding" (id. at 2);

-- "a consistently evasive attitude on the part of expert state and county witnesses" (id. at 6);

-- "a six-year long deliberate, systematic tactic of frustrating and defeating the legitimate discovery efforts of LILCO" (id. at 50); and

-- "a consistent approach to this proceeding . . . ever since its inception in 1982, . . . [of] resist[ing] or divert[ing] disclosure of anything important unless the sanction for refusal is perceived to outweigh the harm from disclosure." (id., at 7).

(All emphasis added). Not one of these accusations is supported by citation or any other basis. The Board must reject them out of hand.

LILCO's so-called "specific" accusations about LILCO-proclaimed "discovery abuses" by the Governments are no more legitimate or credible. They deserve immediate rejection as well. They are outside the scope of the issues noticed for hearing and thus may not be considered by the Board. Further,

even on the merits, they are utterly lacking in basis. Thus, for example, LILCO repeatedly asserts that filing motions, noting objections, and designating witnesses to present a party's direct testimony, constitute "discovery abuses."2/ To the contrary, such actions are clearly proper and, in fact, contemplated by the NRC's rules of practice. See, e.g., 10 CFR §§ 2.740b(b), 2.741(d). Indeed, the precise filings and objections labeled "abuses" by LILCO have been accepted (in some cases granted), and treated as authorized under the NRC's rules by the tribunals to which they were addressed, including this Board and its predecessors.

There is no conceivable basis, nor does LILCO suggest one, for the notion that doing what is necessary and contemplated by the rules to protect a party's interest is an "abuse" of anything, much less of discovery which was the focus of this hearing. In truth, LILCO's advancement of an argument so clearly frivolous on its face could itself be termed an "abuse" of this Board's process.

2/ See, e.g., LILCO Supp. at 7, 8, 12, 21, 44, 47, Att. 3 at 4, Att. 4 at 22 (properly filed objections to interrogatories, or objections to irrelevant questions during hearing, constitutes "bad faith," "obstructionism" and an "abuse of discovery"); 18-19, 46, Att. 3 at 5-6, 8, Att. 4 at 23-24, 27 (properly filed (and granted) motion for extension of time, and motions to vacate and to stay Board order are "obstructive pleadings" and an "abuse of discovery"); 7, 12, 15-16, 42, Att. 4 at 30 (designations of witnesses to present direct testimony on behalf of Governments were "obstructionist," misleading, and an "abuse of discovery").

Overall, the LILCO Supplement appears to be a product of LILCO's frustration and desperation in this licensing proceeding. LILCO's obvious anger and resentment are ultimately directed at Governmental policies and determinations with respect to emergency planning and Shoreham, or facts and testimony, over which LILCO has no control, but which LILCO does not like because they preclude the findings required for licensing.

For example, LILCO's Supplement addresses at length -- and furiously condemns -- the following determinations and decisions, lawfully adopted by the Governments: (1) not to prepare or submit to the NRC emergency plans for Shoreham and not to assist LILCO in its efforts to obtain an operating license; (2) to respond ad hoc and not according to any existing plan, including LILCO's, if Shoreham were licensed and an accident occurred; (3) to oppose the licensing of the Shoreham plant; and (4) to implement these policies by various actions within their sovereign authority.3/ LILCO's frustration aside, those determinations, decisions and policies, and facts resulting from them, have nothing to do with the production of emergency plans in discovery, and they are not matters which can give rise to any NRC sanctions. They are lawful exercises of Governmental authority; they are facts, not abuses of discovery.

3/ See, e.g., LILCO Supp. 6, 8-11, 12, 48-50 (alleged Governmental motivations, intentions, and "strategies" invented by LILCO and -- without documentation -- attributed to the Governments, and labeled "explanations" for lawfully adopted policies).

Similarly, if a fact or a witness' testimony fails to comport with a LILCO expectation or rebuts an argument LILCO wishes to make to further its quest for a license, LILCO simply declares that fact, or the Government official's testimony given under oath, "a lie," "misleading," or deliberate concealment.4/ LILCO cannot change the facts. Nor can it, by impugning without basis, the honesty, integrity, or credibility of Government officials, turn truthful testimony into an "abuse of discovery."

The Board must not sanction LILCO's attempt to turn this limited proceeding into a one-sided re-visitation and re-interpretation of the six years of litigation in this case for an additional reason. There are only two relevant allegations of "discovery abuse" which are properly before the Board: (1) the alleged nonproduction of the County EOP and other plans; and (2) the pre-June 10, 1988, deposition impasse. The former was the matter at issue in the hearing on June 11, 12, 14 and 19; the latter was not the subject of the hearing but was the subject of the Board's June 10 Order and these filings are to supplement the filings ordered by the Board on June 10. This Board has never

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4/ See, e.g., LILCO Supp. at 7 (New York State testimony that State Plan and guidance materials are inapplicable to Shoreham was "to divert disclosure"); id. at 8 (Governments "conceal[ed] or mischaracteriz[ed] facts, plans, documents and policies"); id. at 16-17 (County Executive's testimony that he did not know whether the County has "a general contingency plan for emergencies," and that he was aware of no "standard documents or plans or procedures which [the County Executive] would look to follow in responding to any type of emergency" casts a shadow on County Executive's veracity); id. at 38-39 (Commissioner Axelrod's consistent testimony concerning facts about responding to a Shoreham emergency "is not credible"); id. at 41 (REPG Affidavit is "misleading" and a "shell game").

recognized, or made a part of this proceeding, any other alleged discovery abuse. To consider any other allegations now that the hearing is completed -- assuming any specific, documented, non-frivolous allegations had even been made (which they have not) -- would constitute a serious violation of the Governments' due process rights. See Section IV.A below.

In sum, the Board must recognize the LILCO Supplement for what it is. Most of it should be disregarded, if not actually stricken, for it is without basis, irrelevant, and far beyond the scope of the limited and focused proceeding as structured by the Board. The remainder must be rejected on the merits for the reasons set forth in the rest of this Reply.

This Reply is organized as follows. Sections II and III address the evidence from the recent hearing concerning the matter at issue in the recent hearing. Section II deals with the County's production of the EOP and related facts, and replies primarily to section 3.B (pages 24-33) and portions of Attachment 3 to LILCO's Supplement, and to applicable portions of the Staff's Supplement. Section III deals with the EOP production issue as it relates to New York State. It replies primarily to section 4.A (pages 33-38) and portions of Attachment 4 to LILCO's Supplement, and to applicable portions of the Staff's Supplement.

Section IV of this Reply explains why the remainder of LILCO's Supplement should be rejected out of hand, and why there

is no basis to find any discovery "abuses" as alleged by LILCO. Section V demonstrates why there is no basis to impose any sanctions on the Governments. Finally, Attachments 1 and 2 supplement the responses set forth in the body of this Reply, and respond to LILCO's Attachments 3 and 4, respectively.

II. Suffolk County Complied With Discovery Requirements in 1982 and 1983

A. Introduction

The primary focus of the Board's inquiry at the recent hearing concerned the alleged non-production of the County's EOP during 1982-83. Since the EOP was produced to LILCO in 1988 discovery (on two occasions), the issue became whether LILCO received or otherwise knew of the County's EOP prior to May 1988.

LILCO claims that it never learned of the existence of the County EOP until May 1988. Indeed, LILCO even asserts that the documents LILCO received in discovery in 1982-83 contained "no suggestion that a composite document even existed." LILCO Supp. at 25. LILCO also claims that the record discloses an approach by Suffolk County "to withhold its composite Emergency Operations Plan (LILCO Disc. Exs. 9 and 10) and abstain from even mentioning its name on this record for six years . . . ." LILCO Supp. at 7.

These are serious allegations of concealment. Yet, a review of LILCO's Supplement reveals that LILCO has no support for any of

its concealment allegations and that LILCO has known of the existence of the EOP for years.

Thus, for example, LILCO would have this Board find that a "composite" EOP existed as of 1982-83, and that the scope of that composite document was basically the same as that of the County EOP which exists today. LILCO Supp. at 26. For its "proof," LILCO relies in large part on a review of the dates which appear on particular documents, which are now in the EOP. LILCO argues that if a date on a document is prior to 1983, that "proves" that the document was part of the EOP in 1982 and 1983. LILCO Supp. at 26-27. The evidence demonstrates the fallacy of LILCO's "proof by dates" theory, as discussed in Section II.B below. Nonetheless, notwithstanding LILCO's supposedly careful review of the dates on documents which are now part of the County's EOP, LILCO somehow never gets around to mentioning what else is contained on the documents in evidence: many of the documents LILCO received in discovery in 1982-83 had the words "Emergency Operations Plan" (and various Annex and Appendix numbers) written all over them. It is simply not credible for LILCO to allege there was not even a "suggestion" in 1982-83 that a composite EOP document of some sort existed or at least was intended to exist. LILCO Supp. at 25.

LILCO's advocacy has exceeded legitimate bounds. It is time to bring the facts -- and the uncertainties -- back into perspective. The evidence of record is as follows:

-- The weight of the evidence indicates that the County's EOP grew from a small document in 1980-82 to roughly its present size in 1985. No one can be certain, however, just what it looked like in 1982 or 1983, except that the County's Disaster Preparedness Plan was then, and is now, the heart of the EOP. Of course, LILCO received the Disaster Preparedness Plan in both 1982 and 1983. LILCO Supp., Att. 5, at 3.

-- The evidence is undisputed that in 1982-83, the County attempted and intended to produce to LILCO the entire EOP as it then existed. Notwithstanding LILCO's rhetoric, there is not one scintilla of evidence that the County attempted or intended to withhold any part of that Plan or any other plan.

-- The evidence indicates that LILCO received most, if not all, of the County EOP in 1982-83. LILCO admits that it received the most important portions of the EOP including portions which expressly identified the existence of the EOP. In addition, in 1982-83 LILCO also received from the County over 7,000 pages of documents related to planning matters, including extensive materials on subjects which, by 1985, were discussed in the EOP. This massive document production fully apprised LILCO of the County's emergency planning processes and capabilities.

-- The evidence establishes that it is preposterous for LILCO to maintain that it was ignorant of the existence of the County's EOP until May 1988. Rather, the evidence shows: (a) in 1980-82, LILCO's emergency planning personnel had direct access to and were working with the then-current version of the County EOP; (b) in 1982-83 discovery, LILCO received documents which expressly mention the EOP; (c) during the 1980's, LILCO learned of the EOP by attending County-sponsored hurricane conferences; (d) in 1985, LILCO's emergency planners evidenced their knowledge of the existence of the EOP by asking Mr. Kelly to get a copy of the EOP from the County; and (e) LILCO has had a copy of the EOP since 1985-86.

What does all this mean? When the extravagant rhetoric is set aside, the facts establish (1) that Suffolk County made a good faith effort to respond fully to LILCO's 1982 and 1983 discovery requests, (2) a likelihood that all responsive documents were produced, and (3) that LILCO had knowledge of the existence of the EOP since 1980. The Staff agrees that there was no effort to conceal documents. Staff Supp. at 5-6. There is no basis at all for LILCO's allegations of concealment or of a "six-year long deliberate, systematic tactic of frustrating and defeating legitimate discovery efforts of LILCO." LILCO Supp. at 50.5/

5/ LILCO has argued that the alleged non-production of the EOP caused LILCO prejudice. LILCO Supp. at 52. This allegation is false. The Governments address this issue in Section V.A below.

The Governments addressed many of these points regarding 1982-83 discovery in their July 26 Supplement and will not repeat them in detail again. The following sections address some of the points raised in (or studiously omitted from) LILCO's Supplement.

B. In 1982-83 The County EOP was Smaller in Scope and Content than the Present Version of the Plan

LILCO asserts that although "various witnesses testified that the Plan has grown substantially since 1980, none denied that it had been in current form as of 1982-83." LILCO Supp. at 27. To buttress its position, LILCO selectively cites a few statements out of context, and then urges the Board to find that the version of the EOP existing in 1982-83 was substantially the same as the version produced in 1988. LILCO Supp. at 28. To support this assertion, LILCO attempts to compare the number of pages of EOP documents produced in 1982-83 with the longer version produced in 1988, and also attempts to "prove" the existence of a large EOP in 1982-83 by listing the dates of many documents. When all the evidence is reviewed, however, the Board must reach a single conclusion: while the precise contents of the EOP in 1982-83 cannot be determined, it certainly was not of the same size or scope as the 1985 or 1988 versions.

First, both Mr. Regan and Mr. Kelly testified that in the early 1980's the EOP was a small and very general document. Tr. 21882 (Regan); Tr. 21575 (Kelly). Both witnesses recalled

that very few annexes were in place in the early 1980's, and that the County was beginning the process of adding annexes to the plan. Tr. 21883-84 (Regan); Tr. 21575-76, 21589 (Kelly). The State's May 1981 review of the County EOP, as documented in the State review letter (LILCO Disc. Ex. 15), lends further credence to the testimony of Messrs. Kelly and Regan. The State's review letter indicates that town and village plans (or annexes) had yet to be prepared and that the reviewer had reviewed nothing beyond the County's Disaster Preparedness Plan. See LILCO Disc. Ex. 15 at 2.6/

Second, LILCO attempts to prove that a large EOP existed in 1982-83 by analyzing the dates which appear in the present-day version of the plan. LILCO Supp. at 26-27. Using this theory, LILCO contends that any document now in the Plan bearing a date prior to 1983 should have been produced as part of the EOP during 1982-83. Id. There is no basis for LILCO's theory. There is

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6/ The County's Disaster Preparedness Plan was in 1982-83, and remains today, the County's "Basic Plan." Tr. 21316-17 (R. Jones). It is undisputed that LILCO received the Disaster Preparedness Plan in 1982 and again in 1983. LILCO Supp., Att. 5, at 3.

LILCO asserts that Mr. Regan testified that all of LILCO Disc. Ex. 10, in one form or another, was part of a composite EOP in January 1982. LILCO Supp. at 28. This is not accurate. In testimony preceding that cited by LILCO, Mr. Regan made clear that he could not be sure what particular parts of the 1988 EOP were in the EOP in the early 1980s. Tr. 21901-03. Further, Mr. Regan's testimony on Tr. 21904 is ambiguous in referring to documents. LILCO asserts that Mr. Regan was referring to LILCO Disc. Ex. 10. However, from the context, he appears only to be referring to some portions of that document, not all of it. Tr. 21904 (Regan). At any rate, the testimony clearly does not support the broad proposition asserted by LILCO.

nothing in the record to suggest that the date affixed to a particular document represents the date that the document was incorporated into or became a part of the EOP. Indeed, the evidence indicates that there is no relationship between the date on a document and when, or if, it became a part of the EOP. For instance, the 1985 version of the EOP contained a 1982 version of the County's Emergency Preparedness Emergency Directory. See LILCO Disc. Ex. 9, at K00152. Similarly, the 1988 version of the EOP includes an Emergency Directory dating from May 1986 (LILCO Disc. Ex. 10, at K02380), even though there has been a more current Emergency Directory in existence since August 1987. See LILCO Disc. Ex. 11. Similarly, the replacement for old Annex K is dated December 1986; it is not yet a part of the EOP, although it is to be added in the future. Tr. 21412-13 (R. Jones); LILCO Disc. Ex. 22. Thus, this 1986 document will not be added to the EOP until at least 1988, or maybe later. Accordingly, LILCO's "proof by dates" is not probative of the existence of a larger EOP in 1982-83.7/

Third, LILCO also argues that the fact that the first page of the Table of Contents of LILCO Disc. Ex. 10 is dated "1/82" suggests that the EOP existed in substantially its present size

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7/ Even if LILCO's "proof by dates" theory were probative, it is not accurate. LILCO misrepresents the evidence about the number of pages of the current plan which perhaps existed before 1984. LILCO suggests that most of the current EOP dates back to the first half of the 1980s. LILCO Supp. at 26. In actuality, however, almost half of the plan is either undated or bears a date later than 1982-83. See LILCO Disc. Ex. 10. At least 193 pages bear no date and 117 pages are dated after 1983.

and format in 1982-83. LILCO Supp. at 27. This, again, is pure speculation by LILCO. As LILCO admits, pages 2-4 of the Table of Contents -- i.e., the pages referring to a large portion of the plan -- are undated and in a different typeface. LILCO Supp. at 27. This suggests that pages 2-4 were updated separately from page 1, most likely at a later time, consistent with the evidence that not much, if anything, beyond the basic Disaster Preparedness Plan (which is on page 1 of the Table of Contents) was contained in the County's EOP as of 1982-83.

The bottom line is consistent with what the Governments said in their June 26 Supplement. The precise contents of the EOP in 1982-83 cannot be determined now, since prior versions do not exist. Clearly, however, the EOP was in a state of flux, growing over 3-4 years from a very small to a much larger document.

C. The Record Demonstrates That The County Produced the EOP to LILCO in 1982-83

LILCO asserts that it did not receive the "composite" EOP, to the extent one existed, in 1982-83 discovery. LILCO fails to take into account much relevant evidence which makes it far more likely that LILCO did in fact receive the EOP as it then existed.

First, LILCO claims that the County witnesses had no recollection of production of the County EOP. LILCO Supp. at 28. This is not accurate. Messrs. Regan, Bilello, and F. Jones all testified as to (1) the extensive efforts undertaken in 1982 to

produce all documents even remotely responsive to LILCO discovery requests, and (2) their belief that the EOP was among the documents forwarded for production. Tr. 21839-40 (F. Jones); Tr. 21884-86 (Regan); Tr. 21449-[illegible] (Bilello). Messrs. Regan, Bilello, F. Jones and R. Jones testified to the same effect regarding 1983. Tr. 21318-20 (R. Jones); Tr. 21451-52 (Bilello), 21886-87 (Regan); Tr. 21842-45 (F. Jones). Most importantly, but ignored by LILCO in its Supplement, in response to Board questioning Mr. Regan recollected that in 1983, Mr. R. Jones told him that the County's EOP was included in the box of documents being forwarded for production. Tr. 21887 (Regan).

Second, LILCO's own evidence belies its assertion that it did not receive the EOP in 1982-83. LILCO now concedes that it received 11 portions of the County EOP in 1982-83, totalling some 208 pages. LILCO Supp. at 30.[8] Indeed, LILCO's own indices document this production.[9] See LILCO Supp. at 30. The LILCO indices also reveal, however, that LILCO received at least 19

8/ Although LILCO contends (LILCO Supp. at 30) that there are 161 pages comprising the 11 portions of the EOP produced to LILCO in 1982-83, in actuality, there are 208 pages. See S.C. Disc. Ex. 1.

9/ Specifically, LILCO acknowledges receipt of: Hurricane Disaster Plan Fire Island, New York Fire Service; Flood Disaster Plan Moriches Inlet Area; County Emergency Operating Plan - Annex A, App. 10 & 11, Activation of the County EOC; County of Suffolk Disaster Preparedness Plan, January 1, 1981; Emergency Operations Plan, Annex H, Police Service (with cover letters); Emergency Preparedness EOP for Suffolk County Sheriff's Office (with cover letter); State of New York, County of Suffolk EOP, Basic Plan for Suffolk County and its Towns and Villages (with cover letters); SOP, Office of the County Executive - Procedures for Use in the Event of National Disasters, Man-Made Disasters and Nuclear Attack; Emergency Directory. See S.C. Disc. Ex. 1.

other documents, totalling another 323 pages, that appear to be related to documents which by 1985 -- i.e., after the 1982-83 document production -- had been incorporated into the EOP.10/ Thus, in 1982-83, LILCO appears to have received most, if not all, of the 1982-1983 version of the EOP, as well as what appear to be early versions of documents that later became part of the EOP. In addition, there is no dispute that in 1984, LILCO also received the up-to-date version of the State Plan, an outdated version of which comprises 29 pages of the current County EOP. See Govts' Supp. at 29-31; Tr. 22052-53 (Davidoff); LILCO Supp. at 36, n.30.

Third, a substantial portion of the components of the 1985 and 1988 EOPs which LILCO allegedly did not receive in 1982-83, are unrelated to the substance of a County emergency response. The 1985 and 1988 EOPs contain a host of documents such as federal

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10/ See Govts' Supp. at 17-18. These documents include: When Public Water Supply Fails; Responsibilities of the Commissioner of the Department of Health Services; Responsibilities of the Commissioner of the Department of Health Services Alert A (Standby); Weekend and Holidays Call System - Health Services Department - Documents Produced Emergency Telephone Numbers; Town of Brookhaven Emergency Preparedness Preliminary Fire Island Evacuation Plan; Emergency Action Plan when Public Water Supply Fails; Town of Islip Emergency Preparedness Disaster Procedures and Resource Manual; Emergency Operating Center Staffing Pattern; Fire Island Emergency Operations Plan; Communication section of plan; Suggested Equipment for Response to Hazardous Materials Incidents by the Emergency Services Section, Revised January 1982; Hurricane Mitigation Plan for the South Shore of Long Island Planning Board; Emergency Operations Plan for Suffolk County Department of Parks; Emergency Medical Services Disaster Plan for Suffolk County; and separate "Annex Procedures for Major Radiation Incidents at Shoreham Nuclear Power Station" for the Department of Emergency Preparedness, the Department of Fire and Safety, the Department of Buildings and Grounds, the Department of Social Services, the Department of Public Works, the Health Services Department, and the Suffolk County Police Department. See S.C. Disc. Ex. 1.

and local statutes and regulations, totalling at least 122 pages.11/ LILCO can hardly claim prejudice from allegedly not having received such publicly available documents. They have no practical relevance to the substance of an emergency response.

The evidence underscores that in 1982-83, LILCO likely received all or virtually all of the EOP as it then existed. Counting the materials which by their titles in LILCO's indices appear to relate to subjects eventually included in the EOP, in 1982-83 LILCO received at least 531 pages of EOP-type documents, including many expressly identified as intended EOP components. Clearly, there was no effort by Suffolk County to conceal from LILCO the EOP, its contents, or any other emergency planning or response information that existed in 1982-83.12/

11/ For example, the following non-planning items which LILCO claims it first received in 1988 are contained in the 1988 EOP: Table of Contents (K02232-K02236), Legislative Authority - Legal Statutes Signed into Law (K02267-81); Annex A, Appendix 1 and 2 "Not applicable to County" (K92294-95); EOC Floor Plan (K02375-78); Disaster Relief Act of 1974 (K02473-95); Presidential Executive Order 11795 (K02496-98), Federal Disaster Assistance Administration Regulations (K02499-02519); Situation Reports (K02583-87), Jurisdictions (K02370-73); and Local Law - Establishing Lines of Succession (K02330-39). See LILCO Disc. Ex. 10.

12/ A final comment is appropriate in response to LILCO's disingenuous question: why did counsel produce the EOP in May 1988 if it thought the EOP was produced in 1982-83? LILCO Supp. at 28. LILCO's counsel knows the answer: precise records of documents previously produced cannot be located and thus, consistent with all the County's past efforts to be sure that all responsive documents are produced in discovery, counsel produced the EOP again.

D. LILCO's Claimed Lack of Knowledge of the Existence of the County EOP Until May 1988 is Unfounded

LILCO maintains that it never knew of the existence of a "composite" EOP until May 1988. LILCO Supp. at 1, 24, 25. In fact, the overwhelming evidence shows otherwise, as even the Staff acknowledges. Staff Supp. at 10, 12-13.

1. LILCO Has Known of the Existence of the County EOP At Least Since 1980, If Not Earlier

In 1980-81, the County, State and LILCO were engaged in an active effort to fashion an emergency response plan for Shoreham. The record indicates, and LILCO acknowledges, that in preparing this draft plan in 1980-81, the State, County, and LILCO had at their disposal the County's planning documents, including the County EOP. LILCO Supp. at 35. Thus, LILCO states: "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." LILCO Supp. at 35 (emphasis added). Indeed, Mr. Davidoff testified that he observed the County, State and LILCO planners literally cutting and pasting together a draft radiological response plan, using the County's generic plan as a model and resource to produce the draft radiological plan. Tr. 22004 (Davidoff); see also Tr. 21983-84 (Davidoff). Thus LILCO has conceded that it was aware of the existence of the County EOP at least since 1980.

2. The Documents LILCO Received in 1982-83 Discovery Clearly Disclosed the Existence of the County EOP

LILCO states that the documents Suffolk County produced in 1982-83 discovery contained "no suggestion that a composite [EOP] document even existed." LILCO Supp. at 25. That statement is demonstrably false.

The documents LILCO received from the County in 1982-83 clearly indicated the existence of the County EOP. Many of the documents had the words "County Emergency Operations Plan" stamped on each and every page, just above the annex and appendix notation designating which portion of the plan the document did or would eventually comprise.13/ Furthermore, many of the cover letters or memoranda attached to other documents which LILCO received in 1982-83 discovery also referred to the EOP explicitly.14/ LILCO cannot truthfully claim that the County was engaged in an effort to hide the existence of the EOP or that LILCO was unaware of its existence.

13/ Documents produced to LILCO in 1982-83 containing such explicit reference to the EOP include: the Flood Disaster Plan/Moriches Inlet Area, Activation of the County Emergency Operating Center, Hurricane Disaster Plan/Moriches Inlet, and the Suffolk County Standard Operating Procedure Police Service Annex. See S.C. Disc. Ex. 1.

14/ See letter from Schaller to Rogers, dated June 22, 1978, accompanying the Emergency Operations Plan for the Suffolk County Sheriff's Office; Memorandum from Treder to Uehlinger, dated October 1, 1981 attached to the Police Service Annex; and Memorandum from Treder to Murray attached to the Basic Plan for Suffolk County and its Towns and Villages. S. C. Disc. Ex. 1.

3. LILCO Personnel Have Regularly Attended Briefings Explaining Implementation of the EOP

As explained by Messrs. Regan, Kelly, R. Jones and Bilello (but completely ignored by LILCO in its Supplement), the County's Division of Emergency Preparedness annually convenes a Hurricane Conference. Tr. 21890-91 (Regan); Tr. 21329-30 (R. Jones); Tr. 21454-55 (Bilello); Tr. 21579-80 (Kelly). At such conferences, the staff of the Emergency Preparedness Division discusses the response envisioned by the County EOP should emergency conditions requiring a response arise in the event of a hurricane. All volunteer and response agencies, including LILCO, are invited. Historically, LILCO has attended. Tr. 21890-91 (Regan); Tr. 21330 (R. Jones); Tr. 21455 (Bilello). Thus, LILCO is briefed on a yearly basis as to the implementation of the County EOP in the context of preparedness for a hurricane.

Moreover, LILCO was involved in implementing an emergency response following Hurricane Gloria. Tr. 21330-31 (R. Jones); Tr. 21455-56 (Bilello). This response involved implementation of the County EOP. Id. Again, LILCO is hard-pressed to claim no knowledge of the EOP.

4. In 1985-86, LILCO Instructed Mr. Kelly, A LILCO Employee, to Obtain the County EOP

The record also establishes that in 1985 or early 1986, LILCO supervisors involved in LILCO's emergency planning efforts asked Mr. Norman Kelly, the former Director of the County's Division of

Emergency Preparedness, to obtain a copy of County's EOP. The supervisors who made the request were most likely Mr. Renz or Mr. Daverio. Tr. 21547, 21566-67 (Kelly).15/ LILCO attempts to evade this fact, and has even submitted an affidavit which, in effect, questions the testimony of Mr. Kelly. See Affidavit of John A. Weismantle, dated July 19, 1988.16/ But the truth is clear: LILCO clearly knew of the EOP in 1985 or early 1986. Mr. Kelly's testimony that he was asked by a LERO supervisor to obtain the EOP was not contradicted by any evidence. And, the evidence establishes that the LILCO personnel who worked with the County EOP in 1980-81 included Mr. Daverio and Mr. Re..., both of whom were supervisors of Mr. Kelly in 1985-86. Tr. 21983-84 (Davidoff). Once again, the evidence belies LILCO's feigned ignorance of the EOP until May 1988.

LILCO also claims that Mr. Kelly did not receive from Mr. R. Jones the entire County EOP as it existed in 1985, but only a portion of the EOP. LILCO Supp. at 30-32. The facts are in dispute somewhat on this issue, but the weight of the evidence clearly supports the view that Mr. Kelly received all of the 1985

15/ The Board may take notice of the fact that one of the two supervisors mentioned by Mr. Kelly, Mr. Daverio, attended the first two days of the hearing, but was not in attendance on the third day when Mr. Kelly testified.

16/ The Weismantle Affidavit is not evidence in this special proceeding. If LILCO had thought Mr. Weismantle's testimony was important, it should have barred him from attending sessions of the hearing (Mr. Weismantle was present for at least a portion of the proceeding) and should have proffered him as a witness to be questioned by the Board and parties. His Affidavit, untested by cross-examination and not even offered into evidence by LILCO, is entitled to no weight.

EOP. Mr. Kelly testified in 1985-86, that he only "briefly looked at" the contents of the brown envelope containing the document he received from Mr. Jones and thus, that he does not really know what he obtained. See Tr. 21561-62 (Kelly).17/ Mr. Jones, however, does knows what he gave to Mr. Kelly and he testified as to that knowledge. For his own purposes in updating the EOP, Mr. Jones had reproduced 10 copies of the 1985 version of the EOP. In 1985 or 1986, Mr. Jones provided Mr. Kelly with one of those 10 copies. Tr. 21329 (R. Jones).18/

17/ Mr. Kelly's recollection of facts was at best selective. Thus, while he testified that he recalls that Mr. Jones did not want to copy the whole EOP and he believes that the version he received in 1985 was smaller than the version produced in 1988 (Tr. 21561-62 (Kelly)), on other pertinent facts -- who asked him to get the EOP and what he did with it -- Mr. Kelly had no precise recollection. Tr. 21547, 21549, 21566-69 (Kelly). In these circumstances, Mr. Jones' clear recollection of providing Mr. Kelly with a complete 1985 version of the EOP, one of 10 he had had copied, is more credible.

18/ LILCO attempts to impugn the credibility of Mr. Jones by claiming that he inaccurately described Mr. Kelly's LILCO job description. LILCO Supp. at 32. In fact, in the testimony cited by LILCO, Mr. Jones was describing -- accurately -- Mr. Kelly's job description as Director of the Division of Emergency Preparedness, not Mr. Kelly's LILCO role as LILCO contends. See Tr. 21327 (R. Jones).

LILCO also assumes without basis that Mr. Jones would have had to have copied the EOP on the xerox machine located at the Emergency Preparedness Division. See LILCO Supp. at 32. There is nothing in the record to suggest that this is the course of action he took. Given the limited capacity of the xerox machine at the Division, it is more likely that the 10 copies were made elsewhere, on a larger machine. In his testimony, Mr. Jones referred to the inability of the Division's machine to handle such large jobs as copying the EOP in explaining why he had not copied the 1988 version for production pursuant to LILCO's 1988 document requests rather than providing counsel one of the 10 copies he had had duplicated in 1985. Tr. 21409 (R. Jones).

E. Conclusion

An extensive record has been compiled on the issue of the EOP's production in 1982-83 discovery. As of June 15, 1988, the Governments predicted that the facts would establish that the EOP had been produced in 1982-83, that records "proving" that production could not be found, but that any non-production, if it occurred, was unintentional. See Governments' Response to Board Order of June 10, 1988, Concerning the CLI-86-13 Remand (June 15, 1988).

The hearing record has now established the truth of the Governments' June 15 filing. The record further establishes LILCO's knowledge of the EOP since 1980 and LILCO's likely possession of the EOP since 1985. LILCO's allegations of discovery abuse and of prejudice are completely without foundation.

III. New York State Concealed Nothing About the County's EOP During the Discovery Process

LILCO alleges that New York State withheld the County's EOP from LILCO and concealed knowledge about it. See LILCO Supp. at 33-38; Att. 4, at 1-2. In essence, LILCO argues that New York State had knowledge of the County's EOP in 1988, but concealed that knowledge in answers to deposition questions and in answers to LILCO's March 24, 1988, Second Set of Interrogatories and Document Requests Regarding Contentions 1-2, 4-8, and 10 to

Suffolk County, New York State, and the Town of Southampton ("LILCO's March 24 Discovery"). The Board must reject such assertions. They are unsupported by the record, which in fact reveals that the State fully complied with discovery requirements.

LILCO claims that "it is inconceivable that the State did not know about the SCEOP during the course of discovery." LILCO Supp. at 34. In itself, this is an overstatement. The fact is that some New York State witnesses had some knowledge about the County's EOP during the course of discovery and some witnesses did not. Even given the limited knowledge of some State personnel about the existence of the County EOP, however, LILCO utterly fails to make the connection between that knowledge and any inaccurate or incomplete discovery response. In short, LILCO's accusations are baseless.

LILCO's allegations regarding alleged nondisclosure of the County EOP are divided into two parts: (1) the State's responses to LILCO's March 24 Discovery; and (2) State witnesses' responses to questions asked during depositions and in the recent hearings. These allegations are discussed below.

A. The State Properly Answered LILCO's March 24 Discovery

LILCO claims that "New York State neither produced nor disclosed the existence of the SCEOP during discovery." LILCO Supp. at 33. This allegation is baseless for three reasons.

First, prior to 1988, LILCO had never asked the State for that document or even that class of document. Thus, no County EOP discovery issue concerning New York State exists prior to 1988.

Second, even in 1988, only one of LILCO's March 24 Discovery requests, Interrogatory 120 -- actually, a document request, not an interrogatory -- sought from New York State production of documents such as the County's EOP. While the State objected on relevancy grounds to that document request in its first response dated April 20, 1988,19/ the State could not have produced the EOP at that time in any event, because it did not receive a copy of the document until May 6, 1988.20/ LILCO ignores this fact. Furthermore, following the Board's May 10 ruling that plans pertaining to non-Shoreham emergencies were relevant and needed to be produced (Tr. 19382 (Gleason)), the County produced the EOP

19/ See Governments' Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10 (Apr. 20, 1988), at 2-3, 28.

20/ It appears that in 1981, a SEMO employee did review an early version of the County's EOP. See LILCO Disc. Ex. 15. There is no evidence, however, that a copy of that version of the EOP was retained by the State or was in the possession of the State during 1988 discovery.

to LILCO on May 25, 1988. The version produced by the County was identical to the one that the State had obtained on May 6. Tr. 21101-03 (DeVito); see Tr. 21325 (R. Jones). The State was under no obligation to produce that voluminous document in response to the same interrogatory under which the County produced it.

Third, LILCO charges that New York State did not "disclose" the existence of the County's EOP in its April 22, 1988, and June 3, 1988, interrogatory answers. See LILCO Supp. at 33, n. 25. In addition to the facts that the State did not even receive a copy of the EOP until May 6 and that counsel did not learn of the State's possession of the EOP until June 6,[21] there is yet another dispositive reason for this fact: no LILCO interrogatory asked New York State to disclose the existence of the County's EOP.[22] Indeed, LILCO's Supplement fails to cite a single interrogatory calling for such "disclosure." There can be no "thwarting of discovery" if the party framing the interrogatories neglects to request information that it retrospectively wishes it had requested.

21/ See, e.g., Governments' Motion for Licensing Board to Vacate June 17 Order (June 20, 1988) ("Motion to Vacate"), at 11, n. 9. As the Motion to Vacate makes clear, once New York State discovered the copy of the EOP which had been obtained on May 6, the State made no effort to hide its existence.

22/ As noted above, so-called Interrogatory 120 was, in fact, a document request. And, the record is clear that after counsel for the State discovered on June 6 that the State had received a copy of the EOP, the Board and LILCO were informed of that fact. See Motion to Vacate at 12, n.10.

In sum, there is no basis for the Board to find that the State failed to respond fully and completely to interrogatories and document requests related to the EOP. See also Section IV.B below.

B. The State's Witnesses Testified Truthfully About the EOP in Depositions and Hearings

LILCO contends that the State's witnesses have been less than candid in answering deposition and Board questions about the County's EOP. See, e.g., LILCO Supp. at 33 ("the State denied knowledge of the SCEOP at discovery depositions . . . and even at the recent hearings"). A review of the evidence requires the Board to reject such allegations.

LILCO spends pages citing circumstantial evidence indicating that someone within the State might have known that the County possessed some sort of emergency operations plan. See LILCO Supp. at 34-37. In so doing, LILCO attempts to skew the proper focus of inquiry. The pertinent question in response to LILCO's allegations is whether any State wi' ess was untruthful or less than candid about his own knowledge. There is absolutely no such evidence in the record. The State's witnesses answered the Board's and all parties' questions honestly and to the best of their abilities. It may frustrate LILCO that some witnesses had no knowledge, or only limited knowledge, of the EOP. Indeed, LILCO may not have liked, or even may have been surprised by, the answers given by the State's witnesses on that subject.

Nonetheless, LILCO's tactic of asserting that a witness was lying because someone else in the State might have had the knowledge that the testifying witness lacked, is wholly improper.

Furthermore, in attempting to support its accusations, LILCO resorts to misrepresentations of the record. For instance, citing testimony by Mr. DeVito and Dr. Axelrod, LILCO alleges that New York State "denied knowledge of the SCEOP at discovery depositions . . . and at the recent hearings before the Board." LILCO Supp. at 33. The record actually reveals that neither witness "denied knowledge" of the County's EOP.

For instance, LILCO refers to page 66 of Dr. Axelrod's deposition in an effort to support its allegation. See LILCO Supp. at 33. At that page, however, Dr. Axelrod testifies that Suffolk County has "no site-specific plan with respect to the Shoreham Nuclear facility" (emphasis added). Dr. Axelrod's statement obviously pertains to a Shoreham site-specific plan, not the County EOP, as LILCO falsely alleges. It is also a true statement. The evidence is also clear that, in fact, Dr. Axelrod had only limited knowledge of the existence of the EOP. As he stated at the hearing:

> I'm not aware of the specific existence of the plan. I know that there was a document which was being used by Suffolk County to coordinate its activities and to work with the State at that point in time [1985, Hurricane Gloria]. I did not see the plan, but I was informed that such a plan existed from which Suffolk was working.

Tr. 21660-61 (Axelrod). LILCO may wish that Dr. Axelrod had more familiarity with the County's EOP, but the fact is that Dr. Axelrod's knowledge is what it is -- vague and limited. He testified truthfully, and concealed nothing.

Similarly, Mr. DeVito's testimony that he was not familiar with the EOP was truthful, and entirely reasonable. As he testified, he did not make a practice of studying local government plans, and counties, not SEMO, are responsible for developing County EOPs.23/ Thus, he testified that "you'd have to check with Suffolk County" to determine whether Suffolk County had a "broad-based disaster preparedness plan."24/ He did not, as LILCO alleges (LILCO Supp. at 33), deny knowledge; rather, he directed LILCO to the County as a better source of information.25/

Furthermore, as Mr. DeVito testified in his deposition, he relied on his staff: (a) to provide to counties "the broadest guidance and assistance with respect to what ought to be in the plan and how you might structure it;" and (b) to administer the details of the federal funding program.26/ Thus, it is

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23/ DeVito Deposition, Tr. 24, 27.

24/ Id. at 25, 27.

25/ Mr. DeVito did testify, however, that he had general knowledge similar to that of Dr. Axelrod, regarding the County's use of a plan during Hurricane Gloria. DeVito Deposition, Tr. 31-40.

26/ Id. at 24, 26 and 27.

understandable that he would not have personal knowledge of the County's EOP. Finally, at the time of the April 29, 1988 deposition, Mr. DeVito's staff had not yet begun to work with Suffolk County with respect to the EOP. Tr. 21103, 21179 (DeVito). Thus, despite LILCO's claims to the contrary (see LILCO Supp. at 33, and Att. 4 at 1), at the time of his deposition, Mr. DeVito in fact had every reason to doubt that his staff would know whether Suffolk County had an EOP.27/

LILCO also attempts to make much of the fact that State witnesses Germano and Davidoff had varying degrees of experience or familiarity with the County's EOP. See LILCO's Supp. at 33-38 and Att. 4, at 1-2. For example, LILCO notes that Mr. Davidoff was aware that LILCO and Suffolk County used an "all hazards or generic emergency response plan that existed at that time" to prepare a radiological plan for Shoreham. Tr. 21983-84 (Davidoff). LILCO never identifies what point these facts are supposed to prove, other than that these witnesses, like

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27/ DeVito Deposition, Tr. 25. Furthermore, contrary to LILCO's assertion in Attachment 4 at 1, it is reasonable that Mr. DeVito was unaware of Mr. Horton's review of the County EOP in 1981 because Mr. DeVito did not become Director of SEMO until 1982. Tr. 21096-97 (DeVito). It is also noteworthy that while LILCO now attempts to impugn Mr. DeVito's integrity, on April 29 at his deposition LILCO never provided Mr. DeVito with evidence of Mr. Horton's 1981 review. See LILCO Disc. Ex. 15. Thus, while LILCO could have attempted to refresh Mr. DeVito's recollection, it chose for whatever reason to conceal that 1981 document from the witness. It hardly constitutes a discovery abuse by a New York State witness not to have a recollection, particularly when LILCO made no effort to refresh the recollection but, instead, saved a document that might have refreshed the recollection for use at trial. That may constitute a proper litigation tactic, but it provides no basis for LILCO's discovery abuse allegations against the State.

Dr. Axelrod, had some knowledge of the County's EOP and forthrightly displayed that knowledge when questioned about it. LILCO fails to establish any discovery violation or concealment of knowledge of the County's EOP, because none occurred.28/

Thus, there is no evidence that any discovery abuse of any kind was involved in the testimony of State witnesses concerning the County's EOP cited by LILCO. To the contrary, the evidence is clear that the State's witnesses testified truthfully and to the extent of their knowledge. LILCO's allegations are not based on evidence or on the record, but rather are based on LILCO's imagination. They must be rejected.

IV. Suffolk County and New York State Complied With Discovery Requirements in 1988

LILCO accuses Suffolk County and New York State of a wide array of 1988 discovery abuses, ranging from the alleged failure

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28/ LILCO also incorrectly interprets certain statements of counsel in its futile attempt to show that New York State concealed knowledge of the County's EOP. For example, LILCO claims that counsel made statements "denying knowledge of the SCEOP by anyone in State government." LILCO Supp. at 33, n.27. LILCO's accusation is most improper. Counsel was responding to the Board's inquiry concerning counsel's knowledge of the County's EOP on the day (May 27, 1988) when the County's EOP and its existence first became an issue. Rather than denying that anyone in the State government had knowledge of the County's EOP as LILCO put it, counsel actually stated that he did not know anything about the document and, to the best of his knowledge, no one else did either. Tr. 20548-49 (Zahnleuter). Further, the implication in note 30 of LILCO's Supplement -- that Mr. Davidoff did not verify a reference in an interrogatory response to what counsel stated because the statement was false -- is utter nonsense. References to statements by counsel about the extent of counsel's knowledge at a particular point in time are not the kinds of statements in interrogatory responses that need to be verified.

to produce documents at all or in a timely manner, to the alleged failure to produce witnesses for depositions. The Governments respond to many of LILCO's accusations in Attachments 1 and 2 hereto, and demonstrate that LILCO's charges are without basis. As a threshold matter, however, the Governments stress that although LILCO's allegations are unfounded, the Board cannot even consider them without violating the Governments' statutory and constitutional rights to due process.

A. It Would Violate the Governments' Due Process Rights If The Board Considered the Numerous Alleged "Abuses" Raised By LILCO Which Are Outside the Scope of This Proceeding

Prior to the recent hearing, the Board informed the parties numerous times that the issue to be explored was whether relevant emergency plans had been produced to LILCO during discovery.29/ The Board gave the Governments no notice that in

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29/ "The issue that is being pursued is the question of the late emergence of this state-county emergency plan." Tr. 20884 (Gleason).

"[W]e . . . still decide to retain jurisdiction over the issue as to whether [the Suffolk County] emergency plan or other plans should have been produced during the discovery process." Tr. 20892 (Gleason).

"[J]ust so there is no misunderstanding as far as the Board's view is concerned, the discovery that we have considered and have authorized relates to the production of emergency plans and whether they should have been produced earlier, and relates also to the sanctions which the Board will impose when it resolves that issue." Tr. 20904 (Gleason).

"[T]he basic issue is whether state and county emergency plans may have been withheld during the proceeding. And if such plans were withheld what were the circumstances surrounding the withholding?" Tr. 20924 (Gleason).

(footnote continued)

its limited, focused proceeding, it would consider any other alleged "abuses." There was certainly no suggestion that the Board would consider whether the Governments had attempted to "obstruct" LILCO by filing legitimate motions, designating witnesses to present direct testimony on their behalf, making certain statements in affidavits or interrogatories that LILCO chooses not to believe, returning to LILCO copies of the LERO Plan, or any of the other so-called "abuses" alleged by LILCO. Even LILCO's counsel initially stated his understanding that the scope of the Board's inquiry concerned only the production of emergency plans.30/ As became apparent during the hearing, however, and as now confirmed by LILCO's Supplement, LILCO seeks to have the Board find the Governments guilty of, and sanction them for, a multitude of additional alleged infractions. The Governments never received notice that the proceeding would embrace such a wide gambit.

(footnote continued from previous page)

"The hearing is going to relate to the production of emergency plans and whether they should have been produced earlier and if they have not been produced, what the circumstances were for their nonproduction." Tr. 20935 (Gleason).

30/ "What LILCO is interested in discovering is the reasons and specifics of how the County's emergency operations plan was not produced before now and related matters. It does not go to realism. We concur with the staff that that issue is closed." Tr. 20877 (Irwin).

"With the resolution of the realism and best efforts issues, the scope of the depositions of these state employees would be truncated [from what was stated in LILCO's deposition notices]. It will relate to their knowledge of the existence of county plans, state plans, related items." Tr. 20881 (Irwin).

Indeed, during the hearing the Governments objected strenuously to LILCO's repeated attempts to inquire into matters outside the scope of this proceeding as defined ahead of time by the Board. The Governments argued on numerous occasions that the Board's lenience in permitting LILCO to broaden the scope of the inquiry was an intolerable violation of the Governments' due process rights. See, e.g., Tr. 21718 (Lanpher); Tr. 21085-86, 21788-89 (Zahnleuter). The Board generally permitted LILCO to inquire into matters outside the scope of the proceeding for the stated reason that the Board did not know whether the questions asked would eventually be tied to the narrow issue before it. Nevertheless, the Board sought to allay the Governments' due process concerns by reconfirming that the proper scope of the inquiry related "specifically to either retention or avoidance of delivering up emergency plans . . . and it should not be broadly construed, because we are not going back and relitigate the case." Tr. 21092 (Gleason). Notwithstanding the Board's plain language, LILCO remains determined in its attempt to expand the scope of the inquiry drastically, and thus to deny the Governments their right to due process. The Board cannot condone this LILCO tactic.

It is an elementary principle of administrative and constitutional law that a party must receive adequate notice of the violations it is alleged to have committed prior to adjudication of those violations. See Administrative Procedure Act, 5 USC § 554(b)(3) (party entitled to timely notice of "the

matters and facts asserted"); NLRB v. Tamper, 522 F.2d 781, 789 and n.12 (4th Cir. 1975); Rodale Press v. FTC, 407 F.2d 1252, 1256 (D.C. Cir. 1968); see also 1 Koch, Administrative Law and Practice, § 5.5 (1985). Failure to provide adequate notice to a party, or to render a decision on matters not adequately noticed, constitutes a violation of due process. See NLRB v. Tamper, 522 F.2d at 789 and n.12; see also Gardiner v. A.H. Robins Co., 747 F.2d 1180, 1191-93 (8th Cir. 1984). The obvious purpose behind the requirement of adequate notice is to give the accused party a fair chance to know the specific violations charged against it and to prepare a defense. See NLRB v. Tamper, 522 F.2d at 789; Koch at § 5.5.

The NRC adheres strictly to these principles. Thus, it is well-settled that when parties have been given notice that certain issues are to be considered in a proceeding, a Board does not have the power to explore other matters. Duke Power Co., (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979).

In view of the foregoing, it is evident that this Board may not consider the myriad alleged "abuses" which LILCO has raised in its Supplement. Several times prior to the hearing the Board made it plain that the focus of its inquiry was whether emergency plans -- and particularly the Suffolk County Emergency Operations Plan -- had been improperly withheld. It was on that

basis that the Governments prepared and presented their case for the hearing -- to rebut that baseless LILCO allegation. The Board cannot now consider alleged abuses that the Governments were never given an adequate opportunity to defend against or to rebut.

B. LILCO's Allegations of 1988 Discovery Abuses Have No Basis

In addition to rebutting point-by-point the various allegations made by LILCO,[31] it is necessary to address these allegations in the context of the many NRC proceedings which were in progress during the first half of 1988. Viewed in their proper context, it is clear that LILCO's extreme accusations are devoid of factual or legal basis. They must be rejected.

LILCO's allegations fall into two distinct categories. First, LILCO alleges abuses related to discovery on the merits of the legal authority contentions. These abuses are alleged to have occurred between early April and June 10, 1988, the date when the Board ruled that it would cease proceedings on the legal authority contentions. Tr. 20862 (Gleason). These allegations are addressed in Section IV.B.1 below. Second, LILCO alleges abuses related to discovery after June 10, 1988, related to the Board's "integrity of the proceeding" inquiry about production of

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31/ The Governments reiterate that the majority of LILCO's charges are irrelevant to the document discovery issues which were noticed for hearing by the Board on June 24 (Tr. 20924) and June 29 (Tr. 20935). In addressing LILCO's allegations here, the Governments do not waive their objection, on due process grounds, to any consideration of such allegations.

emergency plans in discovery. These allegations are addressed in Section IV.B.2 below.

1. There Were No Discovery Abuses During Discovery on the Realism Merits: April-June 10, 1988

Reading LILCO's Supplement and Attachments 3 and 4 thereto could lead one to think that the Governments violated virtually every NRC discovery regulation during the April-June 10, 1988, period, many of them several times. When the facts are reviewed, however, it is clear that LILCO's Supplement is long on rhetoric and accusations but short on substance.

The bottom line is not in dispute: on June 10, 1988, the CLI-86-13 remand proceeding reached an impasse.32/ The impasse concerning realism depositions arose out of the Board's erroneous interpretation and application of the NRC's new emergency planning rule, and is discussed further in Sections IV.B.1.c and V.B of this Reply. Nonetheless, despite the occurrence of that impasse, the course of discovery in the CLI-86-13 remand prior to June 10 must be viewed from the proper perspective. It involved interrogatories, document production requests, and depositions, all of which took place at the same time that several other NRC proceedings were very active. A full review of the facts reveals that the Governments responded fully and completely to all

32/ See Governments' Notice That the Board Has Precluded Continuation of the CLI-86-13 Remand (June 9, 1988) (hereafter, "Governments' Notice"). This Notice was served on the Board on the morning of June 10, 1988, and was the subject of a conference call on June 10 (Tr. 20845-62).

realism interrogatories and document requests -- even after the June 10 impasse -- and that the extent of the deposition impasse itself was limited.

a. The Governments' Response to LILCO's March 24 Discovery

LILCO alleges that the Governments' first so-called discovery abuse in 1988 occurred shortly after the filing of LILCO's March 24 Discovery. LILCO's March 24 Discovery contained 115 separate interrogatories and document requests. On April 6, 1988, the Governments sought an extension of time to respond to LILCO's massive discovery, as well as additional time to respond to more limited discovery filed by the NRC Staff.33/ See Governments' Motion for Extension of Time to Respond to Realism Discovery Requests, and to Extend Discovery Schedule, April 6, 1988 ("April 6 Motion"). LILCO now alleges that the Governments abused the discovery process in seeking a time extension. The stated basis for this accusation is that, according to LILCO, the "clear implication" of the April 6 Motion was that the LILCO interrogatories would be answered when, in fact, the Governments' response included objections to many of the interrogatories. LILCO Supp. at 18-19.

LILCO's allegation is false. The Governments did not state that they would answer all or even most of LILCO's

33/ On March 31, 1988, the Staff filed its First Set of Interrogatories.

interrogatories. Rather, in their April 6 Motion the Governments specifically stated that many of the interrogatories sought irrelevant information and would not be answered, unless the yet-to-be-issued April 8 Board Order setting forth the Board's basis and rationale for the February 29 Order denying LILCO's summary disposition motions[34/] were to establish that the information sought was relevant:

> Further, many of LILCO's interrogatories are based on a LILCO view of relevance that the Board may well have rejected by reason of its rejection of LILCO's summary disposition motions. For example, LILCO's outstanding interrogatories include a significant number of questions based upon or related to other New York State nuclear plants. The Governments firmly believe that these (and other) interrogatories are irrelevant to the issues before this Board. Clearly, if the Governments are correct, less effort will need to be expended in answering LILCO's interrogatories. Conversely, if the Governments are wrong in their assessment of the relevancy of LILCO's interrogatories, they face additional work in responding. In any event, the Board's opinion(s) will presumably address this issue.

April 6 Motion at 10-11.[35/] Thus, contrary to LILCO's assertion, the Governments did not give the "clear implication" that they

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[34/] See Confirmatory Memorandum and Order (Ruling on LILCO's Motions for Summary Disposition of Contentions 1, 2, 4, 5, 6, 7, 8 and 10, and Board Guidance on Issues for Litigation) (February 29, 1988) (hereafter, "February 29 Order").

[35/] As it turned out, the Board's April 8 Memorandum did not answer the relevance questions. Instead, the Board stated that the relevance of other plans was an issue to be decided. See Memorandum (Extension of Board's Ruling and Opinion on Summary Disposition Motions of Legal Authority (Realism) Contentions and Guidance to the Parties on New Rule 10 CFR 50.47(c)(1)). (April 8, 1988) (hereafter, "April 8 Memorandum"), at 54.

would answer, rather than object to, all or most of LILCO's interrogatories.

Further, it must be emphasized that contrary to the implications in LILCO's Supplement (LILCO Supp. at 18), the Governments did not principally rely upon the burden of responding to LILCO's March 24 Discovery as the basis for their need for a time extension. That was only one of four reasons stated in the April 6 Motion to support the need for more time. The other reasons were LILCO's April 1 filing of its prima facie case on the legal authority issues, the Board's failure to provide its summary disposition rationale, and, most important, the multiple other Shoreham litigation obligations then confronting the Governments. Those obligations included the following: discovery on school, EBS, and hospital remand issues had been time consuming (leaving little time to devote to the legal authority issues) and had not been completed until March 25; testimony on school, EBS, and hospital issues was due to be filed on April 13, with strike motions and responses thereto due to be filed on April 20 and 27; a brief on LILCO's 25% power application had to filed on April 21; a response to LILCO's LBP-88-2 Exercise appeal had to be filed by April 18; a reply brief had to be prepared and filed by April 26 in the United States Court of Appeals for the First Circuit in the case challenging the NRC's new rule; and counsel had to prepare for oral argument before the Appeal Board on April 28, 1988, regarding LILCO's appeal of LBP-87-32. See April 6 Motion. In

short, the Governments sought a time extension for several reasons. LILCO's shrill attack on the Governments' motivations is unseemly, has no basis, and is, in fact, contradicted by portions of the April 6 Motion that LILCO fails to mention.

During a conference call, the Licensing Board granted the Governments' April 6 Motion and later confirmed the fact in an Order. See Confirmatory Memorandum and Order (April 12, 1988). The Board extended the time to answer the interrogatories to April 22, and to object until April 20. The Governments met those filing dates.36/ The Governments' compliance with the response deadlines established by the Board completely rebuts LILCO's accusation that the Governments were "untimely" in answering LILCO's March 24 Discovery requests. See LILCO Supp., Att. 3, at 1.

LILCO also alleges that the Governments' objections to many of LILCO's March 24 Discovery requests were made in bad faith. LILCO's apparent basis is that LILCO filed similar (though not identical) discovery requests in 1982 and 1983 -- prior to LILCO's realism affirmative defense ever having being raised, and prior to New York State being in the case -- and Suffolk County's relevance objections to them had been overruled. LILCO Supp. at 21, 44, and Att. 3 at 4. LILCO's allegation is frivolous and

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36/ See Governments' Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10 (Apr. 20, 1988); Governments' Answers and Additional Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10 (Apr. 22, 1988).

must be summarily rejected. The NRC's regulations, 10 CFR §§ 2.740b(b), 2.741(d), specifically contemplate the filing of objections to interrogatories and document requests which a party believes to be irrelevant. Moreover, the rulings made in 1982-83 were clearly not controlling five years later in the wholly separate 1988 CLI-86-13 remand proceeding involving different issues, different document requests, and held pursuant to a new emergency planning rule, 10 CFR § 50.47(c)(1)(iii).37/ The Governments set forth detailed bases for their view that LILCO's 1988 requests sought irrelevant information, given the issues pending before the Board in the CLI-86-13 record.38/ There is no

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37/ The 1982 discovery was in the "Phase I" proceeding, when the issue was LILCO's on-site emergency plan. Relevance rulings were made in that context. The 1983 discovery was in the litigation on LILCO's Plan and the County's contentions concerning LILCO's ability to implement that Plan. LILCO did not even raise its realism defense in that proceeding until August 6, 1984. See Section V.A below.

38/ For example, in their April 20, 1988 Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10, the Governments stated (at pages 2-3):

> The Governments object to LILCO's Interrogatories 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 by the Governments to a Shoreham emergency. See Confirmatory Memorandum and Order (Rulings on LILCO's Motions for Summary Disposition of Contentions 1, 2, 4, 5, 6, 7, 8, and 10, and Board Guidance on Issues for Litigation) (Feb. 29, 1988) at 2-3.
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> In addition, LILCO's Interrogatories which

(footnote continued)

body of law under which the assertion of a relevance objection in such circumstances would constitute an abuse of any kind.

On May 10, 1988, the Board overruled the Governments' relevance objections and ordered the Governments to answer the unanswered interrogatories. Tr. 19381-83 (Gleason).39/ Significantly, however, on May 10 the Board did not order the Governments to answer further any of the interrogatories which the Governments had previously answered on April 22. Thus it is improper -- and without any basis in the record -- for LILCO now to complain that the Governments' April 22 Answers were somehow inadequate. See LILCO Supp. at 19. LILCO had so argued on

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(footnote continued from previous page)
seek such information are not within the scope of relevant inquiry established by the NRC's new emergency planning rule. As the NRC stated in adopting the new rule:

> The final rule makes clear that every emergency plan is to be evaluated for adequacy on its own merits, without reference to the specific dose reductions which might be accomplished under the plan or to the capabilities of any other plan.

52 Fed. Reg. 42084 (November 3, 1987). LILCO's Interrogatories are in direct contravention of this NRC directive. Accordingly, LILCO's attempts to obtain information about other plants, other governments, other plans and other emergencies are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. See 10 CFR § 2.740(b)(1).

39/ The Board's May 10 ruling to answer interrogatories was later confirmed in Orders dated May 24 and June 21, 1988. See Board Ruling, May 24, 1988; Memorandum and Order (On Board Ruling of Various Motions Relating to Pending Realism Issues (June 21, 1988).

May 2[40]/ but the Board declined to order any further answers. This LILCO allegation of discovery abuse is not only baseless, but, in essence, is merely reargument of issues which LILCO lost on May 10.

The Board's May 10 ruling on the Governments' relevance objections required the Governments to answer 62 interrogatories from LILCO's March 24 Discovery requests. The Governments filed such responses on June 3, 1988.[41]/ These were timely and complete responses in full compliance with the Board's orders.[42]/

During virtually the entire period between May 10 and June 3, the Governments' counsel were involved in trial of school and nospital issues in Hauppauge, Long Island; when they were not so occupied, they were heavily involved in preparing for the 1988 Shoreham Exercise, working on matters pertaining to the continuing EBS litigation, working on the appeal from the Board's

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40/ 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.

41/ See State of New York's Response to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8 and 10 (June 3, 1988); Suffolk County's Further Responses to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8 and 10 (June 3, 1988).

42/ LILCO alleges that many of the State's answers filed on June 3 were "evasive." LILCO Supp. at 45. However, LILCO provides no details to support this bald allegation. If LILCO thought the State's answers were evasive, it should have moved to compel additional or more complete answers to discovery, by June 13. See 10 CFR § 2.740(f). LILCO did not so move and should not be permitted now to make allegations that responses were insufficient.

May 10 relocation center decision, and preparing for oral argument in the First Circuit case. Indeed, during the hearing on May 27, 1988, counsel for the Governments discussed the ongoing efforts to complete responses to LILCO's interrogatories and the Board agreed that they could be filed on June 3. See Tr. 20545, 20550-51 (McMurray, Gleason, Zahnleuter).43/ It clearly constitutes no abuse for the Governments to have filed responses in accordance with a Board-approved schedule.

Finally, LILCO complains that the Governments did not produce documents in a timely fashion pursuant to the May 10 Order. This allegation is also false. As noted above, the Governments' counsel were engaged on a host of Shoreham matters in the period immediately after May 10. Nevertheless, as documents became available, they were produced, as evidenced by the County's May 25 production of the EOP,44/ its June 1 production of two other documents,45/ and by the State's May 24 production of various documents.46/ In light of the Board's June 10 decision to discontinue the proceeding, document production stopped, since the Board's decision made discovery on the merits of realism issues a moot point. As discussed in

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43/ LILCO had suggested that responses be filed on May 31, only three days earlier. Tr. 20539 (Irwin).

44/ The EOP was transmitted to LILCO via Mr. Lanpher's cover letter to Mr. Sisk, dated May 25, 1988.

45/ See Mr. Lanpher's June 1, 1988, letter to Mr. Sisk conveying Annex K and a 1973 Brookhaven Plan.

46/ See Mr. Zahnleuter's May 24, 1988 Letter to Mr. Sisk conveying seven documents.

Section IV.B.2 below, however, notwithstanding the June 10 Order, the Governments subsequently did complete their document production, and thereby did respond fully to all of LILCO's 1988 document requests, in compliance with Board orders. LILCO can demonstrate no discovery abuse by the Governments with respect to responding to LILCO's 1988 interrogatories or document requests.

b. Suffolk County's Designation of County Executive Halpin to Present Its Direct Testimony on the County's "Best Efforts" Response

LILCO next accuses Suffolk County of abuse in designating Suffolk County Executive Halpin as its witness to present the County's direct case on the legal authority contentions. LILCO asserts that Mr. Halpin was not "knowledgeable" and that his designation was "disingenuous." LILCO Supp. at 12, 15-17. This allegation must be summarily rejected.

First, Mr. Halpin's designation as a witness to present the County's direct case has nothing to do with discovery. Second, it is a fact that Mr. Halpin, as Suffolk County Executive, is the one person who can speak knowledgeably, authoritatively, and on behalf of Suffolk County regarding what the County's "best efforts" response would be, as set forth in Mr. Lanpher's April 15, 1988, letter to the Licensing Board cited by LILCO. See LILCO Supp. at 15. The fact that LILCO was not satisfied

with all Mr. Halpin's answers to LILCO's deposition questions, does not make his designation as the County's witness a "discovery" issue, much less an abuse.47/

In an allegation which barely merits response, LILCO also accuses both the County and New York State of some unspecified abuse in not designating particular persons as witnesses. Thus, LILCO alleges that it was "misleading" for the County not to have designated Emergency Preparedness Division personnel as witnesses at some unspecified time (LILCO Supp. at 17) and for New York State not to have presented REPG personnel as witnesses in 1984. LILCO Supp. at 42. This, of course, has nothing to do with discovery issues and, therefore, is absolutely irrelevant to the matter at issue in this proceeding. Furthermore, every party is entitled to designate whomever it wishes to present its direct case at a hearing. These frivolous and baseless LILCO accusations must be summarily rejected.

47/ LILCO makes the bald allegations that Mr. Halpin either lacked "veracity" or "competence," and that counsel lacked "candor" because Mr. Halpin was not knowledgeable about the County's EOP but, nonetheless was designated to be a witness. LILCO Supp. at 16-17. LILCO's displeasure with Mr. Halpin's truthful testimony about his own knowledge, or with the County's determination that its best efforts response to a Shoreham emergency would be ad hoc and not pursuant to any existing plan, is no basis to impugn a witness's veracity or to allege discovery abuses. Furthermore, the fact that Mr. Halpin was not familiar with the County's EOP is irrelevant to this proceeding. The EOP itself makes clear that it is not designed for use in responding to a nuclear plant accident. See, e.g., LILCO Discovery Ex. 9, at K00200. Mr. Halpin's deposition testimony was thus consistent with his prefiled testimony: the County has no plan for responding to a Shoreham emergency. LILCO may not like that fact because it defeats LILCO's realism theory. But LILCO should refrain from venting its frustration in the form of baseless allegations of discovery abuse.

c. Depositions on the Realism Merits

LILCO makes several allegations related to deposition discovery in 1988 on the merits of the legal authority contentions. Again, the context of deposition-related events must be examined to place LILCO's allegations in proper perspective. At the outset, the following basic facts must be emphasized.

First, the Governments produced for deposition by LILCO the witnesses they had designated to provide their direct testimony on the Governments' "best efforts" response -- County Executive Halpin and Dr. Axelrod. Those depositions took place on April 19 and April 22.

Second, when on May 10 the Board ordered that those witnesses be made available for a continuation of their depositions, the Governments indicated their intention to comply with that order.[48] Even during the June 10 conference call, and despite the Governments' position that the Board's orders had made it impossible for the CLI-86-13 remand proceeding to continue,[49] the Governments reiterated their willingness to

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48/ Indeed, on May 27, the County proposed June 13 as a deposition date for Mr. Halpin but LILCO wanted a later date. See Letter from L.C. Lanpher to D. Sisk (May 27, 1988), and Letter from D. Sisk to L.C. Lanpher (June 1, 1988).

49/ See Governments' Notice.

produce Mr. Halpin and Dr. Axelrod for continued depositions. Tr. 20848, 20849-50, 20852 (Lanpher, Zahnleuter).50/

Third, in response to LILCO's deposition requests, in late April the Governments made available a host of witnesses for deposition. Thus, the following depositions occurred: April 19 -- Halpin; April 21 -- Sholly, Minor; April 22 -- Hartgen, Axelrod; April 25 -- Petrone, Guido; April 26 -- Roberts; April 29 -- DeVito, Papile, Czech, Baranski. Only Messrs. Regan and Harris, who were unavailable, were not produced within the late April time-frame specified by the Board.51/

Fourth, once the Board ruled on June 10 that it would cease proceedings on the legal authority contentions, the depositions being sought by LILCO on the realism merits became moot. Prior to June 10, the parties had been attempting to agree upon a schedule, which was difficult given the OL-3 trial and the 1988 exercise.

LILCO's deposition allegations must be viewed in light of this factual background. LILCO accuses the County of obstructing discovery by not making Dr. Harris and Mr. Regan available for depositions in late April when other persons were deposed. LILCO

50/ The Governments' willingness to make Dr. Halpin and Dr. Axelrod available for a continuation of their depositions, as ordered by the Board, eliminates any basis for arguing that the objections by counsel during their initial depositions were an "abuse" that can give rise to any additional sanctions.

51/ Confirmatory Memorandum and Order, dated April 12, 1988.

Supp. at 13.[52] LILCO ignores the facts. There was no refusal by the County to produce Messrs. Harris or Regan. Rather, as the record makes clear, due to prior scheduling conflicts, these individuals were unavailable for deposition in the late April time frame which the Board had designated for depositions.[53] It is no abuse of discovery not to present witnesses who are unavailable, particularly when the normal practice in this litigation has always been for counsel to work together to schedule depositions around witness availability problems.[54]

LILCO also alleges "calculated footdragging" by the Governments in producing persons for deposition in the period April 18-29. See LILCO Supp. at 13 and Attachment 3, at 5. LILCO's accusations are baseless. On two occasions the Governments filed pleadings with the Board regarding the deposition and general discovery schedule. See Governments'

52/ LILCO accuses the County of making available only three persons for discovery in April 1988. LILCO Supp. at 13. In fact, the County made available Messrs. Halpin, Petrone, Guido, Minor, Sholly, and Roberts.

53/ See April 21, 1988, letter from M. S. Miller to J. Christman, Attachment 12 to LILCO's Supplement to LILCO's Response to Governments' April 15 Objections and Motion in the Alternative to Compel Discovery (May 2, 1988).

54/ LILCO also alleges that the "County's obdurate refusal" to produce Dr. Harris and Mr. Regan gives rise to a strong inference that their testimony would have been favorable to LILCO. See LILCO Supp. at 13-14. LILCO has no basis for such a suggestion, particularly since the witnesses did not appear only because of scheduling problems. At any rate, Mr. Regan and Dr. Harris' substitute, Mr. Sheppard, appeared at the July hearing. There was no suggestion from LILCO's wide-ranging questioning (as permitted by the Board over the Governments' objections) that such County personnel would have testified favorably to LILCO on the merits of the legal authority contentions.

April 6 Motion; Letter from Mr. Lanpher to Licensing Board, April 15, 1988. Then, on April 15, 1988, LILCO itself urged the Licensing Board to postpone depositions until LILCO could file pleadings and the Board could issue rulings. Letter to James P. Gleason from Donald P. Irwin dated April 15, 1988. When on April 18 the Board ruled that depositions should proceed (ASLB Confirmatory Memorandum and Order, April 18, 1988), the Governments presented in a two-week period all the persons who were sought by LILCO and were available. In its Supplement, LILCO ignores that it itself had sought delay of the depositions. Clearly, this was no discovery abuse by the Governments, and surely not the "studied defiance" alleged by LILCO. LILCO Supp. at 13.

d. Conclusion

In sum, the record in the April-June 10 period discloses no abuse of discovery. The Shoreham proceeding was exceedingly busy during that period. The Governments sought and obtained a discovery extension, objected to discovery as is their right under the NRC's rules, filed complete and timely answers to interrogatories pursuant to the Board's orders, and produced all available persons for depositions. While there clearly were serious disagreements among the parties on many of these issues, those disagreements were resolved by the Board and, setting the deposition impasse aside, the Governments fully complied with the Board's orders. Furthermore, the deposition impasse was a result

of the Board's rulings interpreting and applying the new rule, which made it impossible for the CLI-86-13 remand to proceed. See Section V.B below.

2. There Were No Discovery Abuses During the "Integrity Proceedings": June 10-11

LILCO's allegations of discovery abuses after June 10, 1988, are completely without basis. LILCO ignores the fact that on June 10, the procedural posture of the case changed dramatically. The facts disclose that the Governments fully complied with discovery obligations during the post-June 10 period. Again, however, it is necessary to review briefly the procedural posture of the case on and after June 10 in order to put LILCO's allegations in perspective.

On June 10 the Board ruled that it would "either dismiss[] the realism contentions from the proceeding with or without prejudice or find the Intervenors in default and rule on the contentions in LILCO's favor." Tr. 20862 (Gleason). The Board also stated that it intended "to retain jurisdiction over the discovery issues concerning the recent availability of the so-called Suffolk County Emergency Plan." Id. The Board requested filings by June 15 regarding "its proposed action." Id.

Given the Board's June 10 ruling, the legal authority proceeding had been halted, at least insofar as the merits were concerned. The next step, according to the Board, was for the

parties to submit the filings due June 15, 1988. Accordingly, there was no reason even to consider further document production or depositions at least until the Board had issued some further guidance.55/

Following its receipt of the parties' June 15 submissions, the Board provided guidance. On June 17, the Board ordered the Governments to produce 16 persons for LILCO depositions.56/ The Board also directed the Governments to answer by June 21 LILCO's Third Set of Interrogatories and Requests for Production of Documents Regarding Contentions 1-2, 4-8 and 10, which had been filed June 7, 1988. Tr. 20892-93 (Gleason).57/

On the very next business day -- June 20, 1988 -- the Governments moved the Board to vacate its June 17 rulings.58/ In addition, as a courtesy, the Governments' counsel advised LILCO's

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55/ In a June 10, 1988, letter, Mr. Lanpher advised LILCO's counsel that "any talk of depositions seems premature" in advance of the Board issuing more definitive guidance.

56/ LILCO had urged the Board to order these depositions in its June 15 filing. See LILCO's Brief on the Appropriate Remedy for the Intervenors' Failure to Comply With Board Orders, June 15, 1988, at 26.

57/ Under 10 C.F.R. § 2.740(b), responses were not due until June 21 in any event.

58/ The Motion to Vacate was followed on June 21 and 23, respectively, by a Motion to Quash Subpoenas (directed to former County employees Roberts and Regan) and a Motion for Stay of June 17 Order. LILCO argues that it was "particularly egregious" for the County not to present Messrs. Regan and Roberts for deposition, since subpoenas had been issued. LILCO Supp. at 14; see LILCO Supp., Att. 3 at 8-9. That is untrue; as noted, the County not only moved to vacate the Board's deposition order, it also moved to quash the subpoenas.

counsel on June 17 of the Governments' intention to make such a filing on June 20. The Governments' Motion to Vacate raised a number of issues, two of which are critical to the discovery allegations made by LILCO. First, the Governments contended that the Board lacked jurisdiction to order depositions or take other similar actions, in view of its June 10 decision to rule in LILCO's favor. Second, the Governments contended that assuming arguendo Board had jurisdiction, any inquiry into alleged discovery abuse had to be conducted under the Board's auspices. The Governments contended that it would be unlawful to give LILCO, a party in interest, authority to act as the Board's prosecutor.

LILCO asserts that the filing of the Motion to Vacate was somehow improper. See LILCO Supp. at 14-15, 46. Clearly, however, the Governments had the right to argue that the Board's June 17 Order was erroneous. That constitutes no abuse of discovery; it constitutes a direct and appropriate assertion of legal rights. LILCO states no basis for suggesting otherwise.

As things turned out, the Governments' Motion to Vacate provided a basis to resolve the issues raised by the Governments. During a June 24 conference call, the Board considered the Governments' proposal, contained in the Motion to Vacate, to have the Board conduct a hearing and take any necessary testimony concerning the alleged compromise of the integrity of NRC processes resulting from any alleged non-production of emergency

plans in 1982-83. See Motion to Vacate at 11-12 and Tr. 20901-02, 20905-07 (Letsche) (counsel expanding on proposal during June 24 Conference Call). On June 24 the Board requested further filings concerning the Governments' proposal. Tr. 20923-24 (Gleason). The Board also ordered all discovery proceedings to be halted until further order of the Board. Tr. 20925 (Gleason).

Then, on June 29, the Board revised its June 17 Order. This had the effect of granting in part and denying in part the Governments' Motion to Vacate. The Board disagreed with the Governments on the jurisdictional issue; on the question of how to proceed on the "integrity of the proceeding" issue, however, the Board decided that it would convene a special hearing rather than permit LILCO depositions as originally ordered. The Board decided that it needed to hear from a total of 12 witnesses (6 County, 5 State, and 1 LILCO), rather than the 19 requested by LILCO. See Tr. 20932-36 (Gleason); LILCO's Response to June 24 Teleconference Order, dated June 28, 1988 at 4. In a further revision of its June 17 Order, the Board also directed: that the Governments answer LILCO's Third Set of Interrogatories by July 6; and that the Governments produce documents responsive to LILCO's March 24 Discovery requests, also by July 6. Tr. 20934-35 (Gleason).

With the foregoing history in mind, it is clear that there were no discovery "abuses" between June 10 and July 11. First, the Governments' alleged refusal to comply with the June 17 Order

(see e.g., LILCO Supp. at 14) was no discovery abuse. The Governments asserted their rights in a proper Motion to Vacate and Motion for a Stay, and eventually were sustained at least in part.

Second, LILCO argues that the Governments' production of documents on July 6 and the filing of answers to interrogatories on July 6 were "on the eve of hearings" and untimely. LILCO Supp. at 6, 22, 46. That is untrue. On June 29, 1988, the Board had expressly directed such filings to be made on July 6. The Governments complied with that Order. There can be no "abuse" in complying with the Board's June 29 Order.

Third, LILCO alleges a discovery abuse due to the fact that the County provided three documents to LILCO on July 8.[59/] These three documents were a more up-to-date copy of the County's EOP than had been previously served (this copy became LILCO Disc. Ex. 10), a collection of papers which has been termed the "Resources Manual" (this was marked as LILCO Disc. Ex. 13), and a second copy of a Plum Island Plan. See LILCO Supp., Att. 3, at 2.

LILCO's effort to make an issue of the County's July 8 document production underscores LILCO's desperation. LILCO alleges, without any citation to the record, that the July 8

59/ As a courtesy, the County's counsel advised LILCO counsel on July 8 that the documents would arrive the next morning via Federal Express.

production represents evidence of a failure to comply with discovery requests and Board orders. LILCO Supp. at 23. This is plainly untrue.

As to the updated EOP, the record is clear and without contradiction that counsel had been unaware of the existence of the updated EOP until July 6. Tr. 21411 (R. Jones); Tr. 21518-19 (Petrone). There is not one scintilla of evidence that anyone in the County was attempting to conceal the existence of the updated EOP. Id. Rather, this is an instance of the County's counsel supplementing a discovery response promptly when new, responsive material was found. It represents no "discovery abuse." Further, LILCO itself has admitted that except for an updated hurricane plan, the differences between LILCO Discovery Exhibits 9 and 10 "appear to be ministerial." LILCO Supp. at 27, n.20.

Next, LILCO charges the County with failure to produce the so-called "Resources Manual" before July 8. See LILCO Supp. at 7 (charging the County with "avoid[ing] disclosure" of the Resources Manual). See also id. at 22-23. LILCO omits a dispositive fact, however: the so-called "Manual" is not responsive to any LILCO discovery request. LILCO sought production of plans and procedures in the possession of Suffolk County. See, e.g., Interrogatory 120 of LILCO's March 24 Discovery. The record is undisputed that the "Manual" is neither. Tr. 21422-23 (R. Jones). Thus, while LILCO alleges

there was late production of the Manual, the Manual need not have been produced at all.[60] The Board must reject LILCO's allegations. LILCO does not even raise a colorable claim of discovery abuse when it fails even to identify discovery request which allegedly would have required production of the material in question.

Finally, in Attachment 3 to the LILCO Supplement, LILCO lists as a discovery abuse the "late production" of a "corrected copy of [the] Emergency Preparedness Operational Plan for Plum Island (1980)." LILCO Supp., Att. 3, at 2. This is yet another example of LILCO groping for allegations of "abuses" regardless of their substance. The 1980 Plum Island Plan had been produced on July 6, pursuant to the Board's order. Mr. Lanpher's letter of July 8 explained why the Plum Island Plan was sent to LILCO a second time on July 8:

> [I]n reviewing documents previously produced to LILCO, I noticed that the Emergency Preparedness Operational Plan for Plum Island appeared to have some missing pages. I checked the original this week at the Emergency Preparedness Division and found that the original had print on both sides and that the back side had not been copied before. Enclosed you will find a complete copy of the plan as it exists in County files.[61]

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[60] Although it was under no obligation to do so, the County provided those materials to LILCO out of an abundance of caution, in an effort to ward off any further allegation of incomplete production or "withholding" of documents. Unfortunately, that abundance of caution merely created more grist for LILCO's mill of unfounded allegations.

[61] Mr. Lanpher recalls that LILCO's counsel, when informed of this matter in the July 8 courtesy call, commented that LILCO had not yet noticed any missing pages.

This hardly represents "discovery abuse" as alleged by LILCO. Rather, it is clearly discovery compliance of the highest degree: counsel discovered a copying problem and corrected it without even having ever been asked to do so.62/

LILCO also alleges that the State's production of documents was incomplete on July 6, because it did not include a SEMO guidance document for ingestion pathway, a DOE plan for Brookhaven, and "perhaps various standard operating procedures for various agencies." LILCO Supp. at 47. LILCO implies that the State was trying to hide something. This is yet another instance of LILCO inventing "abuse" when there is clearly none to be found.63/ The State did not hide the Brookhaven plan or the SEMO document. Rather, the State was forthright in explaining its position on each.

In a July 5 letter to LILCO's counsel, counsel for New York State stated:

> In a pleading entitled 'LILCO's Response to Intervenors' Motion to Vacate,' dated June 23,

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62/ The NRC Staff seems to believe that the July 8 production is evidence that the County was tardy in discovery responses. See Staff Supp. at 7. For the reasons stated in the text, that conclusion is incorrect; nonetheless, it hardly suggests that the Staff supports LILCO's allegations of abuse. The Staff is wrong, however, in its suggestion that Mr. Sheppard's "library of emergency documents" was responsive to any LILCO discovery request. Staff Supp. at 7. The Staff never asked Mr. Sheppard about these documents. Thus, the Staff is merely speculating that Mr. Sheppard may have had materials which should have been produced. There is no basis in the record for such speculation.

63/ See Attachment 2 to this Reply for a more complete rebuttal of LILCO's allegations.

1988, and in another pleading entitled 'LILCO's Brief on the Appropriate Remedy for the Intervenors' Failure to Comply with Board Orders,' dated June 15, 1988, LILCO alleges that a SEMO document entitled 'Local Government Planning Guidance for Radiological Ingestion Exposure Pathway' is responsive to LILCO's Second Set of Interrogatories and Document Requests. To support this allegation, 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.

LILCO's June 15, 1988 pleading also alleges that a Brookhaven National Laboratory Emergency Response Plan is responsive to LILCO's Second Set of Interrogatories and Document Requests. 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 shipments 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.64/

64/ It turns out that the Brookhaven plan produced by Suffolk County was different from the other plan referenced in the July 5 letter. Nevertheless, the State's reply still is valid regarding the scope of Interrogatory 120. This is further explained in Attachment 2 hereto.

Such up-front explanation by counsel of what is being produced constitutes no "abuse" of the discovery process. Finally, there is no evidence at all for LILCO's speculative allegation that "perhaps" unspecified State documents were not produced.65/

In sum, between June 10 and July 11, there was no discovery abuse. There was a period of hard-fought litigation in a confusing and complex procedural context during which the Governments sought, and to an extent obtained, Licensing Board reconsideration of the June 17 Order. The Governments then complied fully with the Board's Orders, producing documents and interrogatory responses in accordance with the Board's June 29 schedule, and thereafter presenting all witnesses the Board requested to appear at the hearing.

C. LILCO's Additional Claims of Discovery Abuse Against New York State Must be Rejected

LILCO accuses New York State of a variety of additional improprieties: failure to speculate about State resources (LILCO Supp. at 38-41); inconsistent statements by New York State Radiological Emergency Preparedness Group ("REPG") personnel

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65/ The Staff suggests that the State should have produced the County's Emergency Directory. Staff. Supp. at 10. The Staff is mistaken since, in fact, the State did produce that document. See item 4 in Mr. Zahnleuter's July 5, 1988 letter to Mr. Sisk. It should also be noted, however, that no discovery request sought that document and the Staff does not even attempt to identify one. Thus, the State's production of it to LILCO went beyond the State's discovery obligation.

(LILCO Supp. at 41-43); and disagreements with State policy (LILCO Supp. at 48-50). These allegations deserve summary rejection.

1. The State Did Not Violate Discovery Rules in Refusing to Speculate

LILCO argues that New York State abused the discovery process because it refused to speculate as to what resources could be used to respond to a Shoreham emergency. LILCO Supp. at 38-41. The Board should recognize this allegation for what it is. It is not a bona fide allegation of discovery abuse; it is a direct attack on the merits of the New York State's realism/best efforts position. As such, this LILCO argument is beyond the scope of this proceeding.66/

LILCO asserts that statements made by New York State during the discovery process -- for instance, that the State has not and will not adopt a plan to respond to a Shoreham emergency -- were calculated "to avoid revealing facts and details concerning . . . resources" that "are or should be obvious to all." See LILCO Supp. at 38, 41. LILCO provides no basis for this allegation -- and there is none. It is evident that LILCO's real quarrel is that the statements LILCO does not like are consistent with the lawful determination of New York State that an adequate plan

66/ The Board stated in the June 29, 1988, Teleconference that the purpose of this hearing was "not to deal with the best efforts issue." Tr. 20935 (Gleason). LILCO even acknowledges that its argument at pages 38-41 goes to the State's position on the merits. See LILCO Supp. at 41.

cannot be developed for a Shoreham emergency, that the State will develop no plan for a Shoreham emergency, and that the State will never utilize LILCO's Plan.67/ Because the State has no Shoreham plan that dictates what resources would be appropriate, the State is unable to identify what resources would or could be used in a Shoreham emergency. Statements to that effect during discovery are not an abuse of discovery processes. Rather, they are truthful statements of fact which are the logical and lawful consequence of New York State's decision and authority to exercise its police power as it chooses.

The Board must reject LILCO's allegations that the State's policies are "illogical," "convoluted," "flawed," and "not credible." The merits of the realism issues are beyond the scope of this limited proceeding.

67/ That LILCO's discussion goes to the merits of realism issues is highlighted by LILCO's discussion concerning: (1) the bases for New York State's determination that "emergency planning adequate to protect public health and safety is impossible for Shoreham"; (2) the existence and contents of the LILCO Plan and its rejection by New York State; (3) implementation of the provisions of Article 2B; (4) the State's alleged "extensive resources and response capabilities that could be used for a Shoreham emergency"; and (5) the State's alleged "capability" to compensate for the nonexistence of a County radiological plan for a nuclear power plant and to participate in an exercise of that plan. See LILCO Supp. at 38-41. These arguments are clearly attacks on the merits of policy decisions within the lawful province of New York State. They have no place in a hearing designed to investigate the production of emergency plans during discovery.

2. The State Has Provided Truthful Statements Regarding Recovery and Reentry and Ingestion Pathway Issues

LILCO accuses the State of having "played an elaborate shell game, particularly with respect to the State's ingestion pathway and recovery and reentry emergency response capabilities." LILCO Supp. at 41. To support this accusation, LILCO vaguely charges that portions of an affidavit (LILCO Disc. Ex. 3) filed by REPG personnel in response to LILCO's motion for summary disposition of the legal authority contentions are misleading. LILCO Supp. at 41.

This entire section of LILCO's Supplement (pages 41-43) must also be summarily rejected for several reasons. First, the subject is far beyond the scope of the proceeding as defined by this Board. The Board stated many times that the focus of its inquiry was whether emergency plans and procedures, particularly the County's EOP, were produced during discovery. Allegedly misleading statements in the REPG affidavit have nothing to do with alleged non-production of emergency plans. As discussed in Section IV.A above, this Board cannot consider matters outside those which it notified the parties were at issue in the proceeding.

Second, while LILCO claims that certain "inconsistencies" exist, LILCO never explains what it believes those inconsistencies are. Thus, the discussion at pages 41-43 of the LILCO Supplement

and pages 7-15 of Attachment 4 to LILCO's Supplement do nothing to inform this Board or the parties of what those inconsistencies are or why they are allegedly material. To be sure, LILCO asserts that Attachment 4 to its Supplement constitutes a "trace" of the alleged inconsistencies. In fact, however, Attachment 4 contains only lists of disjointed quotations and transcript references headed by curt phrases. There is absolutely no explanation of what the alleged inconsistencies are or why they allegedly are material.

For example, under a heading "Testimony of state witnesses regarding the existence of plans and procedures other than the State Plan," LILCO paraphrases the testimony of Mr. Papile to the effect that the State receives incident reports from other plants as "courtesy notifications." See LILCO Supp., Att. 4, at 15. There is no identification, explanation or illumination of any inconsistency. Certainly LILCO does not mean to suggest that courtesy incident reports are "plans or procedures." If the referenced information provided by Mr. Papile is inconsistent with any testimony by other State witnesses, the inconsistency itself, or the significance of the inconsistency, is not evident from LILCO's list.

Thus, LILCO leaves the Board and the parties in the dark as to the basis for its claims of "inconsistency." The absence of adequate identification of relevant facts tied together with illuminating arguments renders LILCO's list indecipherable and

prevents New York State from responding to it. LILCO's cryptic list clearly provides no basis for finding any abuse of the discovery process.

Third, in one instance where a guess can be made at what the inconsistency is alleged to be, New York State is unable to resolve the inconsistency by citing the record. LILCO neglected to confront the witness with it at the hearing, and New York State did not develop a record on it because the State had no notice that LILCO would attempt to make an issue of that particular alleged inconsistency in its post-hearing brief.

The specific instance is set forth in LILCO's list on page 8 of Attachment 4. LILCO refers to representations that certain implementing procedures outside of the State plan are prepared by the counties. LILCO then states that County procedures were not produced in discovery. LILCO Supp., Att. 4, at 8. The implication is that New York State failed to produce such county procedures. New York State's answer to the allegation is that the procedures are maintained by the counties, not by the State. Accordingly, the State does not have them to produce. The State cannot cite the record to substantiate this fact, however, since LILCO failed to raise this matter at the hearing. Rather, LILCO prefers to operate by innuendo, stating simply that no county procedures were produced, thus leaving the false impression that they should have been. Further, LILCO's tactic of failing to raise the issue at the hearing is unfair and prejudicial to the

State. It would be a denial of due process if the Board were to countenance it.

Fourth, LILCO alleges that the State is guilty of some sort of infraction because it "failed to put forward knowledgeable witnesses either in 1984 . . . or in the remand proceeding in 1988." LILCO Supp. at 42. See also LILCO Supp. at 42 (LILCO asserts that witnesses in 1984 were "evidently" withdrawn because their testimony "would have undercut the State's arguments in the licensing proceeding"). Again, this charge is far outside the scope of this inquiry and must be rejected without Board consideration. See Section IV.A above. In any event, the charge is groundless. The State, just like any party, is entitled to present whatever witnesses it chooses in order to put forth its direct case. LILCO's baseless speculation regarding why particular witnesses were or were not utilized by the State at a particular time is frivolous and irrelevant. It must be summarily rejected.68/

3. LILCO's Attacks on the "State's Policy" Must Be Disregarded

LILCO mounts a strident attack on what LILCO terms the "State's policy" of "preventing emergency planning [for Shoreham] in compliance with federal health and safety standards." LILCO Supp. at 48. In this section of its Supplement (pages 48-50),

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68/ Furthermore, it should be noted that when appropriate issues have been presented, such as the OL-5 Exercise proceeding and the OL-3 Reception Center proceeding, REPG personnel have presented portions of the State's direct case.

LILCO attacks three State acts: the State's decision not to keep copies of the LERO plan except those needed for litigation; the State's decision not to maintain RECS lines between the State and Shoreham; and a recollection of Mr. Davidoff that State personnel were cautioned not to take positions or plans for licensed plants which would be contrary to the Governor's position on Shoreham. LILCO alleges that these acts "reveal an approach to litigation incompatible with responsible participation by a major government on a serious public matter." LILCO Supp. at 50.

It is tempting not to respond at all to LILCO's attack, since any response runs the risk of lending dignity to what are clearly irrelevant and baseless assertions. The following comments demonstrate why LILCO's allegations must be disregarded.

First, the LILCO assertions are per se irrelevant. There is no connection at all between the assertions and the production of emergency plans in discovery. Indeed, LILCO does not even attempt to suggest that there is any connection to discovery. The Board directed that the parties' post-hearing submittals must "relate solely to the issue of abuses concerning the discovery process." Tr. 22074 (Gleason). LILCO has ignored that directive. Its assertions at pages 48-50 must therefore be ignored.

Second, LILCO asserts that the "State apparently destroyed or retrieved successive revisions of the LILCO Plan from

recipients within the State government, solely so that the State could argue that it had no knowledge of the LILCO Plan and could not implement it . . . ." LILCO Supp. at 48. LILCO states no basis at all for this assertion about the State's motives and purposes, much less any support in the record.69/ Thus, again, LILCO violates this Board's directive that filings must be "based on the record of these proceedings . . . ." Tr. 22074 (Gleason).

In fact, the reason that the LILCO plans were gathered up is obvious. The State of New York believes LILCO's Plan is inadequate and has determined that it will never be used by the State. See, e.g., LILCO Disc. Ex. 34, Affidavit of Gov. Cuomo, Feb. 8, 1988, at 2. There is no reason whatever for State personnel to retain copies of a plan which no State agency is studying or using to conduct training and which the State has rejected. In any event, the fact that the State gathered up copies of the LILCO plan clearly constitutes no "abuse," much less something "incompatible with responsible participation" by New York State. See LILCO Supp. at 50. The State is fully within its rights in deciding who within the State government will have a copy of LILCO's Plan. LILCO's allegations are utterly without basis.

Third, LILCO's RECS line allegations are similarly groundless. LILCO surely is not suggesting that federal law

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69/ LILCO cites to pages 3-4 of LILCO Discovery Ex. 34. See LILCO Supp. at 48. That exhibit provides no support for LILCO's allegation.

requires New York State to maintain a RECS line with LILCO. If that were LILCO's belief, LILCO could have challenged the State in court and LILCO most likely would have done so had LILCO been earnest in its belief. LILCO never challenged the State because LILCO presumably recognized that federal law imposes no obligation on a State to engage in planning with a utility. See Citizens for an Orderly Energy Policy Inc. v. County of Suffolk, 604 F. Supp. 1084 (E.D.N.Y. 1985), aff'd, 813 F.2d 570 (2d Cir. 1987). It was entirely lawful and proper for the State to disconnect the RECS lines. Thus, LILCO's allegations are without basis.

LILCO also attempts to make an issue of the fact that in 1985, Dr. Axelrod recommended that the State consider reconnecting the RECS lines. LILCO asserts that this shows that the lines would be reconnected if Shoreham were licensed at full power, and that they were disconnected solely for litigation purposes. See LILCO Supp. at 49. Again, however, LILCO is making assertions -- this time labeled "undeniable implications" (LILCO Supp. at 49, line 12) -- that are totally unsupported by the record and thus violative of the Board's directive. Tr. 27074 (Gleason). LILCO's "undeniable implications" are in fact not accurate at all. While Dr. Axelrod may have made a recommendation three years ago, it has not been accepted and it is not State policy. Indeed, the evidence shows that the State will have nothing to do with LILCO's Plan. See LILCO Disc. Ex. 34.

Fourth, LILCO attempts to make an issue out of the fact that, as Mr. Davidoff acknowledged, State personnel were advised to take care not to take positions or plans for licensed plants contrary to the Governor's Shoreham policy. LILCO Supp. at 49. The only appropriate response is -- so what? It is hardly surprising that such advice would be given. It is standard practice in any organization for personnel to be cognizant of the positions taken by the persons in charge. That hardly constitutes an abuse. Indeed, it is ridiculous that LILCO even makes such a suggestion.

Furthermore, LILCO conveniently omitted from the discussion of Mr. Davidoff's "acknowledgement" the statement by Mr. Davidoff that followed: "At no time were we directed explicitly or implicitly to take a position that wouldn't be good for the existing sites." Tr. 22066 (Davidoff).

Nevertheless, on the basis of the acknowledged "caution" to State personnel mentioned by Mr. Davidoff, LILCO makes the following allegation:

> 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 LEPG 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.

LILCO Supp. at 49-50. Again, LILCO provides no basis at all for its assertions, much less a connection to the discovery issue which was to be briefed. Tr. 22074 (Gleason). Rather, LILCO has concocted a fictional theory, unsupported by fact and unconnected to discovery, and then asserts that the Board must accept it as fact. The Board would commit gross error if it were to give any credence or attention to LILCO's baseless speculation.

V. There is No Basis for Imposing Sanctions on the Governments

There are only two allegations of so-called "discovery abuse" by the Governments which the Board can properly consider in deciding whether sanctions should be imposed on the Governments: (1) the alleged non-production of the County EOP or other plans in 1982-83; and (2) the June 10, 1988 deposition impasse. LILCO's other allegations of abuse are unsupported by the record[70/] and, at any rate, are outside the scope of the issues which the Board noticed for hearing. See Section IV.A above. Thus, in considering sanctions, the Board may consider only two allegations.

70/ As demonstrated in Section IV.B-D above and in Attachments 1 and 2, LILCO's sweeping allegations of "total and systematic failure to meet any obligation of discovery" are undocumented rhetoric, and its accusations about "bad faith" motions and objections, and "delayed" or "incomplete" responses to 1988 interrogatories and document production requests, are frivolous and ignore or distort the relevant facts. The Governments responded fully and completely to every 1988 interrogatory and document production request, in compliance with Board orders to do so.

The evidence presented during the recent hearing demonstrates that the first allegation cannot support the imposition of any sanctions. The NRC Staff agrees. Staff Supp. at 5-6. This is addressed in Section V.A below. Section V.B below demonstrates that the deposition impasse situation does not justify the imposition of sanctions either. The NRC Staff is incorrect in suggesting that dismissal of the legal authority contentions would be an appropriate and justified sanction for the deposition impasse. See Staff Supp. at 1, 12. LILCO's even more extreme argument that the Governments' actions justify the imposition of the "ultimate sanction" of dismissing the Governments from the proceeding altogether (see LILCO Supp. at 2-3, 50-56) is wholly lacking in basis and must be rejected. As the Governments demonstrated in their July 26 Supplement, there is no basis for this Board to impose any sanctions on the Governments in this proceeding. See Govts' Supp. at 34-37.

A. The Evidence Precludes the Imposition of Sanctions for for the Alleged Non-Production of the County EOP

The evidence establishes that the County produced the County EOP to LILCO on May 25, 1988, in compliance with the Board's May 10 Order. There was clearly no discovery abuse related to the County EOP in 1988.

The evidence from the recent hearing also demonstrates that in 1982 and 1983, Suffolk County produced to LILCO the County EOP as it then existed, along with many other plans, procedures and

materials that were responsive to LILCO discovery requests. The Suffolk County witnesses testified consistently and without contradiction that the County made diligent efforts to find and produce all responsive documents, including, specifically, the County EOP as it then existed. See Govts' Supp. at 14; Section II.C, above. Indeed, Mr. Regan testified that Mr. R. Jones expressly told him that the County EOP had been sent to Mr. F. Jones to be produced to LILCO. Tr. 21892-93 (Regan).

Furthermore, even if the Plan as it then existed was not produced in its entirety (which the weight of the evidence does not support), the witnesses' uncontroverted testimony about the County's good faith efforts to locate and produce to LILCO all responsive plans and documents, demonstrates that any assumed partial non-production was inadvertent. See Govts' Supp. at 14; Staff Supp. at 5-6. The volume and nature of the plans, procedures and other materials which the County concededly produced to LILCO in 1982-83, as revealed by LILCO's own indices, further confirm that the County had no intention to conceal the existence of the EOP, the kind of information which it eventually came to contain, or any other planning or emergency response information sought by LILCO's 1982-82 discovery requests. Govts' Supp. at 13-19 and Attachment 1 thereto. Finally, the evidence is overwhelming that LILCO knew and even had a copy of the EOP for many years. Gov't Supp. at 19-25, Section II.D above.

As for New York State, it was not subject to discovery in 1982-83 and LILCO's 1984 discovery directed to the State never sought documents such as the County EOP.71/ With respect to 1988 discovery, the State revealed its possession of the EOP promptly upon discovering on June 6, 1988, that SEMO had received a copy of the EOP on May 6, 1988. Govts' Supp. at 33; Section III.A, above. The State clearly met its discovery obligations.

Given these facts, it is clear that no sanctions can be imposed.

The NRC has issued policy guidance that identifies the factors which must be considered in deciding whether to impose sanctions. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-3, 13 NRC 452 (1981). One important factor is whether a party's alleged failure to meet an obligation resulted in any prejudice to other parties. 13 NRC at 454. Specifically, a Board must consider the "harm to other parties" and must "tailor sanctions to mitigate" that harm. This factor is dispositive on the question of sanctions relating to production of the County EOP. As even the NRC Staff acknowledges, there was no prejudice

71/ In response to non-realism discovery in 1984, however, the State produced to LILCO the up-to-date version of the State Disaster Preparedness Plan, the predecessor of which is the outdated 1979 "State Emergency Operations Plan" which appears in the front of the current County EOP. Tr. 27052 (Davidoff).

to LILCO from any inadvertent non-production of portions of the County EOP during 1982-83 discovery./2/

First, while it is unclear exactly what form the EOP took in 1982-83, there is no dispute that in response to 1982 and 1983 discovery, LILCO received the basic County plan (the Disaster Preparedness Plan) and several substantive annexes, which together comprise the bulk of the planning-related contents which likely existed in 1982 and 1983. See Govt's Supp. at 13-19; Section II.C above. Indeed, LILCO's own indices demonstrate that fact, as well as the fact that the County also produced many other documents and materials apparently containing the type of information which eventually became part of the EOP. See Section II.C above; S.C. Disc. Ex. 1; Govts' Supp. at 17-19.

Second, there is no question that in 1982 and 1983, LILCO was well aware of the existence of the County EOP. Not only did LILCO emergency planning personnel know about, and actually work with, the County EOP in 1980-82 (Section II.D above; LILCO Supp. at 35; Govts' Supp. at 20-21; Staff Supp. at 10), but many of the documents produced to LILCO in 1982 and 1983 either indicated that they were, or would become, a part of the "Suffolk County Emergency Operations Plan," or otherwise referenced that Plan by

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72/ See, e.g., Staff Supp. at 12-13 ("it cannot be said that LILCO did not know of the existence of, or have the benefit of, the County emergency plan for general disasters at the time it structured the Shoreham plan or that the course of this proceeding was substantially affected by County and State failures to completely reveal their general emergency plans since the early 1980's.").

name. See Section II.D above; Govts' Supp. at 17-19; S.C. Disc. Ex. 1. In addition, it is uncontroverted that throughout the 1980's, LILCO regularly participated in hurricane conferences at which the County EOP was discussed. Govts' Supp. at 24-25; Section II.D.3, above.

Third, in 1985 or early 1986, LILCO's emergency planning personnel, likely Mr. Daverio or Mr. Renz, asked Norman Kelly to obtain a copy of the EOP from the County, and Mr. Kelly did. Govts' Supp. at 23-24; Section II.D.4 above. Thus, as of 1985 or early 1986, LILCO had a copy of the EOP as it existed in 1985, since Mr. Kelly had given one to either Mr. Daverio or Mr. Renz.

The dates of LILCO's knowledge about, and receipt of, the County EOP are significant with respect to both LILCO's knowledge of the EOP and LILCO's assertions that it was prejudiced by the alleged non-production of portions of the EOP in 1982-83.[73/] To begin with, LILCO never even raised its "realism" defense to

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73/ LILCO makes the following sweeping general allegation:

> Had Suffolk County and New York State timely and properly disclosed the existence of the myriad 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.

LILCO Supp. at 52. LILCO made similarly bald and sweeping allegations of harm in LILCO's Brief on the Appropriate Remedy for the Intervenors' Failure to Comply with Board Orders (June 15, 1988), at 13-14.

Contentions 1-10 until August 6, 1984, when it initially moved for summary disposition on the legal authority contentions.74/ Accordingly, allegations about "six years" of prejudice to LILCO's ability to "prove" realism are on their face a gross exaggeration. Furthermore, even in 1984, LILCO asserted its "realism" defense as a relatively minor argument; instead LILCO stressed its preemption defense to the legal authority contentions. Indeed, after Justice Geiler's February 1985 State court decision adverse to LILCO, LILCO's renewal of its August 6, 1984 motion focused entirely on preemption issues rather than its "realism" theory.75/

In addition, all the emergency planning litigation which occurred before the CLI-86-13 remand dealt only with the LILCO Plan. Indeed, the Licensing Board expressly limited the matters at issue in the OL-3 litigation to the LILCO Plan, and to LILCO's abilities to implement that plan without any governmental participation. See Order Limiting Scope of Submissions (June 10, 1983). In fact, the Laurenson Board rejected sporadic LILCO efforts to submit evidence concerning County or State actions, ruling such evidence irrelevant to the proceeding.

74/ LILCO's Motion for Summary Disposition of Contentions 1-10 (the "Legal Authority" Issues), (Aug. 6, 1984). See also LILCO's Reply to Responses to Its Motion for Summary Disposition on Contentions 1-10 (Oct. 15, 1984).

75/ See LILCO's Renewed Motion for Summary Disposition of Legal Authority Issues on Federal-Law Grounds (Feb. 27, 1985).

It was not until LILCO filed its 1987 summary disposition motion[76/] -- after the issuance of CLI-86-13 -- that its "realism" argument came to involve to any significant degree any facts about County or State actions, resources, or capabilities (unlike all the previous versions of "realism" which focused primarily on legal arguments). Any alleged prejudice to LILCO's so-called ability to "prove" realism can only be dated from the time that the realism argument involved information about governmental capabilities or resources. Significantly, however, there is no question that by 1987, LILCO had asked for, and received, a copy of the County EOP as it existed in 1985, as well as the New York State Disaster Preparedness Plan and the New York Radiological Emergency Preparedness Plan. Of course, it had also received over 7,000 pages of emergency plans, procedures, and related materials, for radiological and non-radiological emergencies, during 1982 and 1983 discovery.

Thus, there is no legitimate basis for a claim of prejudice concerning LILCO's ability to prove its "realism" argument arising out of any partial non-production of the County EOP in 1982-83.

In light of these facts, a balanced review of the six factors listed in CLI-81-8 reveals no justification for the imposition of any sanctions relating to production of the County EOP. With respect to the first factor (the importance of the unmet obli-

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76/ LILCO's Second Renewed Motion for Summary Disposition of the "Legal Authority" Issues (Contentions EP 1-10) (March 20, 1987).

gation), the evidence demonstrates that there was no unmet obligation with respect to production of th Suffolk County EOP. Given LILCO's knowledge and actual possession of the EOP, and the history of its "realism" argument, the second and third factors (harm or prejudice to the parties or the Board) are not satisfied at all. The evidence demonstrates no pattern (the fourth factor) other than one of good faith efforts by the Governments to produce all documents responsive to LILCO discovery requests. Finally, while the Governments do not dispute the importance of the emergency planning issues (the fifth factor), there are no circumstances (the sixth factor) which weigh in favor of the imposition of sanctions with respect to production of the EOP.

B. The Deposition Impasse Does Not Justify the Imposition of Sanctions

LILCO and the Staff argue that the deposition impasse which occurred prior to the Board's June 10 Order discontinuing the CLI-86-13 remand proceeding justifies the dismissal of the legal authority contentions. Staff Supp. at 1, 12; LILCO Supp. at 2. Section V.B.2 below addresses LILCO's additional argument that the Board should also dismiss the Governments from the proceeding altogether.

1. Dismissal of the Contentions Is Not Warranted

The circumstances and Board rulings which gave rise to the pre-June 10 deposition impasse, in light of the factors which must

be satisfied to justify the imposition of sanctions, preclude the dismissal of the Governments' contentions, and the imposition of any other sanction against the Governments.77/

At the outset, it must be emphasized that, as demonstrated in Section IV.B.1.C above, the extent of the deposition impasse was limited. First, the Governments produced for deposition the witnesses they had designated to submit the Governments' direct testimony in the CLI-86-13 remand (County Executive Halpin, and New York Health Commissioner Axelrod), and those depositions took place.78/ Second, even during the June 10 conference call, the Governments remained prepared to produce those witnesses for a second time, for a continuation of their depositions, as ordered by the Board.

Third, notwithstanding their objections, the Governments also produced for deposition by LILCO 11 additional County and State

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77/ In Section IV.B.2 above, the Governments explain that the depositions sought after the June 10 Order -- that is, those relating to the alleged non-production of the County EOP and not the merits of "realism" -- presented completely different issues, as set forth in the Governments' Motion to Vacate, which the Board, in effect, granted in part. In addition, without waiving its objections to the Board's June 17 Order, the Governments voluntarily produced all 11 of the witnesses which the Board ordered them to produce for the recent Board-conducted hearing held in lieu of LILCO depositions. In light of the Board's adoption of the Governments' proposed alternative to the LILCO-requested EOP depositions, there is no post-June 10 "discovery abuse" issue presented with respect to depositions.

78/ In fact, the Governments actually submitted the witnesses' direct testimony well in advance of the required filing date. Thus, the testimony was available to LILCO for use during the depositions.

witnesses, and those depositions took place, all during the late April 1988 time frame. The County was also prepared to produce Dr. Harris as requested by LILCO; only scheduling difficulties arising out of his and counsel's prior commitments, prevented that deposition from occurring before June 10 as well.

Fourth, the Governments stated repeatedly, and the testimony during the recent hearing in fact demonstrated, that the additional persons LILCO sought to depose could provide only information duplicative of that already provided by other witnesses who were their superiors, or no relevant information at all. As stated in the Governments' Notice, Mr. Halpin and Dr. Axelrod were the only persons who could speak with authority about what the Governments' best-efforts response to a Shoreham emergency would be.

Thus, the Governments' June 9 Notice that the Board's orders had made it impossible for the CLI-86-13 remand proceeding to continue, came about only <u>after</u> the Governments had already provided to LILCO a substantial amount of deposition discovery, as well as responses to interrogatories and document production requests. And, even after that Notice was filed, the Governments remained willing to produce their designated witnesses -- Mr. Halpin and Dr. Axelrod -- for additional depositions.

In addition, it was this Board's orders interpreting and applying the new emergency planning rule to the facts in this

case, which gave rise to the deposition impasse, not any malfeasance on the part of the Governments.[79/] The Board's repeated erroneous interpretation of the NRC's new emergency planning rule, and the Board's refusal to accept the Governments' determinations and clear statements concerning their intended "best efforts" response to a Shoreham emergency, made it impossible for the Governments to comply with the Board's order. See February 29 Order at 4; April 8 Memorandum at 24.

For example, the Board ruled that in the CLI-86-13 remand proceeding, the Governments could not assert LILCO's lack of legal authority to follow or implement the LILCO Plan, even though the delegation of authority to LILCO which is a primary element of the LILCO Plan and LILCO's so-called "interface procedure," is prohibited by New York law. See Feb. 29 Order at 2; April 8 Memorandum at 26-27.

The Board also ruled that the new rule "place[s] a responsibility on state and local governments to produce, in good faith, some adequate and feasible response plan that they will rely on in the event of an emergency" and that the new rule's presumption that non-participating governments will follow a utility's plan "is rebuttable only by timely evidence that the Governments will follow a different but adequate and feasible plan." February 29 Order at 2 (emphasis added). April 8 Memorandum at 21. Neither Suffolk County, nor the State of New York has a plan they would or

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79/ See Govts' Supp. at 34-36 and other filings cited therein.

could rely on to respond to a Shoreham emergency, and the law is clear that neither the NRC nor LILCO can force them to create one.

The Board also ruled "unacceptable" the determinations by the State and County that their "best efforts" response to a Shoreham emergency would be ad hoc and not pursuant to any existing plan, and their truthful statements, made under oath, that the Governments could not and would not follow LILCO's Plan and why. See e.g., February 29 Order at 4.

Taken together, the Board's rulings premised the CLI-86-13 remand proceeding on a falsehood -- that the Governments' "best efforts" response to a Shoreham emergency would follow the LILCO Plan or some other existing plan, and that it would involve "interface" with LILCO as set forth by LILCO in the LILCO Plan. The Board purported to require Government officials whom LILCO sought to depose, to testify about presumed Government actions which would violate the law and the Governments' policies, and which the responsible Government officials had stated would not or could not occur. See Govts' Supp. at 34-37, and filings cited therein, for a more complete discussion.

These facts are all significant with respect to several of the factors to be considered in imposing sanctions. They demonstrate that consideration of those factors precludes the imposition of sanctions.

First, the relative importance of the allegedly unmet obligations here is small. The Governments provided many witnesses to be deposed, remained willing to provide their designated witnesses for additional depositions, and answered all interrogatories and document production requests. In addition, there is nothing but LILCO's bald demand to counter the Governments' proffer that the additional officials sought by LILCO had any relevant, non-duplicative information to offer in any event. Indeed, the testimony at the recent hearing -- when the Board permitted questioning beyond the scope of issues noticed for hearing -- underscores that there is no basis to doubt the truth of the Halpin and Axelrod testimony: the Governments would and could only respond to a Shoreham emergency on an ad hoc basis and not in concert with LILCO or LILCO's Plan. There is no basis to find that the additional deposition discovery sought by LILCO would have provided any additional material information in the nature of the Governments' best efforts response.

Second, for the same reason, the potential for harm to other parties, or for harm to the overall conduct of the licensing proceeding, is also minimal. There simply is no material information to be obtained regarding the Governments' best efforts response beyond that set forth in the Halpin and Axelrod testimony which was probed during their depositions.

Third, as demonstrated throughout this Reply, there is no evidence of any pattern of improper behavior by the Governments

that could support the imposition of sanctions. The County and State have participated actively in this proceeding for more than 6 and 4 years, respectively. Contrary to LILCO's accusations, their conduct over the years provides no basis for sanction.

Fourth, the totality of the circumstances also fails to support the imposition of sanctions. In their June 9 Notice, the Governments, in good faith, put forth their position that the Board's actions made it impossible for them to comply with the Board's orders. This is not an instance of a party willfully refusing to comply with an obligation. Rather, the Governments could not comply with Board orders which: (a) exceeded the Board's and the NRC's legal authority; (b) ignored the State and local law which the Governments are sworn to uphold; (c) constituted an unlawful infringement on the Governments' sovereignty; and (d) purported to require Government officials to testify about actions which the Governments had properly and lawfully determined they would not and legally could not take. In light of all the circumstances, no sanctions should be imposed as a result of the limited deposition impasse, including the dismissal of the legal authority contentions.

2. Dismissal of the Governments From The Proceeding Is Not Warranted

LILCO's plea to have the Governments thrown out of this proceeding altogether is baseless. Indeed, even the NRC Staff does not support it. See Staff Supp. at 12.

The reason is simple. Under the NRC's own case law and policy guidance, dismissal of a party is the ultimate sanction which is reserved only for the most severe transgressions. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1416 (1982). Thus, even where parties have intentionally failed to comply with discovery or Board orders, Boards have been reluctant to apply the ultimate sanction of dismissing the parties from the proceeding. Id.; see Kerr McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 86 (1986) (refusing to dismiss the State of Illinois as a party despite repeated failures to respond to discovery); see also Duke Power Co., (Catawba Nuclear Station, Units 1 and 2), LBP-83-29A, 17 NRC 1121 (1983) (party's repeated failure to respond to interrogatories leads to dismissal of some contentions and narrowing of another).80/

Likewise, federal courts reserve the ultimate sanction of dismissing a party for only those cases in which a party shows bad faith in failing to comply with discovery. Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 212 (1958); see Dellums v. Powell, 566 F.2d 231, 235 (D.C. Cir. 1977); Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977); see also National Hockey League v. Metropolitan Hockey

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80/ Curiously, LILCO cites the Licensing Board decision in the Byron case, LBP-81-52, 14 NRC 901, 902 (1981), to support its position that the Board should dismiss the Governments form the proceeding. LILCO Supp. at 54. However, while the Licensing Board in Byron did dismiss a party for discovery abuses, the Appeal Board specifically found that sanction was too harsh. ALAB-678, 15 NRC at 1416.

Club, 427 U.S. 639 (1976) (finding dismissal appropriate "by reason of respondents' 'flagrant bad faith' and their counsel's 'callous disregard' of their [discovery] responsibilities").

In this case, as amply demonstrated in the preceding sections of this Reply, there is no evidence of bad faith on the part the Governments with respect to discovery. Raising objections, filing motions, and designating witnesses, all as contemplated by the rules, does not constitute bad faith. There is no dispute about the County's good faith with respect to 1982 and 1983 discovery, and there is no evidence of any bad faith by the County or State with respect to 1988 interrogatories or document production; the Governments responded fully and completely pursuant to Board orders.

Similarly, no bad faith was involved in the pre-June 10 deposition impasse. The Governments had consistently made plain their position that the Board's orders interpreting and applying the new rule were erroneous. When those orders made it impossible for the proceeding to continue, the Governments clearly, and in good faith, stated that fact. They have repeatedly set forth sound legal arguments in support of their position. Under such circumstances, the impasse cannot be said to have been the product of bad faith. Furthermore, LILCO has stated no legitimate basis for finding that the Governments acted in bad faith with respect to the deposition impasse.

The Supreme Court has ruled that if a party cannot fulfill discovery obligations not through bad faith, but through legal restraints, it should not suffer the ultimate sanction of dismissal. See Societe Internationale v. Rogers, 357 U.S. at 212. That is the principle that applies here.

As demonstrated in Section V.B.1, a review of the six CLI-81-8 factors to be considered for sanctions does not even justify the imposition of the sanction of dismissing the legal authority contentions. There is most certainly no basis for imposing the ultimate sanction of dismissing the Governments from the proceeding.

VI. Conclusion

For the foregoing reasons, the Board should impose no sanctions and should hold a conference of counsel so that scheduling for the CLI-86-13 remand proceeding may be discussed.

Respectfully submitted,

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Attachment 1

Suffolk County Tabular Response to
Allegations Contained in Attachment 3 to
LILCO's Supplement to Its June 15 Brief on
Discovery Sanctions in Light of Subsequent Developments

Attachment 1

Suffolk County Tabular Response to Allegations Contained in Attachment 3 to LILCO's Supplement to Its June 15 Brief on Discovery Sanctions in Light of Subsequent Developments

As part of LILCO's Supplement, LILCO included an Attachment 3, entitled "Specific Instances of Discovery Abuses by Suffolk County." The purpose of this Tabular Response is to provide the Board with specific responses to LILCO allegations or, as is often the case, to identify where such specific responses may be found in the Governments' Reply to which this document is attached.

To assist the Board, references to the "Governments' Supplement" or the "Govts' Supp." are to the July 26, 1988, filing entitled "Suffolk County and State of New York Supplement to June 15, 1988, Filing." References to the "Governments' Reply" or "Govts' Reply" are to the pleading to which this attachment is appended, entitled "Governments' Reply to July 26, 1988, Supplements by LILCO and the NRC Staff Seeking Imposition of Sanctions," dated August 1, 1988.

LILCO Allegation	Suffolk County Response
1. Nonproduction of Suffolk County Emergency Operations Plan in 1982 (LILCO Supp., Attachment 3, at 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." 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." 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.	False. For primary response, see Governments' Supplement at 13-19 and Governments' Reply at § II.C. In addition, it is noted: a) Filing objections as Suffolk County did in 1982 is proper under 10 CFR §§ 2.740b(b), 2.741(d). b) The evidence indicates the likelihood that LILCO received the entire EOP as it then existed in 1982. If not, at a minimum, LILCO received major portions thereof, including the County's Disaster Preparedness Plan, as well as a total of about 3,788 pages of documents in 1982. Any nonproduction was clearly unintentional. c) The evidence indicates that LILCO personnel had specific knowledge of the EOP in 1980-82.

LILCO Allegation	Suffolk County Response
August 1982: Suffolk County produces various emergency planning documents but not the integrated Emergency Operations Plan.	
2. Nonproduction of Suffolk County Emergency Operations Plan in 1983 (LILCO Supp., Attachment 3, at 1)	
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."	False. For primary response, see Governments' Supplement at 13-19 and Governments' Reply at § IV.C. In addition, the response to #1 above is applicable. Finally, it is also noted that documents received by LILCO in 1983 contained explicit identification of the EOP, thus putting LILCO clearly on notice of its existence (LILCO had, in fact, known of it since at least 1980-82).
August 22, 1983: Suffolk County objects to LILCO's June 21 discovery requests on relevance grounds.	
September-October 1983: Suffolk County provides various emergency planning documents but not the integrated Emergency Operations Plan.	

LILCO Allegation	Suffolk County Response
3. Nonproduction of Suffolk County Emergency Operations Plan in 1988 (LILCO Supp., Attachment 3, at 1-2) 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. April 10, [sic 20] 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 nonradiological emergencies. May 10, 1988: At Prehearing Conference, the Board orders Suffolk County to produce all documents responsive to LILCO's March 24 interrogatories. 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."	False. See Governments' Reply at § IV.B.1.a. Further, it is noted: a) The Governments' April 20, 1988, Objections are proper under 10 CFR §§ 2.740b(b), 2.741(d). Further, the Board's April 12 Order contemplated the filing of Objections on or before April 20. Thus, County filing was timely under Board Order. b) The County's EOP was produced to LILCO just 15 days after the Board's May 10 Order.

LILCO Allegation	Suffolk County Response
May 25, 1988: Letter from Lanpher to Sisk enclosing Emergency Operations Plan.	
4. Late Production of Documents (LILCO Supp., Attachment 3, at 2) 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).	False. See further discussion in Governments' Reply at § IV.B.2. While ASLB had directed documents to be produced July 6, documents (a) and (b) were not discovered until July 6. Two days for copying and redacting was reasonable. Document (c) was produced July 6; a corrected copy was produced July 8.
5. Late Production of Documents (LILCO Supp., Attachment 3, at 2-3) July 6, 1988: Letter from Lanpher to Sisk enclosing copies of the following documents: a) Annex B (Local Radiological Protection Annex)	False. Not late, but precisely timely per ASLB June 29 Order. See Tr. 20934-35 (Gleason). See also Governments' Reply at § IV.B.2.

LILCO Allegation

Suffolk County Response

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)

LILCO Allegation

Suffolk County Response

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)

LILCO Allegation	Suffolk County Response
s) Proposed Changes to New York State Department of Health Standard Operating Procedures for Shoreham (1975)	
6. Late Production of Documents (LILCO Supp., Attachment 3, at 3)	
June 1, 1988: Letter from Lanpher to Sisk enclosing the following documents:	False. Documents produced in timely manner after ASLB's May 10 Order. See Governments' Reply at § IV.B.1.a.
a) Annex K (Radiological Intelligence Annex) (1976)	
b) New York State Department of Health Standard Operating Procedures for Brookhaven National Laboratory (1973)	
7. Bad Faith Relevance Objections to Discovery Requests in 1982 (LILCO Supp., Attachment 3, at 4)	
County Claims Irrelevance	
Suffolk County's Response to LILCO's First Request to Suffolk County for Production of Emergency Planning Documents (July 1, 1982)	False. No evidence of bad faith. Indeed, ASLB admitted that prior Orders were ambiguous regarding scope of discovery. Prehearing Conference Order (Phase I - Emergency Planning), July 27, 1983, at 23-24.

LILCO Allegation	Suffolk County Response
Board Compels Production	
Prehearing Conference Order (Phase I - Emergency Planning) (July 27, 1982)	
8. Bad Faith Relevance Objections to Discovery Requests in 1983 (LILCO Supp., Attachment 3, at 4)	
Suffolk County's Response to LILCO's Informal Discovery Requests for July 21, 1983 (August 22, 1983)	False. County voluntarily produced documents. Hardly a showing of "bad faith."
Suffolk County's Responses to LILCO Requests of August 8, 1983 (August 31, 1983)	
County produces documents after LILCO notifies Board on September 23, 1983, that it intends to move to compel	
9. Bad Faith Relevance Objections to Discovery Requests in 1983 (LILCO Supp., Attachment 3, at 4)	
Governments' Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10 (April 20, 1988)	False. As explained in Governments' Reply at § IV.B.1.a, the Governments' April 20, 1988, Objections were proper, particularly given the different issues presented in discovery under new rule. ASLB's April 8 Memorandum merely raised

LILCO Allegation	Suffolk County Response
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.)	issue of relevance; Memorandum did not resolve relevance issue but, rather, in fact, left the relevance issue for later decision, i.e., on May 10. Thus, the April 8 Memorandum establishes further bases why the April 20 Objections were proper.
10. Bad Faith Objections During Hearings on "Integrity of the Proceedings" Issue (LILCO Supp., Attachment 3, at 4)	
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.	False. Counsel was proper in making relevance objections. ASLB defined scope of hearing on June 24 and 29. Tr. 20924, 20935, 20937 (Gleason). ASLB then failed to follow scope and conducted hearing beyond the noticed issues. This violates due process. Governments' Reply at § IV.A. Objections proper.
11. Refusal to Produce Deponents on Realism Issue (LILCO Supp., Attachment 3, at 5-6)	
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	False. This false allegation is dealt with primarily in Governments' Reply at § IV.B.1.c. We note: -- The Governments sought and obtained ASLB approval of schedule change in April and all available deponents were made available per the ASLB's revised

LILCO Allegation	Suffolk County Response
c) Frank P. Petrone for 4/14/88 d) David E. Harris for 4/15/88 e) William E. Regan for 4/15/88 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. 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. 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.	schedule. Messrs. Regan and Harris were unavailable. Nothing improper for County to attempt to persuade ASLB that only Halpin deposition should proceed. -- LILCO omits fact that Halpin deposition occurred as scheduled on April 19. Subsequently, County offered new date for Halpin deposition, but LILCO wanted to move it back. -- Depositions were being scheduled in early June (for week after the 1988 exercise) when June 10, 1988, impasse occurred which obviated further deposition discovery. -- LILCO omits to disclose that it urged the ASLB on April 15 to defer depositions so that legal pleadings could be filed and ruled upon.

LILCO Allegation

Suffolk County Response

April 15, 1988: Letter from Lanpher to Board announces that the filing by Intervenors 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.

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. . . ."

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.

April 25 and 26, 1988: Depositions of County witnesses Guido, Petrone and Roberts occur as scheduled.

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.

LILCO Allegation

Suffolk County Response

May 10, 1988: Prehearing Conference. Board orders the reopening of Halpin deposition.

May 24, 1988: Board Ruling grants LILCO's request to reopen Roberts and Petrone depositions; orders depositions of Regan and Harris.

May 27, 1988: Letter from Lanpher to Sisk, making Halpin available for reopened deposition on June 13, 1988.

June 9, 1988: Governments' Notice that the Board has Precluded Continuation of the CLI-86-13 Remand is filed.

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.

LILCO Allegation	Suffolk County Response
12. Refusal to Produce Deponents on Issues Related to Document Production (LILCO Supp., Attachment 3, at 6-8) 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 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	False. See Governments' Reply at § IV.B.2. Note also: -- All deposition notices as of June 10, 1988, were placed on hold by Board's request (Tr. 20862 (Gleason)) for June 15 briefing papers. -- After June 17 Order, Governments' properly moved to vacate. The Board's Orders of June 24 and June 29 had effect of granting much of the relief sought by Governments, i.e., all depositions were cancelled. There is no abuse of discovery in seeking and obtaining relief from ASLB discovery order. -- Governments' moved to quash subpoenas and for stay of June 17 Order.

LILCO Allegation

Suffolk County Response

Bennett is characterized as "redundant." Roberts, who has retired, is not offered.

June 6, 1988: Letter from Sisk to Lanpher and Richard J. Zahnleuter proposes tentative schedule for thirteen depositions of Intervenor witnesses.

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

June 8, 1988: LILCO reissues notices of deposition for:

a) Regan for 6/14/88

b) Roberts for 6/15/88

June 9, 1988: Letter from Sisk to Board announces a discovery "impasse" and requests an immediate teleconference to resolve the dispute. Concurrently, Intervenors file Governments' Notice that the Board has Precluded Continuation of the CLI-86-13 Remand.

LILCO Allegation

Suffolk County Response

June 10, 1988: Teleconference. Intervenors refuse to go forward with depositions. Board therefore dismisses the realism contentions; Board retains jurisdiction over the issue of the non-production and other discovery abuses.

June 10, 1988: Letter from Lanpher to Sisk suggests that "any talk of depositions seems premature."

June 15, 1988: LILCO's Brief on the Appropriate Remedy for the Intervenors' Failure to Comply with Board Orders asks that the Board order depositions according to an attached schedule.

June 17, 1988: Teleconference. Board grants LILCO's June 15 deposition schedule.

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.

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.

LILCO Allegation	Suffolk County Response
June 24, 1988: Teleconferences. Board requests briefs on County suggestion of a hearing on the "integrity of the proceeding" issue.	
June 29, 1988: Teleconference. Board orders hearing on the "integrity of the proceeding" issue. Depositions are never held.	
13. Refusing to Honor Subpoenas of Roberts and Regan (LILCO Supp., Attachment 3, at 9)	
June 8, 1988: LILCO reissues notices of deposition for: a) Richard Roberts for 6/14/88 b) William Regan for 6/15/88	False. See Governments' Reply at § IV.B.2. Further: -- County moved to quash and for a stay, thus satisfying all procedural requirements.
June 15, 1988: LILCO files Application for Issuance of Subpoenas for Roberts and Regan.	-- LILCO never sought enforcement of subpoenas.
June 16, 1988: Board grants LILCO's request for subpoenas and orders Roberts to appear on June 22, 1988, and Regan to appear on June 23, 1988.	-- Board on June 24 (Tr. 20925-26) placed all discovery on hold and on June 29 (Tr. 20932-34) cancelled depositions and set matter for hearing. Roberts not ordered to appear at hearing; Regan appeared as ordered.

LILCO Allegation

Suffolk County Response

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 filed Motion to Quash Subpoenas.

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.

June 29, 1988: Teleconference. Board orders hearing on the "integrity of the proceeding" issue. This has the effect of mooting the subpoenas for Roberts and Regan.

July 19, 1988: Regan testifies as a witness in the "integrity of the proceeding" hearing.

Attachment 2

State of New York Response to
LILCO Supplement, Attachment 4 --
"Specific Instances of Discovery Abuse by New York State"

Attachment 2

State of New York Response to LILCO Supplement, Attachment 4 -- "Specific Instances of Discovery Abuse by New York State"

LILCO appended to its July 26 Supplement a 40-page document entitled "Specific Instance of Discovery Abuse by New York State." The State of New York has responded to many of the LILCO allegations in the Reply to which this Attachment is appended. See Governments' Reply to July 26 Supplements filed by LILCO and the NRC Staff Seeking Imposition of Sanctions, Aug. 1, 1988 ("Govts' Reply" or Governments' Reply"). In this Attachment, the State responds to the allegations in LILCO's Attachment 4, or refers the Board to the portion of the Governments' Reply where a response is set forth.

The State notes at the outset that many of LILCO's allegations are not based upon the record of the recent hearing and thus violate the Board's directive. See Tr. 22074 (Gleason). Further, the Board must disregard allegations to the extent they address issues beyond the production of emergency plans, including the EOP. New York State would be deprived of due process if the Board were to rule on such matters absent proper notice. See Gov't Reply, at § IV.A.1/

1/ The State does not waive its due process objection by submitting this response.

I. "Document Production".

A. LILCO Allegation: "Suffolk County Emergency Operation Plan: the State's Knowledge." LILCO Supp. Att. 4, at 1-2.

New York State Response

This matter is discussed in Section III of the Governments' Reply and thus only several matters will be reiterated herein. First, no LILCO interrogatory asked whether New York State personnel knew of the County's EOP and LILCO has not even alleged the existence of such an interrogatory. Accordingly, there is no basis for any allegation that the State's April 22 or June 3 answers to LILCO's March 24 Discovery were in any way deficient.

Second, the evidence is clear that the State did not attempt to conceal knowledge of the EOP. The State first got a copy of the EOP on May 6, 1988, and counsel first learned of the State's possession on June 6, 1988. By then, the exact same copy as possessed by the State had been served on LILCO by the County. The State accordingly informed LILCO of the existence of the document but did not duplicate the County's prior production of the document.

Finally, there is no basis for any allegation that the State's witnesses failed to disclose data about the EOP at their depositions. See Govts' Reply, at § III.B. The State witnesses at their depositions answered truthfully as to the extent of their knowledge about a County EOP. There is no evidence that any State witness attempted to conceal any facts. The fact that individuals might have had greater or lesser knowledge about the County's EOP should have been expected and is not probative of whether th witnesses questioned by LILCO told the truth.

B. LILCO Allegation: "Planning Documents Not Produced to LILCO"

1. LILCO Allegation: "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 Disc. Ex. 5)"

New York State Response

This matter is discussed in Section IV.B of the Governments' Reply wherein the Governments demonstrate that the State complied fully with discovery requirements. In addition, the State adds the following.

First, while LILCO Disc. Ex. 5 was not responsive to any discovery request (as explained in greater detail below), even if it were, its alleged nonproduction is totally outside the scope of this proceeding. The Board's inquiry is limited to the alleged nonproduction of emergency plans or procedures. See Govts' Reply, at § IV.A. For the reasons discussed below, LILCO Disc. Ex. 5 is neither a plan nor procedure. Thus, it would be a violation of the Governments' due process rights for the Board to consider this charge.

Second, LILCO has revealed for the first time in its Supplement which interrogatories it alleges should have resulted in the production of LILCO Disc. Ex. 5. LILCO's failure to identify those interrogatories prior to the hearing is unfair, as the Governments were entitled to notice of the specific discovery requests they were alleged to have failed to comply with. The Governments did not receive such notice and thus were denied the opportunity to place relevant information into the record. Thus,

the allegation is defective and should be rejected.

Third, even if the merits of the allegation are addressed, it is clear that the allegation is unfounded. LILCO alleges that LILCO Disc. Ex. 5 should have been, but was not, produced in response to Interrogatories 50, 76, 123, 68 and 69 of LILCO's March 24 Discovery. LILCO Supp., Att. 4, at 2-5. LILCO is wrong. As stated by New York State counsel in a July 5, 1988, letter to LILCO's counsel:

> 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.

It is evident that the interrogatories referenced by LILCO do not call for production of LILCO Disc. Ex. 5. For instance, LILCO states that its Interrogatory 50 "requested all plans and procedures,

whether generic or specific, relating to ingestion pathway response." LILCO Supp., Att. 4, at 2. That grossly mischaracterizes Interrogatory 50, which actually asks for:

> [A]ll plans and procedures that New York State has and would use, follow or otherwise rely upon to make an ingestion pathway and recovery and reentry response to a radiological emergency at (a) the Yankee Rowe nuclear power plan (Massachusetts), (b) the Millstone nuclear power plant (Connecticut), (c) the Haddam Neck nuclear power plan (Connecticut), (d) the Vermont Yankee nuclear power plant (Vermont), and (e) the Oyster Creek nuclear power plant (New Jersey).

(Emphasis added). LILCO's serious distortion of the actual request needs no further explanation, except to note that it ill-behooves LILCO to allege discovery abuse and then to misstate what is at issue in that discovery controversy.

LILCO Disc. Ex. 5 is not responsive to Interrogatory 50 because it is not a "plan or procedure that New York State has and would use, follow or otherwise rely upon" in an emergency. It is absolutely not a New York State plan or procedure, or, for that matter,

even a county plan or procedure. Tr. 21730-34 (Germano).[2/] The information necessary for state agencies to respond at operating sites is already contained in the New York State Radiological Emergency Preparedness Plan. Tr. 21733-34 (Germano). LILCO Disc. Ex. 5 does not duplicate that information, nor does it identify resources, personnel, phone numbers or implementing procedures. It is not a "plan or procedure that New York State has and would use, follow or otherwise

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2/ LILCO falsely states that at the hearing, Mr. Germano "could not deny, however, that the document on its face was a 'procedure' applicable to all the plants depicted on Attachment 1 to the document, Tr. 21776-777." LILCO Supp. Att. 4, at 4-5. Inspection of the transcript (Tr. 21776-77) shows that Mr. Germano actually said no such thing -- LILCO's counsel simply asked if Attachment 1 was a map and if the map was contained in the portion of the New York State Radiological Plan relating to ingestion pathway response. Mr. Germano responded affirmatively:

> Q. If you turn to Attachment 1 [of LILCO Disc. Ex. 5], Mr. Geramo [sic], at the end of the document, Attachment 1 is a map, is it not, out of the State Radiological Emergency Preparedness Plan?
>
> A. That's correct.
>
> Q. Isn't that map contained in, I believe it's either Annex K or Procedure K to the state radiological plan?
>
> A. I believe so, yes.
>
> Q. That part of the state radiological plan relates to ingestion pathway responses, is that correct?
>
> A. That's correct.

Subsequent questions pertained to a different subject. LILCO's citation is clearly erroneous and misleading.

rely upon" in connection with Yankee Rowe, Millstone, Haddam Neck, Vermont Yankee or Oyster Creek because it was distributed to 13 counties in the Ginna ingestion pathway, not statewide, as a guidance document. Tr. 21731 (Germano). The document is not intended for anyone to "use, follow or otherwise rely upon" in connection with the enumerated nuclear power plants. The purpose of this document was to provide the 13 counties with guidance material so that those counties, in turn, could prepare plans as appropriate, and as deemed necessary by the 13 counties, to sustain a response to an incident at Ginna. Hence, the guidance document is neither a generic nor a specific plan or procedure. Tr. 21732-34 (Germano). LILCO Disc. Ex 5 is not responsive to Interrogatory 50.

LILCO also falsely contends that the document should have been produced in response to LILCO Interrogatories 76 and 123 which seek the identification and production of documents "used" by counties to prepare for and participate in the Ginna exercise. The State government does not control, monitor or

oversee operations of county governments. Thus, New York State cannot presume to speculate what the 13 counties used, if anything, to prepare for and participate in the exercise. This is entirely consistent with New York State's June 3, 1988 response to Interrogatory 76, which said in part "as to the last sentence regarding documents used by these counties, see General Objections 1, 2, and 3. Those objections clearly stated that the State could not speculate on what documents counties actually used or would use.3/ If LILCO thought that the State's June 3 answers or objections were improper, LILCO should have moved to compel discovery

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3/ See LILCO Disc. Ex. 8, at 2. Objection 1 states, in part:

> The State of New York objects to LILCO's Interrogatories to the extent that they call for speculation, which the State of New York is unable to provide. The counties about that [sic, "which"] LILCO seeks such information are separate governmental entities that have independent authority to determine their own actions prior to and during emergencies. Accordingly, the State of New York cannot predict what these counties would do, how they would respond, what plans they would use, or other such matters.

(Emphasis added). Objection 3 states, in part:

> The State of New York objects to LILCO's Interrogatories to the extent that they seek the identification of documents, or production of documents themselves, which are in the possession, custody or control of counties, including Suffolk County. Such counties are separate, independent governmental entities.

within ten days as contemplated under the NRC's rules. LILCO did not do so, however. LILCO should not now, almost two months later, be heard to complain.

It further must be emphasized that LILCO has only itself to blame for having asked narrow interrogatories. If LILCO had asked for all correspondence, or all guidance documents, or all documents related to planning exchanged between the State and the counties, that would be a different matter. However, as posed, LILCO's interrogatories cannot properly be construed to encompass LILCO Disc. Ex. 5 and a party cannot be faulted for responding to interrogatories, as posed.

Similarly, LILCO's claim that the document is responsive to Interrogatories 68 and 69 is unfounded. Interrogatory 68 seeks all "county plans and procedures . . . that would be used" by certain counties. Interrogatory 69 seeks all "county plans and procedures that would be used, followed or otherwise relied upon" by ingestion pathway counties. As noted above with regard to Interrogatory

50, LILCO Disc. Ex. 5 is not a "county plan or procedure" and if it were, for the reasons stated with respect to Interrogatories 76 and 123, New York State cannot presume to speculate whether LILCO Disc. Ex. 5 would be "used, followed or otherwise relied upon" by counties because counties make those determinations independent of New York State. Thus, LILCO Disc. Ex. 5 is not responsive to Interrogatories 68 and 69.

The facts surrounding LILCO Disc. Ex. 5, as supplied by the most knowledgeable, reliable and credible source (its author, Mr. Germano), clearly reveal that this document is not responsive to LILCO Interrogatories 50, 76, 123, 68 or 69.

2. LILCO Allegation: "Brookhaven National Laboratory Emergency Response Plan, Department of Energy, rev. 7/87 (LILCO Disc. Ex. 43)." LILCO Supp. Att. 4, at 5-6.

New York State Response

LILCO argues that LILCO's Interrogatory 120 required the production by New York State of a copy of the Brookhaven National Laboratory Emergency Response Plan. See LILCO Disc. Ex. 43. See Govts' Reply at § IV.B.

Interrogatory 120 specifically asked for "any and all plans for dealing with accidents involving shipment of radiological materials to Brookhaven National Lab." In response, New York State produced two documents on July 5, 1988 "dealing with accidents involving shipments of radiological materials to Brookhaven National Lab" entitled: "Brookhaven Spent Fuel Shipments Notification and Escort Procedure Checklist" and "Memorandum of February 6, 1985 from Lee Bates to Robert Travison."

The document that LILCO alleges should have been produced by New York State does not "deal with accidents involving shipments of radiological materials to Brookhaven National Lab." In fact, LILCO Disc. Ex. 43 addresses a different subject - `considerations of the on-site protective actions that should be taken in the event of a nuclear reactor incident involving the High Flex Beam Reactor on the site of Brookhaven National Laboratory. See LILCO Disc. Ex. 43 at 6, 22.4/ LILCO Disc. Ex. 43 clearly does not

4/ See also LILCO Disc. Ex. 43, at 1, under the heading (footnote continued)

deal with accidents involving shipments of radiological materials to Brookhaven National Lab. LILCO has offered no argument to the contrary, despite having been put on notice of that fact by New York State's counsel's letter of July 5, 1988 to LILCO's counsel. Thus, the document at issue is not responsive to Interrogatory 120. Further, counsel's production of other Brookhaven documents and counsel's July 5 explanation why LILCO Disc. Ex. 43 was not produced rebuts completely LILCO's allegations of discovery abuse.5/ The State cannot be faulted for a good faith determination -- disclosed on the record -- that particular documents are irrelevant.

(footnote continued from previous page)
"Purpose": "The objective of the BNL emergency response plan is to document the organization and procedures which would be called upon to protect laboratory employees, the general public, emergency workers and the environment in the unlikely event of an emergency at the Laboratory." (Emphasis added.)

5/ LILCO apparently had the document at the very time it accused New York State of not producing it. LILCO's Brief on the Appropriate Remedy for the Intervenors' Failure to Comply With Board Orders, June 15, 1988, at 14. Consequently, there was no prejudice arising from any alleged State failure to produce it, questions of responsiveness aside. There is also no basis in the record for believing New York State possesses the document. Although counsel for LILCO contended at the hearing that the U.S. Department of Energy sent a copy of LILCO Disc. Ex. 43 in 1987 to one K. Rimawi (Tr. 21807-08, 21827 (Irwin)), an employee of New York State, there is no evidence in the record to support such a factual finding. Indeed, LILCO's counsel had to admit that he could not be precise about who at DOE had provided him with such information. Tr. 21827 (Irwin).

C. LILCO Allegation: "Inconsistencies Between REPG Affidavit and Interrogatory Responses." LILCO Supp., Att. 4, at 7-16.

New York State Response

See Govts' Reply, § IV.C.2 for a statement of the response to this allegation. The State also adds the following.

This Section of LILCO's Attachment 4 purports to allege six inconsistencies between certain statements selected by LILCO from the REPG Affidavit and later deposition statements. As has been stated previously, this topic is beyond the scope of the proceeding and, therefore, should be disregarded. See Govts' Reply, § IV.A.

Further, this topic has been addressed in Section IV.C.2 of the Governments' Reply and New York State's arguments will not be repeated, except to emphasize several points: (1) due process and fairness require that parties be given adequate notice of allegations that are to be probed at a hearing -- LILCO neglected to provide notice and the Board decided not to require it, thereby depriving New York State of due process; (2) similarly, at the hearing, LILCO neglected to confront the witnesses with alleged

confront the witnesses with alleged inconsistencies; (3) at the hearing, New York State was unable to elicit testimony regarding the alleged inconsistencies because it received no specification of what the alleged inconsistencies were; (4) LILCO's Supplement, Attachment 4, at 7-16, alleges inconsistencies by listing statements in the record and by heading the lists with a curt phrase that is not even a sentence, thereby failing to identify the inconsistency, show why it is an inconsistency, or show why it constitutes discovery abuse; (5) in the absence of an identification and illumination of the alleged inconsistency and discovery abuse, New York State is unable to respond, and in any event, a reading of the statements on the list reveals that they are reconcilable and not inconsistent. There has been no discovery abuse in this regard.

D. LILCO Allegation: "Late Production of Documents." LILCO Supp., Att. 4, at 16-18.

LILCO apparently asserts that production of documents under cover of letters dated July 5, July 6[6] and July 21[7] constituted a specific instance of discovery abuse. This is not true. As the letters explained, New York State provided the documents pursuant to the Board's ruling during the June 29, 1988 Conference of Counsel. Tr. 20934-35 (Gleason). As has been thoroughly explained in Section IV.B.2 of the Governments Reply, events occurring on June 10 and thereafter halted the legal authority proceeding, at least insofar as discovery matters were concerned. There was no reason to contemplate further document production until the Board issued guidance. That occurred on June 29, 1988. Document production by New York State under these circumstances was entirely timely.

6/ LILCO's listing in LILCO's Supplement, Att. 4, at 16, of documents provided under cover of a July 6, 1988 letter is erroneous. It omits three letters authored by Mr. DeVito and two agenda meetings. It includes documents corresponding to items d through l, but those documents were not transmitted under cover of the July 6 letter. They appear to be documents that the County produced at some other time.

7/ LILCO neglected to state that this letter accompanied the transmission of documents that had been identified in the July 6 letter as having been lost or delayed in the mail. The documents arrived in counsel's office during the hearings in Bethesda. Counsel transmitted these documents as promptly as possible.

E. LILCO Allegation: "Late Authentication of State Plans." LILCO Supp., Att. 4, at 18-20.

New York State Response

LILCO accuses the State of abusing discovery by not authenticating two State Plans until ordered to do so by the Board. First, the matter is outside the scope of this proceeding, which does not concern verification of documents. In any event, the allegation is false.

LILCO raised this issue with the Board for the first time in a pleading to which New York State was not given the opportunity to submit a reply. See LILCO's Response to June 24 Teleconference Order, June 28, 1988, at 5. In a teleconference on the next day, without allowing New York State to present its views, and without explaining any rationale, the Board for the first time ordered New York State to supply the authentications that LILCO sought. Tr. 20934 (Gleason). New York State complied with the Board's Order and provided the authentication to LILCO in a timely manner under cover of a letter dated July 5, 1988. Had the Board provided New York State with a fair opportunity to challenge LILCO's arguments, New York State would have shown that all of LILCO's authentication requests were submitted

after the close of discovery and thus were untimely.[8] In addition, New York State would have shown that State deponents Papile and DeVito had already provided sufficient authentications during their depositions.[9] Again, as with other

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8/ The discovery period on the realism issues ended on April 22, 1988. Confirmatory Memorandum and Order, April 12, 1988, at 1. Thereafter, the Board issued an additional Confirmatory Memorandum and Order which expressly extended the realism discovery period to April 29, 1988, only for the purpose of deposing certain Government witnesses. Confirmatory Memorandum and Order, April 18, 1988, at 2. The Board did not extend the time in which to file new document requests or requests for admissions -- the previous deadline of April 22 remained intact.

LILCO ignored these rulings on two subsequent occasions. First, on April 27, 1988, after the close of document discovery, LILCO served on New York State two new document requests hidden within notices of deposition. Notice of Deposition concerning Donald DeVito, April 27, 1988; Notice of Deposition concerning James Papile, James Baranski and Lawrence Czech, April 27, 1988. Each notice "directed" the deponents "to produce" on April 29, 1988, documents responsive to LILCO's March 24 Discovery and other documents that LILCO had not previously requested in connection with realism discovery, of which two documents in particular were: "A true copy of the current New York State Radiological Emergency Preparedness Plan" and "A true copy of the current New York State Disaster Preparedness Plan." Second, on April 28, 1988, after the close of discovery, LILCO served its First Set of Admissions Regarding Contentions 1-2, 4-8, and 10 to Suffolk County and New York State. This request sought admissions that the two State Plans were current, or in the alternative, the request sought "prompt production" of the two State plans. New York State objected on the ground of untimeliness and LILCO never sought Board intervention. In conclusion, New York State was within its lawful rights not to comply with these new document requests and requests for admissions because they were filed after the termination of the discovery period for realism document requests and were, therefore, unauthorized.

9/ When LILCO presented Mr. Papile with a copy of the New York State Radiological Emergency Preparedness Plan at his deposition, Mr. Papile, under oath, identified it as "the updated [plan] - complete to include all pages of the state portion of the

(footnote continued)

allegations, it is clear that the State of New York has complied fully with discovery requirements.

F. LILCO Allegation: "Additional Problems with Verifications of Interrogatory Responses." LILCO Supp., Att. 4, at 20-21.

New York State Response

LILCO's cryptic claim of "problems" with verifications of interrogatory responses is a petty complaint that New York State provided signed verifications subsequent to the filing of interrogatory answers. The Board may not consider it because it is outside the scope of this proceeding. See Govts' Reply, at § IV.A. Even if it is considered, the allegation is meritless. Over the years, this practice has been employed frequently by the parties in this proceeding, especially by LILCO. As all New York State answers to interrogatories have been verified, and as LILCO neglects to specify what the "problem" is, why it is a "problem" and how the "problem"

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New York State radiological emergency preparedness plan." Papile, Baranski, Czech Deposition, at 49. When LILCO presented Mr. DeVito with a copy of the New York State Disaster Preparedness Plan, Mr. DeVito, under oath, testified that in his tenure (since 1982) as SEMO's Director, the plan has not been updated. DeVito Deposition at 63-65. Therefore, the copy of the plan that New York State provided to LILCO on February 17, 1984 (LILCO Disc. Ex. 16, Attachment) is the current plan.

constitutes discovery abuse, the Board should disregard this allegation.

G. LILCO Allegation: "Rephrasing and Limiting LILCO's Document Production Requests." LILCO Supp. Att. 4., at 21-22.

New York State Response

This abuse allegation must be rejected summarily. Not only is it outside the scope of issues to be briefed, but it also is so vague that no one can tell precisely what it is that LILCO is alleging -- if anything. To the extent, however, that LILCO is alleging a failure to answer its March 24, 1988 Discovery, LILCO is blatantly untimely. Its allegations must be rejected for that additional reason. Without waiver of these objections, the State still will attempt to respond.

LILCO appears to be complaining that when LILCO asked State witnesses to rephrase at the hearing how they were asked weeks, months or years earlier to search for documents, they responded in a manner that LILCO suggests limited the actual scope of the document requests. See LILCO Supp., Att. 4, at 21-27. However, this method of questioning invites imprecision due to its

reliance upon long-term memory of specific words used in making the requests. Further, LILCO fails to state which requests were so limited or how they were limited. Rather, LILCO relies on its curtly-phrased heading to present argument and follows the heading with a list of statements by witnesses. Consequently, its allegation is completely vague. It must be disregarded.

For example, LILCO points out that Mr. Papile "testified that he only searched for documents he was particularly asked to search for "Tr. 20970 (Papile). LILCO seems therefore to imply that Mr. Papile did not search for all documents. New York State must reiterate how nonprobative such a "memory" interrogation is. Further, LILCO neglects to inform the Board that Mr. Papile also testified that he was asked to search for documents "that were mentioned in the second interrogatory that was presented to the State" and that he had a copy of LILCO's March 24 Discovery Requests when he commenced the search. Tr. 20966-968 (Papile). Given that this was the only pertinent realism document request, the scope of Mr. Papile's search was proper.10/

10/ LILCO states that Mr. Papile was never asked to search for
(footnote continued)

As another example, LILCO implies with respect to Mr. DeVito and Mr. Germano that SEMC improperly "limited" its search to documents affecting Suffolk County. As the pertinent interrogatory, Interrogatory 120, expressly limits itself to documents "affecting Suffolk County," LILCO's implied allegation is baseless.11/

H. LILCO's Allegation: "Examples of Relevance Objections to Discovery Requests.

1. LILCO's Allegation: "Realism Document Discovery." LILCO Supp., Att. 4 at 22.

New York State Response

This issue is outside the scope of this proceeding and cannot be considered by the Board. In addition, as explained in the Governments' Reply, Section IV.B.1, the Governments' April 20, 1988 objections were proper and expressly contemplated under 10 CFR § 2.7406(b) 2.741(d). Furthermore, such

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the NYS REPP. LILCO Supp., Att. 4, at 22. What this implies is unclear, but in any event, that ubiquitous plan was provided to LILCO once during discovery in 1984 and then a second time when Mr. Papile "drew up another copy of the plan and verified it." Tr. 21037 (Papile). Thus, LILCO's attempt to allege some form of discovery abuse misses the mark.

11/ LILCO presumably implies that there was something improper about Mr. Germano not being asked to search for the County's EOP. LILCO Supp., Att. 4, at 22. As Mr. DeVito, SEMO's Director, took charge of the search for the County's EOP (Tr. 21768 (Germano)), there was nothing wrong with Mr. Germano not searching for it.

objections were particularly proper in light of different issues presented in discovery under the new rule, and the fact that the Board in its April 8 Memorandum at page 52 had not ruled on the relevance of plans for non-nuclear emergencies. It is also entirely improper for LILCO to suggest that New York State, which had not been party to the proceeding in 1982-83, was precluded from raising relevancy objections in 1988.

2. LILCO's Allegation: "Depositions." LILCO Supp., Att. 4, at 22.

New York State Response

This issue is outside the scope of this proceeding and cannot be considered by the Board. Furthermore, the State disagrees with the Board's observation on May 10, 1988, Tr. 19381 (Gleason), concerning "the degree of persistency" of counsel. The Board has never explained its rationale and thus further argument is not possible. At any rate, however, there was no abuse of discovery, particularly since the Governments prior to and on June 10, 1988 offered to make these witnesses available for further

depositions: Tr. 20848 (Lanpher); Tr. 20850 (Zahnleuter).

3. LILCO's Allegation: "Hearings on 'Integrity of the Proceeding' Issue." LILCO Supp., Att. 4, at 23.

New York State Response

This issue is outside the scope of this proceeding and cannot be considered by this Board. In any event, the objections were proper. See Govts' Reply, at §§ I, IV.B. As set forth in Section IV.A of the Govts' Reply, the Board defined the scope of the hearing to be whether relevant emergency plans, and particularly the County's EOP, were not produced, and if not, why. The Board then permitted questioning far beyond that scope, violating the Governments' due process rights. It was entirely proper for the Governments to object.

II. "Witnesses/Deponents"

A. LILCO Allegation: "Footdragging in Designating Witnesses." LILCO Supp., Att. 4, at 23-24.

New York State Response

This issue is outside the scope of the proceeding and cannot be considered by this Board. See Govts' Reply, § IV.A. On the merits, the

allegation is also false. New York State designated its witnesses, Dr. Hartgen and Dr. Axelrod, on April 7 and 13, 1988, respectively. These designations were consistent with the Board's revised discovery schedule and both witnesses were deposed within the time period established by the Board for discovery. It was not possible to designate Dr. Hartgen until LILCO's filed its prima facie case, as it was unclear until that point whether LILCO intended to advance its "immateriality" theory. It was also not possible to designate Dr. Axelrod until the Board issued its April 8 Memorandum. Furthermore, New York State not only designated Dr. Axelrod as a witness in a timely manner on April 13, but also filed his testimony on that date, 23 days prior to the date testimony was required to be filed. This hardly constitutes "footdragging."

B. LILCO Allegation: "Refusal to Produce Deponents on Realism Issue". LILCO Supp., Att. 4 at 24-26.

New York State Response

This issue is outside the scope of this proceeding and cannot be considered by this Board. See Govt. Reply § IV.A. This matter is also addressed in the Governments' Reply, Section IV.B. We add only the following.

In the last two weeks of April, 1988, the State produced 5 persons for depositions within the time period established by the Board, i.e., April 18-29, 1988. Subsequently, after the Board's oral order on May 10 and written order of May 24, efforts were undertaken to schedule additional depositions. Those additional depositions could not be held in late May or early June because counsel for the State was occupied full time in the OL-3 hearing (which lasted until June 3) and the 1988 exercise (June 7-9). Subsequently, the depositions were postponed due to the June 10, 1988, discovery impasse.

C. LILCO Allegation: Refusal to Produce Deponents on Issues Related to Document Production." LILCO Supp., Att. 4 at 26-27.

New York State Response

This issue is outside the scope of this proceeding and cannot be considered by this Board. Notwithstanding, as demonstrated in the Governments' Reply, § I.V.B.2, the State did not violate any discovery requirements. After the Board's Order of June 17, which adopted LILCO's June 15 deposition schedule, the Governments properly filed a Motion to Vacate. Thereafter, the Board's orders of June 24 and June 29 had the

effect of granting much of the relief sought by Governments, in that all depositions were cancelled. The State certainly does not abuse discovery when it seeks and obtains ASLB relief from a previously adopted schedule.

D. LILCO Allegation: "Arbitrary Time Limits and Abrupt Halting of Depositions." LILCO Supp., Att. 4 at 28.

New York State Response

This issue is outside the scope of this proceeding and cannot be considered by this Board. Deposition disputes are not uncommon and when they arise, the rules contemplate intercession by the Board, as necessary. In this case, LILCO's desire to depose Dr. Axelrod, who is one of the most distinguished and busy executive officials in New York State, "day-to-day until completed" was unreasonable. New York State offered a reasonable compromise and LILCO began the deposition under the terms of that compromise. LILCO could have brought its complaint to the Board at that time, but it chose to depose the witnesses in the time available instead. Unfortunately, many questions were inartfully crafted, vague, and ill-conceived, requiring clarification or objection. With prudent questioning, the deposition could have

been completed in the time available. It should be noted that after Board intercession on May 10, 1988 (Tr. 19381 (Gleason)), New York State did make Dr. Axelrod available for further deposition (Tr. 20850 (Zahnleuter)), but the subsequent Board ruling on June 10 rendered Dr. Axelrod's deposition moot.

Conc rning Mr. DeVito, the deposition was conducted in the time available, with counsel for LILCO stating "I am happy to say that concludes my questioning." The deposition was conducted in a satisfactory manner from both parties' perspectives -- the discovery process was not abused, it was effective.

Concerning the REPG deposition, the foregoing argument with respect to Dr. Axelrod is just as applicable, except the Board did not intercede on LILCO's behalf until May 24 and even then never explained why a further deposition might be needed. At any rate, there was no showing of any discovery abuse.

E. LILCO Allegation: "Requiring Subpoena for Axelrod to testify at Hearing." LILCO Supp., Att. 4 at 28-29 .

New York State Response

This issue is outside the scope of this proceeding and cannot be considered by this Board. At any rate, there clearly was no "abuse".

Counsel on July 12, 1988 sought to have the Board reconsider its request to have Dr. Axelrod appear as a witness based on new facts presented in the testimony of Mr. Papile and Mr. DeVito and Dr. Axelrod's important stature in state government. After the Board denied relief, Dr. Axelrod did appear as scheduled, but not pursuant to subpoena because service upon counsel was ineffective service and the Board lacks authority to compel Dr. Axelrod's appearance anywhere but in the Northern District of New York. As stated in the Govts' Reply, at §§ I, IV.B, submitting motions and asserting legal arguments does not constitute discovery abuse.

F. LILCO Allegation: "Obstruction of Depositions and Hearing by Objections." LILCO Supp., Att. 4 at 29-30.

New York State Response

This matter is outside the scope of this

proceeding and cannot be considered by this Board. At any rate, this matter is discussed in the Governments' Reply, Section IV.B.1. Counsel is entitled and indeed has a professional responsibility to enter objections when necessary to safeguard the rights of the client, be it during a deposition or in the course of a hearing. The NRC rules contemplate and allow such objections and the ethics of the profession require objections to be entered when necessary. Further, as explained in Section IV.A of the Governments' Reply, it was proper for the Governments to object at the hearing when the Board permitted questioning beyond the scope of the noticed issues.

G. LILCO Allegation: "Authority of David Axelrod to Testify on Behalf of New York State." LILCO Supp., Att. 4 at 30.

New York State Response

This vague and pointless issue is outside the scope of this proceeding and cannot be considered by this Board. Whatever point LILCO is trying to make, it appears that this entire topic is based on semantics and in no way constitutes discovery abuse. A reading of the transcript (Tr. 61626-30 (Axelrod)) shows that although Dr. Axelrod and

LILCO's counsel had difficulty communicating with each other, Dr. Axelrod did not waiver from the statements in his direct testimony. For example, Dr. Axelrod corrected LILCO's counsel's misimpression that Dr. Axelrod "adopted" the Governors' statements by pointing out that as a subordinate, Dr. Axelrod does not adopt his superior's statemen s. Tr. 21628-29 (Axelrod). Rather, Dr. Axelrod supports his superior's statements and implements his superior's directives. Tr. 21629 (Axelrod). Dr. Axelrod is authorized to implement the policies of the Governor and can testify as to his knowledge of those policies. LILCO Disc. Ex. 34, at 2. That was his role as a witness before this Board. There was no abuse whatsoever.

H. LILCO Allegation: "Nonresponsiveness Regarding Radiological Emergency Communication System (RECS) Lines." LILCO Supp., Att. 4 at 30-33.

New York State Response

This issue is outside the scope of this proceeding and cannot be considered by this Board. Further, this matter is addressed in the Governments' Reply, Section IV.C.3. Finally, LILCO neglects to articulate what the charge of discovery abuse is with regard to the RECS lines. The heading simply

says "Nonresponsiveness Regarding . . . (RECS) Lines." This phrase and the list of quotations below it fail to identify exactly what it is that occurred in discovery that is nonresponsive. The charge is defective and should be disregarded by the Board on that basis alone.

LILCO did not include New York State's responses to Interrogatory 11a and 11c in its list in Attachment 4, so it appears that LILCO does not challenge these answers as being non-responsive. LILCO, however, does include New York State's answers to Interrogatory 11b, 11d, and 11e in the list, presumably meaning that LILCO does challenge their responsiveness.12/ Those answers state lawful determinations within the rightful province of New York State and are responsive. Historical events involving policy implementation, such as the internal letter to Mr. Del Giudice in 1985, do not make the given answers less responsive. Since LILCO submitted no argument to the contrary, the Board should reject this frivolous charge.

12/ LILCO is grossly out of time in complaining about answers filed in April 1988. For this reason, LILCO's allegation must be rejected.

I. LILCO Allegation: "State of New York's Refusal to Identify Resources," LILCO Supp., Att. 4 at 33-37.

New York State Response

This issue is outside the scope of this proceeding and cannot be considered by this Board. The allegation is also without merit, as is demonstrated in the Governments' Reply, Section IV.C.1. The State of New York has no plan for responding to a radiological emergency at the Shoreham Plant were that plant to be licensed. Absent such a plan identifying the resources available for a State response, the State cannot speculate as to what resources would be used in a Shoreham emergency. LILCO's arguments are nothing more than a restatement of its realism arguments, which are not at issue here.

J. LILCO Allegation: "Testimony of State Witnesses Regarding Resources." LILCO Supp., Att. 4 at 37-39.

New York State Response

This issue is outside the scope of this proceeding and cannot be considered by this Board. In addition, again, absent a State plan identifying the resources available for a response to a Shoreham emergency, State witnesses do not know what sorts of resources might hypothetically be available. LILCO's arguments are nothing more

than a restatement of its realism arguments which are not at issue here. See Govts' Reply, at § IV.C.1.

K. LILCO Allegation: "The DPC's "Review" of LILCO's Review of Shoreham Plan."
LILCO Supp., Att. 4 at 39-40.

New York State Response

This section is far outside the scope of the hearing established by the Board and has no bearing on supposed discovery abuse. This section also highlights why the Board's decision to allow LILCO to frame allegations for the first time in a post-hearing brief is unfair and a violation of due process. The only hint of what the alleged "discovery abuse" is is the section heading: "The DPC's 'review' of LILCO's review of Shoreham Plan." If this is the allegation, it makes no sense. What is "LILCO's review of Shoreham Plan"? There is nothing in the record about whatever this is. One step further, there is nothing in the record about a DPC review of a LILCO review of a Shoreham Plan. LILCO's purported allegation should be disregarded at the outset because it is incomprehensible.

Nevertheless, it is evident from LILCO's recitation of various statements by Dr. Axelrod and Mr. Davidoff that LILCO has proceeded under two false assumptions. One false assumption is that all deliberations concerning DPC actions on the plan submitted by LILCO occurred on the record at a DPC meeting. It is undisputed that some deliberations occurred on the record at the March 2, 1983, DPC meeting. The transcript of that meeting, however, indicates that the Governor, not in connection with a DPC meeting, consulted with Dr. Axelrod, other officials of the DPC, and senior staff members on or about February 17, 1983. LILCO Disc. Ex. 37, at 60. Dr. Axelrod's testimony was entirely truthful. LILCO completely overlooks these facts. Assuming but not conceding relevance, had LILCO fully inquired about this subject at the hearing, or had New York State had fair notice of this accusation so it could have developed an evidentiary record at the hearing, these facts could have been brought out on the record. The entire allegation could have been proven to have been frivolous and it could have been dispensed with at that time.

LILCO's second false assumption is that the plan LILCO submitted to the DPC was adequate because LILCO Disc. Exs. 51 and 52 rate certain planning elements as adequate. What LILCO overlooks is that the plan submitted to the DPC in 1982 relied on Suffolk County to implement it and to provide resources. As Suffolk County had denounced this plan, the adequate ratings became obsolete. In any event, the issue became moot because Suffolk County sought and obtained a temporary restraining order preventing the DPC from discussing at its December 1982 meeting the plan that LILCO had purloined. Again, had LILCO inquired about this subject at the hearing,13/ or had New York State had fair notice of this accusation prior to the hearing, these facts would have been developed on the record and they would have disproved LILCO's allegation.

13/ LILCO states that Mr. Davidoff "could not deny that the evaluation was positive," but LILCO provides no citation. He could not deny it because he was not given the opportunity. Had he had the opportunity, he would have denied it. LILCO's unfair tactics are what are abusive here, not New York State's statements.

August 1, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of GOVERNMENTS' REPLY TO JULY 26 SUPPLEMENTS FILED BY LILCO AND THE NRC STAFF SEEKING IMPOSITION OF SANCTIONS and ATTACHMENTS have been served on the following this 1st day of August 1988 by U.S. mail, first class, except as otherwise noted.

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