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)	)	(Realism Issue)
	)	

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

This is LILCO's response to the "Governments' Objection to Portions of February 29 and April 8 Orders in the Realism Remand and Offer of Proof" (hereinafter "Objection"), dated April 13, 1988. That April 13 Objection demonstrates that the Board should now dismiss Contentions EP 1-2, 4-8, and 10 in accordance with its Confirmatory Memorandum and Order (Ruling on LILCO's Motion for Summary Disposition of Contentions 1, 2, 4, 5, 6, 7, 8 and 10, and Board Guidance on Issues for Litigation) (Feb. 29, 1988).

In the February 29 Confirmatory Memorandum and Order the Board ruled on the burden of proof in this proceeding and held that the Intervenors may avoid the operation of the "follow-the-utility-plan" presumption of 10 C.F.R. § 50.47(c)(1), 52 Fed. Reg. 42,078, 42,086 col. 1 (Nov. 3, 1987), only by coming forward with evidence of what they would do in an emergency:

> However, a lack of legal authority cannot be raised under the regulation as a response against LILCO's Plan, nor can simple protestations that the State and County will not use LILCO's Plan. Acceptable rebuttals to the Plan must include positive statements of the projected behavior of the Governments. A determination to respond ad hoc would be acceptable only if accompanied by specification of the resources available for such a response, and the actions such a

> response could entail including the time factors involved. A failure on the part of the Governments to present a positive case for our analysis and evaluation could result in a finding of default and hence in an adverse ruling on the contention to which it applies.

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) at 4, ¶ 12 (Feb. 29, 1988).

The Intervenors, Suffolk County and the State of New York, have made clear in their Objection that, while they continue to insist they would respond to an emergency ad hoc, they refuse to specify the "resources available for such a response" or "the actions such a response could entail including the time factors involved."

Accordingly, the Intervenors have deliberately failed "to present a positive case for [the Board's] analysis and evaluation" and have triggered the portion of the Board's Confirmatory Memorandum and Order calling for an adverse ruling on the contentions. The Intervenors have, in short, failed to take issue with LILCO's prima facie case except on grounds that impermissibly challenge the NRC's regulations, contrary to 10 CFR § 2.758(a). Therefore, a ruling in LILCO's favor on Contentions 1-2, 4-8, and 10 is now called for. That is, the contentions should be dismissed.

At the most, the only issue left for hearing is whether LILCO's "interface procedure," Attachment 10 to OPIP 3.1.1, satisfies the guidance of NUREG-0654 Supp. 1 or is otherwise in compliance with NRC regulations. But this issue, too, does not warrant a hearing. The Intervenors' refusal to cooperate with the Board's factfinding process, analogous to their earlier default on the "Phase I" issues, justifies dismissal of even this last narrow issue.

I. The Intervenors' April 13, 1988 Objection Makes Clear That They Refuse to Reveal What They Would Do in a Shoreham Emergency

The Intervenors' April 13 Objection makes clear that they refuse to comply with the Board's orders on the burden of proof and the effect of the NRC's revised emergency planning rule, 10 C.F.R. § 50.47(c)(1). The Objection is accompanied by the direct testimony the Intervenors wish to present. It is said to be the "full" representation of the Intervenors' position. Objection at 3.

The Intervenors' direct case consist of two pieces of testimony. The first, eight and a half pages long, is the Direct Testimony of Patrick G. Halpin on Behalf of Suffolk County Concerning Contentions 1-2, 4-8, and 10 (Apr. 13, 1988). The second, three and a half pages long, is the Direct Testimony of David Axelrod on Behalf of the State of New York (Apr. 13, 1988). The attachments to this new testimony are affidavits and other documents that have previously been submitted to the Board.

This testimony by the Intervenors' witnesses repeats what the Intervenors have said before: that they have no plan for responding to an accident at Shoreham and that they refuse to develop one. The testimony also goes to some pains to explain why the Intervenors take this position.

What the testimony pointedly does not do is say what the Intervenors would do in a real emergency. This question is raised, but not answered, in the County Executive's testimony as follows:

> Q. You have stated that Suffolk County will have no plan for an accident at Shoreham and that you would not follow LILCO's Plan. What if the NRC were to license Shoreham anyway?
>
> A. I do not believe that the NRC would license Shoreham to operate in the face of the lawful and rational determinations of Suffolk County. If the NRC nevertheless were to take such action, Suffolk County would maintain its position and put the matter before the courts. The County has acted in good faith and solely in the interest of its citizens. We will not back-down from our convictions and our duty as elected government officials.

> Moreover, it is unproductive to engage in make-believe by pretending how the County would act under the hypothetical circumstances of an accident at Shoreham after that plant were somehow licensed by the NRC. For reasons stated above and the attached affidavit, we would never follow LILCO's Plan or coordinate in any way with LILCO. Nor do I know what resources would be available. It is my judgment that if there were a serious emergency, many of our employees would necessarily look after their families as a first and perhaps only priority. Also, County personnel have had no training or preparation to carry out any kind of purported "response" to a Shoreham emergency. The County's position is that it would not be possible to safely evacuate or otherwise protect the public in the event of a nuclear accident at Shoreham. It is thus baseless fantasy to try to speculate about what might hypothetically be done.

Direct Testimony of Patrick G. Halpin on Behalf of Suffolk County Concerning Contentions 1-2, 4-8, and 10 at 7-8 (Apr. 13, 1988).

Like the County's, the State's testimony says it does not know what it would do:

> Q: Please explain what the State's actions would be in the event of the hypothetical Shoreham accident.
>
> A: I do not believe that Shoreham can be lawfully licensed. The State of New York will hold to this position. If the NRC still licenses Shoreham, the State of New York will pursue legal remedies to prevent the plant from operating. I stress this because the question posed assumes the operation of Shoreham under circumstances I believe to be unlawful.
>
> I cannot speculate what specific actions the State would take, when they would be taken, or what resources might be available in the hypothetical situation that the NRC were to license Shoreham to operate at levels above 5% power, the courts were to uphold that licensing decision, and there were a serious accident at the plant that required an offsite emergency response.

Direct Testimony of David Axelrod on Behalf of the State of New York at 3-4 (Apr. 13, 1988).

In addition, the Intervenors' responses to discovery requests have evidenced their determination not to be forthcoming about what they would do in an emergency. Specifics are summarized in Section II.B below.

II. The Intervenors Are Not Permitted to Obstruct the Board's Inquiry or to Violate Its Orders or the NRC Regulations

The Intervenors are obstructing the Board's factfinding process in two ways: first, by refusing to present evidence in accordance with the NRC's emergency planning rule; second, by refusing to cooperate in the discovery process. In the process they are defying several Board orders and violating NRC discovery rules. They are also running afoul of several NRC and federal court decisions.

A. The Intervenors' Refusal to Present Evidence

The Intervenors' refusal to present evidence on what they would do in a real emergency violates NRC case law and a consistent series of Board orders.

As a general proposition, NRC case law recognizes "that when a party has relevant evidence within his control that he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 498, rev'd on other grounds, CLI-78-14, 7 NRC 952 (1978), quoting International Union (UAW) v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972).

In this case itself, this Board has issued a series of orders requiring the Intervenors to come forth with information about what they would do in a real Shoreham emergency. Even before the NRC's promulgation of the revised emergency planning rule, the Board characterized the issue as what the Intervenors would do in an emergency and said that it expected the Intervenors to be "fully forthcoming so that the facts will be developed." LBP-87-26, 26 NRC 201, 216 (1987).

More recently, the Board has said several times that it intends to hold a hearing to find out what the State and County would do in a real emergency. In the passage quoted above from the February 29 Confirmatory Memorandum and Order, the Board made clear that, under the revised emergency planning rule, the Intervenors would be

required to specify what they would do to respond in the event of a radiological emergency at Shoreham.

Even more recently, on April 8, 1988, the Board amplified its February 29 Confirmatory Memorandum and Order as follows:

> We conclude therefore that the new rule reinforces our previously considered judgment that the Board's responsibility is to assure that the LILCO plan supported by a best efforts response meets the test of adequacy under the Commission's rules and regulations. In carrying out that responsibility, however, it would deprive any proceeding of a meaningful purpose if the rule was interpreted to permit any state or local government to successfully demonstrate a continuing non-participatory role. We are confident that the Commission did not intend to dictate to any state and/or local government what particular response it should devise to cover public emergency situations, but neither did it contemplate that no emergency response would materialize. The effect of the new rule then is to place a responsibility on state and local governments to produce, in good faith, some adequate and feasible response plan that they will rely on in the event of an emergency or it will be assumed in the circumstances of this case that the LILCO plan will be utilized by Intervenors here. In that event, the LILCO plan will be evaluated for adequacy alone.

Memorandum (Extension of Board's Ruling and Opinion on LILCO Summary Disposition Motions of Legal Authority (Realism) Contentions and Guidance to Parties on New Rule 10 C.F.R. § 50.47(c)(1)), LBP-88-9, 27 NRC ____, slip op. at 20-21 (Apr. 8, 1988). Elsewhere in the same Memorandum the Board added:

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

Id. at 24-25.

The Intervenors' April 13 Objection and the testimony attached to it show clearly that the Intervenors have no intention of complying with the Board's orders. The Intervenors state that they would not follow the LILCO plan or coordinate with LILCO, but they refuse to "speculate" about what their response to an emergency might be or what resources might be available. In these circumstances, their proposed testimony should be rejected and their contentions dismissed.

The Intervenors' refusal to reveal the facts is longstanding. Indeed, in retrospect it can be seen that the Intervenors never had any intention of answering the question the Board has asked. In 1984 the Board asked the parties to address the question "[i]n connection with LILCO's 'realism' argument, what effect would an unplanned response by the State or County have and would such a response result in chaos, confusion and disorganization so as to compel a finding that there is no 'reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency' at Shoreham." Memorandum and Order Deferring Ruling on LILCO Motion for Summary Disposition and Scheduling Submission of Briefs on the Merits at 3-4 (Oct. 22, 1984). Instead of answering the Board's question, the Intervenors told the Board that its invitation for further briefing "should be withdrawn." Suffolk County and State of New York Response to ASLB Memorandum and Order Dated October 22, 1984 at 88 (Nov. 19, 1984). The Intervenors added that "no possible benefit could result from such speculation . . . ." Id. at 89. The Intervenors now repeat this argument in the testimony of Mr. Halpin and Dr. Axelrod, quoted above.

Since 1984, despite repeated opportunities, the Intervenors have consistently refused to say what they themselves would do in an emergency; they have said only what they would not do. The most recent example is on page 42 of their April 13 Objection:

> The question is: what would the Governments do? The answer is: they would not authorize or permit LILCO or LERO personnel to perform the functions assigned to them under the LILCO Plan, for several reasons, including the Governments' belief, shared by five New York State judges, that New York law precludes them from doing so.

Objection at 42.

Moreover, the gist of the Intervenors' position, and testimony, is that they themselves -- the State and County -- have decided the LILCO emergency plan is inadequate and therefore the NRC cannot go further. This position is contrary to several NRC decisions. For example, in CLI-83-13 the Commission noted its "ultimate authority" to determine whether NRC requirements are met:

> [T]he agency is obligated to consider a utility plan submitted in the absence of State and local government-approved plans and has the ultimate authority to determine whether such a submission is sufficient to meet the prerequisites for the issuance of an operating license.

CLI-83-13, 17 NRC 741, 743 (1983). Likewise, in CLI-85-12 the Commission rejected the suggestion that a state or county would defy NRC findings on health and safety:

> We note that our Licensing Board in its decision of April 17, 1985 (LBP-85-12, 21 NRC 644), has found that an adequate emergency plan is in fact achievable if the State and County participate in emergency planning, as all other local and State jurisdictions have done when so called upon. Like any litigants before us, these Intervenors may challenge the adequacy of this Board's determination, but they may not simply substitute their own judgment for the Commission's regarding what the public health and safety requires for licensing the operation of a nuclear power plant. Congress has entrusted the protection of public health and safety in matters concerning nuclear power to the Commission, not to Suffolk County or New York State. See Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 205 (1983). Accordingly, we believe that the County and the State must recognize that when a health and safety issue has been fully litigated before the Commission, the Commission's final judgment, subject to judicial review, must be the controlling determination, even if some continue to disagree with it.
>
> Thus, while we express no opinion concerning the Board's decision while it remains under administrative review, we are confident that if the Commission upholds the Licensing Board's finding that an adequate emergency plan is feasible with State and local participation, the State and County will accede to that judgment and will provide the participation needed to make the plan successful. In short, we shall not take as an element of uncertainty in the eventual full-power operation of Shoreham the possibility that either the State or the County will refuse to cooperate with LILCO on

> the basis of their own conception of what radiological public health and safety requires, rather than on the findings of the Commission.

CLI-85-12, 21 NRC 1587, 1589-90 (1985) (emphasis added).

To the same effect, the Commission in a Memorandum and Order of January 30, 1986, warned that the Intervenors are not permitted to obstruct its inquiry:

> For the past several years the State, County, and Town have been claiming that no adequate plan can be developed for Shoreham, and that the LILCO plan is inadequate. They are entitled, as litigants before us, to advocate that position; they are not, however, entitled to obstruct our inquiry into the facts necessary to enable us to resolve that assertion.

CLI-86-14, 24 NRC 36, 41 (1986) (footnote omitted, emphasis added).[1/]

The Intervenors' refusal to present evidence on the ground that they have already made a decision also runs counter to the only court decision to deal substantively with the issue of which level of government --federal or state -- has the final word on matters relating to offsite emergency preparedness. In Citizens for an Orderly Energy

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1/ The Intervenors' position is also contrary to Judge Brenner's decision in 1983:

> Accordingly, we hold that we are not bound by the County's findings on the adequacy of the LILCO offsite plan or the feasibility of developing adequate emergency planning for Shoreham. Our determination that the County has made such findings in contradiction to federal law does not have the effect of requiring the County to adopt or implement an emergency plan for Shoreham. We do not possess the jurisdiction necessary to bring about such a result. However, if the County seeks to have its findings adopted, it must litigate before us the facts which it believes support its view that it is not feasible to implement emergency preparedness actions which would meet NRC regulatory requirements in the event of a radiological emergency at the Shoreham nuclear power plant. The right of the County to litigate whether necessary emergency actions can be taken may be distinguishable from the circumstance of a governmental litigant before us which simply refuses to take otherwise feasible actions.

LBP-83-22, 17 NRC 608, 643 (1983), aff'd on other grounds, CLI-83-13, 17 NRC 741 (1983).

Policy v. County of Suffolk, Judge Altimari reaffirmed the exclusive authority of the NRC to rule on the adequacy of an emergency plan:

> The County has not and cannot supersede the judgment of the NRC on whether or not a license should issue for Shoreham. Once the NRC makes that decision the County's opinion on LILCO's RERP [Radiological Emergency Response Plan] will become academic.

604 F. Supp. 1084, 1095 (E.D.N.Y. 1985) (emphasis added), aff'd, 813 F.2d 570 (2d Cir. 1987) (per curiam).

Also, in Long Island Lighting Co. v. County of Suffolk, 628 F. Supp. 654 (E.D.N.Y. 1986), Judge Wexler said as follows:

> It is manifestly clear from an examination of the legislative history, however, that Congress by no means intended to allow local governments to frustrate or impede the NRC's ability to evaluate a utility's RERP, either passively, through non-acquiesence [sic], or actively, through a prohibition such as Local Law 2-86. . . .
>
> . . . .
>
> The County's attempt to stop the February 13 exercise on the grounds that LILCO will be usurping the County's police powers is of a piece with the County's 1983 determination that Shoreham should be abandoned as unsafe. Because the County passed Local Law 2-86 in an attempt to continue its opposition to the Shoreham facility on the basis of a perceived radiological hazard, this Court concludes that Suffolk County has impermissibly intruded into a sphere of authority reserved exclusively to the federal government by Congress.

628 F. Supp. at 664-66.

The short of the matter is that the state and local governments have a right to participate in the NRC's decisionmaking process; they do not have a right to obstruct or veto it. By concealing from the Board what they would do in an emergency -- a matter that the Board has said is at the heart of what it must decide -- the Intervenors are impermissibly obstructing the factfinding process and, in effect, failing to prosecute their claims.

B. The Intervenors' Obstruction of Discovery

It appears that the Intervenors are also attempting to thwart the NRC process by refusing to cooperate with the discovery process. Although this subject cannot be fully discussed here and will most likely have to be briefed next week, a summary of recent events here will help to show why dismissal of the "realism" issues is warranted.

Until yesterday, the Intervenors' misconduct could arguably be said to have been limited to unfair tactics and footdragging. For example, after being ordered twice by the Board to make certain people available for depositions by the end of the discovery period, only yesterday afternoon did the Intervenors make known to LILCO the availability of these deponents; also, the Intervenors say, without explanation, that two of the deponents are not available at all before the end of the discovery period.

Yesterday also LILCO received the Intervenors' objections to its interrogatories, and those objections too suggest that the Intervenors will not be forthcoming with the facts. Of LILCO's 116 outstanding interrogatories, the Intervenors objected to over half. See Governments' Objections to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10 (Apr. 20, 1988). One of their objections, in particular, is a challenge to the NRC regulations:

SPECIFIC OBJECTIONS

LILCO Interrogatory No. 8

8. With respect to each of the following functions,

[list of the functions addressed by Contentions 1-2, 4-8, and 10]

please list each and every factor that Intervenors claim would prevent a "best efforts" response by New York State and Suffolk County, generally following the LILCO Plan, from satisfying the applicable NRC requirements.

Answer to Interrogatory 8.

The Governments object on the ground that the

> premise of the Interrogatory -- that the Governments would generally follow the LILCO Plan -- is false and lacking in any factual basis. For the reasons set forth in the Governments' April 13 Objection to Portions of February 29 and April 8 Orders in the Realism Remand and Offer of Proof and Attachments thereto (hereafter, "April 13 Objections and Offer of Proof"), the Governments will not adopt or follow LILCO's Plan.

Id. at 5-6.

LILCO has not yet received the answers, due today, to its interrogatories. If those answers provide further evidence of the Intervenors' unwillingness to provide facts, LILCO will supplement this pleading early next week.

Likewise, the depositions of Intervenor witnesses have already provided, and may provide further, evidence of the Intervenors' unwillingness to address the facts. The deposition on April 19 of the Suffolk County Executive, the County's only witness on the "best efforts" issue, was ended by the County after only two hours. The County Executive testified that he was the most knowledgeable person in the County on the subject but was unable to answer a number of questions about the County resources available for a best efforts response and how various County agencies would respond to a Shoreham emergency. Dr. Axelrod's deposition this afternoon may provide further instances of the Intervenors' refusal to provide information.

Again, this refusal to cooperate with discovery is longstanding. In 1983 LILCO asked in discovery what Suffolk County would do in an emergency. The County refused to say:

> LILCO Request 103:
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> If emergency planning is deemed by the NRC to be possible for Long Island and a plan is approved by the NRC, will Suffolk County or any of Suffolk County's officials take action to prohibit county employees from responding in an emergency other than by appealing the NRC's decision to the courts?
>
> Response:
>
> This question is objectionable because it calls for speculation rather than for data relevant to whether the LILCO offsite

> plan meets NRC regulatory requirements. Indeed, the question talks only in general terms about whether "planning is deemed . . . to be possible" and if "a plan is approved by the NRC . . . ." The County cannot describe what action(s) might be taken by a government when and if speculative future events take place. If events take place in the future, the County government will evaluate the events and take the action(s) which are agreed to be appropriate in light of the events which in fact occur. We, of course, do not know what actions might be taken until those events occur. This question is objectionable for the further reason that it does not pertain to the adequacy of the LILCO offsite plan which is the focus of the instant proceeding. See also Resolutions 262-1982, 456-1982, 457-1982, and 111-1983 which prohibit County involvement in implementing or adopting any plan other than one approved by the Legislature.
>
> LILCO Request 104.
>
> If emergency planning is deemed by the NRC to be possible and a plan is approved by the NRC, will the County adopt regulations, ordinances, or provide LILCO with a permit to conduct any of the activities necessary to execute the emergency plan which the County, in its contentions, has classified as illegal?
>
> Response:
>
> Objectionable. See response to LILCO Request 103. Further, the County cannot speculate whether it will or will not adopt any "regulations, ordinances or provide LILCO with a permit to conduct any of the activities necessary to execute the emergency plan which the County, in its contentions, has classified as illegal." The County, as a party in this proceeding, cannot possibly predict what action(s) its Legislature or executive agencies might take if LILCO asked for permits, etc.

Suffolk County's Responses to LILCO's Informal Discovery Requests of June 29, 1983 and July 6, 1983 at 17-19 (Aug. 5, 1983).

This stance is impermissible under NRC regulations. Discovery is as much an obligation of intervenors as it is of applicants:

> A litigant may not make serious allegations against another party and then refuse to reveal whether those allegations have any basis. . . . The Coalition's understanding of an intervenor's role is simply wrong. To be sure, the license applicant carries the ultimate burden of proof. But intervenors also bear evidentiary responsibilities. In a ruling that has received explicit Supreme Court approval, the Commission has

> stressed that an intervenor must come forward with evidence "sufficient to require reasonable minds to inquire further" to insure that its contentions are explored at the hearing. Obviously, interrogatories designed to discover what (if any) evidence underlies an intervenor's own contentions are not out of order.

Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 339-40 (1980) (footnote omitted). Compliance with discovery requests may be enforced by dismissal, if necessary, or other strong remedies. See Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298 (1977) (intervenors dismissed for failure to comply with discovery requests), and cases there cited. See also Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802 (1986) (summary disposition of joint contentions granted because intervenors failed to comply with discovery request); Kerr-McGee Chemical Corporation (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75 (1986) (contentions dismissed for failure to meet hearing obligations); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2) LBP-83-20A, 17 NRC 586 (1983) (Board granted motion to dismiss party and contentions for party's failure to meet discovery obligations); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-83-29A, 17 NRC 1121 (1983) (contention dismissed because intervenors failed to meet discovery obligation).

C. The Remedy

Thus the Intervenors have made their choice: they decline to tell the NRC what they would do in an emergency and therefore choose to be bound by the follow-the-utility-plan presumption of the new NRC rule. LILCO's prima facie case is unrebutted. There is no issue to decide, and the Board should dismiss Contentions 1-2, 4-8, and 10.

D. An Alternate Remedy

If the Board believes, contrary to the argument above, that there is still an issue suitable for hearing on the "realism" issue, then that issue must necessarily be a narrow

one. As the Board has observed, LILCO's prima facie case is based on matters adjudicated or uncontested in the record, material facts previously accepted by the Board, other prior Board rulings, and relevant parts of Revision 9 to its emergency plan. Confirmatory Memorandum and Order at 3 (Feb. 29, 1988).

The only such element of the case that is arguably still subject to hearing is Revision 9 of the emergency plan; the primary part of Revision 9 at issue is Attachment 10 to OPIP 3.1.1., entitled "Suffolk County Interface Procedure." The only issue even arguably left for hearing[2/] is whether this procedure complies with NUREG-0654 Supp. 1 (or otherwise meets NRC regulations) and, if not, how it should be revised to comply.

If this last issue were litigated, the Intervenors would be entitled to cross-examine LILCO's witnesses about the procedure. Intervenors would not, however, be permitted to cross-examine on (1) the adequacy of the rest of the LILCO plan, because that has already been litigated, or (2) what the Intervenors would do in an emergency, which is resolved by the "follow-the-utility-plan" presumption. The Intervenors would also not be allowed to pose hypotheticals, as they did in their deposition of LILCO's witnesses on April 20, asking what LILCO would do if Suffolk County behaved irrationally and refused sound advice in accordance with the plan.

Moreover, even the narrow "interface" issue described above should not be litigated. The Board should dismiss it and leave its review for the NRC Staff and FEMA because, analogous with the "Phase I" default, the Intervenors have in essence refused to prosecute their claims, as explained below.

2/ The "immateriality" issue, otherwise a litigable matter, would seem to be mooted by the application of the "follow-the-utility-plan" presumption. Under that presumption, there will be traffic guides in accordance with the LILCO plan, and an evacuation would normally be a "controlled" one.

III. The Intervenors' Behavior Is the Same As Their Phase I Default

The Intervenors' behavior defies the Board's orders and requires the dismissal of the contentions in accordance with the Commission's "Statement of Policy on Conduct of Licensing Proceedings," CLI-81-8, 13 NRC 452 (1981). In that Statement, the Commission observed:

> When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. For example, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one or more of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, boards should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances.

Id. at 454. It was this passage that the Brenner Board cited in 1982 when it dismissed Suffolk County's "Phase I" contentions. See LBP-82-115, 16 NRC 1923, 1928 (1982).

The Intervenors' behavior now is similar to their behavior in 1983. A brief review of why dismissal was ordered in 1983 will show why dismissal should be ordered now.

In 1983 the Licensing Board ordered evidence on onsite emergency preparedness to be taken in the first instance by depositions. See Memorandum and Order Ruling on Licensing Board Authority to Direct that Initial Examination of the Pre-Filed Testimony be Conducted by Means of Prehearing Examinations, LBP-82-107, 16 NRC 1667 (1982). Full cross-examination was to take place, just as in a public hearing, and the public was free to attend, just as in a public hearing. The only difference was that the Board was to read the transcripts of the depositions rather than be present at them.

The Board then planned to hold a conventional public hearing to explore parts of the deposition record that still seemed to need more elaboration. At this hearing the parties were again to cross-examine witnesses, to the extent they had not been able to do so during the depositions, and the Board would have been present to ask questions itself and observe witnesses' demeanor.

The judges' remarks about the proposed procedure show the extent of Suffolk County's intransigence:

> JUDGE CARPENTER: I would just like to make a couple of remarks to provide some perspective on what the Board's hopes are. If we look at the administrative proceedings like this, one would like to see the record which will undoubtedly be reviewed by [sic] both comprehensive and incisive.
>
> And the reason the Board feels this initial examination to develop a comprehensive record is very useful and is [sic] there is unavoidably much detail that must be presented. Then the Board needs to look at that detail, look at the comprehensive record, and then try to bring to focus all parties on the critical elements that have come from that detailed examination. So then we can proceed to examine with perspective that has been developed from the detail.
>
> So all we were suggesting is a recognition of the need to do two different kinds of things -- to get a comprehensive record with all of the technical facts put out on the table, and then to examine those facts in an incisive way. And I am trying ot be responsive, Mr. Brown, to your request to understand the Board's thinking, and I am trying to express it just as simply as I can.

Tr. 14,721-22.

> JUDGE MORRIS: I would just like to add one comment.
>
> The Board recognizes that the subject of emergency planning is of great interest up here in Suffolk County on Long Island, and we want to be sure that we have time to reflect on the details that are developed in the proceeding, and that means hearing the parties, having time to examine the evidence, at least, prior to our conducting the final hearing process in public to ask our questions, and to allow for further questioning by the parties.

Tr. 14,722.

The County and private intervenors categorically refused to participate in this procedure, calling it "unlawful." Tr. 14,725, 14,726. The Board offered to facilitate appellate review of its proposed procedure:

> JUDGE BRENNER: Did you see our remarks on the transcript of Friday as to the appellate procedures that might be invoked if we advocate that position, that that is a normal course of appellate procedure when a trial court rules one way and a party rules another, you sometimes have to wait until the end of the proceeding for review.
>
> However, in this instance, we would be willing to assist the County in facilitating a rapid review, so long as it wasn't otherwise in default of its obligations before us while seeking that review. However, we have never gotten any indication from the County as to any proper appellate procedures that it wished to follow.

Tr. 14,726-27.

> We believe we have the authority to implement this quite clearly. However, trial boards have been wrong before and we would invite that kind of accelerated procedure to assure that the proceeding isn't diverted on the side trail that detracts from the substance, the very antithesis of the comprehensiveness and incisiveness that we are seeking, as Judge Carpenter just said.

Tr. 14,728-29. Nevertheless, the County and private intervenors refused to obey the Board's order.

The County's behavior was unreasonable. The County never explained why it thought the Board-ordered procedure was unlawful. (It did file a paper on the issue, but it contained "no supporting analysis and almost no explication." See LBP-82-107, 16 NRC at 1671; LBP-82-115, 16 NRC 1923, 1927 n.1 (1982). The County never explained why it thought it was prejudiced by the Board's procedure. Finally, the County did not accept the Board's invitation to seek expedited review.

The County, along with the other intervenors, was therefore prohibited from contesting Phase I issues, since it had refused to do so except on its own terms. The

dismissal of the contentions was ordered because of the County's breach of a fundamental principle -- that litigants must obey judges' orders even if they disagree with them. See Memorandum and Order Confirming Ruling on Sanctions for Intervenors' Refusal to Comply with Order to Participate in Prehearing Examinations, LBP-82-115, 16 NRC 1923, 1930 (1982), aff'd, ALAB-788, 20 NRC 1102, 1176-79 (1984). The Intervenors appealed the Board's dismissal of the Phase I contentions, but the Appeal Board found the Board's default ruling "unassailable." ALAB-788, 20 NRC 1102, 1178 (1984).

The same policy that justified the dismissal of issues in 1982 just as surely justifies dismissal now:

> To allow intervenors to decline to follow our order, solely because they disagree with it, would be a particularly egregious abdication of our duty under 10 CFR § 2.718 to regulate the course of this proceeding. Not only would permitting such actions be contrary to Commission precedent, but it would also likely be repeated were sanctions not imposed for this breach so as to induce future compliance with Board orders.

Memorandum and Order Confirming Ruling on Sanctions for Intervenors' Refusal to Comply with Order to Participate in Prehearing Examinations, 16 NRC at 1931.

In accordance with the Commission's Statement of Policy, quoted above, then, the Board should dismiss the "interface" issue and leave it to the ordinary NRC Staff/FEMA review process. The Intervenors' refusal to present the facts is important to resolving the remaining issue, as the Board has defined it. The potential for harm to LILCO is very great, since the Intervenors' purpose is to prevent LILCO from satisfying NRC requirements. The harm to the orderly conduct of the proceeding is great, as it was in Phase I, because the Board cannot get at the facts in the face of the Intervenors' refusal to come forward. Finally, the Intervenors' conduct is part of a pattern of behavior that began at least as early as 1983, as explained above.

IV. Realism Is Not Unlawful

What has been said above addresses the application of the Board's past rulings to the Intervenors' April 13 Objection. But most of the Intervenors' April 13 Objection amounts to a motion for the Board to reconsider those past rulings. LILCO responds below to certain of the arguments the Intervenors raise.

The Board, in providing its guidance for the future direction of the "best efforts" remand proceeding, properly recognized that under the new rule "Intervenors . . . can no longer raise the specter of a lack of legal authority as a response . . . ." Memorandum, LBP-88-9, 27 NRC ___, slip op. at 24 (Apr. 8, 1988). Accordingly, the Board reworded the remaining eight contentions to reflect the fact that "legal authority is no longer the focus of [the Board's] deliberations." Id. at 26. The Intervenors, while disagreeing with the Board's recasting of the legal authority contentions, argue that "it is nonetheless clear that even as 'reformulated,' LILCO's lack of legal authority to implement the Plan remains relevant and material to a decision on Contentions 1-10." Objection at 33. "There is absolutely no basis," the Intervenors protest, "for this Board's ruling that 'a lack of legal authority cannot be raised under the regulation as a response against LILCO's Plan.'" Id. at 37 (footnote omitted).

What the Intervenors wish to argue, in effect, is that "realism" is unlawful. It must be recognized that this legal argument is a sham, based on a misinterpretation of the now-reversed Cuomo v. LILCO.[3/] The Intervenors now interpret Cuomo v. LILCO as holding it illegal for the County to permit LILCO to do things. But Cuomo v. LILCO, even when it was still the law, assumed no County action at all. Cuomo v. LILCO

3/ The Intervenors, predictably, argue that "the fact that the New York Court of Appeals vacated Cuomo v. LILCO for non-justiciability . . . has no impact on the merits of the decision." Objection at 38. The plain fact is, however, that the New York Court of Appeals reversed the Cuomo decision and that, therefore, there is no New York court decision on which the Intervenors may rely.

addressed a utility-only response; the NRC's new rule addresses a joint utility-local-federal "best efforts" response. Even if Cuomo v. LILCC were still the law, it would have no bearing on the present case.

While the Intervenors have refused to recognize this, the Board has not:

> The Intervenors argue that the fact that state and local goverments are prohibited from delegating legal authority to LILCO has been recognized in prior decisions by the Board and has not been changed by CLI-86-13 or the new rule. This was the principal finding of the Cuomo v. LILCO decision recognized by the Board in its September 17 and October 29 Orders . . . . We did not intend then, or now however, to convey the belief that State and County officials could not, under emergency conditions, call upon private entities to assist in performing emergency functions on a temporary basis.

Memorandum, LBP-88-9, 27 NRC ___, slip op. at 25 (Apr. 8, 1988). Attempting to bolster their discredited position, the Intervenors claim that the "relevance of the lack of legal authority issue is res judicata" for this proceeding and that "[t]his Board has provided no basis at all for its abrupt turn-about on this issue." Objection at 37, 42. The assertion is without merit; the Board, of course, has not reversed itself but rather has attempted to correct the Intervenors' own erroneous perception of the Board's earlier rulings on this matter. While the Intervenors may disagree, it is for the Board to state what it meant in its prior decisions.

The short of the matter is that it is nonsense to claim that under New York law the State or County could not authorize LILCO personnel to take specific actions necessary to protect the public and could not themselves use LERO personnel and resources to respond to a Shoreham emergency. The Intervenors' oft-repeated assertion that such a course of action would constitute an illegal "delegation of police powers" defies common sense and cannot be squared with New York State Executive Law Article 2-B, which expressly provides for the use of private volunteer organizations in responding to civil emergencies. The Board has recognized this. See Memorandum, LBP-88-9, 27 NRC ___, slip op. at 25 (Apr. 8, 1988).

Moreover, LILCO has already demonstrated that its employees, as part of their regular jobs, routinely do such things as direct traffic and sometimes ask people to evacuate their homes. See Affidavit of Jay Richard Kessler on Directing Traffic, Training Public Workers for Emergency Response, and Ordering Evacuations (Dec. 14, 1987); Affidavit of Charles A. Daverio on LILCO Responses to Requests by Local Law Enforcement Officials for Public Safety Assistance (Dec. 16, 1987). In addition, at the direction of the New York State Disaster Preparedness Commission in 1983, utility personnel were recruited to perform emergency functions in Rockland County, including directing traffic, in the event of a radiological accident at the Indian Point nuclear power plant. See Affidavit of John D. Leonard, Jr. in Support of LILCO's Motions for Summary Disposition of Contentions 1-10 (Dec. 10, 1987).

The Intervenors have not contested the accuracy of LILCO's affidavits. Instead, they have attempted to dismiss the uncontroverted facts by suggesting that there is a legal distinction between recommending the evacuation of a few houses because of a gas leak and recommending the evacuation of many houses because of a radiation leak. See Overview Memorandum in Support of Governments' Opposition to LILCO's Motions for Summary Disposition of Contentions 1-2 and 4-10 (Feb. 10, 1987) at 49 n.26. The difference, of course, is only one of degree, not kind.

The Intervenors cannot possibly believe that LILCO would be prohibited by New York law from attempting to mitigate the consequences of a radiological accident at Shoreham, particularly if the State and County authorized LILCO's actions and participated themselves in the emergency response. Yet, the Intervenors continue to so argue. Taken to its logical end, the Intervenors' argument implies that the owner of a factory cannot inform the public when it spills a toxic chemical. That the Intervenors continue to hold to such a position is further evidence that they are not serious about engaging the facts in the present proceeding.

The Board is correct in its ruling that, under the revised emergency planning rule, there is no longer any need to consider whether LILCO has the legal authority to perform various emergency response functions. Rather, the pertinent inquiry is whether LILCO's plan and the best efforts response of the State and County governments will satisfy the NRC's regulatory requirements. Should the Intervenors continue to press their legal authority claims, however, it should be noted that there is no jurisdictional bar to the Board's deciding the point. See Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 195 n.39 and accompanying text, on remand, LBP-78-12, 7 NRC 573, affirmed, ALAB-493, 8 NRC 253 (1978), affirmed, Commonwealth of Kentucky v. NRC, 626 F.2d 995 (1980) (application of law defining boundary between Indiana and Kentucky to facts to determine the need for a discharge permit from the Commonwealth of Kentucky under the Clean Water Act). Moreover, the Board's assessment of New York law in its April 8, 1988 Memorandum is correct. See LBP-88-9, supra, 27 NRC at ___, slip op. at 25.

It should also be noted that Intervenors' claims of res judicata regarding their intended "response" are based, not only on the now-reversed holding in Cuomo v. LILCO, supra, but also on Licensing Board decisions which preceded the revised emergency planning rule. LBP-87-26, 26 NRC 201 (1987); LBP-87-29, 26 NRC 302 (1987). Thus, they can have no res judicata effect with regard to interpretation of the requirements of that rule and the evidentiary showing that Intervenors are required to make under that rule to rebut the presumption that they will follow the LILCO plan.

V. The Intervenors Are Not Being Precluded From Presenting Their Case

The Intervenors claim the Board has ordered them to violate State and local law. They say this presents them with a "Hobson's Choice." Objection at 2. They complain about the following language:

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

Memorandum (Extension of Board's Ruling and Opinion on LILCO Summary Deposition Motions of Legal Authority (Realism) Contentions and Guidance to Parties on New Rule 10 C.F.R. § 50.47(c)(1)), LBP-88-9, 27 NRC ___, slip op. at 21 (Apr. 8, 1988).

Their argument seems to be that Suffolk County has required itself by law not to do emergency planning and that the Board's order that the Intervenors present evidence requires the County to do emergency planning. In fact, the Board has not ordered them to do emergency planning; it has ordered them to present evidence of what they would do in an emergency -- evidence that is squarely within their ability to provide -- if they seek to avoid the presumption of the new NRC rule.

Contrary to Intervenors' assertion, the revised emergency planning rule does not require them to participate in emergency planning. Rather, it establishes a framework for evaluating the adequacy of LILCO's emergency plan and for considering that issue in an adjudicatory licensing proceeding. The NRC rule simply structures Intervenors' participation in the licensing proceeding. If Intervenors wish to contest the adequacy of LILCO's plan in that proceeding, they must follow and comply with the NRC's rules governing the litigation of emergency planning issues. The choice is theirs: rebut the presumption properly, or suffer its consequences.

The Suffolk County resolutions relied on by the Intervenors do not forbid the County to present evidence. To the contrary, Resolution No. 111-1983 orders the County Executive to pursue the County's position in all possible forums, including the NRC.[4/] And, New York State, of course, has no law forbidding it to plan, or to present

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4/ [T]he County Executive is hereby directed to take all actions necessary to assure that actions taken by any other governmental agency, be it State or Federal, are consistent with the decisions mandated by this Resolution." Suffolk County Resolution No. 111-1983.

evidence. Indeed, at one point the State said that it would present its own emergency plan as evidence ("testimony") in this very proceeding. Letter from Matthew J. Kelly, Staff Counsel, New York State Public Service Commission, to Lawrence Brenner, Apr. 9, 1982. The real problem for the Intervenors is that presenting evidence hurts their case: the facts are contrary to their legal position. The Board has found repeatedly that adequate emergency planning can be done on Long Island. The Intervenors have said nothing to suggest why they cannot do it.

The Intervenors, as parties to this proceeding, have obligations to participate in the process and to obey the Board's orders. In this instance they have an obligation to go forward with evidence, if they wish to be heard. The cannot simultaneously ask the Board to make a finding that LILCO's plan is inadequate and at the same time refuse to present evidence that the Board needs to decide that issue.

VI. Intervenors Have No Absolute Right to Cross-Examine LILCO's Witnesses

The Intervenors, anticipating that the Board will will decline their "offer of proof," argue that they are nevertheless entitled to a hearing so that they may cross-examine LILCO's witnesses. See Objection at 4. They refer to the conventional law that intervenors are entitled to make their case by cross-examination.

That law, however, does not apply to intervenors who have defied Board orders. It does not apply to a case in which the intervenors have failed to meet their own burden of going forward. In such a case the dismissal of the intervenors' contentions is appropriate. Intervenors have an obligation during discovery to reveal what evidence, if any, underlies their contentions. See Susquehannah, supra, ALAB-613, 12 NRC at 340. Moreover, that "requirement is not obviated by an intervenor's strategic choice to make its case through cross-examination." Seabrook, supra LBP-83-20A, 17 NRC at 589. As the Appeal Board said in this case, addressing the Intervenors' "Phase I" argument that they were entitled to an oral hearing:

> The right to submit rebuttal evidence and conduct cross-examination, moreover, is not unlimited; it is bounded by a need for a full and true disclosure of the facts.

ALAB-788, 20 NRC 1102, 1178 (1984) (footnote omitted).

The situation is now as it was in Phase I. The Intervenors have refused to go forward with their contentions. Those contentions should be dismissed. With the contentions dismissed, the Board has nothing further to decide, and the resolution of any remaining safety issues lies with the FEMA and the NRC Staff. Cf. LBP-82-115, 16 NRC 1923, 1933 (NRC Staff is aware of matters raised in Intervenors' prefiled testimony and will be presumed to address these issues in their review).

Conclusion

For the above reasons, the Board should dismiss Contentions 1-2, 4-8, and 10. In the alternative, the Board should rule that the subject of the "realism" hearing is only the adequacy of LILCO's procedure for dealing with the State and County, and should dismiss that issue also because of the Intervenors' refusal to reveal the facts within their control.

Respectfully submitted,

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DATED: April 22, 1988

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 RESPONSE TO GOVERNMENTS' OBJECTION TO PORTIONS OF FEBRUARY 29 AND APRIL 8 ORDERS IN THE REALISM REMAND AND OFFER OF PROOF were served this date upon the following by hand or telecopier, as indicated by one asterisk, or by first-class mail, postage prepaid.

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