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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BRANCH

Before the Atomic Safety and Licensing Board

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

ANSWER OF SUFFOLK COUNTY, THE STATE OF NEW YORK
AND THE TOWN OF SOUTHAMPTON TO LILCO'S MOTION FOR
SUMMARY DISPOSITION OF CONTENTIONS 5 AND 6

The Governments (Suffolk County, the State of New York, and the Town of Southampton) hereby respond to "LILCO's Motion for Summary Disposition of Contentions 5 and 6 (Making Decisions and Telling the Public)," dated December 18, 1987 (hereafter, "LILCO's 5/6 Motion"). We do not repeat at length herein the arguments made in the Overview Memorandum in Support of Governments' Opposition to LILCO's Motions for Summary Disposition of Contentions 1-2 and 4-10, filed simultaneously herewith (hereafter, "Governments' Overview"), but incorporate them by reference.

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The Governments' Overview demonstrates why LILCO's 5/6 Motion, as well as its other December 18 summary disposition motions relating to particular contentions, must be denied as a matter of law. The Governments respond below to the arguments made with particular reference to Contentions 5 and 6, which LILCO urges in its 5/6 Motion. We demonstrate that there are material facts in dispute and that LILCO's arguments provide no basis to grant summary disposition of Contentions 5 and 6.

I. INTRODUCTION

LILCO's 5/6 Motion suffers from the same infirmities which caused this Board to deny LILCO's last attempt to obtain summary disposition of Contentions 5 and 6.^{1/} It is fundamentally premised on a mischaracterization of the issues raised by Contentions 5 and 6 and by CLI-86-13, in direct contradiction of this Board's prior orders. It is premised on a definitively rejected argument that the Governments would authorize LILCO to perform police power functions, an argument which ignores the binding precedent of Cuomo v. LILCO, Consol. Index No. 84-4615

^{1/} See Memorandum and Order (Ruling on Applicant's Motions of March 20, 1987 for Summary Disposition of the Legal Authority Issues and of May 22, 1987 for Leave to File a Reply and Interpreting Rulings Made by the Commission in CLI-86-13 Involving the Remand of the Realism Issue and Its Effect on the Legal Authority Question), LBP-87-26, ___ NRC ___ (Sept. 17, 1987) (hereafter, "September 17 Order"); Memorandum and Order (Ruling on Applicant's Motion of October 5, 1987 for Reconsideration and Other Relief), LBP-87-29, ___ NRC ___ (Oct. 29, 1987) (hereafter, "October 29 Order"). We refer herein to LILCO's Second Renewed Motion for Summary Disposition of the "Legal Authority" Issues (Contentions EP 1-10) (March 20, 1987) as the "March 1987 Motion."

(N.Y.Sup.Ct., slip op., Feb. 20, 1985). It is premised on an unfounded claim that the LILCO Plan has been found to comply with NRC requirements. It is based upon LILCO suppositions and speculation which lack any factual or record basis. It ignores the evidentiary record in this proceeding concerning how the Governments would respond in an emergency, even assuming a "best efforts" response.

Furthermore, LILCO's reliance upon the recent amendment to 10 CFR § 50.47(c)(1) to argue that its 5/6 Motion should be granted although its March 1987 Motion was not, is misplaced. As demonstrated in the Governments' Overview, LILCO's 5/6 Motion, like all its December 18 motions, is premised on a fundamental mischaracterization of the new rule, its applicability in this adjudication, and what that rule authorizes or permit. this Licensing Board to do, in light of the law of the case and the evidentiary record in this proceeding. See Governments' Overview, Section III.

LILCO's 5/6 Motion boils down to a recitation of what LILCO proposes, intends, or believes that LILCO and LERO could or would do in the event of a Shoreham emergency. It contains no facts about what the Governments would or could do; but rather, presents suppositions and theorizing about what LILCO expects, predicts, hopes, assumes, or wishes the Governments would do. Thus, its discussion of notifications, communications, briefings,

and coordination -- all supposedly originating from LILCO/LERO and going to Government personnel -- addresses only one half of those processes: LILCO's half.

Moreover, LILCO's discussion contains no facts about what the Governments would or could do after the LILCO notification, communication, or coordination attempts occurred. It thus fails to address altogether the essence of the issues raised by Contentions 5 and 6 which this Board recognized in its September 17 Order: how, when and if the Governments would receive, accept or address LILCO notifications and communications; how, when or if the Governments would make decisions, including those relating to protective action recommendations; how, when, if and by whom notifications, emergency information and protective action recommendations would be communicated to the public; how, by whom and whether an emergency response could be managed, controlled, and coordinated; and whether any such actions by the Governments would be adequate, would comply with the regulatory requirements, or would provide reasonable assurance that adequate protective measures could and would be taken to protect the public.

In short, LILCO ignores the real issues. The Board recognized in the September 17 Order that the evidentiary record did not answer the foregoing questions. In its latest Motion,

LILCO essentially ignores the Board's prior ruling and urges the Board to close its eyes to the previously-identified issues. The Board must deny the 5/6 Motion.

II. LILCO'S 5/6 MOTION REPEATS ARGUMENTS ALREADY DEFINITELY REJECTED BY THIS BOARD

A. LILCO Mischaracterizes the Contentions and Ignores the Issues Identified by the Board and the Commission

LILCO's 5/6 Motion is fundamentally premised upon LILCO's characterization of the issues raised by Contentions 5 and 6. It asserts that those contentions "are basically about deciding whether the public should shelter or evacuate and telling the public about the decision." LILCO's 5/6 Motion at 1. Alternatively, it characterizes the issues as whether sirens would be sounded and protective action recommendations broadcast to the public over the emergency broadcasting system. Id. This Board has already definitively rejected LILCO's facile rewriting of Contentions 5 and 6. In fact, the Board itself identified the substantive issues which lie at the heart of those contentions, when viewed in light of LILCO's realism defense to them. The Commission also identified specific issues, requiring findings of fact, arising out of Contentions 5 and 6 and LILCO's realism defense. LILCO's 5/6 Motion must be denied for the same reason

its March 1987 Motion was denied: it fails to provide any basis in the record for this Board to rule on the actual issues presented by Contentions 5 and 6 and CLI-86-13.^{2/}

1. The Issues Raised by the Contentions
Themselves in Light of LILCO's Realism
Defense

Contention 5 states:

LILCO is prohibited by law from activating sirens and directing the broadcast and contents of emergency broadcast system ("EBS") messages to the public N.Y. Penal Law §§ 1190.25(3), 195.05 (McKinney); N.Y. Exec. Law § 20 et seq. (McKinney). Under the LILCO Plan, LILCO employees are expected to order that sirens be activated. They are also expected to determine the contents of EBS messages, to determine that an EBS broadcast should be made, and to direct that such broadcast occurs. (See OPIPs 3.3.4 and 3.8.2) Because LILCO employees are prohibited by law from performing such actions, the LILCO Plan cannot and will not be implemented, and the Plan fails to comply with 10 CFR Section 50.47(b)(5) and NUREG 0654 Sections II.E.5 and E.6. Moreover, in assigning such functions to LILCO employees, the Plan fails to comply with 10 CFR Part 50, Appendix E, Section IV.D.3.

Thus, Contention 5 presents the issue of whether LILCO has legal authority to perform all the actions set forth in its OPIPs 3.3.4 and 3.8.2. They include deciding when, how frequently, and how to activate sirens, activating them, deciding when, how, and how frequently to make EBS broadcasts, determining the content and

^{2/} As noted in the Governments' Overview, Section III, CLI-86-13 is the law of the case in this proceeding and must be followed by this Licensing Board. The adoption of the new rule does nothing to change that fact.

format of EBS messages to be broadcast, actually drafting EBS messages, and directing that messages actually be broadcast. The Contention also presents the issues of whether there is compliance with Section 50.47(b)(5), Part 50, Appendix E, Section IV.D.3; and NUREG 0654 Sections II.E.5 and E.6.

LILCO's realism affirmative defense to Contention 5, which is the subject of this CLI-86-13 remand proceeding, asserts that its conceded lack of legal authority is of no consequence because a "best efforts" Government response, combined with the LILCO Plan and alleged actions to be taken by LILCO/LERO personnel, would result in the adequate performance of all the functions identified in Contention 5, in a manner that complies with the cited regulatory requirements and permits a reasonable assurance finding, as required by 10 CFR § 50.47(c)(1)(iii).

Contention 6 states:

LILCO is prohibited by law from making decisions and official recommendations to the public as to the appropriate actions necessary to protect the public health and safety. N.Y. Penal Law §§ 19G.25(3), 195.G5 (McKinney); N.Y. Exec. Law § 20 et seq. (McKinney). Under the LILCO Plan, all command and control functions, as well as all management and coordination of the entire emergency response, are to be performed by various LILCO employees or, in the case of the "Radiation Health Coordinator," by an unidentified LILCO "Contractor." (See Plan at 3.1-1; OPIPs 2.1.1, 3.1.1, 3.6.1). Thus, contrary to 10 CFR Part 50, Appendix E, Section IV.A, LILCO employees and contractors rather than "state and/or local officials" are identified as responsible for planning, ordering, controlling and implementing the offsite response including appropriate protective actions. Because LILCO is prohibited by law from performing such functions, its Plan cannot and

will not be implemented, and it fails to comply with 10 CFR Sections 50.47(b)(5), 50.47(b)(6), 50.47(b)(10), and NUREG 0654 Sections II.E.5, E.6, E.7, G, J.9 and J.10.

Thus, Contention 6 presents a central issue: can LILCO exercise any of the command and control authority necessary to plan, order, control, direct, and implement an offsite response to a radiological emergency, including, specifically, the decisionmaking processes involved in determining and communicating to the public, appropriate protective action recommendations. LILCO's realism affirmative defense to Contention 6 presents the issues of whether any portions of LILCO's Plan could or would be implemented, whether, how, and according to what criteria and means, protective action recommendations would be decided upon and communicated to the public, and whether the cited specific regulatory requirements and 10 CFR § 50.47(c)(1)(iii) could or would be satisfied, in addition to Section 50.47(a)(1), assuming a "best efforts" Government response. To assert that Contention 6 can be "boiled down" into "deciding between sheltering and evacuation and telling the public about it," as LILCO so glibly asserts (5/6 Motion at 1), is absurd.

LILCO's argument relating to Contention 6 ignores the complex processes which, by LILCO's own admission, are involved in the decisionmaking and command and control functions necessary to implement LILCO's Plan, even assuming a "best efforts" Government response. LILCO's own Plan and procedures comprise five

volumes; the vast majority of these materials relate to the decisionmaking and implementation of protective action recommendations, and they include references to computer programs and analyses which are voluminous, and not even contained in the procedures. And, as noted above, by purporting to limit the "issue" presented by LILCO's realism defense to Contention 6 to solely a choice between sheltering and evacuation recommendations, LILCO ignores all the other command and control decisionmaking which the implementation of its Plan, the provisions cited in Contention 6, and a response to a Shoreham emergency, would in fact entail, given a "best efforts" Government response. Its bald assertion that "[t]he County would be able to exercise command and control of the emergency response" (LILCO's 5/6 Motion at 19) fails to address the practical personnel identification and location, information communication and processing, coordination, decisionmaking, and implementation issues actually presented by Contention 6, and which a ruling by this Board on that contention must address.

2. The Issues Identified in Board's Orders
and CLI-86-13

In its September 17 Order, this Board recognized that many substantive questions, which go to implementation capabilities and response adequacy, are raised by LILCO's realism defense to Contentions 5 and 6 and CLI-86-13. Specifically, with respect to Contention 5, this Board acknowledged that while sirens and telephone lines may exist, the Board, nonetheless, could not

reach any reasoned conclusion regarding the Commission's mandate to us to discover the effect of a "best efforts" response on such things as dose if we do not know whether, when, or by whom the sirens would be activated. We are thus unable to grant summary disposition

. . . .

September 17 Order at 30 (emphasis added). It held further, that despite the alleged existence of a New York State EBS, the record in this proceeding

leaves it unclear whether the New York State system, the LILCO system, some other system, or no system at all would be used in the event of an emergency. It is also unclear whether the messages prepared by LILCO or some other as yet unapproved set of messages would be used. Further, it is unclear who would decide when to broadcast the EBS messages and by what system.

Id. at 31. The Board held:

As with the siren sounding issue, we cannot resolve the questions surrounding the effect on the public health and safety of ad hoc government participation without a more exact picture of the governments' intended behavior. What EBS system will be used? How and at whose direction will it be activated? What messages will it broadcast? We shall require evidence on these matters.

Id. (emphasis added).

Similarly, after noting that LILCO had in its March 1987 Motion asserted that its realism defense to Contention 6 "boils down" to the "limited question" of "whether the State or County would be able to make a timely decision regarding sheltering or evacuation," the Board stated:

LILCO would have us take the Commission's assumption of "best efforts" and the Commission's belief that local officials would rely on the LILCO Plan as a "compendium" to compel the conclusion that any local official who assumed the burden of decision-making would make decisions identical to those mandated by LILCO for LERO. That leap of logic we cannot make. In order to decide the fundamental issues in this case, we require additional evidence on the questions: Who will assume charge in the event of an radiological emergency at Shoreham? Who will decide when protective actions are required? What criteria will the decision-maker (or decision-makers) use to determine the appropriate protective actions?

Id. at 31-32, 33 (emphasis added). In its October 29 Order, the Board refused to reconsider or change any of its conclusions.

The Board's orders not only correctly identified some of the issues raised by LILCO's realism defense to Contentions 5 and 6; they were also fully consistent with the Commission's directions in CLI-86-13. Specifically, the Commission ordered the Board to examine and make factual findings on the following issues pertinent to Contentions 5 and 6, among others, in determining what a "best efforts" State and County response to a Shoreham emergency would be and whether it would be adequate:

- The familiarity of pertinent State and County officials with the LILCO Plan;
- How much delay would be involved in alerting the public;
- How much delay would be involved in making decisions on protective actions;
- How much delay would be involved in making recommendations to the public on protective actions;

- Would evacuation be a viable protective action;
- Would any other protective actions be foreclosed.

CLI-86-13, 24 NRC at 31-32. See also this Board's Memorandum to the Parties at 2-3 (Oct. 8, 1987) ("the Commission was unwilling to assume that the best-effort government response would necessarily be adequate to overcome LILCO's legal inability to implement the emergency plan. It posed open questions . . . [and] stated that more information is needed. . . .").

LILCO's 5/6 Motion mentions some of the issues identified by the Board in its September 17 Order; however, it fails to provide any of the facts or evidence concerning those issues, which the Board and the Commission have definitively held are required. This failure is dispositive. It requires the denial of LILCO's 5/6 Motion.

The "Statement of Material Facts as to Which There is No Genuine Issue to be Heard on Contentions 5 and 6" attached to LILCO's 5/6 Motion fails to provide a basis for granting LILCO's Motion for the reasons just stated and those set forth below. In addition, however, the Governments have controverted those facts in the Affidavits submitted herewith, as detailed in the discussion which follows. Thus, the Governments identify the matters as to which there are facts in dispute in the "Statement of Material Facts as to Which There Exist a Genuine Issue to be Heard on Matters Raised by LILCO's December 18, 1987 Motion for Summary Disposition of Contentions 5 and 6" attached hereto.

B. LILCO's Reliance on Obtaining "Permission" or "Authorization" from the Governments Violates the Cuomo v. LILCO Decision and Has Been Definitively Rejected

LILCO's latest 5/6 Motion is premised -- precisely as was its March 1987 Motion -- on its argument that the Governments would authorize or permit LILCO to perform police power functions identified in Contentions 5 and 6 during a Shoreham emergency. As this Board has stated repeatedly, this argument is inconsistent with the binding precedent of Cuomo v. LILCO.

In its current Motion, LILCO asserts over and over that the Governments would engage in the unlawful delegation of police power to LILCO which the Cuomo v. LILCO decision held to be unlawful.^{3/} As noted in the Governments' Overview (see Section V), this Board has ruled definitively three times that LILCO's argument is without merit and contrary to Cuomo v. LILCO. For example, the Board held on September 17, 1987:

This claim that the State and County's response would take the form of authorizing LILCO to act for them was previously rejected by this Board

^{3/} For example, LILCO asserts: "the County would tell LERO to sound the sirens" (5/6 Motion at 2); a County official could "direct[] LERO to place the phone call to WPLR-FM . . . or WCBS, the lead station in the State system" (id. at 4); the LERO Director would "obtain permission to begin implementing certain elements of the emergency response" (id. at 13); "The LERO director would then request permission to initiate broadcast of an alert EBS message," and to "activate the siren system in conjunction with the broadcast of the EBS message" (id. at 14-15); "The LERO Director would then ask the County Executive if he might advise the members of the public . . . to shelter or evacuate by EBS message" (id. at 15); "The LERO director would be able to contact WPLR-FM directly and could initiate an EBS message immediately after approval was given by the Suffolk County Executive" (id. at 17-18).

in our Partial Initial Decision on the basis of Cuomo v. LILCO, supra, which holds that applicant cannot be delegated the authority to perform the functions enumerated in Contentions 1-10. Nothing in CLI-86-13 alters the Cuomo decision which so far has been upheld on appeal. . . . Applicant's claim that the Governments' response will be on a basis of what has been found contrary to law is meritless.

September 17 Order at 25 (footnote omitted; emphasis added).

And, in its' October 29 Order the Board stated once again:

The Board did not improperly apply Cuomo v. LILCO and make it determinative of the summary disposition motion as Applicant claims. The Licensing Board first applied Cuomo v. LILCO as part of its Partial Initial Decision in ruling on the legal authority issues. The Commission in CLI-86-13 never faulted the Licensing Board in its interpretation and application of Cuomo. The remand action the Commission took in CLI-86-13 was not inconsistent with how the Board applied Cuomo. For purposes of the remand, the Commission assumed that LILCO is prohibited from performing the State or County roles in the areas specified in Contentions 1-10.

In applying Cuomo to Applicant's motion for summary disposition, we did not change our prior interpretation of it. We again stated, inter alia, it prohibits the Government from delegating its police power. The Board considered that stricture along with how LILCO said it expected Interveners will operate in an emergency

LILCO incorrectly viewed our handling of Cuomo and Applicant presents no basis for reconsideration and granting the motion for summary disposition in its favor.

October 29 Order at 13-14. Consistent with its prior rulings, this Board must deny LILCO's 5/6 Motion, because it once again relies upon an argument which violates Cuomo v. LILCO.

C. LILCO's Argument that the LILCO Plan Has Been Found Adequate and in Compliance With NRC Requirements Has Already Been Rejected

In its 5/6 Motion, LILCO relies upon yet another definitively rejected claim -- that the LILCO Plan has been found adequate and in compliance with NRC requirements. Such a claim was unfounded when made in LILCO's March 1987 Motion and this Board expressly ruled to that effect. See September 17 Order at 24 (LILCO's "claim that its plan complies with NRC requirements is contrary to the record."). It is even more unfounded now, in light of the recent Exercise Decision which found LILCO's Plan fundamentally flawed in many respects. See Governments' Overview, Section VI.

LILCO relies heavily upon "the existing record," and matters allegedly "previously litigated and decided in LILCO's favor," in arguing that summary disposition should be granted on Contentions 5 and 6. For example, LILCO asserts "the existing record provides ample evidence that, as part of a 'best efforts' emergency response, the early warning sirens would be sounded, and protective action recommendations would be broadcast to the public over the emergency broadcasting system." LILCO 5/6 Motion at 1. It asserts, further, that a "'more exact picture' of how the Intervenors would respond can be drawn from the existing record," and "[t]he existing record offers a clear description of how a coordinated response, using the LILCO Plan, would occur in the event of an emergency at Shoreham." Id. at 13. Similarly,

in asserting that Government officials would utilize LILCO's EBS messages to communicate with the public during an emergency, LILCO asserts "to the extent [the Governments] have quarrelled with [LILCO's EBS messages], their arguments have been rejected by the NRC." Id. at 16.^{4/}

This Board has already found, and repeatedly told LILCO, that "the existing record" does not establish either that the LILCO Plan complies with NRC requirements, or that a "best efforts" Government response will assure an adequate response. See, e.g., September 17 Order at 24; October 29 Order at 14.^{5/}

^{4/} Amazingly, LILCO also asserts that its new proposed EBS network is "capable of notifying the entire EPZ of the Shoreham emergency, capable of activating tone alert receivers," and would play "a crucial role in notifying the public." 5/6 Motion at 17. As this Board knows, the question of the adequacy, effectiveness, and regulatory compliance of LILCO's new proposed EBS system has not yet even been litigated, much less ruled upon in LILCO's favor in this proceeding. See also Section III below.

^{5/} See also Memorandum to the Parties, Docket No. 50-322-OL-6 (25% Power) (Oct. 6, 1987) at 6:

Applicant considered the unresolved offsite emergency planning matters to be minor deficiencies, that are remediable and represent no bar to a full power license. The Licensing Board does not consider them to be minor deficiencies. Only after further hearing can it be determined whether the fatal flaws the Licensing Board found are remediable and not a bar to the issuance of a full power license. Applicant misconstrues the record. LILCO acts as if it received a reasonable assurance finding and all that there is left to do in that regard is to tidy up some minor deficiencies. To the contrary, a no reasonable assurance finding was made Applicant's claim that its plan complies with NRC requirements was found to be contrary to the record

(Emphasis added).

In its 5/6 Motion LILCO provides no additional basis in the record to support its summary disposition request. Its inability or unwillingness to do so is not surprising, since other than the Governments' Affidavits submitted with their May 11, 1987 Answer to LILCO's March 1987 Motions and that created in the Exercise litigation, no additional "record" has come into being in this proceeding since March 1987. LILCO apparently refuses to acknowledge that the Exercise litigation record and the Governments' May 1987 Affidavits provide even more support for the denial of its summary disposition motion.

Moreover, with its repeated reliance in its 5/6 Motion upon LILCO's alleged abilities to communicate with governmental officials and to implement emergency responses (with the alleged permission of governmental officials), LILCO relies upon portions of its Plan which the NRC has found to be fundamentally flawed, and LERO workers whom the NRC has found to be inadequately trained. See, e.g., Exercise Decision at 50, 52-53, 63-64, 86, 88, 180, 183-84, 194, 215-17, 249-52. See also Governments' Overview, Section VI. Thus, just as this Board previously rejected LILCO's argument underlying its March 1987 Motion that the LILCO Plan complies with NRC requirements and, that combined with the supposed actions of "trained LERO workers," a "best efforts" response would assure an adequate response to a Shoreham emergency (September 17 Order at 24), this Board must now reject

LILCO's latest 5/6 Motion. The Exercise Decision provides irrefutable evidence that the summary findings sought by LILCO cannot be made.

D. LILCO Relies on Already Rejected Supposition and Speculation and Ignores the Evidentiary Record Concerning the Nature of the Governments' "Best Efforts" Response

LILCO's 5/6 Motion also suffers from yet another fatal deficiency which characterized its March 1987 Motion, and which this Licensing Board has rejected twice. LILCO's latest ipse dixit theories concerning the form of a "best efforts" Government response and whether such response would fulfill regulatory requirements, are blatant in their refusal to acknowledge the evidentiary record in this proceeding. LILCO's conclusory assertions in its 5/6 Motion, just like those in its March 1987 Motion, are not based upon any facts. LILCO can cite no facts to support its theorized Government response because the facts, as set forth in sworn statements by the Governments themselves, directly contradict LILCO's self-serving and unfounded theories. See Governments' Overview, Section III.

As this Board has already stated:

[T]he "best effort" assumptions do not formulate a single response. They leave open to question how the Governments will respond and whether their response will be adequate in fulfilling regulatory requirements. The scenario that Applicant presents as to what form Intervenor's response would be during an emergency at Shoreham is unsupported by CLI-86-13, or otherwise in this record.

Applicant does not premise its assertion on what the Governments' response will be on undisputed fact. Rather it is based on the supposition of what the Applicant expects the State and County would do considering that they would have access to what the LILCO plan offers, something which in Applicant's view is an important resource. Thus, the response theorized is without factual basis.

September 17 Order at 26. The Board forcefully reiterated its conclusion in its October 29 Order:

The Board considered . . . how LILCO said it expected Intervenor's will operate in an emergency. Further, we took into account the evidentiary record in which the Governments stated that they would not implement the LILCO Plan, would not respond to a Shoreham emergency in concert or in partnership with LILCO, would not rely on LILCO recommendations or advice, and would not authorize LILCO to perform the functions in Contentions 1-10. Considering the best effort assumptions and the foregoing led the Board to the conclusion that it remained an open question as to how the Governments would respond in an emergency and whether their response will be adequate in fulfilling regulatory requirements. Material facts remained in dispute and on that basis we denied the motion for summary disposition.

October 29 Order at 13-14. These statements remain fully applicable today with respect to LILCO's 5/6 Motion, and with respect to LILCO's other motions as well. Accordingly, the Board must reiterate once again its denial of LILCO's attempt to obtain rulings in the absence of facts or evidence which support its unfounded theories.

Furthermore, the October 29, 1987 amendment to Section 50.47(c)(1) does nothing to change the Board's prior rulings or the required result with respect to LILCO's current 5/6 Motion. We address at length in the Governments' Overview (Section III) why LILCO's argument concerning the impact of the new rule on this proceeding must be rejected, and, therefore, do not repeat that discussion here. It demonstrates, however, that in fact, the new rule actually confirms and reinforces this Board's September 17 and October 29 rulings: the Board must decide this case based upon the facts and evidence before it; it must determine what form a "best efforts" response of the Governments involved in this case would take, based upon facts and evidence; the "presumption" in the new rule that governments would "generally follow a utility plan" -- assuming, arguendo, it could be adopted in this proceeding -- has been rebutted by evidence presented by the actual Governments whose actions are at issue; there is no basis upon which this Board could make the reasonable assurance finding necessary under the amended Section 50.47(c)(1)(iii) in light of the record before it.

This Board must reaffirm its prior clear and definitive holdings. Thus, in a ruling fully consistent with the new rule, this Board rejected the following LILCO argument in its March 1987 Motion:

all questions related to how a response specified by the 10 contentions will be implemented [are] to be answered by reliance on the Commission's "best efforts" assumption under which the Governments would have no choice but to

respond in conformance to LILCO's plan and delegate to it the authority it needs to implement a response.

September 17 Order at 45. This LILCO argument is essentially identical to the one upon which LILCO's latest 5/6 Motion is premised. And the referenced "best efforts" assumption was that in CLI-86-13, assuming a "best efforts" response "using the LILCO Plan" as "the best source of emergency planning information and options." As demonstrated in the Governments' Overview (Section III), that CLI-86-13 assumption is no different from the one in the new rule. Thus, this Board's September 17 ruling is still fully applicable:

We have found that the "best efforts" assumption is rebuttable in this case to the extent that it leaves open the question of the adequacy of the response. We do not accept LILCO's argument [quoted above] because we are not free to gloss over important factual matters by assumption without inquiry into the factual basis for that assumption. The Commission itself was unwilling to take that step in CLI-86-13 where it raised factual questions relating to the adequacy of performance of the State and County Governments in an emergency response under the "best efforts" assumption. Our analysis of the 10 contentions . . . reaches the conclusion that there remain factual questions of adequacy of the Governments' response for each of them. Furthermore, LILCO's belief that the "best efforts assumption compels but a single conclusion favorable to itself has been controverted by the Interveners

Id. at 45.

For the reasons set forth in the Governments' Overview, the new rule has essentially no impact on the validity of this holding. For the reasons already identified by the Board, then, LILCO's 5/6 Motion must be denied.

III. THE ARGUMENTS AND ASSERTIONS CONCERNING THE SPECIFICS OF CONTENTIONS 5 AND 6 ARE WITHOUT BASIS AND FAIL TO SUPPORT LILCO'S MOTION

As noted, the issues presented by LILCO's realism defense to Contentions 5 and 6, CLI-86-13, and the new rule require this Board to determine how the Governments would respond in an emergency (i.e., in the words of the Commission (52 Fed. Reg. 42082) "what form the 'best efforts' of state and local officials would take"), and whether that response would be adequate in fulfilling the regulatory requirements cited in Contentions 5 and 6, and would permit the 50.47(a)(1) and 50.47(c)(1)(iii) reasonable assurance findings. As the Board and Commission have noted in identifying questions requiring evidence in this proceeding, the Board's inquiry must focus on matters such as the following.

With respect to siren activation: how the State would learn of a Shoreham accident (because LILCO's RECS lines are not connected with any State officials cognizant of emergency response matters (see Papile Affidavit ¶ 4); how long it would take for the Governments to react to a call from LILCO reporting that there had been an accident at Shoreham; who the person or persons who received such a call would in turn have to contact,

how those contacts would be made, and how long they would take; who, and from which Governments, would need to be consulted in connection with a decision concerning when or how to activate sirens, how such consultations would take place, and how long they would take; who would make the decisions; what data, information, and criteria would be needed, desired, consulted, or relied upon by the unknown decisionmakers and/or their advisors in determining when to activate sirens and how to do so; and if a decision were made to activate sirens, how that decision would be implemented, by whom, and how long that would take.

With respect to EBS activation, decisions to broadcast emergency messages to the public, implementation of those decisions, and contents of messages: what procedures would be followed by the Governments in attempting to decide whether to activate an EBS; who would have to be contacted in connection with the making of such a decision, how those contacts would be made, and how long they would take; who would need to be consulted in connection with a decision concerning when or how to activate an EBS, how such consultations would take place, and how long they would take; who would make the decisions; what data, information, and criteria would be needed, desired, consulted, or relied upon by the unknown decisionmakers and/or their advisors in determining whether or when to activate an EBS and how to do so; if a decision were made to activate an EBS, how that decision would be implemented, by whom, and how long that would take; whether whatever EBS system chosen for use by the Governments in

a "best efforts" response to a Shoreham emergency (assuming it were decided to utilize an EBS at all) would or could work as described in LILCO's 5/6 Motion; who would determine the contents of EBS messages, and what criteria would be used in making such determinations; who would draft EBS messages, who would need to approve them, and how long that would take; who would broadcast them, how would such broadcasts be made, how often would they be made; and what radio stations would be chosen by the Governments, whether these unknown stations have the capabilities to perform expected EBS functions, and how would they do so.

With respect to decisions as to protective action recommendations, command and control, management, implementation and coordination of the entire emergency response: who would be responsible for performing each of these functions; how long would it take to locate such persons and provide them with information they believed necessary and appropriate; what information would they require in order to perform such functions and make decisions they deemed necessary; how would they obtain it; what criteria and information would they utilize in making decisions, exercising command and control, and managing and coordinating an emergency response; what criteria would be used in determining protective action recommendations for the public; how would those criteria be applied to information actually available in an emergency; how long would such a process take; who would perform it; how would recommendations be communicated to the public, in what form, and how long would it take; what functions and what

personnel would need to be managed and controlled during an emergency response; could whoever was responsible for such management and coordination contact and communicate with all necessary personnel in order to accomplish management and coordination; and how would they do so, and how long would it take.

As we demonstrate below, LILCO's discussion in its 5/6 Motion provides no relevant factual or other basis or evidence in the record on any of these matters even though such facts are clearly necessary to a decision on Contentions 5 and 6. Indeed, LILCO's discussion only further highlights the outstanding questions of fact which remain outstanding and, consequently, why its summary disposition motion must be denied.

A. LILCO's Assertion that "LILCO Would be Allowed to Activate the Prompt Notification System and EBS" is Contrary to Law and the Evidentiary Record

Based on its title, Section II.A of LILCO's 5/6 Motion (pp. 2-4) is apparently intended to show that "LILCO would be allowed to activate the prompt notification system and EBS." LILCO's 5/6 Motion at 2. This entire section of LILCO's Motion must be rejected, however, because on its face it violates Cuomo v. LILCO. See Section II.B above; Governments' Overview, Section V. LILCO's argument that the Governments of New York or Suffolk County would allow LILCO to sound sirens or to prepare or disseminate EBS messages during a Shoreham emergency is also contradicted by the existing evidentiary record -- as the Board

acknowledged in the September 17 Order -- as well as by the additional sworn affidavits submitted herewith. See Cuomo Affidavit ¶ 6 and Attachment thereto; Halpin Affidavit ¶¶ 7-9 and Attachments 4 and 5 thereto. This section of LILCO's 5/6 Motion must also be rejected for the following additional reasons.

First, LILCO acknowledges that under the LILCO Plan, the only entities with legal authority to activate the LILCO sirens -- i.e., the County and the State -- are in fact physically incapable of doing so. According to LILCO, the LILCO sirens are "activated by a digital encoder system" and "the State and County do not have the encoder device or the authorization codes to access and activate the system." LILCO 5/6 Motion at 2. Therefore, under the LILCO Plan, the sirens could only be activated by means of actions which the New York Courts, this Board, the Appeal Board, and the Commission, have held to be unlawful.

It is also clear that even setting aside the unlawful delegation of authority which LILCO's 5/6 Motion assumes would take place, the sirens in fact could not be activated until LILCO had successfully located and contacted Government officials, communicated information to them, and the persons so notified had, in turn, identified, located and communicated with the appropriate Government officials who could deal with the LILCO-transmitted information and make a decision concerning whether and how to notify the public. Thus, LILCO's glib statement that "the County would tell LERO to sound the sirens because the public deserves to be notified and because there is no reason not to alert them"

(LILCO 5/6 Motion at 2, emphasis in original) ignores the fundamental issues presented by the siren-related portion of Contention 5 in light of LILCO's realism defense: whether, when, and by whom the sirens would be activated, how the decision would be made, and by whom and how long it would take. LILCO's empty, conclusory assertion flies in the face of this Board's September 17 Order which explicitly identified the matters which require evidence on the siren activation issue.^{6/}

Second, LILCO's references to unidentified county policies with respect to "other sites in New York," and to the Wayne County Plan for the Ginna plant (LILCO 5/6 Motion at 2-3, 4), are irrelevant. See Governments' Overview, Section VII; REPG Affidavit ¶ 9. It is undisputed that there is no Suffolk County emergency plan for Shoreham in existence. See Halpin Affidavit ¶¶ 5-6, and Attachments 3-5 thereto. There is no basis (nor does LILCO even suggest one), upon which this Board could find that Suffolk County officials would decide, in an actual emergency, to do something which officials from some other county may have written in a plan for some other plant, never seen by such Suffolk County officials.

Moreover, the referenced portion of the Wayne County Plan relied upon by LILCO in fact contradicts the argument it purportedly supports. The quoted portion of the Wayne County

^{6/} LILCO's assertion the New York laws cited in Contention 5 "give no reason why the County could not direct LERO to sound the sirens," ignores, once again, the binding precedent set forth in the Cuomo decision, as well as this Board's September 17 Order (see p. 25). See LILCO 5/6 Motion at 2-3 n.3.

Plan states with respect to sirens that "System control rests with Wayne and Monroe County officials within their respective border," and that "activation of sirens is the responsibility of the [Wayne County] Director, Emergency Management Office." LILCO Motion at 3, quoting Wayne County Plan at F-6 (emphasis added).

Third, LILCO's argument that "the same rationale applies to EBS messages as to sirens" (LILCO 5/6 Motion at 4) must also be rejected. It too relies upon an unlawful delegation of authority^{7/} and thus is a direct challenge to Cuomo v. LILCO and to this Board's prior rulings. It also ignores the fundamental questions of fact already identified by this Board and the Commission concerning how and by when EBS-related decisions would be made and implemented.^{8/}

For these reasons, the fundamental premise of LILCO's 5/6 Motion -- that LILCO would be permitted by the Governments to perform the functions identified in Contentions 5 and 6 -- is without basis.

^{7/} LILCO asserts "Once a County official had decided that it was appropriate to broadcast a protective action recommendation over the EBS, nothing in New York State law (or the Cuomo v. LILCO decision) would prevent him from directing LERO to place the phone call to WPLR-FM" Id.

^{8/} Moreover, LILCO cites no basis (nor can one be imagined) for LILCO's apparent belief that the primary station in the New York State EBS network -- WCBS -- would accept from a LILCO employee a protective action recommendation, or EBS message, to be broadcast to the public in New York State or in Suffolk County.

B. LILCO's Conclusion that "The Functions in Contentions 5 and 6 Would be Performed in a Manner Adequate to Protect Public Health and Safety" is Without Basis

In Section II.B of its 5/6 Motion, LILCO asserts that "further hearings are unnecessary to establish that the State and County could and would take the steps necessary to assure that the functions specified in Contentions 5 and 6 would be performed in a manner adequate to protect public health and safety." LILCO 5/6 Motion at 4-5. Based on this statement alone, LILCO's Motion must be summarily denied. It directly contradicts the law of this case as set forth in CLI-86-13 and this Board's September 17 and October 29 Orders. See Section II above. Nonetheless, we also demonstrate below that each of the so-called "reasons" asserted by LILCO to support its already-rejected conclusory assertion in fact fail to do so.

1. LILCO's Assertion that "The State and County Already Have Emergency Response Capabilities" has Already been Rejected and is Contrary to the Evidentiary Record

In Section II.B.1 of its 5/6 Motion, LILCO once again makes arguments which have already been rejected by this Board, and which are directly contradicted by sworn statements in the evidentiary record of this proceeding. Nothing in Section II.B of LILCO's Motion provides any basis for granting summary disposition of Contentions 5 or 6.

a. There is No New York State Plan
for Shoreham

In a two-page section of its Motion which is wholly devoid of analysis or reasoning, LILCO refers to the New York State plans for four nuclear power plants in an apparent attempt to support its allegation that New York State has some "emergency response capabilities." The Governments demonstrated in response to LILCO's March 1987 Motion, however, that neither the existence of a generic New York State plan, nor the existence of site-specific supplements for plants other than Shoreham, provides any information concerning how New York State officials would or could respond, on a "best efforts" basis, to a Shoreham emergency. Those irrelevant materials also provide no information whatsoever as to the adequacy of such a "best efforts" response to a Shoreham emergency.

Specifically, the Governments responded to LILCO's prior identical argument (see March 1987 Motion at 17) by pointing out that LILCO's 1987 assertion that New York State "is already prepared" to respond to a Shoreham emergency because there exists a generic plan for the State of New York is incorrect, as documented by the Papile Affidavit ¶¶ 2-3. The facts stated in that Affidavit have not been controverted; and LILCO's conclusory and baseless assertions in its 5/6 Motion do not constitute facts that could controvert those stated by Mr. Papile. The mere existence of a generic State plan is meaningless (1) in the absence of a Shoreham-specific State plan, which identifies and

includes the data, procedures, and other information necessary to permit an adequate and coordinated response by State personnel, and (2) in the absence of preparedness and training of such personnel with respect to such a Shoreham site-specific plan and procedures. Papile Affidavit ¶ 3; REPG Affidavit ¶¶ 5-9.

In denying LILCO's March 1987 Motion, this Board refused to accept as a basis for summary disposition in LILCO's favor, LILCO's identical argument that New York State "is fully prepared to cope with a radiological emergency by virtue of its plan for such emergencies at other plants in New York." See September 17 Order at 32-33. Furthermore, although there may be admitted facts concerning the existence of a New York State Plan for other nuclear power plants and provisions of such plans to the effect that under certain circumstances the State "will implement a County plan" (see LILCO 5/6 Motion at 5, 6, referring to "Admitted Facts 35 and 38"), this Board also held that:

The truth of LILCO's facts would not save its motion for summary disposition even if none of its facts had been controverted because they establish only that specified aspects of emergency planning can be done but do not establish what will be done as required by 10 C.F.R. 53.47(a)

September 17 Order at 44-45 (emphasis in original). The purported discussion of the New York State Plan set forth in LILCO's 1988 5/6 Motion provides no information, beyond that which this

Board already ruled was insufficient, concerning what form a "best efforts" response would take and whether that response would be adequate.^{9/}

Furthermore, the affidavits submitted herewith also demonstrate with specificity once again that the existence of a generic New York State plan, and site-specific supplements for plants other than Shoreham, provide no basis to determine what a New York State best efforts response would be to a Shoreham emergency. See Papile Affidavit ¶¶ 2-5; REPG Affidavit ¶¶ 5-9.^{10/}

b. There is No Suffolk County Plan for Shoreham

LILCO also devotes two pages of its 5/6 Motion to a discussion of what it refers to as a "Voorhees Plan" which was drafted in 1982. LILCO 5/6 Motion at 7-8. Although this section of LILCO's Motion again contains no analysis or reasoning, it is apparently included to support LILCO's assertion that "the County

^{9/} It is also significant that in its 5/6 Motion LILCO acknowledges that contrary to its assertion in March 1987, it does not in fact have a RECS line connection with the State of New York. See LILCO 5/6 Motion at 6 n.5.

^{10/} It should also be noted that the portion of the New York State Plan for other plants relied upon by LILCO is expressly premised on the existence of a County Plan for those plants. See, e.g., LILCO 5/6 Motion at 6. There is no county plan for the Shoreham plant. Thus, LILCO's assertion that "if the State is forced to assume command and control of the local response, it will not respond ad hoc but will instead implement the existing local plan using available local resources" (id.), is wrong if it is intended to apply to a "best efforts" response to a Shoreham accident.

already has emergency response capabilities." In fact, references to the so-called "Voorhees Plan" do no such thing. They are totally irrelevant.

As the existing evidentiary record makes clear and current Suffolk County Executive Halpin has confirmed, the purported "plan" referenced by LILCO in fact was a draft document prepared by Suffolk County consultants in 1982. The draft plan was presented to the Suffolk County Legislature, and following extensive hearings, the draft was definitively rejected. Pursuant to Suffolk County law, the draft plan was not adopted. It was not distributed to Suffolk County officials or departments. It is a nullity. Halpin Affidavit ¶¶ 6, 14 and n.6. Therefore, LILCO's discussion of the draft "Voorhees Plan" is irrelevant.^{11/}

Furthermore, the existing evidentiary record, and the Affidavit of County Executive Halpin, establish that Suffolk County has not -- and by law will not -- plan for a Shoreham emergency; that Suffolk County is not prepared to respond to a Shoreham emergency; that Suffolk County's personnel have not been -- and by law will not be -- trained to respond to a Shoreham

^{11/} It should also be noted that whatever facts or assumptions were included in that 1982 draft document may or may not remain true or accurate in 1988. Thus, if LILCO's apparent assumptions about the location of County facilities and who would be in charge of emergencies are based upon the rejected draft plan, they are without basis.

emergency; and that any "best efforts" response to a Shoreham emergency would be ad hoc, and would not follow the LILCO Plan. Halpin Affidavit and Attachment 3 thereto.

In sum, there is absolutely no basis upon which this Board could find as a fact that either New York State or Suffolk County has planned for, or has emergency response capabilities for, responding to a Shoreham emergency.

2. LILCO's Assertion That "Notification Systems Are Already in Place to Inform the State and County" Has Already Been Rejected and is Without Basis

Section II.B.2 of LILCO's 5/6 Motion (pages 8-12) presents an argument identical to the one LILCO made in its March 1987 Motion, which resulted in its denial. Thus, LILCO cites, as it did in 1987, portions of the LILCO Plan which provide that efforts would be made to notify State and County officials of a Shoreham emergency, as an alleged basis for granting summary disposition of the siren portion of Contention 5. See March 1987 Motion at 9-11. As this Board noted in its September 17 Order, however, even assuming the existence of a RECS line does not permit "any reasoned conclusion regarding the Commission's mandate . . . to discover the effect of a 'best efforts' response . . . if we do not know whether, when, or by whom the sirens would be activated." September 17 Order at 30. Clearly, even if the success of LILCO's notification efforts could be accepted as fact -- something which as we explain below cannot be done -- the

assumed success of such one-sided actions fails to address the fact issues presented for decision by Contentions 5 and 6 and CLI-86-13.

LILCO's entire discussion of the notification issue in its 5/6 Motion addresses only one side of the "notification" process: LILCO's side. And, while LILCO's Plan can and apparently does include directions to LILCO employees about how they should attempt to notify governmental officials, the mere existence of such directions provides no information at all about the result of such attempts. Whether they would reach anyone, how long it would take, whether the persons reached would be the appropriate officials with decision-making authority, and, if not, how long it would take to find such officials, and most importantly, what, if anything, would be done by the officials assuming the notification were eventually successful, are nowhere addressed in the LILCO Plan or in its 5/6 Motion. Those matters, however, as well as whether the resulting unknown actions by the Governments would be adequate under the NRC's regulations, comprise the crux of the issue to be decided by this Board in ruling on LILCO's realism defense to Contentions 5 and 6.

Moreover, it must be emphasized that LILCO's assumption that its notification and communication efforts would be successful, timely, effective, and adequate, is refuted by the Licensing Board's findings in the Exercise Decision. See the Governments'

Overview, Section VI. Thus, there is even more reason now than there was in September 1987 that this Board must reject LILCO's summary disposition motions as wholly lacking in basis.

Finally, LILCO's own affidavits fail to support LILCO's position; to the contrary, they confirm the Frye Board's conclusions that, with respect to communications capabilities, LILCO's Plan and its training program are fundamentally flawed. For example, the Affidavit of Douglas M. Crocker (cited in LILCO 5/6 Motion at 11 n.9) indicates that on March 18, 1987, when the LILCO Emergency Director declared an Unusual Event at 2:15, an attempt 15 minutes later to notify New York State and Suffolk County on the RECS lines, resulted in no response; an operator at the New York State Warning Point was not actually contacted for 27 minutes; an operator at the Suffolk County Warning Point was not actually contacted for 35 minutes; and, a representative of the New York State Health Department did not get in touch with LILCO for almost an hour (53 minutes after the declaration). Crocker Affidavit ¶ 6.

Similarly, on July 4, 1987, the LILCO Watch Engineer learned of a bomb threat at 6:45; an attempt to notify New York State and Suffolk County through the RECS lines at 7:07 was unsuccessful because the RECS system failed to operate; an operator at the New York State Warning Point was not contacted until 7:09; a Suffolk County operator was not contacted until 7:16; and, information concerning the emergency was not communicated to the State and County until 7:22. Id. at ¶ 7.

Finally, on December 4, 1987, the NRC Inspector informed LILCO of a bomb threat at 9:20; an attempt to notify New York State and Suffolk County on the RECS lines was made at 9:48 -- 28 minutes afterwards -- but there was no response; an operator at the New York State Warning Point was not contacted for 40 minutes; and a Suffolk County operator was not contacted for 41 minutes. Id. at ¶ 8.

Certainly, the facts in Mr. Crocker's Affidavit cannot be used to support the conclusion sought by LILCO: that LILCO's notification efforts and abilities were consistent with past demonstrations and assuming a "best efforts" Government response, the regulatory requirements cited in Contention 5 (including the 15-minute requirement set forth in Appendix E) could be satisfied, or that a reasonable assurance finding could be made. See Roberts 1988 Affidavit ¶ 15. In fact, in light of LILCO's demonstrated inability to perform notification and communications functions, precisely the opposite conclusion is the only one possible, regardless of the unknown "best efforts" governmental response that would follow such efforts.

As a final note, LILCO's reference to a Westchester County Plan (LILCO 5/6 Motion at 11-12) is inapposite for the reasons stated in the Governments' Overview (Section VII) and in Section III.A above. See also REPG Affidavit ¶ 9.

C. LILCO's Purported Answer to the Questions at Issue With Respect to Contentions 5 and 6 Adds Nothing of Substance to Its Already Rejected Arguments, and Is Contradicted by the Evidentiary Record

In Section II.B.3 of its Motion, entitled "The Sirens Would Be Sounded and Protective Action Recommendations Would Be Broadcast Over The EBS" (LILCO 5/6 Motion at 12-19), LILCO purports to address the questions identified in the September 17 Order as being at issue in this proceeding in LILCO's realism defense to Contentions 1-10.^{12/} Although this section fills six and one half pages of LILCO's 5/6 Motion, in fact it adds only three new things to the arguments already rejected in the September 17 Order: it adds some additional quotations from LILCO's Plan (Revision 9) concerning what LILCO personnel would attempt to do in a Shoreham emergency; it adds a discussion of LILCO's new EBS proposal (the litigation of which is just beginning in a separate proceeding), and it now asks the Board to assume that both the State EBS system and LILCO's new proposed Connecticut-based EBS system would be used by the Governments in a "best efforts" response; and, it adds references to a

^{12/} It is noteworthy, however, that in setting forth the questions supposedly raised by the Board's September 17 Order, LILCO conveniently leaves some out -- notably, those which focus on the elements of information transfer and decisionmaking which are the heart of the issues presented in Contentions 5 and 6. Thus, on page 12 of its 5/6 Motion, LILCO omits the Board's questions of whether LILCO messages or some other messages would be used in an emergency; who would decide when to broadcast EBS messages; what messages would the Governments broadcast; and, what criteria would the decisionmaker or decisionmakers use to determine which protective action recommendations are appropriate. See September 17 Order at 31, 33.

Westchester County Plan. None of the three additional items provides any support for LILCO's 5/6 Motion. Accordingly, it must be denied for the same reasons that the March 1987 Motion was denied. We nonetheless address below the particulars of LILCO's reiterated argument.

First, LILCO's conclusory assertion that the "'more exact picture' of how the Intervenors would respond can be drawn from the existing record," which, according to LILCO, "offers a clear description of how a coordinated response, using the LILCO Plan, would occur in the event of an emergency at Shoreham," (LILCO 5/6 Motion at 13) is baseless. As already demonstrated, nothing has been added to the evidentiary record in this proceeding to counter the sworn statements of the Governments' officials, upon which this Board based its conclusions in September and again in October, 1987, that "the best effort assumptions . . . leave open to question how the Governments will respond and whether their response will be adequate in fulfilling regulatory requirements" and that LILCO "does not premise its assertion on what the Governments' response will be on undisputed fact. Rather, it is based on the supposition of what the applicant expects the State and County would do Thus, the response theorized is without factual basis"; and that it "remained an open question as to how the Governments would respond in an emergency and whether their response will be adequate in fulfilling regulatory require-

ments." September 17 Order at 26; October 29 Order at 14. There are no record citations in LILCO's latest Motion that could possibly change the Board's conclusions.

Furthermore, the affidavits submitted herewith reaffirm and supplement the existing evidentiary record concerning the nature of a "best efforts" response by the Governments, and the falsity or lack of basis for LILCO's conclusory assumptions. See Cuomo Affidavit; Halpin Affidavit; REPG Affidavit; Roberts 1988 Affidavit. Moreover, the holdings in the Exercise Decision confirm the Governments' conclusion that the LILCO Plan is fundamentally flawed and incapable of implementation in accordance with the NRC's regulations. See Governments' Overview, Section VI. Contrary to LILCO's assertion in its 5/6 Motion, in fact the evidentiary record in this proceeding now provides additional reason to deny LILCO's summary disposition motions. See also the Statement of Material Facts as to Which There Exists a Genuine Issue to Be Heard, attached hereto.

Second, LILCO's discussion is blatantly self-serving and conclusory; it is devoid of facts concerning what the Governments would do in the event of a Shoreham emergency. As noted earlier, provisions in LILCO's Plan concerning what LILCO or LERO personnel are instructed to attempt or propose to do in an emergency are all well and good; however, they fail to address the matter actually at issue in this demand proceeding under the terms of CLI-86-13 and this Board's prior orders. The question is what

the Governments would do and whether those actions would be adequate and in compliance with the regulations. LILCO's Motion fails to address those topics.

Third, several particular assertions in this section of LILCO's Motion cannot stand unchallenged. For example, the assertion that the Governments would give "permission for LILCO to begin implementing certain elements of its Plan" (see LILCO 5/6 Motion at 13, 14, 15), is unlawful under Cuomo, and contradicted by the sworn affidavits of Government officials that are in the evidentiary record of this proceeding and attached hereto. See Cuomo Affidavit ¶¶ 3-6 and Attachment thereto; Halpin Affidavit ¶¶ 6-12 and Attachments 4 and 5 thereto. That assertion must be rejected.

Similarly, LILCO's assertion that in a "very unlikely fast-breaking emergency," "it must be presumed . . . that the County Executive would agree with LILCO's onsite recommendation," and that "the 'best efforts' principle dictates that the County Executive would have to rely on the best available information, and that is the advice of the plant staff, particularly when no other information is available," (LILCO 5/6 Motion at 15), are identical to LILCO's argument in March 1987 which was rejected by this Board in its September 17 Order. See March 1987 Motion at 18-19; September 17 Order at 33. Just as it did in 1987, this LILCO argument ignores the most fundamental and "real" fact in this remand proceeding on LILCO's "realism" defense: the Governments are sovereign entities. They possess the right, the power,

and the obligation to act as they see fit to protect and further the interests of their citizens. They have in the past, and they will in the future, exercise that power and fulfill that obligation to the best of their abilities -- but, according to their judgments, their beliefs, and their knowledge and understanding of the needs and demands of their citizenry, not as dictated, presumed, recommended or hypothesized by LILCO, or even by the NRC. Clearly, the Governments would not "have to" do anything postulated by LILCO; they would always have a "choice"; and they would make that "choice" as they saw fit at the time. See Cuomo Affidavit and Attachment thereto; Halpin Affidavit and Attachments 4 and 5 thereto. This Board cannot adopt LILCO's arrogant assumptions or hypothesize away the Governments' sovereign powers.

Government officials would, at the time of an accident, exercise their judgment as to what their "best efforts" would be, including judgments about what information is the "best available," what advice it would be appropriate to rely upon, and what decisions or recommendations should be made. The Affidavits of County Executive Halpin and Governor Cuomo set forth clearly the views of the Government officials on those subjects. LILCO's unfounded speculation must be rejected.

Fourth, LILCO cites the generic New York State Plan and the Westchester County Plan for the proposition that the State and Westchester County have recognized that nuclear facility operators have a responsibility for assessing the magnitude of a

radiological emergency and its potential consequences," (citing New York State Plan) and for making "initial recommendations concerning protective actions," (citing Westchester County Plan). LILCO 5/6 Motion at 16. Even if true, such observations are totally irrelevant. The matter at issue with respect to LILCO's realism defense to Contentions 5 and 6 is not whether or not a facility operator will assess the magnitude of an emergency or its consequences, or even whether such an operator will make recommendations about protective actions. The matter at issue is what the Governments would do in a "best efforts" response to an emergency and whether such Government action would be adequate, would be in compliance with the regulations, and would permit a reasonable assurance finding. Under the LILCO Plan, the Governments may or may not even learn within any appropriate time frame of assessments or recommendation made by LILCO personnel, in light of the fundamental flaws in communications and training capabilities which have been found to exist in the LILCO Plan. See Governments' Overview, Section VI. Even if the Governments were to learn of such assessments and recommendations, however, there remains no evidence in the record concerning how they would address such information or what kind of recommendations they in turn would make to the public, other than that contained in the affidavits of New York State and Suffolk County officials. These sworn statements make clear that the Governments would exercise their judgment and respond at the time of an emergency, but that they would not rely upon or adopt the advice or recommendations

of LILCO personnel. See Cuomo Affidavit ¶¶ 3-6; Halpin Affidavit ¶¶ 6-14 and Attachments 3-6; Roberts 1988 Affidavit ¶¶ 11, 13-14.

Fifth, in its 5/6 Motion, LILCO is forced to acknowledge that the Governments "would have the option of changing" LILCO EBS messages if they wished. LILCO 5/6 Motion at 16. LILCO then asserts, however, that the "'best efforts' principle" "requires [the County Executive to] use the pre-approved [LILCO] messages if immediate action is needed." Id. There is absolutely no basis in the evidentiary record or elsewhere for such an assertion, and it must be rejected by this Board. Indeed, it is directly contradicted by the affidavits of the responsible Government officials. See Cuomo and Halpin Affidavits.^{13/}

Sixth, LILCO's brand new argument that in the event of an emergency both the State EBS system and LILCO's new proposed Connecticut-based EBS system would be used, and that they would be used "in a coordinated fashion," is unfounded in fact or logic. It cannot be accepted by this Board or relied upon in this summary disposition context.

^{13/} Furthermore, LILCO's assertion that the Governments' asserted criticisms of LILCO's EBS messages "have been rejected by the NRC" is false. The recent Exercise Decision found, consistent with the position of the Governments, that the EBS messages prepared by LILCO during the 1986 Exercise were defective, and found, further, that the LILCO Plan as a whole and LILCO's LERO training program, are fundamentally flawed with respect to the dissemination of emergency information to the public. See Exercise Decision at 3-4; 167-68, 171 and n.48, 251-52; Governments' Overview, Section VI.

There is no basis in the record to support the proposition that either one, much less both, of such "networks" would be used in a "best efforts" Government response to a Shoreham emergency. The Board expressly so ruled with respect to the State system in its September 17 Order (at 31); and, there is no evidentiary record in existence concerning LILCO's latest Connecticut-based EBS scheme, since the litigation concerning that new proposal has barely begun.^{14/}

Similarly, there is no basis in the record for LILCO's assertion that "the State would make its extensive EBS network available to LERO" (5/6 Motion at 17). Indeed, the Affidavit of Governor Cuomo makes clear that the opposite is the fact. See Cuomo Affidavit ¶ 5.

Finally, LILCO's conclusory argument that "there would be no problem with coordinating broadcasts" by two separate EBS networks (see LILCO 5/6 Motion at 17-18) barely merits response. As noted, there is no basis to believe that either of the systems referenced by LILCO would in fact be used in a Governments' "best

^{14/} There is also no basis in the record to support any of LILCO's allegations concerning the alleged efficiency, capability, or effectiveness of LILCO's new Connecticut-based EBS scheme, since the Governments have challenged such allegations in their EBS Contention now pending in the separate proceeding on that subject. See, e.g., LILCO Motion at 17 (new "system" is "capable of notifying the entire EPZ of a Shoreham emergency"; in a "best efforts" Government response WPLR "would still play a crucial role in notifying the public"; tone alert receivers "are being modified or replaced with receivers set to be activated instead by WPLR-FM"; "WPLR-FM would always be used whenever a new EBS message was broadcast"; "it would be efficient to use the WPLR-FM EBS [in a fastbreaking emergency]"); and Emergency Planning Contention Relating to LILCO's New Emergency Broadcast System Proposal (January 12, 1988).

efforts" response. Indeed, this Board has already held that a question of fact which requires evidence is "whether the New York State system, the LILCO system, some other system, or no system at all would be used in the event of an emergency." September 17 Order at 31. No evidence has been provided by LILCO because there is none. LILCO's "coordination" argument is created out of whole cloth and must be rejected.

D. LILCO's Conclusory Assertions About Management and Coordination of an Ad Hoc Response are Pure Fabrication

The section of LILCO's 5/6 Motion entitled "The County Would Be Able to Exercise Command and Control of the Emergency Response," (LILCO 5/6 Motion at 19-24) reads like a novel. That is not surprising since it is wholly an invention of LILCO's imagination. It consists of nothing but assertions about what LILCO personnel would attempt to do in an emergency, followed by blatant speculation about what LILCO hypothesizes that the Governments "would" do in response. Thus, according to LILCO, LILCO officials would "call" Government officials, "brief" them, "advise" them as to where they should go and how "to better coordinate the emergency response," "suggest" that officials order other officials to go to the LERO EOC, and bring certain equipment with them, etcetera. Even assuming that LILCO could successfully and adequately accomplish the communications necessary to perform all this advising and suggesting, a conclusion inconsistent with LILCO's own Crocker Affidavit and the findings

in the Exercise Decision, LILCO's self-serving rhetorical fiction fails to address the issues raised by the Board in its September 17 Order which must be addressed in ruling upon LILCO's realism defense to Contentions 5 and 6 as ordered by CLI-86-13 and the new rule. LILCO's hypothesized "suggestions" and "advice" notwithstanding, the Governmental officials which LILCO presumes to "direct" have stated under oath that they will not rely upon LILCO advice or suggestions. See Cuomo Affidavit ¶¶ 3-6; Halpin Affidavit ¶¶ 6-13; Roberts 1988 Affidavit ¶¶ 10, 14.

Moreover, there is certainly no basis upon which this Board could find that in a "best efforts" Suffolk County or New York State response, officials would coordinate or manage a "best efforts" emergency response from the LILCO or LERO EOC. See LILCO 5/6 Motion at 20-21. The Governments' officials have stated flatly that they would not do so. See Halpin Affidavit ¶ 11; Roberts 1988 Affidavit ¶ 13; Cuomo Affidavit ¶ 6. Even if it were assumed that the County would "try to stay in contact with LILCO," that in no way requires the leap in logic asserted by LILCO -- that County officials would determine that they would "have to" go to the LERO EOC in order to do so, particularly in light of the statements to the contrary by those very officials.

More importantly, however, this entire LILCO argument insults the Board. To suggest that the serious issues identified in the September 17 Order concerning how decisions would be made, by what criteria and whether there could be a coordinated emer-

gency response, could be reduced to question of what building government officials would act from, is patently absurd. LILCO has simply ignored this Board's Orders, and its clear findings and conclusions. Its attempt to get around that fact by focussing on what building people would be in should not be countenanced.

We now address certain additional particulars of LILCO's "argument" which must be rejected. First, LILCO's assertion that it now proposes to send a new "liaison" "to whatever location the Suffolk County Executive chooses to use as his emergency command center" (LILCO 5/6 Motion at 20-21 n.11) gets LILCO nowhere. To suggest that such a proposal could fill the evidentiary and factual void in the record concerning Contentions 5 and 6 makes a mockery of the Board's Orders. It must be summarily rejected.^{15/}

Second, LILCO's reference to what happened during the 1986 Exercise as "evidence" that a "best efforts" Government response would be "coordinated" with a LILCO response (see LILCO 5/6 Motion at 21-23) is preposterous. The "evidence" from that Exercise is a Licensing Board finding that LILCO's Plan itself is pervasively and fundamentally flawed and that the LERO workers are incapable of performing essential communications and mobilization functions, as well as things as basic as following the LILCO Plan. See Exercise Decision and Governments' Overview Section VI.

^{15/} See also the Governments' Overview (Section VII) concerning the impropriety of relying upon draft NUREG 0654, Rev. 1, Supp. 1 in LILCO's summary disposition motions.

In addition, however, the so-called "demonstration of coordination," which allegedly occurred during the Exercise, was between LILCO personnel and "FEMA simulators representing State and County personnel [who] were instructed not to assume a response posture." LILCO 5/6 Motion at 21-22, quoting FEMA Post-Exercise Assessment (April 17, 1986 at 7) (emphasis added). Indeed, the simulators "at all times . . . were to allow the LERO staff to direct all response efforts." Id. The suggestion that whatever "demonstration" was made with respect to simulators who were explicitly not performing as would "best efforts" governmental responders, could be used to support LILCO's summary disposition motion, is disingenuous and must be rejected.^{16/}

Third, LILCO's assertions about what the State "would probably" do in a "best efforts" response (see LILCO 5/6 Motion at 23-24) are as fictional as its speculation about the nature of a County response. They can be given no weight since they are without any basis, and are contradicted by the Governments' affidavits which are in the record and submitted herewith. See Cuomo Affidavit and Attachment thereto; Papile Affidavit ¶ 3.

^{16/} See also Governments' Overview, Section VI.

IV. CONCLUSION

For the reasons stated above, LILCO's Motion for Summary Disposition of Contentions 5 and 6 must be denied.

Respectfully submitted,

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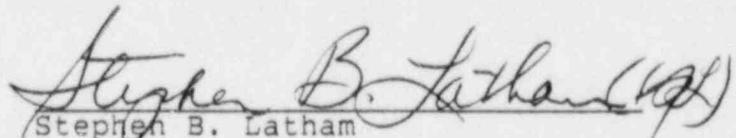
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STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE EXISTS A GENUINE ISSUE TO BE HEARD
ON MATTERS RAISED BY LILCO'S DECEMBER 18, 1988
MOTION FOR SUMMARY DISPOSITION OF CONTENTIONS 5 AND 6

1. How the State of New York and Suffolk County would respond to LILCO's efforts "to accommodate participation by the State of New York and Suffolk County in an emergency response," as asserted in LILCO Fact 1,^{1/} and whether such response would be adequate or in compliance with regulatory requirements.

2. Whether, despite the LILCO Plan provision that "the Director of Local Response will work in conjunction with the County Executive or his representative in responding to" a Shoreham emergency (LILCO Fact 1), the Suffolk County Executive or his representatives would or could work "in conjunction with" LILCO or LERO personnel.

3. Whether, despite the LILCO Plan instructions to the LERO Director of Local Response to "provide" State and County officials "with whatever information and assistance is appropriate" (LILCO Fact 2), LILCO or LERO personnel could or would be able to provide to the State and County the information deemed necessary and appropriate by the State and County officials who would use it, and how long it would take to do so.

^{1/} Throughout this Statement, references to "LILCO Fact ____" refer to the numbered paragraphs contained in the "Statement Of The Material Facts As to Which There Is No Genuine Issue To Be Heard On Contentions 5 And 6," which was Attachment 1 to LILCO's Motion for Summary Disposition of Contentions 5 and 6.

4. Whether, despite the provisions of LILCO's Plan (LILCO Fact 2), either New York State or Suffolk County would or could permit LERO to "utilize police officers as detailed in OPIP 3.6.3."

5. Whether, despite the provisions of LILCO's Plan (LILCO Fact 2), LERO personnel could or would be able or permitted to escort State or County officials into restricted areas.

6. Whether activities by LILCO personnel during the February 1986 Exercise, involving FEMA simulators who "were instructed not to assume a response posture," and "to allow the LERO staff to direct all response efforts," (FEMA Post-Exercise Assessment (April 17, 1986) at 7), demonstrated any ability on the part of LERO to coordinate an emergency response with State and County officials engaged in a "best efforts" response (LILCO Fact 3).

7. Whether any LERO-assigned "State/county liaison" could or would be able "to interface with" State or County officials engaged in a "best efforts" response to a Shoreham emergency (LILCO Fact 3).

8. Whether, in a "best efforts" response to a Shoreham emergency, State or County officials would or could coordinate an emergency response with LILCO or LERO (LILCO Fact 3).

9. Whether LILCO's knowledge of the location of the New York State EOC (LILCO Fact 4) or the telephone number of the State Emergency Management Office (LILCO Fact 5) means that in a Shoreham emergency, LILCO personnel could or would be able to

locate or contact appropriate New York State officials, and if so, how long it would take to do so, and whether such contact could be achieved in a timely manner.

10. Whether in a "best efforts" response to a Shoreham emergency, in the absence of a site-specific New York State plan for the Shoreham plant, officials from the New York State Department of Health, the State Emergency Management Office, the Radiological Emergency Preparedness Group, or the Disaster Preparedness Commission could or would assess or evaluate an accident, recommend protective actions, coordinate accident assessment or evaluation, or coordinate response with Suffolk County or LILCO (LILCO Fact 6), and whether any such actions would be adequate or in compliance with regulatory requirements.

11. In light of the absence of a RECS line between LILCO and the State of New York, whether in a "best efforts" response to a Shoreham emergency, LILCO or LERO could or would notify or communicate with the State of New York (LILCO Fact 7).

12. Whether, in a "best efforts" Government response to a Shoreham emergency, the Suffolk County Executive or the Chairman of the DPC would or could receive necessary or appropriate data or information concerning an accident, and how long it would take (LILCO Fact 7).

13. Whether, in a "best efforts" Government response to a Shoreham emergency, the New York State Department of Health would or could make a protective action recommendation (LILCO Fact 7).

14. In a "best efforts" Government response to a Shoreham emergency, which State and County officials would need to be consulted concerning any protective action recommendation, and what criteria would they use in deciding what protective action recommendations to make (LILCO Fact 7).

15. Whether, in the absence of a site-specific New York State plan for a Shoreham emergency, the State Emergency Management Office would or could effectively coordinate State resources to support any protective action recommendations (LILCO Fact 7), and whether any such actions would be adequate or in compliance with regulatory requirements.

16. Whether, in a "best efforts" Government response to a Shoreham emergency, and in the absence of a Shoreham-specific State plan, New York State would or could send representatives to any LILCO facilities, and if so, which representatives would be sent and how would it take for them to get there (LILCO Fact 8).

17. Whether LILCO's knowledge of the location of the Suffolk County EOC for emergencies other than Shoreham, and of the telephone number of the Suffolk County Department of Fire, Rescue and Emergency Services, means that in a Shoreham emergency LILCO personnel could or would be able to locate, notify, or communicate with appropriate Suffolk County officials, that they could do so in compliance with regulatory requirements, or that actions taken by such officials, if any, in response to an emergency would be adequate or in compliance with NRC regulations (LILCO Facts 9, 10).

18. Whether statements contained in the draft plan prepared in 1982 and rejected by the Suffolk County Legislature in 1983 (referred to by LILCO as the "Voorhees Plan") are accurate or valid in 1988 (LILCO Facts 9, 11, 22).

19. Whether, in a "best efforts" response to a Shoreham emergency, actions by Suffolk County personnel would or could be consistent with statements contained in a 1982 draft plan, which was never distributed to County personnel, and never adopted by Suffolk County (LILCO Facts 9, 11, 22).

20. What actions would be taken by Suffolk County officials with command and control responsibilities in the event of a "best efforts" response to a Shoreham emergency, and whether any such actions would be adequate or in compliance with the regulations (LILCO Fact 11).

21. Whether, despite provisions of LILCO's Plan, LILCO on-site personnel could accomplish notification and communication of emergency information to appropriate State and local officials in a Shoreham emergency (LILCO Facts 12, 13), particularly in light of LILCO's past performance as set forth in the Affidavit of Douglas M. Crocker, and in the Exercise Decision.

22. Whether a "best efforts" response to a Shoreham emergency by Suffolk County and the State of New York would rely upon, or be consistent with, the provisions of the Westchester County Plan for the Indian Point Nuclear Power Station (LILCO Facts 14, 17).

23. Whether, despite revisions to LILCO's Plan, in the event of a Shoreham emergency, the LERO Director could locate the Suffolk County Executive or inform him of a Shoreham emergency, and if so, how long it would take him to do so (LILCO Fact 16).

24. Whether, despite revisions to LILCO's Plan, in the event of a Shoreham emergency, the LERO Director of Local Response could or would obtain permission from the Suffolk County Executive to begin implementing certain elements of the emergency response (LILCO Fact 16).

25. Whether a "best efforts" Government response by Suffolk County and the State of New York to a Shoreham emergency would follow or be consistent with the provisions of the Wayne County Radiological Emergency Preparedness Plan for the Ginna Nuclear Power Station (LILCO Fact 18).

26. Whether, in a "best efforts" Government response to a Shoreham emergency, the appropriate Government officials would decide to use WPLR-FM, located in Connecticut, as a primary EBS station (LILCO Fact 19).

27. Whether, in a "best efforts" Government response to a Shoreham emergency, Government officials would decide to broadcast EBS messages over WPLR-FM (LILCO Fact 19).

28. In a "best efforts" Government response to a Shoreham emergency, who would prepare EBS messages (LILCO Fact 20).

29. In a "best efforts" Government response to a Shoreham emergency, who would determine when EBS messages were broadcast (LILCO Fact 20).

30. In a "best efforts" Government response to a Shoreham emergency what, if any, EBS stations would be used for the broadcast of EBS messages (LILCO Fact 20).

31. Whether, despite the provision of LILCO's Plan, in a "best efforts" Government response to a Shoreham emergency, Government officials would include LILCO Protective Action Recommendations in EBS messages (LILCO Fact 20).

32. Whether, despite the provisions of LILCO's Plan, in a "best efforts" Government response to a Shoreham emergency, State or County officials would authorize LILCO personnel to contact WCBS or any other EBS station, or to transmit EBS messages to such stations (LILCO Fact 20).

33. Whether in a "best efforts" Government response to a Shoreham emergency, there could or would be coordination of EBS messages (LILCO Fact 20).

34. Whether Connecticut station WPLR could or would function as an effective or adequate EBS station in the event of a Shoreham emergency (LILCO Fact 20).

35. Whether WPLR is capable of performing the functions alleged in LILCO Fact 20, and whether such performance would comply with regulatory requirements.

36. Whether actions by Governmental officials in a "best efforts" response to a Shoreham emergency would result in the notification of the public or communication of emergency information, including protective action recommendations to the

public, in a manner adequate and in compliance with regulatory requirements (LILCO Facts 20, 21).

37. In a "best efforts" Government response to a Shoreham emergency, which County officials would be responsible for deciding whether to activate sirens (LILCO Fact 21).

38. In a "best efforts" Government response to a Shoreham emergency, what criteria would be used by County decisionmakers to determine whether or when to activate sirens (LILCO Fact 21).

39. In a "best efforts" Government response to a Shoreham emergency, how long would it take for a decision to be made to activate sirens (LILCO Fact 21).

40. In a "best efforts" Government response to a Shoreham emergency, would or could County officials release EBS messages to the public prior to coordination with the State (LILCO Fact 21).

41. Whether, in a "best efforts" Government response to a Shoreham emergency, the Suffolk County Executive or any Suffolk County officials or personnel would go to LILCO's LERO EOC.