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LILCO, June 23, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

LILCO'S RESPONSE TO INTERVENORS' MOTION TO VACATE

LILCO responds as follows to the June 20 motion of Suffolk County and New York State, which ostensibly asks this Licensing Board to vacate its June 17 teleconference Order on discovery concerning the recently remanded Suffolk County Emergency Operations Plan and related matters going to the integrity of this proceeding. LILCO's position can be tersely stated: the Board's June 10 Order, and the June 17 Order which confirmed it and gave it more specificity, are proper; and prompt steps should be taken to enforce them if Intervenors are to remain in this case. LILCO has been driven by now, however, to the conclusion that Intervenors appear to recognize no law but their own, and that serious consideration should be given to their total dismissal from all proceedings before this Board.

I. Background

During a June 10 teleconference, this Board determined to dismiss Intervenors' realism/best efforts contentions.[1/] Tr. 20862. The Board also ordered Intervenors to

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1/ The Board has not yet issued its order or opinion providing its rationale for dismissal — summary disposition on the merits/default, or sanction for failure to comply with Board orders, or both. LILCO believes that summary disposition/default is thoroughly justified, and that dismissal on a sanctions theory is also justified. See LILCO's Brief on the Appropriate Remedy for the Intervenors' Failure to Comply with Board Orders (June 15, 1988).

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produce for deposition numerous persons requested by LILCO on matters deriving from the nonproduction of a 750-page Suffolk County Emergency Operations Plan, existing in 1982 and still an effective document, until May 1988, and other potential abuses of discovery. Tr. 20853, 20862. Noting that the issue in this "discovery goes much beyond [realism-related] interface," the Board ordered discovery going to additional matters involving Intervenors' conduct and the maintenance of the integrity of this proceeding. Tr. 20862, 20875-76. The Board also permitted the parties to respond to its order by June 15. Id. All parties did so.[2/] However, none of the depositions which had been ordered by the Board were permitted by Intervenors.

On June 15, LILCO filed with the Board a request for subpoenas to compel the testimony of two former Suffolk County officials, former Assistant Police Chief Inspector Richard C. Roberts and former Director of Emergency Preparedness William Regan. Those subpoenas were signed by the Presiding Officer on June 16.[3/]

On June 17, at another teleconference convened in light of the parties' June 15 filings, the Board issued three rulings of current importance. First, it reaffirmed the depositions granted by its June 10 Order.[4/] It added, at LILCO's request, a specific deposition schedule beginning Monday, June 20, to obviate the Intervenors' unwillingness to agree on specific dates for the repeatedly ordered depositions. Tr. 20892-93. Second, the Board affirmed the scope of its June 10 discovery ruling, rejecting suggestions that the scope of permissible discovery was to be limited to the

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2/ LILCO's June 15 submission asked the Board to order a specific schedule for depositions requested by LILCO, and to order response to LILCO's Third Set of Interrogatories on June 21.

3/ LILCO effected personal service on Mr. Roberts on Saturday, June 18, and on Mr. Regan on the evening of June 21.

4/ In actuality, these depositions had already been required in a series of orders beginning on April 11, and reaffirmed or extended on April 18, May 10 and 22, and June 3.

issue of nonproduction of the Suffolk County Emergency Operations Plan in 1982-83; and stated clearly that the discovery issues involved did not go to the merits of the realism/best efforts issues, but rather went to the maintenance of the integrity of the proceeding. Tr. 20875-76, 20892-93. Finally, the Board ordered that LILCO's Third Set of Interrogatories, concerning the nonproduction of the Suffolk County Emergency Operations Plan and related matters, be answered in accordance with the Commission's regulations on the normal return date, June 21.

Intervenors have flouted each of the Board's rulings. Since June 17, the following events have occurred:

1. On June 20, Intervenors filed a paper captioned "Governments' Motion for Licensing Board to Vacate June 17 Order."[5/] That paper frontally challenges the Board's authority to inquire into matters affecting the integrity of this proceeding. On that basis alone and without Board approval, Intervenors have totally stonewalled further the discovery, including Board-ordered depositions, interrogatories and compliance with subpoenas. Item 2-5 below document this.

2. Intervenors have refused to make persons ordered on June 10 and 17 (and earlier) to be produced for deposition available in accordance with the Board's orders. See letter from Donald P. Irwin to the Licensing Board, June 20, 1988, and attachments. Intervenors' June 20 Motion for Licensing Board to Vacate complains about that Order but does not admit that Intervenors are not complying with it.

5/ Intervenors' motion, though styled as coming from "The Governments," includes only Suffolk County and New York State, and omits the Town of Southampton. LILCO has no knowledge of whether this omission was inadvertent or intentional, perhaps with an eye to excepting the Town of Southampton from the reach of any further sanctions imposed by this Board. It suffices to say that the Town of Southampton, which has for years bound itself to the County and State, cannot so dissociate itself from their conduct as to carry on their issues like a new runner taking the baton in a relay race. Easton Utilities Commission v. Atomic Energy Commission, 424 F.2d 847, 852 (D.C. Cir. 1970).

3. Intervenors have refused to respond to LILCO's Third Set of Interrogatories despite the Board's June 17 Order. While purporting to summarize the gist of their answers in their June 20 Motion to Vacate at 11-12, footnotes 9 and 10, these summaries of counsel are neither complete and separate answers, nor under oath or affirmation, as required by the Commission's regulations, 10 CFR § 2.740b(b). Counsel for Suffolk County and New York State have each confirmed to counsel for LILCO that they do not intend to provide proper answers to these interrogatories. See letters from K. Dennis Sisk to Lawrence Coe Lanpher, Esq. and Richard J. Zahnleuter, Esq., June 21, 1988 (collectively, Attachment 1 hereto).

4. Intervenors are defying the Board's subpoenas. Counsel for Suffolk County instructed Messrs. Roberts and Regan not to appear for depositions on June 22 and 23, and thus to defy the Board's subpoenas for that testimony; and have only belatedly filed, on the evening of June 21, motions to quash those subpoenas. LILCO counsel was notified of these actions when he made a telephone inquiry on the afternoon of June 21. See Attachment 1. Suffolk County counsel was reminded that a motion to quash a subpoena has no effect without a Board or Commission order, 10 CFR § 2.720(f), and that both he and the witness risked whatever sanctions might befall deliberate disobedience to a subpoena. LILCO responded on June 22 to the motion to quash.

It is difficult to imagine a more complete defiance of this Board's orders or a more complete threat to the good order and integrity of this proceeding, than that which Intervenors have undertaken.

II. Summary of LILCO's Position

LILCO's position on the matters raised by Intervenors' actions and papers of the past several days is as follows:

1. The Board's basic determinations on disposition of the realism/best efforts contentions, and on discovery relating to the nonproduction of the Suffolk County

Emergency Operations Plan and other matters potentially affecting the integrity of this proceeding, were stated in its June 10 Order. That Order was correct.

2. The Order giving rise to Intervenors' discovery objections was issued on June 10. Intervenors could, should, and already did argue all (except perhaps, one) of those objections in their June 15 filing and at the June 17 teleconference. Those objections were rejected there. Their repetition now, disguised as a motion to vacate, is merely an undisclosed, baseless request for reconsideration, and should be summarily dismissed. See III.I below.

3. Intervenors demonstrate no prejudice to themselves from permitting the discovery ordered by the Board on the Emergency Operations Plan and related issues to proceed. See III.II below.

4. Intervenors' attempt to suggest that the Suffolk County Emergency Operations Plan might have been produced to LILCO in 1982-82, but that no one can tell, is absurd. No copy of this document was in LILCO's possession when Suffolk County counsel produced it on or about May 26, 1988; none of the lawyers working on this matter (some with personal familiarity dating back to 1982) had ever seen this document or its recognizable equivalent before about May 26; and discovery document inventory logs, maintained since 1982 by LILCO counsel in the normal course of business on emergency planning matters, do not reveal any entry for the Plan or for any component documents other than the and unrecognizably incomplete fragments already referred to. The Plan was never produced; the enormous harm from that fact stands unchallengeable. See III. II.B.1, below and the Affidavit of James N. Christman (Attachment 2 hereto).

5. Intervenors' motion alternately, and incorrectly, attempts to construe the Board's June 10 Order, as amplified on June 17, as permitting discovery only on the issue of nonproduction of the Suffolk County Emergency Operations Plan, and even on

that issue as permitting an unwarranted fishing expedition. The Board's Orders did neither. The Board's orders clearly include the issue of production of the Emergency Operations Plan but go beyond it, as necessary to determine whether Intervenors have abused their rights as participants in the NRC's proceedings on Shoreham, by failing to be forthright in discovery and in filings, to the prejudice of the course of this proceeding and of LILCO To the extent that the order justifies discovery into other matters, basis has been accumulating over the years in this proceeding but is illustrated in particular in the examples cited at pages 12-17 of LILCO's June 15 Brief on the Appropriate Remedy for Intervenors' Failure to Comply with Board Orders at 12-17, and at III. II.B.4 and III.C, below.

6. The Board, like any adjudicatory tribunal, has authority under the Commission's regulations to inquire into matters affecting the integrity of its proceedings. It did not lose that authority as the result of its determination to resolve one of a series of related issues in this ongoing proceeding. The Limerick case does not dictate a contrary result. See III. II.A, below.

7. The Board has not improperly invested LILCO as a prosecutor. This is still a civil proceeding subject to normal civil procedural rules. The inquiry now at issue involves serious questions affecting the course and integrity of this proceeding, and is within the authority of the Licensing Board. See III.C, below.

8. Intervenors' behavior is a total affront to this Board's authority. It is also part of a years'-long course of conduct tracing back as far as 1982. The Board would be warranted in dismissing them entirely from the proceedings before it. In the event the Board wishes to make matters unquestionably clear before acting, it should consider issuing a final warning order, of the nature set forth in Part IV of this memorandum, and state that failure to comply fully with it will result in total dismissal from the proceeding.

III. Argument

I. The Motion Should Be Rejected As An Undisclosed and Improper Motion to Reconsider Issues Already Argued and Decided

The Motion to Vacate seeks to raise three main issues: (1) the continuing jurisdiction of this Board given its announced determination to decide the realism/best efforts issues in LILCO's favor; (2) the basis for and scope of inquiry to be permitted as a result of the nodisclosure of the Suffolk County Emergency Operations Plan; and (3) the pursuit of this inquiry by LILCO using normal civil discovery. It also is premised on the proposition that these issues arose for the first time out of the Board's June 17 teleconference Order.

This premise is incorrect. In reality, it was this Board's June 10 teleconference order which (1) announced the Board's determination to dismiss the realism contentions (Tr. 20862) and (2) reaffirmed the entire scope of discovery of which Intervenors now complain (Tr. 20853, 20862). The only addition made by the June 17 teleconference Order was the affixing of a specific schedule, at LILCO's request, to discovery already ordered.[6/] Tr. 20892-93. Thus the time to complain of these matters was in the June 15 filings invited by the Board on June 10 (Tr. 20862), or at the June 17 teleconference.

At least the first two of these issues, and perhaps the third, were briefed and argued in fact before the June 17 Order. The first argument -- that the Board has no further jurisdiction (June 20 Motion at 2) -- was made by Intervenors in their June 15 Response at 3 and then during the June 17 teleconference at Tr. 20,869 ("discovery issues pertaining to the best efforts, proceeding are moot and this board has no longer jurisdiction over those" (Lanpher)). The second argument -- that the discovery issues are

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6/ Intervenors apparently recognize this fact, since they have filed a notice of appeal from the June 10 order. See Motion to Vacate at 3-4. The arguments in their motion to vacate blink this fact, however.

moot because they are "either undisputed or not capable of resolution" (June 20 Motion at 2) -- was made by Intervenors in their June 15 Response at 3-5 and by the County during the teleconference (Tr. 20,870 (Lanpher)). Thus these arguments have already been considered and rejected, and no new facts are alleged to justify raising them again. The third argument complains about the method the Board has chosen to pursue this matter -- i.e., in the first instance through normal discovery conducted by LILCO. Nothing has changed since June 10; the parties were on notice then of the Board's intentions; Intervenors could and should have advanced this argument then, or on June 15 and 17.[7/] Intervenors' failure to do so does not give them the right to raise the issue now.

Motions for reconsideration, in whatever guise, are disfavored except where there are new facts to support them.[8/] None are alleged here, nor are any grounds to

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7/ Indeed, Intervenors appear to have raised the argument in passing on the 17th. See Tr. 20,887. ("This Board has not been constituted to become an inquisitor or to take LILCO's witch hunt and permit LILCO to run after this matter." (Brown)).

8/ This Board has already warned Intervenors about seeking reconsideration of matters already decided, without new facts:

> I might say, as we have tried to indicate in some of our proceedings, I do believe that motion for reconsideration of anything should come up -- should be supported by new material. This was really a rehash of material that had been supplied to us in response to those motions.

Tr. 19,620 (Gleason). See also Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Unit 1), LBP-84-23, 19 NRC 1412, 1414 (1984). Federal case law also frowns on motions for reconsideration. See Shepherd v. Health Drinks of America, 69 F.R.D. 607 (E. Va. 1976). In the Shepherd case, the district court noted:

> There appears to be no statutory authority for such a motion to be considered. There appears to be no statutory authority for such a motion and it is not mentioned in the Federal Rules of Civil Procedure. It appears to be a legal animal invented by lawyers who are dissatisfied with a decision of the Court and want to be heard again on the subject.

Id. There the court refused to consider the motion after deciding that it "merely cites authority and factual matter which was available to the litigant and easily could have been included in his original brief." Id. at 608.

suggest that these issues could not have been properly briefed and argued on June 15 and 17. Similarly, to the extent that the arguments advanced in the motion to vacate were not made in the two previous opportunities on June 15 and 17, Intervenors fail to advance any good cause for that failure.

The Motion thus merely seeks, without any showing of good cause, to relitigate matters already decided. It should be summarily rejected.

II. The Motion's Substantive Arguments Are Incorrect

A. This Board Properly Retains Jurisdiction Over the Disclosure of the Suffolk County Emergency Operations Plan and Other Matters Relating to the Good Order and Integrity of This Proceeding

Intervenors' technical argument that the Board's jurisdiction to inquire into the consistency of Intervenors' conduct in this proceeding with the integrity of the Commission's process somehow expired with its determination to dismiss the realism/best efforts contentions is wrong, for three reasons.

First, jurisdiction of the issue has not even left this Board, since it has not yet issued its decision or order setting forth the rationale for its determination to dismiss the contentions.

Second, the argument overlooks the fact that the recent Limerick opinion on which they rely heavily, CLI-86-18, 24 NRC 501 (1986), involved solely a discrete matter which had clearly left the Appeal Board's jurisdiction at the time the conduct complained of arose.[9/] By contrast, the conduct at issue here involves matters currently

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9/ As noted in the Commission's opinion, both the Appeal Board and the Commission recognized that the potentially ex parte document which gave rise to the controversy had not even been received by the Appeal Board until after it had rendered its merits decision on the matter at issue. Further, the Appeal Board expressly disclaimed reliance on the pendency of any other matters before it in its determination (reversed by the Commission) to explore the conduct of the law firm which had promulgated the document. 24 NRC at 503. In any event, the Limerick opinion dealt only with the questions of which level of the NRC had jurisdiction over an issue at a given point in time -- not with whether authority to inquire exists.

(e.g., EBS, hospital ETEs, school bus driver role conflict, 25% power application), and prospectively (the 1988 emergency planning exercise) before the Licensing Board, and an axis of the parties' entire manner of approach to these issues.

Finally, Intervenors' argument would effectively interdict Licensing Boards from undertaking the inquiries necessary to police their own process, as they are expected to do under the Commission's Rules of Practice and Policy Statement on the Conduct of Licensing Proceedings whenever the problems faced are more subtle than missed filing deadlines and open contumacy.[10/] In order to decide whether sanctions are appropriate, Licensing Boards must be able to inquire into whether the parties' conduct affects the integrity of a proceeding, and if so, how; the litigation status of a given issue is a factitious matter not determinative of its powers of inquiry into that issue.

The Commision's Rules of Practice, at 10 CFR § 2.718, invest the Presiding Officer of a Licensing Board with

> the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order. He has all powers necessary to maintain these ends, including the power to: . . .
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> (b) Issue subpoenas authorized by law; . . .
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> (d) Order depositions to be taken;
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> (e) Regulate the course of the proceeding and the conduct of the participants. . . .

10 CFR § 2.718.

10/ For this reason, the holding of the Appeal Board in the Three Mile Island case cited by Intervenors, ALAB-881, 26 NRC 465 (1987) -- that licensing boards are creatures of limited jurisdiction defined by the Commission -- is inapposite. In TMI, the question was whether the Licensing Board had acted properly in unilaterally adding a distinct additional substantive issue to those specified in the Commission's Notice of Hearing. Here, by contrast, the Licensing Board's inquiry lies definitionally within the scope of substantive offsite emergency planning issues delegated to it by the Commission, and is rather an inquiry into whether the lawful process of the Commission for determination of those issues has been tampered with.

Similarly, the Commission's Statement of Policy on the Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981) enunciates a policy which includes the expectation of sanctions for disobedience to Board orders:

> When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions is available to the boards to assist in management of proceedings.

Under this policy, Boards can "dismiss one or more of a party's contentions, impose appropriate sanctions on counsel for a party, or in severe cases, dismiss the party from the proceeding." Id. (emphasis added).

As this Board knows, its predecessor was compelled to invoke the sanction of dismissal of contentions against Suffolk County in Phase I of the emergency planning proceeding, when the County again refused to comply with Board orders. LBP-82-115, 16 NRC 1923 (1982). The applicability of sanctions under this Policy Statement to the current situation is explored at length in LILCO's June 15 Brief at pages 10-23 and will not be repeated here.

The policy of the regulations and the Policy Statement embody simply the normal and necessary ability of a judicial or quasijudicial tribunal to police the integrity of its process in order to maintain efficiency and public confidence. The body before which the alleged misconduct occurred -- be it a trial or appellate body -- is clearly the best qualified one to determine whether the alleged taint, if it occurred, had an effect on the course of the proceeding before it. The Limerick opinion on which Intervenors rely is not to the contrary, given the total lack of impact -- stipulated in the Commission's opinion -- of the potentially improper submission on the Appeal Board's determination. Further, in Limerick, the Appeal Board did not rely on other issues pending before it to support jurisdiction, as this Board has and can.

In this case, certain facts are obvious. A large, integrated document entitled the Suffolk County Emergency Operations Plan was produced for the first time more than five years into the course of this proceeding and more than four years since the concepts of realism and LILCO-governmental interface have been raised. That document is not a comprehensive Radiological Emergency Response Plan for Shoreham designed square with NRC and FEMA guidance, which would by itself eliminate any need for the LILCO Offsite Emergency Plan or its equivalent. It is, however, a directory of services, personnel and resources which gives life, color and specificity to factual arguments LILCO has had to piece together out of isolated inferences for years. The LILCO plan lays out what would need to be done in a radiological emergency at Shoreham; the Suffolk County Plan tells whom to call and what the County's resources are to do the job. Its centrality to this proceeding cannot be gainsaid.

Why was it not produced earlier? LILCO does not know. The answers may determine whether sanctions more extensive then those already determined to be imposed should be levied. But this Board, which has jurisdiction over emergency planning issues, is clearly the proper body to make the initial inquiry into the matter. And to suggest that it would have had jurisdiction before June 17, or before June 10, but has somehow lost it since, even though Intervenors are still in the proceeding and purport to be appealing its June 10 Order,[11/] is irrational.

Similarly, LILCO has begun to obtain, from discovery and other means, information which may suggest additional respects in which it and this Board may have been misled by the submissions or omissions of Intervenors. See Items III.II.B.4 and III.C below, and LILCO's June 15 Brief at 12-14, 15-17. LILCO cannot be sure that its

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11/ Intervenors filed, on June 20, a notice of appeal with the Appeal Board from the Board's June 10 Order. LILCO does not agree that that order constitutes an appealable final order.

misgivings are well-founded; discovery, or deliberate refusals to comply with discovery, will tell. But it is clear that this Board, which has jurisdiction over these issues generally, is the proper body to supervise the inquiry.

B. Intervenors Attempt To Confuse the Remaining Discovery Issues

1. The Suffolk County EOP was not Produced in 1982-83

Intervenors are simply incorrect in their suggestion that there is no documentary or other basis to infer any likelihood whether the Suffolk County Emergency Operations Plan was ever produced before May 1988. It may be the case that Suffolk County's outside counsel cannot now trace the chain of custody of the Suffolk County Emergency Operations Plan; only discovery can tell.

Further, while the burden is not properly on LILCO to demonstrate that the plan was not produced in 1982-83, LILCO has performed by now a sufficient search to demonstrate convincingly, through orderly indexes maintained of documents received in discovery as well as other means, that neither the Suffolk County Emergency Operations Plan, nor any document identifiably corresponding to it, was ever received by LILCO in discovery before May 1988. This demonstration, described in the attached Affidavit of James N. Christman, one of LILCO's counsel who has been familiar with this matter since 1982, puts to rest the sophistic suggestion that some burden rests on LILCO to compensate for Suffolk County's institutional amnesia.

2. Intervenors' Refusal to Answer LILCO's Third Set of Interrogatories Constitutes a Default under the Commission's Regulations

Intervenors did not answer LILCO's Third Set of Interrogatories, which relate generally to the nonproduction and custody of the Suffolk County Emergency Operations Plan, on their return date, June 21. Intervenors have now clarified, though their motion to vacate does not admit it, that they refuse to answer those interrogatories despite the fact that such answers have been compelled by this Board on June 17. See Attachment 1; Tr. 20893.

Intervenors' attorneys' summary statements in lieu of answers, motion to vacate at 11-12, footnotes 9 and 10, are not proper answers under the Commission's regulations.[12/] The regulations require, 10 CFR § 2.740b(b), that individual interrogatories be separately answered and that the answers be under oath or affirmation. The regulations provide that relief from discovery obligations may be sought by a timely motion for a protective order under 10 CFR § 2.740(b). None was sought. For failure to comply with discovery ordered by the Board, Intervenors are in default as described in the regulations, 10 CFR § 2.707, and subject to appropriate sanction.

3. Intervenors' Failure to Provide Witnesses for Deposition on Matters Relating to the Suffolk County Emergency Operations Plan, and Their Defiance of Board Subpoenas on That Issue, Constitute Defaults under the Commission's Regulations

Intervenors' motion to vacate concedes (Motion to Vacate at 11-12, footnotes 9 and 10) that at least three of the witnesses whose depositions the Board has ordered (R. Jones, F. Petrone, J. Bilello) were in the chain of custody of the Suffolk County Emergency Operations Plan or have knowledge of it. Nevertheless, even as to these witnesses, whose relevance to the current inquiry as most narrowly defined is indisputable, Intervenors have simply refused to produce them for deposition without seeking a timely protective order as required by the regulations, 10 CFR § 2.740(b). This refusal constitutes a default under 10 CFR § 2.707 and is subject to appropriate sanction.

12/ Indeed, the statements offered in Intervenors' motion in lieu of answers (Motion at 11, footnote 9, 12, footnote 10) raise as many questions as they purport to answer. The proffered explanation of the disposition of the Suffolk County Emergency Operations Plan (footnote 9 generally) does not illuminate Mr. Lanpher's representation in open hearing on June 3 (Tr. 20816-17) that some 100 crates of Shoreham litigation records were transmitted from Kirkpatrick & Lockhart to the Suffolk County Attorney's office in 1985: where have they gone since? Similarly, footnote 9, ¶ 9(c) states that Suffolk County transmitted one copy of the Emergency Operations Plan to New York State on May 6, 1988, some four days before this Board's initial document production order and 18 days before it was initially made available to LILCO. Why was this transmission made at that time, and by whom? Similarly (footnote 9, ¶ 9(e)), when in May 1988 did Mr. Bilello produce the plan to Mr. Petrone? Why? When did Mr. Petrone transmit it to counsel? The statements about what Suffolk County witnesses would be expected to testify to if deposed (footnote 10) may be true; but nonetheless LILCO is entitled to have them affirmed by witnesses who are under oath.

Suffolk County counsel has similarly refused to produce for deposition the two former County employees, now being represented by Suffolk County counsel, for whom the Board has issued subpoenas -- William Regan, Mr. Bilello's superior, or former Chief Inspector Roberts. They neither obtained an order quashing the subpoenas nor filed timely motions to quash.[13/] The failure to obtain, or to seek in timely fashion, an order to quash the subpoenas is a default subject to sanction under 10 CFR § 2.707.

4. The Appropriate Scope of Discovery on Matters Relating to the Orderly Conduct and Integrity of This Proceeding Goes Beyond the Suffolk County Emergency Operations Plan

The appropriate scope of discovery at this point goes beyond questions merely directed toward the production of the County Plan.[14/] and encompasses other potentially serious matters that have come to light during the course of this proceeding. These matters involve New York State as well as Suffolk County. The following seven recent examples suffice.

1. New York State's responses to LILCO's interrogatories and statements made by the State REPG contain many decrepancies. On February 10, REPG filed an affidavit in support of the Governments' Opposition to LILCO's Summary Disposition Motion on Contentions 1-2 and 4-10 (Feb. 10, 1988), which the Board relied on heavily

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13/ The merits of the motion to quash are being dealth with separately. It suffices to say that the motion relies on the arguments made in the motion to vacate, and raises no other issue more substantial than the scheduling convenience of Mr. Regan.

14/ Recent depositions have also raised issues going just to the Plan. For example, during Frank Petrone's deposition Suffolk County's counsel's represented that the county had no emergency plan even though Mr. Petrone twice said that the county had an emergency plan (Petrone depos. (April 25, 1988) at 24 and 54-55). Counsel for the County made this representation after a question was asked about what "the emergency plan of Suffolk County call[ed] for under the conditions" of a hypothetical emergency not "initiated by an event or related by an event at Shoreham"? Counsel for the County objected: "Mr. Davies, I have a very basic problem with your question. You keep referring to the emergency plan of the county. The county has no emergency plan . . . ." Petrone depos. at 86. Suffolk County counsel's representation contradicts the existence of the Suffolk County Emergency Operation Plan.

in denying LILCO's motion for summary disposition on realism. See Memorandum (Extension of Board's Ruling and Opinion on LILCO Summary Disposition Motions on 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 55 (1985). There REPG claimed that site-specific plans and procedures, training, drills, and exercises involving local and state personnel were essential to an adequate ingestion pathway and recovery and reentry response. REPG Affidavit at 4-6, 8, 9, 10, 13 and 17. REPG claimed that without these plans and activities the State could not adequately respond to a Shoreham emergency. Id. at 4-5 and 12.

The April 29, 1988 REPG Deposition and the State of New York's Response to LILCO's Second Set of Interrogatories Regarding Contentions 1-2, 4-8, and 10 (June 3, 1988) ("State June 3 Response") tell a different story, however. They show that, for the most part, such activities have not occurred and such plans and procedures do not exist for almost all of the counties in the State located within the 50-mile EPZ's of the operating plants in the State and in bordering States. See State June 3 Response Nos. 53, 54, 61, 67, 69, and 72.

2. The REPG witnesses in their affidavit also claimed that "[t]hrough detailed State and local government drills and exercises, government personnel have learned to work together and to prepare for unexpected events." REPG Affidavit at 5-6. In its June 3 Response, the State frequently commented, however, that it "does not know" what the counties can do or have done and that it "is not aware of" or "is unable to speculate" about the plans and procedures the counties would use to respond to a radiological emergency at one of the State's or bordering State's nuclear facilities. See State June 3 Response Nos. 52, 61, 62, 69, 71, and 76.

3. During the April 29, 1988 deposition of Papile, Baranski, and Czech (the REPG deposition), Mr. Czech stated that "Elements of recovery and reentry have been

exercised at all of the sites, [i.e., the operating plants in the State] . . ." REPG Depos. at 156-57. However, in its answer to LILCO Interrogatory No. 72, when asked about exercises, drills, and training for recovery and reentry activites, the State stated that training had been conducted at only two counties. State June 3 Response at 7-8.

4. Other examples of misleading and inconsistent statements concern the State Emergency Management Office (SEMO). LILCO possesses a SEMO document entitled "Local Government Planning Guidance for Radiological Ingestion Exposure Pathway" (August 1987) under cover of a memorandum from Anthony Germano (one of the individuals LILCO seeks to depose) to "County Emergency Managers" (collectively the "Germano document").[15/] According to the cover memorandum at page 1, the "planning guidance" was "developed to provide generic guidance for counties that are within the ingestion exposure pathway [of operating nuclear power plants in the State and those bordering the State]. It includes responsibilities of local, state and federal governments and the utility." (Emphasis added.) Not once has the State identified this document in its responses to LILCO's interrogatories requesting the identification and production of all plans and procedures involving an ingestion pathway response. LILCO obtained it from another source.[16/] This document squarely refutes the State's claims in the REPG Affidavit that detailed, site-specific plans and procedures must be developed for each facility. REPG Affidavit at 4, 9, 13, 17 and 18. The Germano Document presumptively was intended for distribution to all counties in a 50-mile EPZ; the document, by its own proclamation, is generic; and the document clearly implies that, prior to this time, the recipient counties did not have any plans and procedures (let alone site-specific ones) for an ingestion pathway response.

15/ This document is Attachment 1 to LILCO's Brief on the Appropriate Remedy for the Intervenors' Failure to Comply with Board Orders (June 15, 1988).

16/ The existence of this document and the obvious inconsistencies it shows in the State's representations beg the question: "What other documents haven't been produced that would show further inconsistencies?"

5. During his deposition, SEMO Director Donald DeVito was asked about "radiological emergency preparedness plans that cover or provide for any response by New York State or Suffolk County to a radiological emergency at any nuclear facility located in the State of Connecticut." DeVito Depos. (April 29, 1988) at 7-8. Mr. DeVito claimed to have no knowledge of any such plans. Id. It is suprising that Mr. DeVito was not aware of the Germano document since it is fairly new and since Mr. Germano reports directly to him. See Id. at 45.

6. Mr. DeVito was also asked about his knowledge of SEMO procedures "for alert and notification for any ingestion pathway response within Suffolk County for the [Connecticut] Millstone plant." DeVito depo. at 85. Mr. DeVito claimed no knowledge of any such procedures. Id. The Germano document, however, makes it clear that SEMO is responsible for alert and notification activities involving an ingestion pathway response during a radiological emergency at a nuclear plants in a bordering state. Germano document at 8, 9, 10, and 15 and page 1 of the cover memorandum.

7. Mr. DeVito was asked if SEMO "was involved in any way in training state or local personnel in connection with any radiological emergency response plans for nuclear power plants in the State of New York other than Shoreham." DeVito depos. at 86-87. Mr. DeVito replied that he was "not aware that [SEMO did] any radiological training specifically to qualify people to deal with a response at a nuclear power plant other than Shoreham." Id. Page 15 of the Germano document says that one of SEMO's functions is to "provide training and awareness to state and local officials. . . ." Unless Mr. DeVito's testimony cannot be squared with his agency's current guidance, unless he (though head of the agency) was unaware of that guidance.

It may well be that these discrepancies, and others going to the good order and integrity of parties' participation in this proceeding, can all be reconciled But LILCO is at least entitled to probe these matters to determine whether it and the Board have

been misled. And as long as the parties in possession of this information -- Suffolk County and New York State -- are active in this proceeding, they cannot refuse to permit inquiries into matters which have affected the shaping and disposition of substantive issues in the case.

C. The Procedures Being Used In the Current Inquiry are Appropriate

Intervenors' final argument is that the normal devices under the Rules of Practice are inappropriate for the conduct of the current inquiry. This argument does not need, at least at this point, extended treatment. Nothing in the Regulations states that the procedures to assemble information which may bear on the imposition of sanctions are different from those used in the compiling of the rest of an adjudicatory record.

Intervenors' suggestion that 10 CFR § 2.722 "constrains" the Board to appoint an additional member (in a manner not illuminated by Intervenors) is unpersuasive. The procedures in § 2.722 relating to "taking evidence and preparing a suitable record for review" pertain to all proceedings and issues, and not specially to inquiries of the current type. More important, they are entirely discretionary with the Presiding Officer.

Further, not only the Board but LILCO has an active interest in the maintenance of the integrity of this proceeding. LILCO has a due process right to a fair and impartial trial of its application for Shoreham. And it, as well as the Board, has standing to pursue information bearing on the issue. Nothing in the regulations disables LILCO from seeking information relating to sanctions against opponents in litigation if such sanctions are appropriate.

As for the suggestion that a threshold of proof needs to be satisified to warrant such inquiry, LILCO submits that any such requirement has been more than satisfied to permit further inquiry of both County and State personnel. As to the plan itself:

1. The Suffolk County Plan, a composite document of some 750 pages, exists. It existed in 1982-83. It is an official Suffolk County document effective now and was an official document effective in 1982-83. Why was it not identified or produced in discovery?

2. LILCO did not hold the Suffolk County Plan when it was produced in May 1988. There is no evidence in LILCO's comprehensive records that it was ever produced. LILCO is very confident that the document was never produced in discovery.

3. Suffolk County asserts that County personnel provided the document to Frank Jones, a former Deputy County Executive in 1982. They also claim that it was identified to counsel for production. They have no record of its production. Their records of document production have apparently been returned to Suffolk County and disappeared. The County refuses to answer questions about the whereabouts or fate of those records. What has happened?

4. The relevance of the Suffolk County Emergency Operations Plan to the realism argument is immediately obvious and enormous. LILCO believes that if this document had been turned over in 1982 LILCO could have developed the details of the realism argument much more rapidly than has been possible without it. LILCO also believes that there thus is a significant likelihood that with such earlier development of detail, acceptance of the realism argument, and hence the course of this proceeding, would have been advanced by years as a result.

5. Suffolk County personnel have consistently given answers in testimony that pointed away from the existence of this plan. Further, the Suffolk County has never proffered any personnel from their Department of Emergency Preparedness, which maintained the plan, as sponsors of testimony, and has evaded depositions of persons noticed by LILCO who should be knowledgeable about the Suffolk County Plan.

6. New York State personnel appear to disclaim active knowledge of the Suffolk County plan. But the plan contains important segments labeled "Prepared by the State." It also appears to have been prepared as part of a comprehensive statewide series of plans relating to comprehensive civil defense under federal statutes which include nuclear power plant accidents within the scope of civil defense. Civil Defense Act of 1950, 50 U.S.C. App. § 2252(b), (c); Disaster Relief Act, 42 U.S.C. §§ 5121, 5122. It would appear unlikely that no one in the State government was aware of this series of plans and of the Suffolk County plan.

7. In their Motion to Vacate, Intervenors disclose that a copy of the Suffolk County Plan was found in the possession of the State Emergency Management Office (SEMO) on June 6, 1988, and was first received by SEMO on May 6, 1988. That was four days before this Board ordered (on May 10) production of all State and County emergency plans. Who sent the Suffolk County Plan to SEMO, and why? Who at SEMO received it or knew of its existence? Why was the Plan not produced to LILCO by the State or the County until May 25, 1988? Did SEMO maintain prior versions of the County Plan, or review or know about them?

As to separate matters, particularly those involving the state, the list of discrepancies from recent discovery and testimony, at III.B.4 above, suffices.

In short, if a threshold for inquiry exists, LILCO believes it has been satisfied.

IV. Conclusion

Intervenors' "Motion to Vacate" is nothing but a baseless motion to reconsider the Board's June 10 and 17 Order. At this point it is untimely and prejudicial.

The substantive arguments in the Motion are incorrect. It distorts the focus, scope and duration of discovery in an attempt to shift attention from the basic fact that this discovery is an inquiry into whether Suffolk County and New York State, separately or together, have acted in ways which have materially deflected the course of this proceeding from the standards required by the Commission's rules.

The immediate tangible effect of Intervenors' motion and the position it represents is that Intervenors have again defaulted on compliance with this Board's discovery orders and prevented discovery from being taken.

This situation is grave. Without making any tangible showing of prejudice by allowing discovery to proceed, or attempting at all to rebut the factual allegations advanced by LILCO in support of its application for discovery, Intervenors have now defied a Board order repeatedly on at least three different dates -- May 10, June 10, June 17. By now, there can be no mistake that their default is deliberate. As the Board has correctly noted, both the subject matter of the discovery and the parties' obedience to its lawful orders raise issues of enforcement of the integrity of Commission proceedings. It seems plain that intervenors simply do not intend to be governed by the Board on this basic and pervasive issue.

It is difficult to maintain the good order of a proceeding when one or more parties repeatedly place themselves above the Board both procedurally and substantively. It prejudices LILCO' ability to continue the good-faith prosecution of its license application. It prejudices this Board's ability to perform its role in the Commission's structure.

LILCO believes that the time has come for the Board to consider seriously the extreme sanctions of dismissal of the governmental Intervenors -- Suffolk County, New York State and the Town of Southampton -- from the spectrum of issues remaining before it. This involves, as to offsite emergency "plan" issues (in addition to the realism/best efforts issues) the issues of hospital ETEs and school bus driver role conflict, which have been tried and are now in the findings process. It also involves the EBS issue, for which LILCO has moved on June 20 for summary disposition. It involves the 25% license motion. Finally, it involves issues relating to the June 7-9, 1988 FEMA-graded offsite emergency preparedness exercise.[17/]

17/ On this issue, the adequacy of LILCO's performance would be determined by the usual course of FEMA review in a Post-Exercise Assessment of the exercise, which would then be subject to review by the Commission's staff.

In the event that the Board wishes, before acting definitively, to give Intervenors unmistakable notice of what awaits their continued defiance, it may choose to order them one final time to comply with discovery. The schedule approved by the Board on June 17 has been effectively mooted by Intervenors' latest refusals to obey it. Accordingly, LILCO requests, in the event that the Board is inclined to provide yet another chance to Intervenors, that it approve the modification, attached as Attachment 3 hereto, to the schedule approved on June 17. This modified schedule is the same as that approved on June 17 except to allow a week for the slippage caused by Intervenors' refusals to comply. LILCO is also today requesting the Board to issue one additional subpoena, to former Deputy Suffolk County Executive Frank Jones, given his pivotal role in custody of the Suffolk County Emergency Operations Plan and in Suffolk County's emergency planning litigation strategy.

Prayer for Relief

For the reasons stated above, the Board should dismiss the Intervenors from the operating license proceeding for repeated and deliberate defaults involving failure to comply with its orders or to seek relief from them in the manner provided by the Commission's rules. Alternatively, the Board should:

1. Deny the Intervenors' June 20 motion to vacate;

2. Deny the Intervenors' June 21 motion to quash the subpoenas of Messrs. Roberts and Regan;

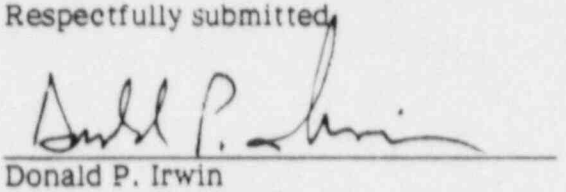
3. Grant the subpoena requested by LILCO for Frank Jones;

4. Grant the deposition schedule set forth in Attachment 3, which reaffirms earlier deposition schedules with dates modified to recognize an approximately one-week slippage;

5. Reaffirm its previous order that Intervenors respond fully, in writing and under oath, to LILCO's Third Set of Interrogatories, dated June 7, 1988.

6. Instruct Intervenors that failure to comply fully with the orders in paragraphs 3, 4 and 5 above without having obtained advance interlocutory relief therefrom will result in their dismissal from this docket, which encompasses all remaining operating license issues for the Shoreham Nuclear Power Station.

Respectfully submitted,



Donald P. Irwin
James N. Christman
K. Dennis Sisk
Counsel for Long Island Lighting Company

Hunton & Williams
707 East Main Street
P.O. Box 1535
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DATED: June 23, 1988

Attachment 1

Attachment 1

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June 21, 1988

FILE NO 24566.300001
DIRECT DIAL NO 804 788- 7250

BY TELECOPY

Lawrence Coe Lanpher, Esq.
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Board Ordered Discovery

Dear Larry:

This letter confirms our telephone conversation of this afternoon. I asked whether your firm is representing Messrs. Regan and Roberts. You stated that you are filing motions to quash the subpoenas for their depositions, had been authorized to do so by Messrs. Regan and Roberts, and were representing them at least to that extent. As of 4 PM, I still have not seen the motions to quash, but presume they are being telecopied to us today. I asked whether you had requested a Board ruling on the motions to quash today; you said "not explicitly." You stated that you had spoken with Mr. Regan today, that he had not yet been served with the subpoena, but that you were not relying on that "technicality" in your motion to quash. I therefore asked where Mr. Regan was when you spoke to him; you stated you did not know, that he had called you, and that you did not ask where he was. We have served Mr. Roberts, but we have not yet succeeded in serving Mr. Regan either at his home or office; we plan to continue our attempts to effect service of the subpoena on Mr. Regan.

I asked whether Messrs. Regan and Roberts would appear for their depositions absent further order from the Board (Mr. Roberts' deposition is scheduled for tomorrow, June 22 at 9 AM, and Mr. Regan's deposition is scheduled for June 23 at 9 AM); you stated that they would not appear for the subpoenaed depositions, and referred me to 10 CFR § 2.720(f). As I stated, it is LILCO's position that a duly issued subpoena imposes an obligation to comply unless and until the Board (or

the Commission) quashes or modifies the subpoena. That is what 10 CFR § 2.720(f) provides. Nonetheless, because LILCO cannot control whether you comply with the subpoenas issued for Messrs. Roberts and Regan, we have cancelled travel plans and court reporters based on your representations.

Finally, I asked whether the County intends to answer LILCO's Third Set of Interrogatories today, as ordered by the Board most recently in the teleconference on June 17. You stated that that issue was under "advisement." I appreciate your commitment to telecopy to me any answers or objections the County may determine to file.

Sincerely yours,

K. Dennis Sisk

201/374
cc: Richard J. Zahnleuter, Esq.
Richard G. Bachmann, Esq.
William R. Cumming, Esq.

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June 21, 1988

FILE NO 24566.300001
DIRECT DIAL NO 804 788- 7250

BY TELECOPY

Richard J. Zahnleuter, Esq.
Deputy Special Counsel to the
Governor of the State of New York
Executive Chamber
Room 229
Capitol Building
Albany, New York 12224

Board Ordered Discovery

Dear Rick:

This letter confirms our telephone conversation this afternoon. I asked whether the State intended to file responses to LILCO's Third Set of Interrogatories today, as ordered by the Board most recently in the teleconference on Friday, June 17. You stated that your position on the Interrogatories was as set forth in the Government's Motion for Licensing Board to Vacate June 17 Order, filed yesterday, and that the State will make no further response to the Interrogatories and production requests during the pendency of that motion. I also inquired whether, if ordered by the Board, Dr. Axeldod could be made available for deposition earlier than July 7. You stated that July 7 is Dr. Axelrod's earliest available date.

Sincerely yours,

K. Dennis Sisk

201/374
cc: Lawrence Coe Lanpher, Esq.
William R. Cumming, Esq.
Richard G. Bachmann, Esq.

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LAWRENCE COE LANPHER
(202) 778-9011

June 21, 1988

VIA TELECOPY

Dennis Sisk, Esq.
Hunton & Williams
P.O. Box 1535
707 E. Main Street
Richmond, Virginia 23212

Dear Dennis:

I am in receipt of your letter of June 21 purporting to "confirm" our telephone call today. I need not address your first two paragraphs, since the Motion to Quash sets forth the pertinent facts. However, the last paragraph is not complete.

You asked whether the County would respond today to LILCO's Third Set of Interrogatories. Among other things, I pointed out to you the Governments' June 20 Motion, in which the Governments made clear that (a) no answers should be required but (b) at any rate, the responsive data to those interrogatories were available to LILCO. See June 20 Motion at 11-12.

You seemed to question whether the data set forth at pages 11-12 of the June 20 Motion were responsive to the Interrogatories. However, as we have said before, only limited data are available regarding discovery matters which took place 5-6 years ago. Those data are set forth in the June 20 Motion, and largely repeat data which were previously made available to LILCO.

Sincerely,

Lawrence Coe Lanpher

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June 22, 1988

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BY TELECOPY

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Board Ordered Discovery

Dear Larry:

I received your letter of June 21, 1988, responding to my letter earlier that same day. I did not receive any answers or objections to LILCO's Third Set of Interrogatories, as your letter seemed to forebode. I must take issue with your statements that "the responsive data to those Interrogatories were available to LILCO" and that "the data set forth at pages 11-12 of the June 20 Motion were responsive to the Interrogatories." Among other things, there has been no answer to the questions concerning the files of Kirkpatrick & Lockhart which, you stated that the hearing before the Board on June 3, were returned in 1985 to the Suffolk County Attorney's office (Interrogatory No. 124). Further, at this stage of the proceeding, LILCO cannot accept, without further explanation and inquiry, the Intervenors' representations as to what certain people, selected and identified by the State and the County, "could be expected to testify" (Motion to Vacate, p. 12 n.10), particularly when LILCO has requested, and the Board has repeatedly ordered, the depositions of other individuals whom the State and County have declined to produce. Finally, to the extent that your letter suggests that LILCO's Third Set of Interrogatories have, in substance, been answered, that certainly is not true as a procedural matter. Answers must not only be responsive, they must also be verified, under oath, by

the person making them, and the person making them must have personal knowledge of the facts stated or knowledge based on reasonable inquiry. The Board has ordered answers to the Interrogatories, not incomplete "data" set forth in footnotes to a motion.

Sincerely yours,

K. Dennis Sisk

201/374
cc: Richard J. Zahnleuter, Esq.
Richard G. Bachmann, Esq.
William R. Cumming, Esq.

Attachment 2