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LILCO, August 1, 1988

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
OFFICE OF REGULATORY  
INQUIRY & SERVICE  
BRANCH

Before the Atomic Safety and Licensing Board

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

LILCO'S REPLY BRIEF ON DISCOVERY SANCTIONS

Hunton & Williams  
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P. O. Box 1535  
Richmond, Virginia 23212

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I. THE ISSUE BEFORE THE BOARD IS WHETHER INTERVENORS HAVE FAILED TO COMPLY WITH DISCOVERY PROCESSES.

The Suffolk County and State of New York Supplement to June 15, 1988 Filing (July 26, 1988) (hereinafter "Intervenors' Supp."), not surprisingly, attempts to draw an exceedingly narrow line around the scope of the recent proceeding before the Board. Not only have the Intervenors sought to portray the recent hearings as being limited to document discovery (presumably excluding numerous abuses of the deposition discovery process and evasive interrogatory answers), they also have attempted to confine the Board's consideration to the production or nonproduction of the County of Suffolk, State of New York Emergency Operations Plan (SCEOP). See, e.g., Intervenors' Supp. at 2-3 & n.3; 27-28 & n.18. Intervenors even claim that "it would constitute a denial of due process" for the Board to consider anything beyond the circumscribed issue of the production or nonproduction of the SCEOP. Id. at n.18. Intervenors' feigned ignorance of the purpose and scope of the recent hearing, and their claim of lack of "notice", conveniently ignore several facts.

First, the Board initially determined to dismiss the realism contentions in a teleconference on June 10, 1988. The immediate reason was the Intervenors' refusal to go forward with Board-ordered depositions of State and County personnel. See, e.g., Tr. 20850-862 (Judge Gleason). The Board found that the "Governments' Notice" of that date constituted "a refusal to proceed with the Board's orders on discovery of the realism issues. Discovery goes much beyond interface." Tr. 20862 (Judge Gleason). The Board determined to retain jurisdiction of discovery matters, and specifically the recent production of the SCEOP. The purpose of the recent hearing was to provide



information for the Board to consider in determining the scope of the sanctions to be imposed against Intervenor, e.g., Tr. 20932 (Judge Gleason), which would include dismissal of the realism contentions either on procedural grounds as a sanction or on the merits after holding the Intervenor in default, Tr. 20862, 20872 (Judge Gleason), and might include dismissing Intervenor as parties to this proceeding, Tr. 20923 (Judge Gleason).

Second, the Board made it clear when it retained jurisdiction on and after June 10 that it was concerned with "whether the discovery requirements have been complied with in this proceeding." Teleconference of June 17, 1988, Tr. 20875 (Judge Gleason). In response to comments by LILCO's counsel, the Board stated:

Let me say, Mr. Sisk, as I've tried [to] get clear in my responses to Mr. Lanpher, the issue that we're involved in here is whether the discovery requirements have been complied with in this proceeding.

This does not only involve in my view the integrity of NRC's procedural rules of practice, but it does involve substantive matters concerning the rights and responsibilities of parties in these proceedings.

We have a responsibility -- this board has a responsibility to resolve that matter, to the extent that an administrative board can resolve it. If we are unable to resolve it, we may have to refer the matter to other levels of the NRC. But that is the principal reason we are retaining jurisdiction.

We are not attempting to draw a line around the kind of questions of the documents we asked. We are drawing a line around the purpose for which this inquiry is being authorized, if it is to be authorized.

Id., Tr. 20875-876 (Judge Gleason) (emphasis added). Indeed, the State's counsel acknowledged what the Board had said:

And after Mr. Sisk's discussion, I think you said that the issue would be whether the discovery requirements have been complied with in this proceeding.

Tr. 20879 (Zahnleuter). The Board stated that any further depositions would include "exploring the knowledge and lack of knowledge" of State personnel concerning the SCEOP, Tr. 20883 (Judge Gleason), and "whether there are other plans that should have been produced and have not been produced." Tr. 20885-886 (Judge Gleason). The Board further stated:

Certainly those kinds of questions are relevant to this proceeding that we are involved in here, because it raises once again the issue as whether the discovery processes have been complied with.

So I don't want to just narrow this thing in such a circumscribed manner that it just allows people to say yes or no in a certain issue which doesn't help the overall elevation [sic, evaluation] of the issue and illumination of the issue so we can decide things if we are called upon to decide them.

Tr. 20886 (Judge Gleason) (emphasis added). While the Board made clear that "the basic issue is whether state and county emergency plans may have been withheld during the proceeding," Teleconference of June 24, 1988, Tr. 20924 (Judge Gleason), it also made it repeatedly clear that the scope of the hearing, while narrow, was not confined solely to that issue.

Third, the Board also made it clear that, even as to document discovery, the hearing would not be confined to nonproduction of emergency plans. Indeed the Board, in the teleconference on June 29, 1988, ordered the Intervenor to produce to LILCO by July 6 "any documents that relate to emergency plans or relate to things that should have been produced in connection with emergency plans. . . ." Tr. 20934 (Judge Gleason). The eleventh-hour document productions by both the State and the County in response to that order were substantial.

Fourth, at the conclusion of the hearing on July 19, 1988, the Board directed the parties to submit "any additions to their prior filings which were dated June 15 relating to the proposed sanctions." Tr. 22074 (Judge Gleason). The June 15 filings, of course, addressed the appropriate scope of sanctions based on abuses of the discovery process, not just nonproduction of the SCEOP. The Board specifically ordered the parties to address "the issue of abuses concerning the discovery process." Id.

Finally, and fundamentally, it is beyond the pale for Intervenorors to suggest that they are ignorant of or have no "notice" of the specifics of their approach to discovery in this proceeding. They are far more intimately familiar with their own tactics in discovery than the Board, LILCO, or the other parties will ever be.

Thus, Intervenorors' attempt to cramp the framework of the Board's analysis on sanctions represents yet another attempt by Intervenorors to define all issues in this proceeding, and address them, only as they see fit. The Board correctly defined the scope of its inquiry on sanctions, and LILCO's Supplement to its June 15 Brief on Discovery Sanctions in Light of Subsequent Developments (July 26, 1988) (hereinafter "LILCO Supp.") detailed the discovery abuses that have been revealed.

II. SUFFOLK COUNTY'S CONCLUSIONS AS TO WHAT THE EVIDENCE ESTABLISHES REGARDING THE COUNTY'S COMPLIANCE WITH DISCOVERY IN 1982-83 ARE FLAWED.

Intervenorors' Supp., with respect to Suffolk County's assertion that it has "fully complied with its discovery obligations," id. at 2, touches on few topics and makes few arguments not already addressed in LILCO's Supp. LILCO's Supp., which more accurately and comprehensively characterizes and analyzes the evidence presented

during the recent hearing in Bethesda, will therefore be referenced wherever appropriate. This Reply will not address the County's assertions in detail, point by point; however, certain of the County's arguments do merit particular attention.

The County submits that the evidence from the recent hearing "establishes" four general "facts." In sum, the County alleges that:

1. it is "impossible to reconstruct, or to determine precisely" whether the SCEOP existed in its composite form during the 1982-83 discovery periods; that
2. the County produced in 1982-83 the "most important" portions of the SCEOP, including the Disaster Preparedness Plan, which the County characterizes as being the "heart of the present-day EOP"; that
3. the County provided more than 7,000 pages of documents to LILCO in 1982-83, that many of these documents were similar in content to portions of the SCEOP, and that this evidences the County's good faith intent to produce the SCEOP in 1982-83; and that
4. LILCO has not only been aware of the existence of the SCEOP "for many years" but has had a copy of the SCEOP "since at least since 1980."

Intervenors' Supp. at 4-7. The County concludes, based on these four "facts," that there is "no basis for finding that Suffolk County failed to produce documents responsive to discovery requests in 1982-83." *Id.* at 7.

The County's conclusion is erroneous because the "facts" on which it is based are not true. First, as LILCO demonstrates in its Supp., the preponderance of the evidence indicates that the SCEOP did exist in substantially its present form at the time LILCO propounded its discovery requests in 1982-83. Second, several of the most crucial components of the SCEOP (components which clearly were in existence at least in 1983) were not produced to LILCO prior to May 1988. Third, the fact that the County

produced a large, undifferentiated assortment of emergency plans and materials in 1982-83 is simply irrelevant to the issue of the County's nonproduction of the SCEOP. Finally, as is shown in LILCO's Supp., the clear weight of the evidence establishes that LILCO did not receive the composite SCEOP at any time prior to May 1988.

A. The Evidence Clearly Indicates that the SCEOP Did Exist in its Composite Form in 1982-83

In its Supplement, the County argues that there

is no clear evidence . . . that any "integrated" EOP beyond the County's Disaster Preparedness Plan even existed as of 1982-83, much less what such an "integrated" EOP consisted of. Rather, the evidence, at best, is inconclusive as to the precise contents and extent of the EOP in 1982-83.

Intervenors' Supp. at 8. This suggestion that "no one can really know" what the SCEOP looked like in 1982-83 more reflects the County's refusal to face the facts than it does any absence of facts. As LILCO stated in its Supp., the "evidence that the SCEOP existed as of 1982-83 in present or virtually present form (subject to updatings of names, addresses and telephone numbers) is overwhelming." LILCO Supp. at 26. It is unnecessary to repeat here the documentary and testimonial evidence that supports that conclusion. The date notations found on the various parts of the SCEOP, the Table of Contents (dated "1/82") appended to the updated version of the SCEOP (LILCO Disc. Ex. 10), and the testimony of the County's own witnesses all speak for themselves. See LILCO Supp. at 26-28.

The County makes little effort to reconcile its position with this conflicting documentary and testimonial evidence; for instance, their attempt to explain away the date notations on the SCEOP simply blinks the facts:



Nonetheless, and despite the dates and notations which appear on some documents which subsequently became part of the EOP, there is no evidence to establish that as of 1982 or 1983, the County maintained a single integrated document which constituted the County EOP and which contained anything other than the County's Disaster Preparedness Plan.

Intervenors' Supp. at 12 (footnote omitted) (emphasis added). To this argument, the County adds the claim that

[e]ven the EOP notations on the documents JILCO acknowledges it received in 1982 and 1983 do not necessarily mean that those documents, in fact, were part of the EOP at that time. For example, Mr. Richard Jones explained that one of the documents in Suffolk County Disc. Ex. 1 -- the Annex H police procedure -- was a beginning effort by the police to formulate an annex to the EOP. Tr. 21388-89 (R. Jones). Thus, some of the annotated documents may have been only drafts in 1982-83.

Id. at 12 n.8.

The County's hypothesis that the Suffolk County Disaster Preparedness Plan (SCEOP, Annex A, Appendix 9) more or less constituted the entirety of the SCEOP in 1982-83, and that any annexes in existence during that time period were only draft versions not integrated into a larger whole, is facially plausible. However, the County's position cannot be squared with information contained in previously produced discovery documents which demonstrates conclusively that: (1) a document called the Emergency Operations Plan, distinct from and larger than the Disaster Preparedness Plan, existed as early as September 1981; and that (2) Annex H, and probably other annexes as well, were already discrete and integrated parts of this Emergency Operations Plan at that time.

One of the documents contained in County Discovery Exhibit 1 (designated on its first page by Suffolk County Bates No. 000090), in addition to containing an early version of police Annex H, also has attached to it a series of memoranda pertaining to the



SCEOP and Annex H and sent between members of the Suffolk County Police Department. One memorandum, dated "18 Sept. 1981," from Dominick Parella to Edmund M. Erickson, (Suffolk County Bates No. 000091-92) reads, in pertinent part, as follows:

Re: the above subject [i.e., Police Service Annex to the Suffolk County Emergency Operations Plan Project #81-R-215], I contacted Mr. Don Terrell, Plans and Training Officer for the Suffolk County Department of Emergency Preparedness. Mr. Terrell advised me that this Department's previous annex to the County Emergency Operations Plan was good, but some modifications should be given to the notification procedure. I advised Mr. Terrell that if I had to elaborate on the notification procedure, I should modify other areas as well. Mr. Terrell stated that he did not know if other areas were affected and that I should contact Mr. Bruce McQueen, Executive Director of the New York State Disaster Commission in Albany, N.Y. for further clarification.

(emphasis added). Elsewhere in the memorandum, Mr. Parella indicates that he had "reviewed the various emergency plans" maintained by the County and notes that

[p]rimarily we have one major plan, the Suffolk County Emergency Operations Plan. This plan is maintained by Emergency Preparedness Department and is continuously being updated. The contents of this plan consist of general function overviews from County agencies. This plan is not available to the public. In front of this book is the Suffolk County Disaster Preparedness Plan printed ["Jan."] - 1981. This plan, an overview also, is available to the public.

(emphasis added).<sup>1/</sup> It is thus clear from the Parella memorandum that as of 1981 there ~~did~~ exist an Emergency Operations Plan that was distinct from the Disaster

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<sup>1/</sup> During the hearing Mr. R. Jones, at the direction of counsel for the County, read a portion of this memorandum into the record. Tr. 21338-39 (R. Jones, Letsche) While the County apparently believes that the portion of the memorandum which was read supports the County's position, when read in its entirety the memorandum in fact demolishes the County's assertion that in 1982-83 the SCEOP consisted entirely of the Disaster Preparedness Plan.

Preparedness Plan, though the Disaster Preparedness Plan was part of the larger EOP.  
2/

It is also clear from the memorandum that despite Mr. R. Jones' testimony (or, rather, the County's characterization of that testimony), the version of Annex H provided to LILCO in 1983 was not a draft. Rather, as of September 1981, police Annex H was already considered to be a part of the SCEOP and was in the process of being updated; it was not being written for the first time.

In sum, the County's conclusion that it is impossible to tell just what the SCEOP consisted of in 1982-83, and that it probably contained little more than the Disaster Preparedness Plan, simply fails to account for a vast amount of evidence that points to the opposite conclusion. Moreover, if the County disputes this conclusion, which follows inexorably from the evidence now in the record, then it is incumbent on the County to provide some evidence that effectively rebuts that conclusion. The County is in custody of the SCEOP and County employees have long maintained it. It was the County's responsibility to proffer witnesses who could have spoken definitively about the matters at issue.<sup>3/</sup> Given that the County was apparently unable or unwilling to do so,

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2/ Moreover, the fact that the Disaster Preparedness Plan was available to the public while the Emergency Operations Plan was not suggests that in 1981 the EOP already contained such confidential material as lines of succession/call-up lists (Annex A, Appendix 2, Attachment D), emergency phone numbers (Annex A, Appendix 7) and resource inventories. In addition, Mr. Parella's observation that EOP "is continuously being updated" is noteworthy because it also indicates the inclusion within the EOP of detailed information subject to frequent change. Conversely, the Disaster Preparedness Plan contains no such information requiring periodic updating. Indeed, the version of the Disaster Preparedness Plan found in Annex A, Appendix 9 of LILCO Disc. Ex. 10 is virtually indistinguishable from the version of the plan provided to LILCO in 1982-83.

3/ It was revealed for the first time at the hearing that a Mr. Donald Terrell, and not Mr. R. Jones, was the County's Plans and Training Officer during the 1982-83 time

(Continued)

and in light of the uncontroverted documentary evidence which flatly contradicts their position, the County's suggestion now that it is "impossible to determine" what the SCEOP contained in 1982-83 is indefensible should be rejected.

B. Several Important Components of the  
SCEOP Were Not Produced in 1982-83

The County contends that "there is no dispute that at a minimum, the most important portions of the County's EOP were produced to LILCO in 1982-83 discovery . . . ." Intervenor's Supp. at 5. This is not true. LILCO does dispute that what it received in 1982-83 constitutes the "most important" components of the SCEOP as it existed both then and now.<sup>4/</sup> The County's attempt to define what parts of the SCEOP are or are not important for LILCO is plainly not valid, given the County's refusal throughout the course of the Shoreham proceeding to come to grips with the factual underpinnings of LILCO's "realism" case.

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period and that Mr. R. Jones did not assume that position until mid-1984 (Tr. 21370-71 (R. Jones)). Mr. Bilello testified that he was only "vaguely" familiar with the SCEOP, and that while he had seen the document before he was "not knowledgeable of the contents of it." (Tr. 21446 (Bilello)).

<sup>4/</sup> Moreover, the County's claim that there is "no allegation, much less evidence to suggest, that the County failed to produce any plan sought during discovery other than the EOP," Intervenor's Supplement at 3 n.3, is incorrect. The last-minute production on July 8, 1988 of the Suffolk County Resource Manual, a document containing components dating back to 1980-81 and clearly responsive to LILCO's 1982-83 discovery requests, raises considerable question as to the County's diligence in searching for documents in 1982, 1983, and 1988.

The relationship between the contents of the SCEOP and what parts of it LILCO received in 1982-83 discovery is graphically represented in Attachment 5 of LILCO's Supplement. Key portions not produced in 1982-83 include (1) the "Basic Plan" prepared by the State; (2) Annex A, Appendix 2, Attachment D (lines of succession to command); (3) Annex D (Communications and Warning System); (4) Annex I (Public Information Service); and (5) Annex K (Radiological Intelligence). While this list is by no means exclusive, these parts bear particular relevance to LILCO's realism case, and their nonproduction in 1982-83 has prejudiced LILCO's ability to prove definitively that case.

For instance, the "Basic Plan," prepared by the State of New York and bearing the date "5/79" (Bates No. K02245-65)<sup>5/</sup> is significant because it establishes that the SCEOP is "fundamentally promulgated" under the authority of New York Executive Law Article 2-B, and that, as such, it includes "nuclear facility accidents" within its definition of disasters that the plan is designed to deal with. This is particularly important as it contradicts the County's position that the "Operations Plan is not for use in responding to any nuclear power plant incident." See Suffolk County Response to Licensing Board Discovery Inquiries (June 1, 1988) at 2.

Annex A, Appendix 2, Attachment D of the SCEOP (Bates No. K02296-329) consists of the official lines of succession (including designated "emergency interim successors") for 35 departments and jurisdictions within Suffolk County.<sup>6/</sup> Included are the

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<sup>5/</sup> The references are to the Bates-numbered pages of LILCO Disc. Ex. 10.

<sup>6/</sup> It appears that the version of Annex A, Appendix 2, Attachment D found in LILCO Disc. Ex. 10 has been updated as of 1985. It is indisputable that a version of this section of the SCEOP existed at least as early as 1982-83. One of the documents contained in County Disc. Ex. 1 (designated on its cover page by Suffolk County Bates No. 000090) has within it a page that bears the notation "Emergency Operation Plan, Annex A, App. 2, Att. D" (County Bates No. 000109) and which lists the then-existing line of succession for the Suffolk County Police Department.

office of the County Executive, Department of Fire, Rescue, and Emergency Services, the Division of Emergency Preparedness, and the Department of Health Services, all key players in any County response to a Shoreham emergency.

Annex D of the SCEOP is the Communications and Warning System section of the plan. Annex D, which bears a date "7/83" on most of its pages,<sup>7/</sup> is 54-pages long and includes eleven separate appendices, including standard operating procedures, alerting lists, and inventories of the County's communications system and equipment. The importance of this information to LILCO's realism case is readily apparent.<sup>8/</sup>

Annex I, the Public Information section, is short (four pages) but of particular importance. Specifically, Annex I indicates that

[r]esources and requirements data and such materials as rosters, and emergency announcements are maintained on a current basis and facilities for the transmission of broadcast material are maintained in a state of constant readiness at the EOC.

SCEOP, Annex I, Appendix 3 at 4. The Suffolk County Resource Manual (LILCO Disc. Ex. 13), not produced to LILCO until July 8, 1988, contains the Nassau-Suffolk Counties Operational Area Emergency Broadcast System (EBS) Procedures (LILCO Disc. Ex. 31).

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<sup>7/</sup> One page (Bates No. K02647) bears a date of "7/82," suggesting that earlier versions did exist.

<sup>8/</sup> During the hearing, counsel for the County stated that in 1982-83 discovery "LILCO got communications plans, which are Annex D to the Suffolk County Emergency Operations Plan." Tr. 21297 (Letsche). The County is mistaken; as shown in part C below, the entries in LILCO's document indexes to a "communications section" are not references to any part of the SCEOP, but, rather, to a draft version of the now-repudiated Suffolk County Radiological Emergency Response Plan, developed when the County was working cooperatively with LILCO in developing a Plan for Shoreham. In large part, this draft communications section dealt prospectively with systems and procedures which the County would have had to have developed prior to Shoreham being licensed to operate.



In light of LILCO's reliance, under the "best efforts" principle, on WCBS in New York City as the primary originating relay station for the Shoreham EBS, the importance of Suffolk County officials having the information and means for contacting WCBS is self-evident. See LILCO Supp. at 22-23.

The significance of Annex K (LILCO Disc. Ex. 25), the 160-page Radiological Intelligence section of the SCEOP, is similarly apparent, despite the County's attempt to dismiss it as a "1976 document which discusses a civil defense-type approach to a nuclear attack" and of "little apparent usefulness." Intervenor's Supp. at 20 n.14. In fact, information found in Annex K establishes that, among other things, the County maintains a large supply of personnel dosimeters. Such information is certainly relevant to the issue of the County's ability to respond to a Shoreham emergency and suggests that County officials and response personnel would not be completely ignorant of things radiological despite their refusal to plan in advance for Shoreham.<sup>9/</sup>

In sum, crucial portions of the SCEOP were not provided to LILCO until May 1988, and the prejudice which LILCO has suffered because of that fact cannot be gainsaid.

C. The Additional Documents Cited by the County Are Not Related to the SCEOP

In a transparent effort to play down the harm to LILCO caused by its failure to produce the SCEOP in 1982-83, the County seizes upon certain entries in LILCO's

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<sup>9/</sup> While the County testified that Annex K is due to be replaced, Mr. R. Jones stated that "Annex K is simply going to be removed and most of the contents of Annex K will become Annex B using some of the terminologies, lists of names of trained people and things like that that still exist." Tr. 21415 (R. Jones). Mr. R. Jones further testified that Annex K is currently a part of the SCEOP and has been "as far back as 1976." Tr. 21414-415 (R. Jones).



document indexes and states that during the 1982-83 discovery period the County "produced additional documents that, from their titles and length, at least appear to have contents related to documents which by 1985 had become part of the EOP." Intervenor's Supp. at 17. The County then goes on to list nineteen documents which it believes may somehow relate to either the SCEOP or components of the SCEOP. *Id.* at 17-18. "It is thus clear and beyond dispute," the County therefore concludes, "that in 1982-83 the County produced not only documents which were, or eventually became, parts of the EOP, but also thousands of pages of other documents containing similar planning information . . . ." *Id.* at 19.

As shown below, the County could not be more wrong in its characterization of the nineteen documents it has cited as containing material later incorporated into the SCEOP. The suggestion that the County's production in 1982-83 of these documents somehow excuses its failure to provide at that time the composite SCEOP, and mitigates the harm suffered by LILCO due to its nonproduction, is baseless.

Of the nineteen documents listed in Intervenor's Supplement at 17-18, almost half are either related to early (*i.e.*, pre-NUREG-0654) County efforts to plan for radiological accidents at the then yet-to-be completed Shoreham plant,<sup>10/</sup> or constitute a portion of the Radiological Emergency Response Plan developed during the period in 1980-82 when the County was cooperating with LILCO in developing a plan for Shoreham that would satisfy the NRC's regulatory requirements.<sup>11/</sup>

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<sup>10/</sup> *I.e.*, the six-page document entitled "Responsibilities of the Commissioner of the Department of Health Services"; the five-page document entitled "Responsibilities of the Commissioner of the Department of Health Services Alert A (Standby);" and the six documents entitled "Annex Procedures for Major Radiation Incidents at Shoreham Nuclear Power Station."

<sup>11/</sup> *I.e.*, the 54-page document entitled "Communications Section of plan."

The County's argument that these pre-1982, Shoreham-specific documents provided LILCO with useful planning information, comparable if not identical to that contained in the SCEOP, cannot be taken seriously in light of the County's absolute repudiation of all of its early planning efforts for Shoreham. LILCO could hardly have relied upon or cited the information in these early plans in building its realism case. For instance, LILCO had no means of verifying whether the factual information contained within these old documents was still current or accurate. Only the SCEOP, the single, composite, official emergency plan represented by the County as being currently in effect, would have provided LILCO with undeniable evidence of the County's emergency response capabilities.

Indeed, in its December 18, 1987 "realism" summary disposition motion on Contentions 5 and 6, LILCO used information from the so-called "Voorhees Plan"<sup>12/</sup> as a means of establishing such basic County emergency response resources as the Emergency Operations Center in Yaphank. The County, in response, asserted that while "apparently included to support LILCO's assertion that 'the County already has emergency response capabilities,'" references to the Voorhees Plan "do no such thing" and that they were "totally irrelevant." See Answer of Suffolk County, the State of New York and the Town of Southampton to LILCO's Motion for Summary Disposition of Contentions 5 and 6 (February 10, 1988) at 32-33. The County went on to state that the Voorhees Plan was a "nullity," and that

[i]t should also be noted that whatever facts or assumptions

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<sup>12/</sup> The Voorhees Plan refers to the draft plan for Shoreham prepared by consultants to the County in 1982 after joint planning between LILCO and the County had been halted. The County judged it to be the "best possible plan" for Suffolk County, but it was rejected by the County legislature.

were included in that 1982 draft document may or may not remain true or accurate in 1988. Thus, if LILCO's apparent assumptions about the location of County facilities and who would be in charge of emergencies are based upon the rejected draft plan, they are without basis.

Id. at 33 n.11.

In light of the position taken by the County in response to LILCO's use of information in the Voorhees Plan, the County's insinuation now that LILCO could have extracted authoritative information (comparable to that found in the SCEOP) from the even older radiological planning materials that the County produced in 1982-83 is disingenuous in the extreme. It represents yet another example of the County's willingness to color any fact or manipulate any argument in its effort to prevent the NRC from issuing a full-power operating license for Shoreham. See LILCO Supp. at 8-11.

The balance of the documents cited by the County are either generally duplicative of (though not identical to) the portions of the SCEOP which were produced in 1982-83,<sup>13/</sup> or are a random assortment of miscellaneous, outdated planning materials which, in their fragmented state, present no insight into the County's overall ability to respond to a large-scale emergency.<sup>14/</sup> The County's production in 1982-83 of

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<sup>13/</sup> I.e., the seven-page document entitled "Town of Brookhaven Emergency Preparedness Preliminary Fire Island Evacuation Plan"; the 10-page memo regarding "Emergency Operating Center Staffing Pattern"; the 62-page document entitled "Hurricane Mitigation Plan for the South Shore of Long Island Planning Board"; and the 11-page document entitled "Fire Island Emergency Operations Plan."

<sup>14/</sup> I.e., the one-page document entitled "Weekend and Holidays Call System -- Health Services Department -- Document Produced Emergency Telephone Numbers"; the two-page document entitled "Emergency Action Plan When Public Water Supply Fails"; the 24-page document entitled "Emergency Medical Services Disaster Plan for Suffolk County"; the 12-page document entitled "Suggested Equipment for Response to Hazardous Materials Incidents by the Emergency Services Section, Revised January 1982"; the memo with "Emergency Operations Plan for Suffolk County Department of Parks" totalling 18 pages; and the document entitled "Town of Islip Emergency Preparedness Disaster Procedures and Resources Manual."

these materials, as well as of the various other documents cited in Attachment 1 of Intervenor's Supplement, by no means compensates for its failure to provide the SCEOP. The County uses its references to these documents as chaff, in an attempt to turn the focus of this proceeding to what the County did provide to LILCO in 1982-83, rather than what it did not.

C. LILCO First Became Aware of the Composite SCEOP in May, 1988

Finally, in an attempt to excuse its own failure to comply with the discovery process, the County maintains that not only was LILCO aware, prior to May 1988, of the existence of the composite SCEOP but that it, in fact, already had a copy of that document, perhaps as early as 1985. Because of this, the County concludes, "there is no basis to find that LILCO was prejudiced even assuming arguendo some inadvertent nonproduction of portions of the EOP in 1982-83." Intervenor's Supp. at 26.

The County's conclusion is predicated essentially on four factual arguments:

- (1) In 1980-81, when LILCO and the County were cooperating in the Shoreham planning effort, LILCO's emergency planners had access to and used portions of the SCEOP while developing a plan for Shoreham;
- (2) Certain of the documents produced to LILCO in 1982-83 bear the notation "Emergency Operations Plan," and LILCO's document indexes reflect that fact;
- (3) Norman Kelly, a LILCO employee, was asked by his superiors to obtain a copy of the SCEOP and, in fact, did so obtain a copy of the plan (identical to LILCO Disc. Ex. 9) from the County's Emergency Preparedness Division in 1985 or early 1986; and
- (4) LILCO representatives have since the early 1980's attended annual "hurricane conferences" conducted by the County, at which discussions have occurred pertaining to the use of the SCEOP in responding to hurricanes.



Intervenors' Supp. at 20-25.

The County's position appears to be that any failure on its own part to produce the composite SCEOP prior to May 1988 is cured by LILCO's own alleged prior knowledge and possession of that document. Even apart from the simple fact that whatever LILCO may or may not have learned or obtained outside the discovery process is irrelevant to whether the County complied with its discovery obligations, the County's position suffers from three serious shortcomings.

First, the County's characterization of LILCO's alleged prior knowledge and possession of the composite SCEOP is, in a number of important respects, factually inaccurate. Second, the County's assertion that LILCO knew about the SCEOP as early as 1980-81 is logically incompatible with the County's position that the SCEOP did not exist in its composite form until well after that time. Third, in arguing that LILCO had been "put on notice" of the existence of the SCEOP in 1982-83, the County attempts to assign to LILCO the responsibility for ensuring the County's compliance with discovery. In the face of concurrent protestations by the County that it should be given the benefit of the doubt that it complied with its 1982-83 discovery obligations in good faith and using due diligence, this latter argument is particularly difficult to credit.

(1) Factual Inaccuracies

The most egregious of the County's mischaracterizations of the record is its assertion that Norman Kelly "did in fact obtain for LERO a copy of the County's EOP," and that the "copy he obtained was likely identical to the version which the County produced to LILCO in May 1988, which is LILCO Discovery Exhibit 9." Intervenors' Supp. at 23-24. As shown in LILCO Supp. at 30-33, the clear weight of the evidence refutes the County's claim.<sup>15/</sup> It is unnecessary to recite that evidence once again.

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<sup>15/</sup> The County's assertion that it is "unrebutted evidence" that in 1985 or 1986, a "high LERO official, likely Mr. Daverio or Mr. Renz, asked Mr. Kelly to obtain a copy of

Suffice to say, contrary to the County's statement that "it is undisputed that LILCO asked for a copy of the County EOP in 1985 or early 1986, and that it actually has had a copy for at least two and one-half years," Intervenor's Supp. at 24, LILCO vigorously disputes the County's version of the "facts."

The County's characterization of Mr. Davidoff's testimony regarding the 1980-81 joint County/LILCO Shoreham planning effort is similarly one-sided and inaccurate. Drawing on Mr. Davidoff's recollections from that time, the County states that "[a]s a result of the 1980-81 County/LILCO planning efforts, LILCO's emergency planners knew of the County's EOP as it existed at that time." *Id.* at 21. In fact, Mr. Davidoff testified that while he remembers that LILCO's planners had access to the County's "then extant all hazards materials," he could not recall the name of that "all hazard plan," did not know the scope of the planning materials in LILCO's possession, and had "no basis for comparison" to determine whether the materials available to LILCO in 1980-81 were the same as, larger, or smaller than the SCEOP as it exists today (LILCO Disc. Ex. 10). Tr. 22004-05 (Davidoff). Thus, even on its own terms, Mr. Davidoff's testimony does not impute any knowledge to LILCO of a Suffolk County Emergency Operations Plan or its predecessor, since Mr. Davidoff himself did not recall what source materials were being used in the 1980-81 period.<sup>16/</sup>

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the County's EOP," Intervenor's Supp. at 23, mischaracterizes the evidence. In fact, Mr. Kelly testified that while it is "possible" that it was either Mr. Daverio or Mr. Renz who asked him to get the County's emergency plan, (Tr. 21569) (Kelly)), he simply does not recall who made the request. Moreover, the County has utterly failed to confront the evidence presented by the Affidavit of John A. Weismantle (July 21, 1988), which establishes that the SCEOP was not in LILCO's possession prior to May 1988. *See* LILCO Supp. at 32.

<sup>16/</sup> None of Suffolk County's or New York State's pleadings prior to Mr. Davidoff's July 19 appearance gave any notice that the County would attempt to elicit testimony

(Continued)



Finally, the County's suggestion that "LILCO likely would have been made aware of the existence of the County's EOP through its attendance at [hurricane] conferences," Intervenor's Supp. at 25, is not supported by the weight of the evidence. Certainly, such "hurricane conferences" have taken place for years and LILCO representatives have attended. Two of the County's own witnesses testified, however, that while the SCEOP has been referred to (as opposed to being specifically discussed in any detail) at these conferences, the conversations have been generally limited to the use of the plan in response to hurricanes per se, and not for any other types of disasters. Tr. 21454-55 (Bilello), 21890-91, 21893-94 (Regan). Moreover, the County has failed to establish that any of the LILCO attendees at these conferences were involved in or familiar with the Shoreham litigation (or Shoreham emergency planning) and, hence, were in a position to appreciate the significance of any passing references which might have been made to the existence of a comprehensive, integrated County emergency plan.

(2) Logical Inconsistency

A significant portion of the County's argument -- its suggestion that LILCO had been "put on notice" of the existence of the SCEOP prior to May 1988 -- suffers from a breakdown in logic which makes the argument difficult to follow. The County begins by

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from him imputing knowledge of the SCEOP to LILCO on the basis of the repudiated 1980-81 cooperative planning process, making rebuttal of Mr. Davidoff's claims at the hearing difficult. However, depositions taken of two Suffolk County emergency planners in 1982 in connection with this proceeding do not corroborate Mr. Davidoff's testimony on this point. See Depositions of Robert Meunkle (August 6, 1982) and Laura Palmer (August 16, 1982). Mr. Meunkle and Ms. Palmer, in their recollections of the joint County/LILCO planning effort, do not indicate that either the County's or LILCO's emergency planners directly incorporated any portions of the County's then-existing generic emergency plan into the radiological plan then being developed.

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asserting that "it was not until the mid-1980s that the EOP grew to the size of LILCO's Discovery Exhibits 9 and 10." Intervenor's Supp. at 9. In the next breath, however, the County makes note of evidence which allegedly shows that both LILCO and its counsel knew or should have known of the SCEOP at least as early as 1982-83.

The evidence is overwhelming that the composite SCEOP existed at the time LILCO first propounded its discovery requests in the Shoreham emergency planning proceeding. Nevertheless, the County disputes that claim. The County, however, cannot argue that information which LILCO may have obtained regarding the County's emergency planning efforts in the 1980-83 time period imputes to LILCO knowledge of a large, integrated emergency plan, a plan which the County denies to have existed during that time. The County cannot have it both ways.

(3) Attempt to Shift Responsibility

As a slight twist on its argument that LILCO had prior notice of the existence of the SCEOP, the County notes that the

materials Suffolk County produced to LILCO in 1982/83 discovery included several documents which had typed right on their face an indication that they were, or would in the future become, a part of the County's EOP.

Intervenor's Supp. at 21. Elsewhere, the County states that

LILCO's own indices of the documents produced by the County in the 1982/83 discovery confirm LILCO's knowledge of the existence of the EOP . . . . Clearly, LILCO's own words in 1982 and 1983 reveal its knowledge of the existence of the County EOP.

Id. at 22-23. The County's insinuation, if not its expressed position, is that LILCO is at least partly responsible for its failure to receive the entire SCEOP in 1982-83. It is the County's apparent view that LILCO should have somehow "followed up" once it received documents suggesting the existence of a larger, integrated emergency plan.

As the County has pointed out, LILCO was sent over 7000 pages of documents, of lengths varying from one page to several hundred pages, in 1982 and 1983. Id. at 15. These assorted documents, which were sent by the County to LILCO in multiple shipments over the course of 1982-83, appeared to bear no particular relationship to each other when they were received in large cardboard packing boxes. Indeed, the County's own Bates stamp numbers do not reveal any logical pattern or sequence between even the various parts of the SCEOP which were provided in 1982-83. See, e.g., LILCO Supp., Attachment 5.

LILCO's two indices to the documents produced in 1982-83 contain approximately 1100 separate entries. Of these some 1100 different documents, five contained notations indicating that they were part of an "Emergency Operations Plan." However, some of the documents now known to have long been a part of the SCEOP, such as the Emergency Services Directory (Tr. 21416 (R. Jones)), and the Disaster Preparedness Plan, were not marked in any fashion that would have suggested their inclusion in a larger whole.

In sum, LILCO's ability to have deduced the existence of the SCEOP from the isolated, seemingly unrelated documentary fragments provided to it in 1982-83 is highly questionable. Only in the hindsight provided by the initial emergence of the SCEOP in 1988 could the significance of those fragments have become fully known to LILCO.

In retrospect, LILCO's mistake during the 1982 and 1983 discovery periods was not a failure on its part to understand or appreciate what it had been provided. Rather, LILCO's error was its reliance on the County's good faith and due diligence to provide all of the documents which LILCO had requested, and which the Board had ordered to be produced.



### III. NEW YORK STATE HAS OBSTRUCTED DISCOVERY BY NUMEROUS MEANS.

The Intervenor's Supp. discusses the State's performance in discovery at pages 27-34. It is limited almost exclusively to the nonproduction of the SCEOP. See, e.g., Intervenor's Supp. at 28 n.18. Intervenor did this despite the State's counsel's recognition that "the issue would be whether the discovery requirements have been complied with in this proceeding." Teleconference of June 17, 1988, Tr. 20879 (Zahnleuter) (acknowledging Judge Gleason's statement at Tr. 20875). The Intervenor thus ignored the State's discovery obstructions set forth in LILCO Supp. at 33-50 & Attachment 4. Thus, the State's attempt to confine the relevant issue to the State's role in the nonproduction of the SCEOP is the central flaw in its argument. This issue was discussed in Part I of this reply brief, and will not be repeated here.

It is of telling importance that the State's obstructions of discovery were wide-ranging, pervasive, and carefully orchestrated. It is also telling that the conduct which precipitated the Board's determination on June 10 to dismiss the realism contentions was the State's and the County's refusal to produce knowledgeable deponents, whom the Board had repeatedly ordered produced. The recent hearings revealed, indirectly but unmistakably, that the State has a wealth of knowledgeable personnel for both radiological and nonradiological planning and response, who know perfectly well how to interface with a utility and specifically with Suffolk County in an emergency.

It would serve little purpose to repeat the summary of the State's discovery obstructions set forth in LILCO's Supp., LILCO's June 15 Brief and Supplement of July 26 detail both general and specific discovery abuses by the State, including obstruction of depositions; failure to comply with Board discovery orders; unfounded objections and evasive answers to interrogatories; nonproduction of responsive documents; late

production or authentication of responsive documents; and obfuscating or misleading statements in discovery depositions, in interrogatory objections and responses, and in the REPG Affidavit, that were designed to conceal or mischaracterize State resources and response capabilities. Among these, it is significant that the State undoubtedly knew of the existence and basic contents of the SCEOP for many years, but denied or deflected revealing that knowledge throughout discovery. See LILCO Supp. at 33-38 & Attachment 4 at 1-2. See also Intervenor's Supp. at 33 n.26 (conceding that "the State appears to have reviewed an earlier version of the EOP in 1981 (See LILCO Disc. Ex. 15)". . .). The close historical connection between SEMO and County emergency planners, and the role of SEMO in plans and responses for both radiological and nonradiological emergencies (including nuclear power plant emergencies), shows that a coordinated governmental response to a Shoreham emergency is quite feasible, and the State deflected LILCO's inquiries in that direction in discovery.

Four items in the Intervenor's Supp., however, do merit brief comment:

1. Intervenor's concede that: "In 1988, LILCO's Second Set of Interrogatories and Document Request, dated March 24, 1988, did seek that Plan [the SCEOP] from New York State." Intervenor's Supp. at 27. The Intervenor then state that the County had produced the SCEOP to LILCO before the State discovered a copy of the SCEOP in its files, assertedly on June 6, 1988. This overlooks the facts that (a) the interrogatories also requested identification of responsive documents, LILCO Disc. Ex. 29,<sup>17/</sup> and the State undoubtedly knew of the existence of the SCEOP much earlier than June 6, 1988, see LILCO Supp. at 33-38; (b) the State's initial response to the pertinent

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<sup>17/</sup> See, e.g., interrogatory nos. 50 and 120.



interrogatories and document requests (indeed virtually all interrogatories and document requests) was a blanket relevance objection and failure to respond or produce -- an objection not taken in good faith in light of Board orders in 1982, (Prehearing Conference Order (Phase I -- Emergency Planning) (July 27, 1982)) and 1984 (Order Granting LILCO's Motion to Compel Expedited Production of the New York State Emergency Preparedness Plan (February 28, 1984)) (the last one directed specifically to the State), ruling that plans for nonradiological emergencies are relevant; and (c) even in its June 3, 1988, responses to LILCO's Second Set of Interrogatories and Requests for Production, the State repeatedly deflected all questions as to county planning, asserting in essence that counties, not the State, have knowledge of county plans, LILCO Disc. Ex. 8 (admitted Tr. 21696-697).

2. Intervenor's are simply incorrect in asserting that:

Beyond the County's EOP, all New York State documents responsive to LILCO's Second Set of Interrogatories and Document Requests have been provided to LILCO in a timely manner in accordance with the Board's orders.

Intervenor's Supp. at 28. The State's obstructions of discovery are summarized in LILCO's Supp. at 33-50 and Attachment 4 thereto, and the State's procedural obstructions and untimely responses are detailed at pages 43-48 of the LILCO Supp.. Further, the Intervenor's statement is revealing because it ties timeliness to Board orders. It is an indisputable fact that the State assumed that it had to be ordered by the Board to respond substantively to discovery before it would do so. This assumption, however, is simply inconsistent with the NRC's discovery rules which, like the discovery rules in the federal courts, are premised on voluntary compliance and should require minimal judicial intervention. The State, for example, failed to produce or authenticate even

the core State radiological plan, the NYS REPP, either in document discovery or in depositions (including those of Dr. Axelrod and the REPG Panel), until the State was specifically ordered to do so on June 29, 1988.<sup>18/</sup> The State's attitude is further revealed by the statement on page 32 of the Intervenor's Supp., that the State's "document search targeted a completion date of thirty days from May 10, 1988," i.e., the date of the Board's order at the prehearing conference, when LILCO's requests were served on March 24.

3. Intervenor' complain that "LILCO spent extensive time examining Dr. Axelrod and Mr. Davidoff" on "irrelevant" matters during the hearings. Intervenor's Supp. at 28 n.18. The matters as to which LILCO inquired, however, were fundamentally necessary to reveal fully both the fact of, and the basis for, the State's pattern of discovery obstructions. Those matters, and their importance to understanding the State's discovery abuses, are explained in LILCO's Supp. at 8-11, 38-41, 42, and 48-50. The signal feature of the State's position in discovery, predicated on the evolution of the State's position since 1982, was its obfuscation of State resources for emergency planning and responses, both radiological and nonradiological. The State's approach to discovery was too systematic, carefully conceived, and interlocking to have been

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<sup>18/</sup> To the extent that Intervenor's Supp. at 31 n.22 implies or suggests that LILCO did not request a copy or authentication of the current version of the NYS REPP because LILCO already had that plan, it is incorrect. LILCO repeatedly sought a copy or authentication of the 1987 version of the generic part of the NYS REPP, LILCO Disc. Ex. 6 (admitted Tr. 21733), in its Interrogatories, in document requests in connection with depositions, in the depositions themselves, and by pointed letters to the State's counsel in connection with discovery. The "components" of the NYS REPP which LILCO's counsel in the school bus driver remand, Ms. Leugers, said she already possessed, were the four county plans appended to the NYS REPP, other than the plans for Orange, Putnam and Rockland Counties.

anything other than purposeful. This demonstrates that severe sanctions are warranted, and explains why the State wishes to dismiss these matters as "irrelevant."

4. Intervenor's contend that the SEMO guidance document, prepared primarily by Mr. Germano, LILCO Disc. Ex. 5 (admitted Tr. 21031), which was not produced in discovery, was not responsive to LILCO's discovery requests. The well-orchestrated direct examination of Mr. Germano by the State's counsel on that point, and cited in the Intervenor's Supp. at 28 n.18, simply is not credible. Mr. Germano's explanations were fatally irreconcilable with the text of the document itself, including its Attachment 1, e.g., Tr. 21730-31, 21776-780 (Germano);<sup>19/</sup> Dr. Axelrod recognized the generic

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<sup>19/</sup> On direct examination Mr. Germano testified that LILCO Disc. Ex. 5 was intended only as guidance for the 13 counties near the Ginna site. Tr. 21730-731 (Germano) and is not a plan or procedure 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 Yankee Rowe, Millstone, Haddam Neck, Vermont Yankee, or the Oyster Creek nuclear power plants. Tr. 21733 (Germano). On cross examination, however, Mr. Germano testified that Attachment 1 of the document is contained in Procedure K of the NYS REPP, Tr. 21777 (Germano), which is the generic State ingestion pathway procedure for all plants in or within 50 miles of New York State. He could not deny that the document on its face was a "procedure" applicable to all plants depicted on Attachment 1 of LILCO Disc. Ex. 5, Tr. 21776-277 (Germano), including Yankee Rowe, Millstone, Haddam Neck, Vermont Yankee, and Oyster Creek.

The Germano document states "The material and operational data contained within this document reflect the current policies and criteria associated with the radiological ingestion exposure pathway from the operating nuclear power plants located within, as well as bordering the State. Attachment 1 depicts operating nuclear power plants for which this procedure has been developed." LILCO Disc. Ex. 5, guidance memorandum at 2. Attachment 1 graphically depicts eight operating nuclear power plants: Ginna, Nine Mile, Vermont Yankee, Yankee Rowe, Indian Point, Haddam, Millstone, and Oyster Creek.

Though Mr. Germano contended that the SEMO guidance document was not a plan or procedure, Tr. 21730-731, the document is a self-described "procedure," LILCO Disc. Ex. 5, guidance memo at 2, states that "This document can become an appendix to the County all hazard Comprehensive Emergency Operations Plan," Disc. Ex. 5, guidance memorandum at 1. Indeed, Mr. Germano testified that "The direct quote is really indicating that whatever the county prepared, it's their responsibility that their document in turn should become an annex to the overall county emergency operations plan." Tr. 21775 (Germano).

of the document and its responsiveness to at least one LILCO interrogatory, Tr. 21682, 21686-691 (Axelrod); Mr. Papile said that the document could be applied to any county in the State, Tr. 21028 (Papile); and the document was plainly responsive to several LILCO interrogatories. These points are set forth, with record references, in the LILCO Supp. at 47 and in Attachment 4 thereto, pp. 2-5.

Thus, the recent hearings illuminated a pattern of unwarranted discovery obstruction by the State, going well beyond its flat refusal to produce deponents on the merits in response to Board orders. This conduct fully justifies the sanctions LILCO has requested.

#### IV. OBSERVATIONS ON "FURTHER NRC STAFF COMMENTS."

LILCO has reviewed the "Further NRC Staff Comments on Imposition of Sanctions" (hereinafter "Staff Comments") and agrees with the Staff's conclusion that the record of this immediate proceeding shows that the State and County engaged in foot-dragging and unwarranted denials in discovery, supporting dismissal of the realism contentions as a sanction.

Two matters need comment, however. First, the Staff is incorrect in its assertion (Staff Comments at 3, 13) that the testimony of Mr. Davidoff establishes that LILCO probably had access to the SCEOP or its then-predecessor in the 1980-81 cooperative period. Mr. Davidoff, when pinned down on cross-examination, could not identify or remember the materials to which LILCO had access in the collaborative period. Tr. 22004-05 (Davidoff). Moreover, even if, as the Staff suggests, LILCO had had access to the "basic" Suffolk County disaster plan during that period, that 50-page plan (LILCO Disc. Ex. 10, Annex. A, Appendix 9) is not the one which contained multiple



informative appendices and hundreds of pages in length. It is the full SCEOP, with its spread of information, that opens doors and minds; and Mr. Davidoff's testimony does not show, even at face value, that LILCO had access to the full SCEOP in 1980-81.

Second and more basically, the Staff's inability to discern the State's or County's motive or intention may reflect the Staff's lack of full substantive participation in discovery and discovery disputes of the past six years, in which the protagonists have been LILCO on one side and the State and County on the other, but not the Staff. The Staff has not been an active participant in discovery.

For instance, in 54 instances of motions to compel discovery or other discovery-related matters that needed to be brought to the Board, the Staff has filed a response on only 23 of them. In many of these instances, the Staff filed a paper stating that the Staff took no position since the matter involved a discovery dispute between LILCO and Intervenor. And the Staff has been physically present at less than one-quarter of the 203 depositions which have been conducted in the emergency planning proceeding since 1982 (the Staff has been present at 46 and absent at 157). At the ones in which it has been present it has asked questions at only 18. Those questions consume 67 pages of the total of 24,464 pages of the depositions.

In short, the Staff's comments come against a background of only intermittent involvement in these discovery matters, and the Staff's inability to discern intent or motive may well follow from that lack of involvement. To that extent, LILCO believes the Staff's comments need to be discounted on the issue of intent or motive that is relevant to dismissal of parties as a sanction.



## V. SUMMARY AND CONCLUSION

When all is said and done about the content of discovery in the emergency planning proceeding for Shoreham, the following things cannot be gainsaid:

1. Suffolk County and New York State each have substantial emergency planning and response organizations operating in nonradiological as well as radiological areas pursuant to comprehensive planning documents as well as facility-specific documents. In particular, the general capabilities of the nonradiological organizations (at the State level, SEMO; at the county level, the DEP) and their documents are of special relevance to the ability to demonstrate the realism principle's application in circumstances where the utility provides the radiological plan and plant-specific information. The roles of SEMO and the Suffolk County DEP, and of their documents, were matters both the State and County obfuscated by their insistence on focusing on site-specific radiological planning, their claims that they had no such plan for Shoreham, and their obdurate refusal to recognize either the existence or the contents of the LILCO Plan.

2. The Suffolk County Emergency Operations Plan is merely the most conspicuous document among the many raised in connection with the immediate inquiry. Even as to that document, the following matters seem clear:

- a. The SCEOP provides a wealth of organized information about Suffolk County emergency planning and response capabilities.

- b. Suffolk County's initial argument that matters are too confused to demonstrate anything about the existence or production of the SCEOP in 1982-83 is incorrect. There is strong evidence that a unitary physical document -- whether it is described as "integrated," "composite," or otherwise -- known as the Suffolk County Emergency Operations Plan existed as of 1982 or 1983.

c. There is some (but not conclusive) evidence that County officials intended to produce the SCEOP to their attorneys for transmittal to LILCO in 1982 and 1983. There is, however, no evidence that it was ever actually produced by the County's attorneys to LILCO either time, and there is strong documentary evidence (LILCO's document indexes) that it was not produced either time.

d. Suffolk County's arguments about the SCEOP are not truly in the alternative: they are mutually inconsistent. Intervenor's argue that LILCO emergency planners had access to the SCEOP in 1980-81 (which presumes it existed), though the testimony of Mr. Davidoff (the only witness to raise the issue, and the last witness at the hearings) was inconclusive, Tr. 22004-05 (Davidoff). The County says next that it turned over the entire SCEOP in discovery in 1982 and 1983 (which also presumes that it existed), though this is contradicted by LILCO's document indexes. Then the County alleges that the SCEOP didn't really exist in 1982-83 as a unitary document (which is belied by the documentary evidence from tables of contents and document-identification labels on the fragments actually produced, and by the testimony of County witnesses, e.g., Tr. 21412-415 (R. Jones), 21901-903, 29104 (Regan) and if this were true, it would excuse LILCO from alleged knowledge of it at the time). Intervenor's then argue that LILCO's emergency planners again obtained access to (or at least "knowledge" of) the SCEOP in 1985-86, or episodically through hurricane briefings, without ever attempting to explain how or why LILCO, which had the most powerful incentive imaginable to prove the realism argument, failed to ever make use of the SCEOP for that purpose.

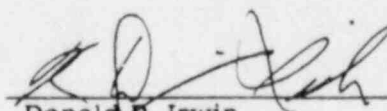
What one is left with is the question whether LILCO, having received three fragments of the SCEOP in 1982 and another half-dozen in 1983, should have been

sufficiently alert to have deduced that they represented pieces of a larger document, and should have somehow divined the content of the larger document, when no such document had ever appeared despite repeated requests and orders and when the concept of planning adaptable to Shoreham was met universally by County and State denials that there were any such plans. Under these circumstances the answer is that no entity possessing only these fragments could reasonably have divined the existence of the SCEOP, complete with annexes and appendices, departmental assignments and responsibilities, directories, procedures and lists.

Finally, Suffolk County's repeated attempts to engraft on LILCO independent knowledge of the SCEOP (e.g., hurricane conferences, cooperative planning with the State, forays by Mr. Kelly, etc.) overlook a fundamental principle: documents produced in the regular course of discovery carry with them the producer's representation that they are authentic and complete. LILCO is entitled to that representation. While LILCO's independent knowledge -- if it had any -- could be relevant to the issue of prejudice to LILCO, it is wholly irrelevant to the basic subject matter of this proceeding: integrity of the discovery process.

The bottom line is that the County and State did obstruct the course of discovery by various means throughout the course of this proceeding, see LILCO Supp. at 11-50 & Attachment 3, 4, in order to cling to their asserted veto power on the merits of the issues, see id. at 8-11. Their discovery tactics substantially delayed and deflected the course of this proceeding. LILCO therefore urges the Board to dismiss the Intervenor from this entire proceeding, to find Intervenor in default and rule in LILCO's favor on the realism contentions, and to dismiss the realism contentions as a sanction.

Respectfully submitted,



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DATED: August 1, 1988

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CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO'S BRIEF ON DISCOVERY SANCTIONS were served this date upon the following by hand as indicated by one asterisk, by Federal Express as indicated by two asterisks, or by first-class mail, postage prepaid.

James P. Gleason, Chairman \*  
Atomic Safety and Licensing Board  
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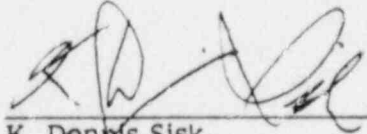
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