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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'88 MAY -3 P6:30

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

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

NRC STAFF RESPONSE TO INTERVENORS'  
OBJECTIONS TO PORTIONS OF FEBRUARY 29  
AND APRIL 8 REALISM ORDERS AND OFFER OF PROOF

I. INTRODUCTION

By Order dated February 29, 1988, <sup>1/</sup> the Board confirmed its denial of LILCO's summary disposition motions concerning the realism contentions and provided guidance concerning the the litigation of the issues in this proceeding. Therein the Board stated that 10 C.F.R. § 50.47(c)(1) requires the Board to determine "whether the LILCO Plan with a best efforts or other response meets regulatory requirements." February 29 Order at 2.

Specifically, the Board stated that "[t]here is a presumption that the State and County response will follow the LILCO plan, a presumption rebuttable only by timely evidence that the Governments will follow a different but adequate and feasible plan that can be relied on or by other evidence of like kind." Id. The Board: (1) reformulated the remaining

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

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contentions to incorporate the salient issue, the best efforts response of the State and County governments; (2) held that LILCO could meet its burden of proof under the contentions by putting forth a prima facie case which addresses the questions raised by the Commission in CLI-86-13 (i.e., that the Plan supplemented by a best efforts response will meet the standard that adequate protective measures can and will be taken in an emergency and thus, provides the reasonable assurance finding for operation); (3) held that the burden of going forward would shift to Intervenor to rebut the Plan with an affirmative showing of their projected response efforts, but any proffer of an ad hoc response must specify available resources and projected response actions including the time factors involved; and (4) held that Intervenor would have to demonstrate that such best efforts response would not meet the adequacy standard with respect to the matters contested. Id. at 2-4. The Board further indicated it would amplify the judgments stated in the Order in a written opinion. Id. at 5.

Subsequently, by Memorandum dated April 8, 1988, the Board further explained its ruling on summary disposition and guidance for litigation under the new emergency planning rule.<sup>2/</sup> On April 13, 1988, Intervenor filed (1) their objections to portions of the Order and Memorandum based on their position that the Board rulings "appear to preemptively bar Intervenor from filing full and truthful testimony" on

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<sup>2/</sup> Memorandum (Extension of Board's Ruling and opinion on LILCO Summary Disposition Motions of Legal Authority (Realms) Contentions and Guidance to Parties on New Rule 10 C.F.R. 50.47(c)(1)) ("Memorandum").

their contentions and (2) made an offer of proof, pursuant to 10 C.F.R. § 2.743(e), of the testimony they would file. Governments' Objection to Portions of February 29 and April 8 Orders in the Realism Remand and Offer of Proof, April 13, 1988 ("Objection"). For the reasons stated below, the Board should (1) reject Intervenors' objections to the Board's rulings as both untimely and inconsistent with the new rule and (2) reject Intervenors' offer of proof as failing to comport with the showing required under 10 C.F.R. § 50.47(c)(1) to rebut the presumption that state and local governments will use or follow the Plan.

## II. DISCUSSION

Under the Realism Rule there are two presumptions. The first is irrebuttable -- state and local governments will act in an radiological emergency to protect the health and safety of the public. 52 Fed. Reg. 42078, 42082 (November 3, 1987). The second is that it may be presumed that state and local authorities will look to the utility for guidance and generally follow its plan in an actual emergency. This presumption is to be rebutted only by a timely offer of an adequate and feasible state or local plan which would in fact be relied upon in an radiological emergency. Id.

This latter presumption is premised upon the Commissions reasonable expectation that state and local governments will, in the absence of a state or local radiological plan, look to the utility plan for guidance and generally follow it or some other plan that exists. Id. The Commission based its judgment on the record in rulemaking that "strongly supports that proposition that state and local governments believe that a planned

response is preferable to an ad hoc one." Id. at 42085. Throughout their filing, Intervenors make it clear that they will respond to an emergency on an ad hoc basis, but refuse to specify either the resources available for their response, the actions that would be taken, or the time such actions would entail. E.g., Objections at 9, 14-18, 41-45. Thus it is evident that Intervenors, contrary to the procedural orders of this Board, are refusing to set forth their projected response effort and will not aid any inquiry into their best efforts response. In addition, Intervenors state they would not authorize or permit LILCO/LERO to perform any of their assigned functions under the Plan (id. at 42) and would seek to develop their case through cross-examination of LILCO and Staff witnesses to "demonstrate, among other things, that LILCO failed to present a prima facie case on the Legal Authority Contentions [1, 2, 4, 5, 6, 7, 8, and 10]," Objection at 13.

The purpose for Intervenors' refusal to make an affirmative showing of their best efforts response is that they seek to "put the matter before the courts." Objection, Direct Testimony of Patrick G. Halpin on Behalf of Suffolk County Concerning Contentions 1-2, 4-8, and 10, April 13, 1988, at 10. This position, although allegedly taken in good faith (see Objection at 1-4), obstructs the Board's inquiry into the adequacy of the LILCO plan under the realism rule. The NRC 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 the plan satisfies the requirements for licensing. CLI-83-13, 21 NRC 741, 743.

Contrary to Intervenor's assertion (Objections at 16), the Board's Order and Memorandum which provide that under the rule the Board must presume that the State and County will follow the Plan unless rebutted by a showing of a government plan that will be followed in an emergency is consistent with the plain terms of the realism rule. To read the word "may" in new rule as giving boards discretion regarding the presumption of best efforts response should be applied would be inconsistent with the Commission's intent to establish a "process by which a utility plan can be evaluated against the same standards that are used to evaluate a state or local plan (with allowances made both for those areas in which compliance is infeasible because of governmental non-participation and for the compensatory measures proposed by the utility)." Id. at 42084. See NRC Staff Positions on Matters Raised in December 23, 1987 Confirmatory Order, January 15, 1988, at 2-7.

The fact that the Board's structuring of the proceeding consistent with the rule acts to "preemptively bar" evidence that the State and County would like to present concerning their refusal to use the LILCO Plan, rely on LILCO recommendations or advice, or seek to coordinate with LILCO their actions in response to a Shoreham emergency (Objection at 1-3, 5-6), is not grounds for the Board to disturb rulings which are proper under the rule. Rather, the harm or unfairness Intervenor's complain of is the direct result of their attempt to ignore board orders and obstruct the NRC's licensing process. Efforts to withhold the showing required to rebut the presumption under the rule cannot obstruct the Commission's inquiry into the facts necessary to determine the adequacy of the LILCO plan, CLI-86-14, 24 NRC 36, 41 (1986), or

"supercede the judgment of the NRC" on licensing matters, Citizens for an Orderly Energy Policy v. County of Suffolk, 604 F. Supp. 1084, 1095 (E.D.N.Y. 1985), aff'd, 813 F.2d 570 (2d Cir. 1987) (per curiam); Long Island Lighting Co. v. County of Suffolk, 628 F. Supp 654, 664-66 (1986).

The Commission makes it clear that the realism rule "amplifies and clarifies" the realism doctrine set out in its decision in CLI-86-13, 24 NRC 22 (1986). 52 Fed. Reg. at 42084. In that decision, the Commission directed the Board to assume that best efforts of the State and County would use the LILCO plan as the best source of information and options." 24 NRC at 31, 33. Given that the Commission's direction was mandatory and that the sole purpose of the rule was to establish a process to meet situations where state and local governments fail to participate in emergency planning, the Board properly concluded that the presumption that the utility plan would be followed absent some other plan was mandatory; and Intervenors may not avoid making an affirmative showing of their own best efforts.

The Board issued its order structuring of this proceeding under the Realism Rule on February 29. Intervenors' request of April 13, 1988, that the Board reconsider its rulings is thus out of time and should be rejected as untimely. See 10 C.F.R. 2.771. <sup>3/</sup>

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<sup>3/</sup> Intervenors state that they have filed their objections based on the belief that a motion for reconsideration of the portions of the Orders "would likely be futile." Objection at 12. Whatever the caption of their pleading, it is clear that the purpose of the filing is to persuade the Board to "correct their erroneous rulings before the



The Board should also reject Intervenor's offer of proof pursuant to 10 C.F.R. 2.743(f). As Intervenor themselves state, the purpose of the testimony would be (1) to establish LILCO's lack of authority to implement its Plan and (2) the Intervenor's lack of authority to permit or authorize LILCO employees to perform their functions under the plan. E.g., Objections at 42-45. Such showing would be inconsistent with the inquiry under the Commission's rule, that is, the nature of a state or local government's best efforts response.

In addition, Intervenor should not be permitted to establish their position concerning LILCO's legal authority through cross-examination since such inquiry is not relevant under the rule. Without evidence that another plan would, in fact be relied upon, the Board would be entitled to find in LILCO's favor if it determines LILCO's prima facie showing is adequate. LILCO's Plan has been found to generally meet the regulatory planning standards. LBP-85-12, 21 NRC 644 (1985); LBP-85-31, 22 NRC 410 (1985). If Intervenor have no evidence to present which would enable the Board to evaluate the nature of best efforts, LILCO has met its burden in this proceeding and there is nothing for the Board to consider in any hearing under CLI-86-13 and the Realism rule. There is no evidence that can be presented to properly rebut the presumption in 10 C.F.R. § 50.47(c)(1) that the Government would not act on an ad hoc

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

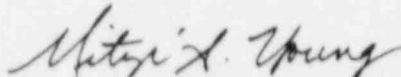
errors permanently taint this entire proceeding." *Id.* at 14. This statement clearly shows that Intervenor request reconsideration of allegedly erroneous rulings in the February 29 Order as expanded by the later Memorandum.

basis but would follow the LILCO Plan. With the recent closing of the discovery period and under the terms of the Board's ruling, Intervenor are now in default in this proceeding. As such, they are subject to appropriate sanctions for failure to comply with Board Orders. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981). <sup>4/</sup>

### III. CONCLUSION

For the reasons discussed above, the Board should reject Intervenor's objections to the February 29 Order and the explanatory Memorandum and reject Intervenor's offer of proof.

Respectfully submitted,

  
Mitzel A. Young  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 28th day of April, 1988

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<sup>4/</sup> The Applicant, in their response to Intervenor's Objections, asks that the Board (1) dismiss Intervenor's contentions or (2), in the alternative, rule that the subject of the "realism" hearing is only whether LILCO's procedure for dealing with the State and County is adequate, and dismiss that issue because of Intervenor's failure to reveal such facts. LILCO's Response To Governments' Objection to Portions of February 29 and April 8 Order in the Realism Remand and Offer of Proof, April 22, 1988, at 2, 26. The Staff believes dismissal of this proceeding for default would be appropriate.



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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENORS' OBJECTIONS TO PORTIONS OF FEBRUARY 29 AND APRIL 8 REALISM ORDERS AND OFFER OF PROOF" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 28th day of April 1988.

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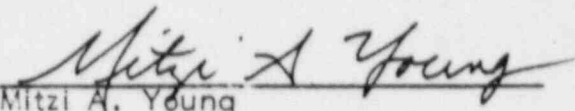
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