



When considered together, they highlight and illustrate the absurdity of LILCO's Motion. In essence, LILCO asserts the following: LILCO has an adequate Plan, including an adequate traffic control scheme; Suffolk County has sufficient personnel, including a police force, to efficiently and effectively implement that traffic control scheme in a radiological emergency; LERO personnel will assist Suffolk County in implementing the traffic control measures, especially by making sure that the County personnel have all necessary information; Suffolk County will give LERO personnel permission to take any actions necessary to carry out the traffic plan; and if the need should arise, LERO personnel will take the lead in implementing Plan provisions, including those related to the direction of traffic.<sup>2/</sup>

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<sup>2/</sup> LILCO's Motion constructs this argument through a series of broad assertions, none of which is based on any facts. The assertions include:

-- "[T]here is also no question that the police, with assistance from LERO, would be able to implement the traffic control portion of the LILCO Plan without appreciable delay or confusion." LILCO 1/2 Motion at 3.

-- "[I]t is evident that the police could be notified and mobilized quickly, that they would know where to go once they were dispatched, and that they would understand what they needed to do once they arrived at the TCPs." *Id.* at 4.

-- "[T]he LERO Director of Local Response [is instructed by the Plan] to not only inform the Suffolk County Executive of an emergency at Shoreham but to explain the specific response actions that need to be taken and obtain, as necessary, permission to perform them." *Id.* at 5. "The LERO Director is instructed by this procedure [OPIP 3.1.1] to  
(footnote continued)

Based on the evidentiary record, however, and discounting LILCO's self-serving and purely conclusory statements, LILCO's Motion should more properly be construed as follows: LILCO does not have an adequate Plan or even an adequate traffic control scheme (as confirmed by the OL-5 Licensing Board's recent Exercise Decision); there is nothing in the evidentiary record that would demonstrate that Suffolk County has sufficient

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advise the Suffolk County Executive that he, or his representative, should go to the LERO EOC in Brentwood to better coordinate the emergency response." Id.

-- "The Suffolk County police would almost certainly be able to assemble and be briefed at Yaphank within the same time [approximately two hours]." Id.

-- "LERO will be sending the Traffic Control Point Coordinator to serve as liaison at police headquarters . . . ." Id. at 6.

-- "[T]he Traffic Control Coordinator would be instructed to coordinate the dispatch of both the LERO Traffic Guides and the Suffolk County police . . . ." Id. at 7. "The patrolmen and Traffic Guides would link up at the TCPs . . . ." Id.

-- "[T]he 'best efforts' principle forecloses the argument that the police would drastically deviate from the LILCO plan, or simply ignore the advice of trained traffic guides . . . . Common sense refutes the argument that the police, trying their best, would somehow spoil the emergency response out of ignorance or incompetence." Id. at 8.

-- "If in such circumstances some LERO Traffic Guides were mobilized and dispatched before enough police could be mobilized and briefed, these Traffic Guides could be given permission to direct traffic by themselves." Id. at 10.

personnel, including police, to efficiently and effectively implement LILCO's traffic control scheme; LERO personnel lack the legal authority, capability, training and experience to assist Suffolk County in implementing traffic control measures; Suffolk County cannot and will not give LERO personnel permission to take any actions necessary to carry out the traffic control portions of the LILCO Plan; LERO personnel are prohibited by law from implementing traffic-related Plan provisions, including those related to the direction of traffic; any County attempt to implement traffic control would necessarily be ad hoc with unknown results; and even assuming, arguendo, that LILCO's Plan were used as a guide by Suffolk County personnel, there is no evidence that the Plan could be implemented adequately and effectively.

Viewed in this light, as the Board must if it is to accurately appraise LILCO's Motion, the Motion must be rejected. This conclusion is based upon a number reasons, any one of which compels denial of LILCO's Motion. Those reasons follow:

1. LILCO urges that the "best efforts" assumption of the Commission's new rule<sup>3/</sup> permits this Board, without any evidentiary hearing, to resolve the numerous factual issues which were identified by the Board in its September 17 Order<sup>4/</sup> and the

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<sup>3/</sup> 10 CFR § 50.47(c)(1), 52 Fed. Reg. 42078-87 (1987).

<sup>4/</sup> Memorandum and Order (Ruling on Applicant's Motion of  
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Commission in CLI-86-13. LILCO 1/2 Motion at 1. Instead of the case-by-case adjudication called for in these decisions and the NRC's new emergency planning rule, LILCO would have this Board shut its eyes to the facts and assume, with no factual basis at all, that the Governments can and will respond using LILCO's Plan and that the response will be effective and efficient. LILCO's proposition is ridiculous; this Board can make findings only on the basis of facts, not LILCO fantasy.

2. LILCO urges this Board to interpret the new rule to embrace an irrebuttable presumption that Suffolk County will use the LILCO Plan and work cooperatively with LILCO to implement traffic control measures and strategies during a Shoreham emergency. The new rule, however, neither requires nor permits such an extreme position to be taken. Rather, consistent with CLI-86-13 and the Board's September 17 Order, the new rule calls for case-by-case adjudication of the adequacy of a "best efforts" Suffolk County response. The facts are undisputed: the affidavits of Suffolk County officials and the evidentiary record establish persuasive reasons why the County would not follow LILCO's traffic plan and would not work with LILCO's personnel. Moreover, the record documents that County response personnel are

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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, (Sept. 17, 1987) ("September 17 Order").

not familiar with LILCO's Plan, making it all the more baseless for LILCO to assert that this Board could find summarily that a "best efforts" response using the LILCO Plan could and would result in adequate protection for the public. In short, there is no basis to find that LILCO's Plan would be used or would result in an adequate response.

3. In its Motion, LILCO continues its practice of urging the Board to license Shoreham on the basis of LERO personnel performing illegal acts; thus, LILCO persists in its claims that its personnel will direct traffic and perform other similar acts. This Board has said no to this LILCO argument on two occasions. It must do so again.

4. The OL-5 Licensing Board's February 1 Initial Decision (LBP-88-2) ("Exercise Decision") eliminates much of the purported basis for LILCO's Motion. In essence, the Exercise Decision establishes that LILCO's Plan is fundamentally flawed in several respects, that LERO personnel are "amateurs" who cannot be counted on to communicate and perform effectively, and that LERO personnel are inadequately trained. In light of these findings, there could be no possible basis for this Board to conclude that as a matter of law, a "best efforts" Suffolk County response, using a fundamentally-flawed plan and coordinating with a LERO organization comprised of poorly-trained, "amateur" emergency workers, would result in adequate protection to the public.

5. There are numerous unresolved factual issues regarding the nature and adequacy of a governmental "best efforts" response -- even if it is assumed, arguendo, that LILCO's Plan would be used. In the face of such unresolved factual issues, summary disposition cannot be granted.

6. The Governments also take issue with LILCO's so-called "undisputed" facts, all of which are either disputed or are otherwise baseless. See Statement of Material Facts as to Which There Is No Genuine Issue to Be Heard on Contentions 1 and 2 ("LILCO's Statement"), attached to LILCO's Motion as Attachment 1. With such factual disputes among the parties, summary disposition cannot be granted.

7. LILCO's Motion must also be denied under 10 CFR § 2.749(c). The Motion introduces a new traffic control plan, purportedly set forth in Revision 9 of the Plan. However, the Governments have not had a fair opportunity to review Revision 9, much less pursue discovery and determine how it impacts the issues raised in LILCO's Motion. Accordingly, under Section 2.749(c), LILCO's Motion must be rejected.

Any one of the foregoing bases, as well as other bases discussed hereafter, is itself sufficient to compel denial of the Motion. Taken together, they comprise a transparent LILCO attempt to have the Board return to pre-TMI days, by requesting

the Board to license the plant even though questions remain unanswered concerning the adequacy and implementability of an emergency response plan. This Board cannot condone such an approach. LILCO's plea for a retreat from concern for public safety must be rejected, as they have been in the past.

## II. BACKGROUND

Contentions 1 and 2 concern, in essence, the implementation of traffic control measures in connection with an evacuation of all or part of the 10-mile EPZ.<sup>5/</sup> Specifically, Contention 1 states that LILCO personnel do not have the legal authority to direct traffic or to ensure that evacuees follow the evacuation routes identified and prescribed in the LILCO Plan. It alleges, further, that because LILCO's evacuation time estimates, and the computer model and analyses from which those estimates were derived, are premised upon evacuees using only prescribed routes, the inability to implement traffic control and direction as set forth in the LILCO Plan, renders LILCO's evacuation time estimates inaccurate.

Contention 2 is related to Contention 1 and alleges that LILCO personnel do not have the legal authority to implement

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<sup>5/</sup> This is LILCO's fourth attempt to obtain summary disposition of Contentions 1 and 2, as well as the other legal authority contentions at issue in this proceeding (Contentions 4-10). LILCO's earlier motions for summary disposition were filed on August 6, 1984, February 27, 1985, and most recently, on March 20, 1987.

various traffic control measures such as blocking roads, imposing channelization treatments, prescribing turn movements and changing two-way roads to one-way operation. These functions are integral parts of LILCO's traffic control scheme. The contention alleges that the evacuation portions of LILCO's Plan cannot be implemented, and that LILCO's evacuation time estimates are unrealistically low and inaccurate because the use of prescribed evacuation routes, and other assumptions, are invalid. It also raises the issues of whether there can be findings of compliance with enumerated regulatory requirements.

The truth of the allegations in Contentions 1 and 2 -- that LILCO lacks the legal authority to implement traffic control strategies -- has already been established. Cuomo v. Long Island Lighting Co., Consol. Index No. 84-4615 (N.Y. Sup. Ct.), slip op., Feb. 20, 1985, aff'd, 511 N.Y.S.2d 867 (2d Dept. 1987), appeal pending ("Cuomo v. LILCO"). The Cuomo v. LILCO decision has been accepted by both this Board and the Commission itself. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 30-31 (1986) ("CLI-86-13"); September 17 Order at 10-11.<sup>6/</sup>

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<sup>6/</sup> While Cuomo v. LILCO is still pending before the New York Court of Appeals, LILCO has conceded that it lacks legal authority to implement traffic control by dropping that issue from its appeal. Thus, LILCO's lack of legal authority to implement the traffic control portions of its Plan cannot be disputed and is not at issue in this proceeding.

Notwithstanding LILCO's lack of legal authority to implement traffic control, the Commission, in CLI-86-13, remanded that matter, along with the rest of the "legal authority" issues, to this Board for further factual inquiry to determine whether a "best efforts" government response would be adequate. 24 NRC at 22. However, before this Board could commence the fact-finding proceeding clearly contemplated by the Commission, LILCO filed its third attempt at summary disposition on the legal authority issues, including Contentions 1 and 2.<sup>7/</sup>

This Board rejected that LILCO attempt to resolve summarily the legal authority issues in its September 17 Order. That Order is discussed in Section III of the Governments' Overview. In brief, the Board found that, even assuming governmental "best efforts," there remained numerous "factual questions of adequacy of the Governments' response" in the event of a Shoreham emergency. September 17 Order at 45.<sup>8/</sup> With respect to Contentions 1 and 2, this Board found that "[t]he question of how

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<sup>7/</sup> LILCO's Second Renewed Motion for Summary Disposition of the "Legal Authority" Issues (Contentions EP 1-10) (March 20, 1987).

<sup>8/</sup> On October 29, 1987, the Board reaffirmed the conclusions reached in its September 17 Order, stating again that the Commission's decision in CLI-86-13 required the Board "to determine the adequacy of governmental response under the Commission's best efforts assumption." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-87-29, \_\_\_\_\_ NRC \_\_\_\_\_ (1987) (the "October 29 Order"), at 13. The Board recognized that the granting of summary disposition in LILCO's favor was not warranted, since LILCO had not demonstrated the adequacy of the Governments' response in the event of a Shoreham emergency. The Board again therefore concluded that "[a] hearing is required to obtain the facts upon which a decision can be based." Id. at 10.

traffic will be guided and by whom is indeed material," and ruled that it could not decide the ultimate issues in this case "while so much uncertainty surrounds that question." Id. at 35.

Since this Board's September 17 Order, nothing has occurred to alter the Board's conclusion that summary disposition on Contentions 1-2 is inappropriate in the face of the numerous unresolved issues which are outstanding. Nevertheless, LILCO's latest Motion fails to respond to the unresolved factual issues recognized by the Board. Rather, LILCO takes the approach of shouting "best efforts" and misinterpreting the scope of the new rule whenever questions arise about the unknown nature and adequacy of governmental attempts to implement traffic control in a Shoreham emergency. This Board must reject this LILCO approach, as it has done in the past.

In short, LILCO has failed to demonstrate that the Governments' response in a Shoreham emergency would be adequate to protect the public health and safety, as required by 10 CFR § 50.47(a)(1). Thus, LILCO's Motion for summary disposition of Contentions 1 and 2 must be denied.

### III. DISCUSSION

#### A. LILCO's Motion for Summary Judgment Is Premature

LILCO's Motion contains numerous references to Revision 9 of its Plan. In fact, the body of LILCO's Motion is devoted almost exclusively to LILCO's claims of what the Suffolk County Police Department ("SCPD") and LERO allegedly would do singly and together to control traffic during a Shoreham emergency. Those claims are purportedly based on changes to LILCO's traffic control scheme found in Revision 9 of its Plan. Revision 9 was issued by LILCO on January 22, and received by the Governments on or about January 25, 1988.<sup>9/</sup>

Even though LILCO's Motion predates Revision 9, it is clear that LILCO had the benefit of knowing and understanding the contents of Revision 9 before its Motion was prepared and filed. The Governments, however, have not been given a similar opportunity. Revision 9 consists of perhaps thousands of pages

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<sup>9/</sup> For example, LILCO claims that the LERO Event Summary Sheet "is being modified to instruct the LERO Director of Local Response to not only inform the Suffolk County Executive of an emergency at Shoreham but to explain the specific response actions that need to be taken and obtain, as necessary, permission to perform them." LILCO 1/2 Motion at 5 (emphasis added). LILCO also states that ". . . OPIP 3.6.3, Traffic Control, § 5.1.6 is being modified to read substantially as follows: . . .," that "OPIP 3.6.3, Attachment 15, as it will substantially read after it is revised, . . .," and that "OPIP 3.6.3 § 5.2.3 is being revised to read, in part: . . ." LILCO 1/2 Motion at 6, 7 (emphasis added).

which have not yet been reviewed or evaluated by the Governments (including their counsel and experts) or this Board. That is a substantial task that could not possibly have been accomplished in the brief time between the receipt of Revision 9 on January 25 and the February 10 deadline for responding to the instant Motion. See Letsche Affidavit; Zahnleuter Affidavit, ¶¶ 3-7. Until there has been an adequate opportunity for the Governments to review and evaluate Revision 9, it is premature for this Board even to consider LILCO's Motion. See 10 CFR § 2.749(c). Thus, this Board should summarily deny LILCO's request to grant summary disposition in its favor.

This is not the first time that LILCO has sought summary disposition without providing adequate opportunity for the other parties in this proceeding to review or evaluate the matters underlying its request. For example, on the issues relating to LILCO's new proposed emergency broadcast system ("EBS") network, LILCO sought to obtain summary disposition despite the fact that it had just unveiled its new plan. In denying LILCO's summary disposition motion, the Board stated:

It can hardly be considered as acceptable procedure that LILCO's plan revisions, unreviewed by other parties and FEMA, with new radio stations forming significant links in its emergency broadcast responsibilities, could be the subject of a summary disposition resolution.

Memorandum and Order (Ruling on Applicant's Motion of November 6, 1937 for Summary Disposition of the WALK Radio Issue), dated December 21, 1987, at 3-4. The Board, accordingly, instructed LILCO that summary disposition motions are appropriate only after the other parties in a proceeding have had an "opportunity to determine and respond to matters potentially in controversy." Id. at 4.

More recently, the Board denied LILCO's motion for summary disposition of its new schools evacuation proposal, concluding that LILCO's proposal "present[ed] material issues only resolvable in a future contested forum." Memorandum and Order (Ruling on Applicant's Motion of October 22, 1987 for Summary Disposition of Contention 25.C ("Role Conflict" of School Bus Drivers)), dated December 30, 1987, at 5. As with its ruling on LILCO's EBS motion, the Board observed that LILCO's new schools evacuation proposal required analysis and review before summary disposition in LILCO's favor could even be considered, much less granted. Id.<sup>10/</sup>

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<sup>10/</sup> On February 1, 1988, the Board deferred ruling on LILCO's hospital evacuation summary disposition motion, to provide the parties an opportunity to evaluate Revision 9. See Memorandum and Order (Ruling on Applicant's Motion of December 8 [sic] for Summary Disposition of the Hospital Evacuation Issue), dated February 1, 1988, at 4. A similar opportunity should be given the parties with respect to all LILCO's pending summary disposition motions, although the parties should be afforded more time than was provided in connection with LILCO's hospital evacuation proposal, in light of the enormous task of reviewing the thousands of pages involved.

Consistent with the above rulings, it is clear that the present circumstances present another compelling instance requiring denial of LILCO's Motion under 10 CFR § 2.749(c). LILCO's apparent changes to its traffic control plan appear to be far-reaching.<sup>11/</sup> It is absurd to suggest that anyone could be in a position to respond to matters related to the new plan on such short notice. See Lotsche Affidavit; Zahnleuter Affidavit, ¶ 3-7. Accordingly, LILCO's Motion should be denied as premature.

B. LILCO's Claim That 10 CFR § 50.47(c)(1)(iii) Creates an Irrebuttable Presumption That Suffolk County Would Follow LILCO's Plan Is False

One of the chief bases for LILCO's Motion is its erroneous claim that 10 CFR § 50.47(c)(1)(iii) effectively eliminates the need for the fact-finding recognized in CLI-86-13 and this Board's Orders of September 17 and October 29, by creating an ironclad and irrebuttable presumption that Suffolk County could and would unequivocally follow LILCO's traffic control scheme as part of a "best efforts" response. Thus, LILCO asserts that "given the presumption of 10 CFR § 50.47(c)(1)(iii) that the

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<sup>11/</sup> Indeed, LILCO states that it has revised its traffic control scheme based on NUREG 0654, Supp. 1, Rev. 1, "Criteria for Utility Offsite Planning and Preparedness, Draft Report for Interim Use and Comment," (Nov. 1987) ("NUREG 0654, Supp. 1"). LILCO 1/2 Motion at 6. NUREG 0654, Supp. 1 sets forth draft guidance and criteria for judging the adequacy of onsite and offsite emergency response plans. Leaving aside for now the issue whether NUREG 0654, Supp. 1 can be considered at all by this Board (see Governments' Overview, Section VII for discussion of why NUREG 0654, Supp. 1 must be disregarded), it is clear that LILCO's efforts to revise its Plan according to that new format have resulted in a massive plan revision. The 0654-related changes, together with other changes, have in essence led to the issuance of a new plan.

State and County would follow the LILCO Plan as part of a 'best efforts' response, the Intervenor's arguments regarding the traffic control contentions are simply irrelevant and . . . the uncertainty that the Board perceived previously has been eliminated." LILCO 1/2 Motion at 1. Accordingly, LILCO concludes that "[t]he only legitimate question left for the Intervenor to raise is not whether the police, working with LERO Traffic Guides, would implement the traffic portions of the LILCO Plan but whether they could implement it." *Id.* at 2 (emphasis in original). Because, in LILCO's view, there is "already sufficient evidence in the existing record for the Board to find on this matter that no genuine issue exists to be heard" (*id.*), LILCO urges that summary disposition is required. LILCO's reasoning is incorrect, however, because LILCO misinterprets Section 50.47(c)(1)(iii).

The nature of the presumption set forth in Section 50.47(c)(1)(iii) is addressed in Section III of the Governments' Overview, which is incorporated herein by reference. There, it is demonstrated that LILCO's legal analysis is wholly without merit because: the rule does not mandate that a presumption exists at all (it states that a Board "may" presume, not that it "will" presume); the facts in this case make clear that no presumption would be appropriate; and to the extent any presumption exists, it clearly has already been rebutted. With

respect to Contentions 1 and 2, the Governments add the following additional comments.

The new rule expressly provides the Governments with an opportunity to rebut any presumption that they would follow LILCO's Plan. See Governments' Overview, Section III. As shown in Section III.C.2 below, the Governments have already rebutted this presumption by stating unequivocally on numerous occasions, that they would not follow or implement LILCO's traffic control scheme because LILCO's Plan is flawed. Since the new rule's enactment, the Governments have reaffirmed that they could not and would not follow LILCO's Plan, including the traffic control scheme set forth in the Plan. See Cuomo Affidavit, ¶¶ 3-5; Halpin Affidavit, ¶¶ 7, 9-15; Roberts 1988 Affidavit, ¶ 10.

There is no basis for LILCO's assertion that the new rule eliminates the Commission's recognition in CLI-86-13 that questions remain concerning, among other things, the scope and adequacy of the Governments' response, or this Board's rulings confirming the existence of those questions in its September 17 and October 29 Orders. See LILCO 1/2 Motion at 1. The new rule does not nullify CLI-86-13. To the contrary, the rule recognizes and endorses that Commission decision. See, e.g., 52 Fed. Reg. 42,082 (rule "adheres" to CLI-86-13, "leav[ing] it to the Licensing Board to judge what form the 'best efforts' of state and local officials would take"); 42,084 (rule "incorporates,"

and in some respects "amplifies" and "clarifies" CLI-86-13). Thus, the previously-recognized unresolved issues pertaining to Contentions 1 and 2 remain unresolved, rendering summary disposition in LILCO's favor still inappropriate.

Further, notwithstanding LILCO's assertions, the new rule does not affect the Board's rulings in its September 17 and October 29 Orders. Indeed, the Commission's discussion of the new rule emphasizes that decisions under the new rule are to be made based on the facts and evidentiary record developed in each individual adjudication.<sup>12/</sup> The Board's September 17 Order is fully consistent with the Commission's new rule. It is based on the facts and evidentiary record -- or more fittingly, the lack of facts and evidentiary record -- in this adjudication which must be developed before Contentions 1 and 2 can be decided on the merits. LILCO's Motion, in contrast, is premised on the preposterous notion that despite the NRC's repeated recognition of the need for case-by-case adjudication, this Board can disregard its September 17 and October 29 Orders and find that LILCO's traffic control scheme would be and could be adequately

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<sup>12/</sup> See, e.g., 52 Fed. Reg. 42081 ("whether a utility could succeed in making [the] showing [required by the new rule] would depend on the record developed in a specific adjudication . . ."); 42,082 (under the new rule, judgments and evaluations, and uncertainties therein, are to be "addressed in the case-by-case adjudications on individual fact-specific situations"); 42083 ("under the particular facts of an individual case it may be impossible for the NRC to conclude that a utility plan is adequate, as defined in this rule"); 42,084 (under new rule, NRC will "take into account the probable response of state and local authorities, to be determined on a case-by-case basis") (all emphasis added).

implemented by the State and County without any further inquiry into the nature or adequacy of such a governmental response. This misinterpretation of the new rule, which is the driving force behind LILCO's Motion, must be rejected.

C. The Governments Would Not Follow the LILCO Traffic Control Plan

Another recurring theme in LILCO's Motion is the so-called "indisputable fact" that the SCPD would implement the traffic control elements of the LILCO Plan in the event of a Shoreham emergency. LILCO 1/2 Motion at 2. This assertion is nothing more than wishful thinking on LILCO's part, and flies in the face of the existing evidentiary record in this case.

LILCO's claim is wrong for two reasons. First, the Plan calls for the Governments under certain circumstances to authorize LERO personnel to implement traffic control. However, the Governments cannot lawfully delegate their police powers to LILCO. Therefore, the Governments could not implement LILCO's traffic control scheme. Second, as is well established in the record of this case and reaffirmed by the affidavits filed simultaneously with this Response, the Governments would not follow LILCO's traffic control scheme, for reasons arising from the inadequacy of the Plan itself, the inherent incapability of LILCO utility workers to perform as anything more than amateurs, and the Governments' overall lack of trust in LILCO. It is ridiculous, for example, for LILCO to claim that the Suffolk

County police would follow the very traffic control scheme that they and other Government experts have long criticized and rejected.

These grounds are discussed in further detail below.

1. The Governments Do Not Have the Legal Authority to Delegate Their Police Powers

In its Motion, LILCO claims that participation by the Suffolk County police would somehow "cure" any legal authority problem faced by LILCO. LILCO 1/2 Motion at 2. But, LILCO's traffic control scheme assumes far more than the Suffolk County police implementing LILCO's traffic control scheme alone. In various situations, LILCO's traffic scheme, even as supposedly modified by LILCO's just-issued Revision 9, calls for LERO personnel to direct the dispatch of police officers (LILCO 1/2 Motion at 6 and 7), provide specific traffic control strategies (id. at 9), direct traffic by themselves (id. at 10), request police mobilization (id. at 9), and direct traffic in conjunction with the police (id. at 7).

However, as discussed in Section V of the Governments' Overview, such actions by LERO personnel would involve an unlawful delegation of the Governments' police powers. In Cuomo v. LILCO, the New York State Supreme Court held that the functions embraced by LILCO's Plan, including traffic control, are inherently governmental and that LILCO could not be delegated

the authority to perform those functions. Accordingly, the Court entered an order prohibiting LILCO from implementing its Plan -- a decision since affirmed on appeal.

In its decision in CLI-86-13, the Commission correctly interpreted Cuomo v. LILCO to hold that LILCO is prohibited from performing the State and County functions contained in Contentions 1-10. 24 NRC at 22. Thereafter, this Board adopted and endorsed the Commission's position, as it was required to do. See, e.g., September 17 Order at 25, 46. Most recently, the Board clearly and definitively interpreted Cuomo v. LILCO, and the Commission's decision in CLI-86-13, by ruling that "it [Cuomo v. LILCO] prohibits the government from delegating its police power." October 29 Order at 13 (emphasis added).

Moreover, as made clear in Cuomo v. LILCO, and as confirmed on at least two occasions by this Board,<sup>13/</sup> LILCO lacks the legal authority to implement its traffic control scheme, even if the Governments were to participate in its implementation and even if LERO personnel were given permission to take particular actions. Thus, whether or not the police simultaneously perform traffic control functions with LILCO does not "cure" LILCO's lack of legal authority to perform the same functions. The fact remains that LILCO is a private company to which the Governments' police

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<sup>13/</sup> See Long Island Lighting Co. (Shoreham Nuclear Power Station Unit 1), LBP-85-12, 21 NRC 644, 911 (1985); September 17 Order at 25.

powers cannot lawfully be delegated or authorized. It is thus disingenuous for LILCO to continue to assert to this Board that LILCO can implement the traffic control portions of its Plan.

2. The Suffolk County Police Would Not Follow LILCO's Traffic Control Scheme

In its Motion, LILCO asserts that "[c]ommon sense refutes the argument that the police, trying their best, would somehow spoil the emergency response out of ignorance or incompetence." LILCO 1/2 Motion at 8. Based on the substantial testimony that has been presented in this proceeding concerning the inadequacies of LILCO's traffic scheme, and the failure of LILCO's Motion to demonstrate otherwise, however, it would be more honest of LILCO to admit that "common sense refutes the argument that the police, trying their best, would somehow follow the LILCO Plan." They would not -- and for good reason.

a. The OL-5 Licensing Board Has Found the LILCO Plan to Be Fundamentally Flawed

On February 13, 1986, FEMA conducted an exercise to test offsite emergency preparedness at Shoreham (the "Exercise"). The Exercise was limited to LILCO personnel and did not include the participation of the Governments.<sup>14/</sup>

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<sup>14/</sup> In its Post-Exercise Assessment Report, FEMA noted that because of this lack of participation, it could not measure the capabilities and preparedness of the Governments. See Post-Exercise Assessment, February 13, 1986 Exercise of the Local Emergency Response Organization (LERO) as Specified in the LILCO Transition Plan for the Shoreham Nuclear Power Station, dated April 17, 1986 ("FEMA Report"), at ix.

The Exercise revealed, and LILCO's performance demonstrated, the existence of many fundamental flaws in LILCO's Plan. These flaws were recently discussed at length by the OL-5 Licensing Board in its recent Exercise Decision.<sup>15/</sup> Section VI of the Governments' Overview discusses the Exercise Decision's pervasive impact on this proceeding and will not be repeated here. It is clear from that Decision, however, that two critical assumptions underlying LILCO's Motion -- that LILCO has an adequate, approved Plan and that LERO personnel are capable of implementing such a Plan -- are wrong.

With respect to Contentions 1 and 2, the OL-5 Licensing Board identified multiple reasons which explain why Suffolk County clearly would not rely upon LILCO's flawed traffic control scheme. Highlighted below are just some of the Board's findings related to traffic control which underscore the absurdity of the suggestion that there exists any basis to find that the County would rely on LILCO's Plan or that, if it did, the resulting response would be adequate:

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<sup>15/</sup> In addition to the OL-5 Licensing Board, others have criticized LILCO's Plan. See, FEMA Report; NRC Staff's Proposed Findings of Fact and Conclusions of Law on the February 13, 1986 Emergency Planning Exercise, dated September 11, 1987; and Suffolk County, State of New York, and Town of Southampton Proposed Findings of Fact and Conclusions of Law on the February 13, 1986 Shoreham Exercise, dated August 17, 1987.

1) Mobilization:

In the event of an emergency at Shoreham, the LILCO Plan calls for LILCO to mobilize numerous field personnel to facilitate the evacuation. The mobilization time for certain field workers was an area in which the Exercise revealed a fundamental flaw based on the numerous and serious problems demonstrated. Exercise Decision at 88. For example, the OL-5 Board noted that:

clearly, large numbers of TCPs were not staffed until well after traffic congestion would have occurred. Consequently, a controlled evacuation would probably not have been achieved. We agree with FEMA that a Deficiency should be assessed, and conclude that LERO's performance demonstrates a fundamental flaw.

Exercise Decision at 86.

2) Training:

The OL-5 Board also concluded that LILCO's training program is fundamentally flawed. It specifically noted that many of the problems which occurred during the Exercise continued to appear in drills LILCO held after the Exercise -- even though parts of the LILCO Plan were changed purportedly to address the criticisms of the Exercise. For instance, the Board concluded that:

the proportion of LERO workers observed failing to follow the Plan or procedures was disturbingly great. These failures occurred frequently enough to suggest

that there is, indeed, a pervasive problem in training LERO workers to follow the Plan. We conclude, therefore, that . . . LILCO's training program has not adequately trained LERO personnel to follow the LILCO Plan and procedures.

Exercise Decision at 194 (footnote omitted; emphasis added).

The Board also criticized the LILCO training program for not effectively training LERO personnel to exercise independent or good judgment or to use common sense in dealing with the type of situations which would be encountered during an emergency. Exercise Decision at 219. The Board pointed out that:

"[T]he weight of the evidence supports Suffolk's contention that LERO workers are not adequately trained to use independent and good judgment in response to unanticipated events . . . . LILCO's training program should be modified to teach LERO personnel that they can and should exercise independent judgment and common sense when faced with unanticipated events that require a prompt, effective response."

Id. at 224.

The Board reached the following overall conclusion regarding LILCO's training program:

"Deficiencies in the following areas, which are significant to the ability of LERO to implement the LILCO Plan, were found during the Exercise and were not

demonstrated to have been compensated for or corrected:

- 1) training for, and execution of internal communications within the LERO command structure and between that structure and field personnel in response to unexpected events;
- 2) basic knowledge of Traffic Guides and Bus Drivers of their assigned functions; and
- 3) training for timely and prompt response of Traffic Guides, Bus Drivers, Route Spotters, and Road Crews in the performance of their emergency tasks.

These deficiencies in LILCO's training program preclude a finding of reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at SNPS and therefore constitute a fundamental flaw in the Plan."

Exercise Decision at 250-51 (emphasis added).

3) Communications:

The OL-5 Licensing Board was also extremely concerned with the serious communications problems revealed by the Exercise. Of particular relevance to the issues at hand, the Board found a fundamental flaw arising from the absence of communications among field workers, including Traffic Guides, under the LILCO Plan. Exercise Decision at 251. As the Board

concluded with respect to LILCO's communications problems:

It may be difficult for LILCO to cure this fundamental flaw because of the training and experience of the personnel used to implement the Plan. As emergency workers, LILCO personnel are amateurs; this fact may be the root cause of the communications problems.

Id. at 64.

In light of the OL-5 Board's determinations that the Plan is fundamentally flawed, and that the LERO workers who are supposed to implement the Plan and assist the SCPD are badly trained and incapable of effectively communicating, there is no basis to state that the SCPD or the Suffolk County Executive would rely on or follow LILCO's Plan. The County would not involve itself with such a flawed plan or with such untrained amateurs. Halpin Affidavit, ¶¶ 7-14; Roberts 1988 Affidavit, ¶¶ 10, 11, 13, 14, 16, 17, 20, 21. Nor would New York State. Cuomo Affidavit, ¶¶ 3-6.

b. The Governments Have Found the LILCO Traffic Control Scheme to Be Unworkable

The affidavits submitted herewith by the Governments, and the existing evidentiary record, demonstrate that the County

would not implement LILCO's traffic control scheme because, as the recent Exercise Decision confirms, the LILCO traffic control scheme cannot be effectively implemented. See Halpin Affidavit, ¶¶ 9-10; Roberts 1988 Affidavit, ¶¶ 6-10. Additional reasons why the LILCO traffic control scheme is unworkable, aside from those discussed in the Exercise Decision, are set forth in the Roberts 1984 Affidavit, also submitted today. Furthermore, the SCPD would not take direction or advice from LILCO's amateur emergency workers, nor would the Suffolk County police mobilize at the request of LILCO. Roberts 1988 Affidavit, ¶¶ 10-11, 14.

In light of the foregoing, the County would likely respond to a radiological emergency at Shoreham in ways very different from those set forth in LILCO's Plan. Any attempts to implement traffic control would necessarily be ad hoc, with uncertain results. Roberts 1988 Affidavit, ¶ 8. In short, it is baseless for LILCO to assert that any argument "that the police would drastically deviate from the LILCO [traffic] plan or simply ignore the advice of trained traffic guides" is foreclosed. LILCO 1/2 Motion at 8. Indeed, if any argument is foreclosed, it is LILCO's assertion that the SCPD would follow the LILCO Plan or comply with the directions or advice of LERO Traffic Guides.

c. LILCO Has Not Materially Modified  
Its Traffic Control Scheme

LILCO's claim that it has modified its traffic control

scheme to some degree based on the criticisms of the SCPD, and that therefore, the police would follow the LILCO traffic plan (LILCO 1/2 Motion at 4), is clearly erroneous. LILCO has not modified its traffic control plan in any material way, and the criticisms of the SCPD therefore remain as valid today as when they were first made known to LILCO, the Board, and the other parties in this proceeding.

In support of its contention that its traffic control plan and strategies have been modified to take into account the SCPD's criticisms, LILCO lists nine "technical changes." LILCO 1/2 Motion at 4 and Att. 2. Eight of these nine "technical changes" are mere corrections of typographical errors, however. The other calls for the addition of a Traffic Guide, cones and flashing lights along one of LILCO's evacuation routes. Roberts 1988 Affidavit, ¶ 12.

LILCO, however, continues to ignore, and has not corrected serious deficiencies exposed by the SCPD some four years ago. The following examples are illustrative of this point:

- (1) The SCPD, during the 1987 Exercise litigation (OL-5 proceeding), testified regarding eight intersections within the EPZ, but outside the 2-mile zone, that were "critical" and unmanned under the LILCO Plan. The SCPD testified that evacuation flow through these intersec-

tions, and others, needed to be kept moving during an emergency at Shoreham. Otherwise, the SCPD concluded, LILCO's evacuation time estimates would be significantly lengthened. See Roberts et al., ff. Tr. 2180, at 41-42 (March 3, 1987). Notwithstanding this testimony, these eight intersections remain unmanned under LILCO's Plan. Plan, Appendix A, Fig. 8, at IV-52 through IV-64.<sup>16/</sup>

- (2) During the 1983-84 planning litigation (OL-3 proceeding), the SCPD listed 14 intersections within the Sixth Precinct patrol area and in the LILCO 10-mile EPZ that had the highest accident rate in that area. Of these 14, three were not designated by LILCO as manned Traffic Control Points ("TCPs"). The SCPD stated that 57 traffic accidents were reported in the previous year at these three intersections, and opined that if all the accidents that could occur during a Shoreham evacuation were included in this total, the figure would be substantially higher. Roberts et al., ff. Tr. 2260, at 57-58 (Jan. 17, 1984). These three high-accident intersections are still not designated as manned control posts under LILCO's Plan. Plan, Appendix A, Fig. 8, at IV-52 through IV-64.

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<sup>16/</sup> These Plan cites are to earlier Plan revisions; it is believed that Revision 9 made no changes in this regard, but there has been no opportunity to perform the detailed review necessary to verify this belief.

- (3) Also during the 1983-84 planning litigation, the SCPD testified that there should be at least two Traffic Guides at each TCP. Otherwise, it was much more likely that evacuees would proceed along evacuation routes different from and perhaps in conflict with the routes or traffic strategies prescribed by LILCO. Moreover, for a number of reasons, a single Traffic Guide would likely confront situations that could not be handled by one person alone. The absence of another Traffic Guide to assist under such circumstances would make it more likely that traffic would back up and become congested, causing evacuees to change lanes and take other actions likely to result in further delays in traffic flow. Roberts et al., ff. Tr. 2260, at 47 (Jan. 17, 1984). In spite of these criticisms, LILCO's Plan still only has 23% of its TCPs manned by two or more Traffic Guides. Plan, Appendix A, Fig. 8, at IV-52 thru IV-64.
- (4) Also during the 1983-84 emergency planning litigation, the SCPD testified regarding eight TCPs and the routing strategies for each which, in the SCPD's opinion, would be deviated from by evacuees due to the inappropriate and illogical nature of the traffic routes and strategies employed by LILCO. Roberts et al., ff. Tr. 2260, at 30-34 (Jan. 17, 1984). In subsequent testimony offered during the 1987 Exercise litigation, the SCPD

highlighted one such TCP -- TCP #9 -- and explained why evacuees would not follow the evacuation routing prescribed by LILCO's traffic plan. Roberts et al., ff. Tr. 2180, at 37 (March 3, 1987). Nonetheless, LILCO still retains these routing strategies in its Plan. Plan, Appendix A, Fig. 8, at IV-52 thru IV-64.

- (5) During the 1983-84 planning litigation, the SCPD testified that attempting to regulate traffic contrary to traffic signals or other traffic control devices is extremely difficult and usually proves unsuccessful. Indeed, the SCPD pointed out that even uniformed police officers have difficulty in directing traffic against signal lights. Accordingly, the SCPD testified that this LILCO traffic strategy would lead to confusion and increase traffic congestion and evacuation times. Roberts et al., ff. Tr. 2260, at 52-54 (Jan. 17, 1984). Notwithstanding this SCPD criticism, LILCO still directs traffic contrary to traffic signal lights and other traffic control devices. Plan, Appendix A, at IV-9 and Table V; OPIP 3.6.3, Att. 1 at 2.
- (6) Also during the 1983-84 planning litigation, the SCPD testified that blocking main traffic lanes on limited access highways, in order to facilitate access to the highways by traffic from the entrance ramps, would only

create further congestion not only on the limited access highways, but on the access routes as well. Roberts et al., ff. Tr. 2260, at 25 (Jan. 17, 1984). In their 1987 testimony offered during the Exercise litigation, the SCPD again criticized this traffic strategy. Roberts et al., ff. Tr. 2180, at 35-36 (March 3, 1987). Nonetheless, LILCO's Plan still calls for some traffic lanes to be blocked. Plan, Appendix A, at IV-7 and Fig. 8.2.

- (7) Also during the 1983-84 planning litigation, the SCPD testified that LILCO's proposed traffic channelization treatments would likely fail to control evacuation traffic flow. Roberts et al., ff. Tr. 2260, at 17 and 19-20 (Jan. 17, 1984). In particular, four of LILCO's six channelization strategies were specifically criticized by the SCPD. Id. at Att. 3. Despite these criticisms, LILCO still retains six such traffic channelization strategies in its Plan, including the four that were criticized. Plan, Appendix A, at IV-19 through IV-21.
- (8) During the 1983-84 planning litigation, the SCPD testified that LILCO's concurrent continuous flow treatments would fail to control evacuation traffic flow during a Shoreham emergency. Roberts et al., ff. Tr. 2260, at

21-23 (Jan. 17, 1984). In fact, the SCPD specifically criticized all 10 of LILCO's concurrent continuous flow treatments. Id. at Att. 4. In subsequent testimony offered during the 1987 Exercise litigation, the SCPD reaffirmed its criticisms of LILCO's concurrent continuous flow treatments, claiming that such treatment(s) often ignore conflicting traffic movements likely to occur at the intersections selected by LILCO for this traffic control technique. Roberts et al., ff. Tr. 2180, at 34-35 (March 3, 1987).

Notwithstanding these criticisms, LILCO still incorporates all 10 concurrent continuous flow treatments in its Plan. Plan, Appendix A, at IV-9 through IV-13.

- (9) Finally, during both the 1983-84 planning litigation and the subsequent Exercise litigation, the SCPD criticized LILCO's plan to convert a two-mile stretch of roadway to one-way traffic flow during a Shoreham emergency. Roberts et al., ff. Tr. 2260, at 23-24 (Jan. 17, 1984); Roberts et al., ff. Tr. 2180, at 23-24 (March 3, 1987). In spite of these criticisms, LILCO still retains the proposed one-way flow treatment in its Plan. Plan, Appendix A, at IV-18.

Based on the foregoing, it is clear that LILCO misleads the Board when it claims that it has modified the traffic control measures in its Plan to take into account the criticisms of the SCPD. LILCO 1/2 Motion at 4. LILCO's failure to address the many flaws in its Plan brought to light by the SCPD underscores why the SCPD never would or could follow or attempt to implement LILCO's Plan. See Roberts 1988 Affidavit, ¶ 12.

d. The Governments Are Not Familiar with LILCO's Plan

Throughout its Motion, LILCO implies that the Governments are familiar with the LILCO Plan.<sup>17/</sup> LILCO is wrong.

There is nothing in the evidentiary record of this proceeding to support the contention that the SCPD, or other State or County officials or personnel, are familiar with the LILCO Plan or the traffic control measures and strategies set forth in the Plan. Indeed, the record is to the contrary. See, Halpin Affidavit at ¶ 9; Roberts 1988 Affidavit at ¶¶ 5, 9. See also

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<sup>17/</sup> For example, LILCO claims that "there is also no question that the police with assistance from LERO, would be able to implement the traffic control portion of the LILCO Plan without appreciable delay or confusion." LILCO 1/2 Motion at 3 (emphasis added). LILCO further claims that "it is evident that the police could be notified and mobilized quickly, that they would know where to go once they were dispatched, and that they would understand what they needed to do once they arrived at the TCPs." Id. at 4 (emphasis added). Thus, it is clearly LILCO's intent to suggest that, partly as a result of the SCPD's familiarity with the LILCO Plan, the LILCO traffic control scheme could be implemented quickly and efficiently by the Suffolk County police in the event of a Shoreham emergency.

Papile Affidavit, ¶ 6; REPG Affidavit, ¶ 10; Zahnleuter Affidavit, ¶ 8. Although a handful of high-ranking Suffolk County police officials have testified in this proceeding and in the Exercise proceeding (OL-5 docket) about the inadequacies of LILCO's traffic plan, this does not mean that they are sufficiently knowledgeable about the details of LILCO's Plan to implement it, even if they chose to do so. Further, nothing about LILCO's traffic plan is known by the SCPD officers who would actually be called upon and expected to implement LILCO's traffic scheme in the event of a Shoreham emergency. See Roberts 1988 Affidavit, ¶ 9. Finally, a total of only three copies of LILCO's Plan are in the possession of County personnel, and they are being kept solely to assist in litigation. No attempt has been made or will be made to become familiar with the Plan for purposes other than litigation support. Halpin Affidavit ¶ 9. The same is true for New York State. Zahnleuter Affidavit, ¶ 8.

In its Second Renewed Motion for Summary Disposition of Contentions 1-10 (March 20, 1987), LILCO also asserted, as it does here, that the Governments were familiar with the LILCO Plan. See Statement of Material Facts No. 40, 41, 42, 43 and 58 to LILCO's Second Renewed Motion for Summary Disposition. However, the Board rejected this assertion, noting in its September 17 Order that the issue of the familiarity of the Governments with LILCO's Plan is an open issue upon which evidence must be heard.

The issue of the familiarity of the State and County Governments with the plan and how they will respond to a future radiological emergency is one which will be heard in any future hearing on remanded issues in this case.

September 17 Order at 44. In light of this prior ruling, and the clear evidence in the record regarding the total absence of familiarity with the Plan on the part of the State and County (particularly the SCPD), it is plain that this Board must hear evidence on the consequences of such lack of familiarity before it can rule on Contentions 1 and 2.

D. The Board's Reasons for Denying LILCO's Second Renewed Motion for Summary Judgment Still Exist

In its September 17 Order, this Board noted with respect to Contentions 1 and 2 that questions remained as to "how traffic will be guided and by whom." September 17 Order at 35. Those questions remain unresolved. Even assuming, arguendo, an ad hoc "best efforts" governmental response in the event of a Shoreham emergency, there are no facts in the record to support LILCO's assertion (LILCO 1/2 Motion at 8) that an ad hoc response by the SCPD would be the same as, or consistent with, the LILCO Plan or the traffic control measures set forth in the Plan, or that such a response would be adequate. Roberts 1988 Affidavit, ¶¶ 7-8, 21-22.

For example, contrary to LILCO's assertions (LILCO 1/2 Motion at 4-5), there is no evidence in the record that the

Suffolk County police could be mobilized as quickly as assumed by LILCO to respond to a radiological emergency at Shoreham. Roberts 1988 Affidavit, ¶ 21.<sup>18/</sup> Likewise, the SCPD may not be able to mobilize sufficient manpower in a timely fashion. Roberts 1988 Affidavit, ¶¶ 7, 21. Indeed, the SCPD has no plans and its officers have not been trained to implement traffic control in a radiological emergency. Roberts 1988 Affidavit, ¶¶ 5, 7-8.

LILCO's Motion therefore fails to demonstrate that a "best efforts" governmental response to a Shoreham emergency, particularly by the SCPD with respect to the traffic control measures contemplated by LILCO's Plan, would adequately protect the public health and safety. Accordingly, LILCO's Motion must fail.

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<sup>18/</sup> Previously, the Sixth Precinct (the SCPD precinct that covers most of the area of the Shoreham EPZ) conducted a test to determine how long it would take for officers not on duty to report for duty. See Monteith et al., ff. Tr. 7381, at 12-14 (May 1, 1984). The test, which was not conducted under the congested traffic conditions likely to prevail during a radiological emergency, showed that it would take approximately 1 hour and 18 minutes to gather 54% of the off-duty officers at the Sixth Precinct; approximately two hours would be required before two-thirds of the off-duty officers could report for duty. Moreover, these times were unrealistically low, since the SCPD test did not involve any of the activities involved in the mobilization effort contemplated by LILCO's Plan, such as reporting to staging areas, receiving briefings, installing equipment, traveling to obtain vehicles, preparing those vehicles for use, traveling back to the EPZ, or the deployment of personnel to field locations. Thus, a full scale mobilization of the Suffolk County police would take longer than the activities evaluated in the Sixth Precinct test.

E. LILCO's Statement of "Material Facts"  
is Filled With Errors and Misstatements

Attached to LILCO's Motion are 11 "material facts" as to which LILCO claims there are no genuine issues to be heard. LILCO 1/2 Motion, Att. 1. However, as shown below, these "facts" are either disputed, unsupported by the record, misleading and/or immaterial.

Alleged Fact 1 - LILCO begins by claiming that the Suffolk County police have the personnel and communications systems necessary to direct traffic during a Shoreham evacuation.

This alleged "fact" is unsupported by the record. In fact, it is questionable whether the SCPD could mobilize sufficient personnel rapidly enough to implement traffic control in a timely and effective manner, as alleged by LILCO. Roberts 1988 Affidavit, ¶¶ 7, 21. Furthermore, it is unclear what communications system LILCO is referring to. If LILCO is referring to communications with LILCO, then the alleged "fact" is plainly wrong. Roberts 1988 Affidavit, ¶¶ 13, 16.<sup>19/</sup>

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<sup>19/</sup> LILCO's reliance on NUREG 0654, Supp. 1 to support "Fact 1" does not obviate the need for a factual inquiry into the capabilities of the SCPD and how such capabilities would be employed in a Shoreham emergency. The cited portion of NUREG 0654, Supp. 1 regarding the availability of "resources" is clearly illegal, since the new rule provides no basis at all for such a resource assumption. See Governments' Overview, Section VII. Further, even if NUREG 0654, Supp. 1 were not illegal, it merely creates an assumption that the Governments have sufficient  
(footnote continued)

Moreover, this "fact" is of limited relevance to LILCO's Motion. As this Board has noted, questions regarding the adequacy of a governmental response "cannot be answered based only on the capabilities of the State and County and the assumptions contained in CLI-86-13." October 29 Order, at 9-10.

Alleged Fact 2 - LILCO next claims that LILCO's onsite notification procedures (EPIP 1-5) have been put into practice on several occasions and the Suffolk County police have responded.

In support of this "fact," LILCO cites only the Affidavit of Douglas M. Crocker, which is attached to LILCO's Motion. That affidavit describes the response of LILCO and police personnel to the declaration of an "Unusual Event" and two bomb threats at Shoreham. In all three instances, however, LILCO's onsite notification procedures failed miserably. In fact, LILCO's "response" demonstrated that LILCO lacks the capability to promptly notify the SCPD. See Roberts 1988 Affidavit, ¶ 15.20/

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(footnote continued from previous page)  
resources to implement a utility plan. The burden, however, is still on LILCO to demonstrate the assumption's validity. Moreover, NUREG 0654, Supp. 1 does not carry the force of a regulatory requirement; rather, it is only entitled to the weight afforded any guidance material. Thus, LILCO's reliance on NUREG 0654, Supp. 1 is misplaced.

20/ With respect to the declaration of the "Unusual Event," an attempt was made to use the RECS line, but the LILCO communicator received no response. It took 35 minutes from the declaration of the "Unusual Event" before LILCO even contacted Suffolk County; almost an hour elapsed before New York State was contacted and  
(footnote continued)

Thus, this "fact," assuming it is even material, is disputed.

Alleged Fact 3 - LILCO's alleged "Fact 3" states that the LERO Director is instructed by procedures to call the Suffolk County Executive to inform him of an emergency at Shoreham, explain the emergency response actions that need to be taken, and, as necessary, obtain permission to implement those response actions.

LILCO's alleged "Fact 3" is entitled to no weight. First, to the extent that it implies that the LERO Director would contact the Suffolk County Executive quickly in the event of a Shoreham emergency, alleged "Fact 3" is misleading. This conclusion follows from a reading of the Crocker and Roberts Affidavits, which reveal that LILCO had great difficulty, and took substantial time, in initially reaching a representative of Suffolk County, even when equipment supposedly designed to provide expeditious contact in an emergency was used. Crocker

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responded. See Crocker Affidavit, ¶ 6. With respect to the two bomb threats, the RECS line again failed. As a result, it took nearly 40 minutes just to notify Suffolk County about each of the bomb threats; due to these delays, it took the Suffolk County police a full hour to respond in each instance. Id., ¶¶ 7, 8.

Clearly, "Fact 2" does not support the LILCO assertions for which it is cited: that "[e]xisting communications systems and procedures ensure that Suffolk County would be contacted promptly in the event of an incident at Shoreham" and that "the Suffolk County police have responded quickly in such circumstances as bomb threats." LILCO 1/2 Motion at 4. To the contrary, the Crocker Affidavit plainly reveals that Suffolk County was not "contacted promptly" and, because of this, the SCPD did not respond quickly. See also Roberts 1988 Affidavit, ¶ 15.

Affidavit, ¶¶ 6-8; see Roberts 1988 Affidavit, ¶ 15. It therefore is disputed whether the LERO Director could contact the Suffolk County Executive at all, much less in a timely manner, in the event of a Shoreham emergency.

Second, this alleged "fact" is unsupported by the record. Nowhere does the record suggest that the Suffolk County Executive would or could give the LERO Director permission to implement any response actions. Indeed, the sworn testimony of the Suffolk County Executive is to the contrary. See Halpin Affidavit, ¶¶ 4, 6-7. See also Cuomo Affidavit ¶ 5 (Governor will not give LILCO permission to act). Thus, even if the LERO Director were able to contact the Suffolk County Executive within a reasonable period of time, the County Executive would not follow the instructions of the LERO Director as to what actions needed to be taken.

Alleged Fact 4 - LILCO claims that in the event of a Shoreham emergency, the LERO Director is instructed by procedures to request that the Suffolk County Executive and certain other County officials, including a police representative, come to the LERO EOC. The police representative is instructed to bring a portable police radio with which to communicate with police headquarters.

Alleged "Fact 4" is nothing more than a LILCO fantasy. Regardless of what LILCO's Plan might suggest, neither the Suffolk County Executive nor any representative of the SCPD would report to the LERO EOC during a Shoreham emergency. Halpin Affidavit, ¶ 11; Roberts 1988 Affidavit, ¶ 13. Moreover, even if a police representative were to come to the LERO EOC, a portable police radio would not be relied upon to provide the sole means of communications between the LERO EOC and police headquarters. See Roberts Affidavit, ¶ 13.

Alleged Fact 5 - In alleged "Fact 5," LILCO alleges that if the initial notification from the plant is of a Site Area or General Emergency, the LERO Director of Local Response is instructed by procedures to request that the Suffolk County police begin to mobilize at least 165 uniformed police officers for traffic control.

This allegedly "undisputed" fact is, in fact, disputed because under no circumstances would the SCPD ever mobilize at the request of the LERO Director. Roberts 1988 Affidavit, ¶ 14. See also Halpin Affidavit, ¶ 11. In any event, there is no basis to assume that the mobilization of only 165 officers would be adequate, even assuming, arguendo, that the County complied with the LERO Director's request. Roberts 1988 Affidavit, ¶ 14.

Alleged Fact 6 - LILCO claims that LERO will send the Traffic Control Point Coordinator to serve as liaison at police headquarters during a Shoreham emergency.

Once again, LILCO's alleged "fact" is disputed because neither the LERO Traffic Control Point Coordinator nor any other member of LERO would be provided access to police headquarters to serve as liaison or to perform any other function. See Halpin Affidavit, ¶ 11; Roberts 1988 Affidavit, ¶ 16.

Alleged Fact 7 - "Fact 7" alleges that the Traffic Control Point Coordinator is instructed by procedures to brief the Suffolk County police on how the LERO traffic control plan works.

For the reasons previously discussed, this alleged "fact" is not supported by the record. The SCPD would never allow LERO personnel to brief its officers on a traffic control plan which has long been criticized as being unworkable and inadequate in significant respects. See Roberts 1988 Affidavit, ¶ 16.

Alleged Fact 8 - LILCO claims that in the event an evacuation is recommended, the Traffic Control Coordinator is instructed by procedures to coordinate the dispatch of both the LERO Traffic Guides and the Suffolk County police.

This alleged "fact" is not supported by the record because the Suffolk County police, absent a directive from the Suffolk County Executive, would not participate in LILCO's Plan; moreover, the SCPD would never allow LERO's Traffic Control Coordinator to dispatch police personnel into the field. See Roberts 1988 Affidavit, ¶ 17.

Alleged Fact 9 - "Fact 9" alleges that LERO Traffic Guides will monitor the police officers' radiological exposure and inform them if Protective Action Guidelines ("PAGs") for permissible exposure were exceeded.

This fact is disputed because the SCPD will not work with or receive assistance from LILCO's amateur Traffic Guides to implement a flawed Plan. See Roberts 1988 Affidavit, ¶ 19-20.

Alleged Fact 10 - Alleged "Fact 10" claims that the Suffolk County police will be provided radiological monitoring and decontamination, if necessary, at the LERO Emergency Worker Decontamination Facility in Brentwood.

This alleged "fact" is disputed for the same reasons given above with respect to alleged "Fact 9." Further, "Fact 10" is immaterial to the issues raised by LILCO's Motion.

Alleged Fact 11 - Finally, "Fact 11" alleges that the LERO Director of Local Response will advise the Suffolk County Executive to give LERO Traffic Guides permission to direct traffic before the police arrive.

This alleged "fact" is plainly disputed by the sworn testimony of the Suffolk County Executive. The Suffolk County Executive could not and would not give LERO Traffic Guides permission to direct traffic in the event of a Shoreham emergency. See Halpin Affidavit, ¶ 7. As discussed above and in the Governments' Overview, any such attempted delegation of police powers would be unlawful.

F. Material Issues of Fact Remain to Be Decided

As noted above and in the Board's September 17 Order, there are issues of fact regarding the nature and adequacy of a governmental "best efforts" attempt at traffic control. Until those questions are answered, this Board cannot determine whether such a response would afford adequate protection or how it would affect the viability of evacuation as a protective action. See October 29 Order at 9.

Among the questions which must be addressed are the level of preparedness of the SCPD and relevant County officials to attempt to implement traffic control; whether any meaningful familiarity

with the LILCO Plan exists (assuming arguendo that the County would even attempt to implement it); what strategies would be implemented and how; how long would it take to implement those strategies; how long would it take to mobilize sufficient SCPD personnel to attempt to implement traffic control; how many SCPD personnel would be required to implement whatever strategies are eventually adopted; how and whether the County would or could coordinate with other organizations; and similar questions. See generally Roberts 1988 Affidavit. A Statement of Material Facts as to Which There Exists a Genuine Issue to be Heard, which sets forth the above issues, and others, in greater detail is attached hereto.

Once these questions are answered, the Board must then determine how the results of a governmental "best efforts" response would affect evacuation times and whether that protective action might be foreclosed or negatively impacted. October 29 Order at 9. Only then will this Board be able to determine whether a "best efforts" governmental response meets the NRC's regulatory standards.

IV. CONCLUSION

For the reasons set forth above, LILCO's Motion should be denied.

Respectfully submitted,

E. Thomas Boyle  
Suffolk County Attorney  
Building 158 North County  
Complex  
Veteran Memorial Highway  
Hauppauge, New York 11788

Michael S. Miller  
Lawrence C. Lanpher  
Michael S. Miller  
Christopher M. McMurray  
Michael J. Missal  
KIRKPATRICK & LOCKHART  
1800 M Street, N.W.  
South Lobby - Ninth Floor  
Washington, D.C. 20036-5891

Attorneys for Suffolk County

Fabian G. Palomino *OK*  
Fabian G. Palomino  
Richard J. Zahnleuter  
Special Counsel to the  
Governor of the State  
of New York  
Executive Chamber, Room 229  
Capitol Building  
Albany, New York 12224

Attorneys for Mario M. Cuomo,  
Governor of the State of New  
York

*Stephen B Latham*

Stephen B. Latham  
Twomey, Latham & Shea  
P.O. Box 398  
33 West Second Street  
Riverhead, New York 11901

Attorney for the Town of  
Southampton

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE  
EXISTS A GENUINE ISSUE TO BE HEARD ON  
MATTERS RAISED BY LILCO'S MOTION FOR  
SUMMARY DISPOSITION OF CONTENTIONS 1 AND 2

1. Under a "best efforts" government response, would the assumptions concerning compliance with prescribed evacuation routes which underlie the evacuation time estimates contained in LILCO's Plan be valid?
2. Under a "best efforts" government response, would the evacuation routing, traffic control strategies (including roadblocks, prescribed turn movements, channelization treatments, one-way traffic direction, and lane blockages), and procedures described in LILCO's Plan (particularly, in OPIP 3.6.3 and Appendix A) be implemented?
3. Assuming that the evacuation routing, traffic control strategies, and procedures in LILCO's Plan would be implemented, how and when would they be implemented and how long would it take?
4. Are pertinent governmental officials, including police officials and officers, sufficiently familiar with LILCO's Plan, including its traffic control scheme, to be able to implement all or a portion of it, with or without LILCO assistance?

5. Under a "best efforts" government response, would the evacuation time estimates in LILCO's Plan and the computer models from which they were derived be applicable, accurate, or appropriate for use in making protective action recommendations?
6. What traffic control scheme, if any, would be implemented if the "best efforts" government response did not adopt the LILCO traffic control proposals in whole or in part?
7. How long would it take to develop and implement any such traffic control scheme on an ad hoc basis?
8. Would such timing limit or foreclose the protective action of evacuation?
9. Under a "best efforts" government response, how would a decision to develop and implement a traffic control scheme or strategy be implemented and how long would it take?
10. Under a "best efforts" government response, how long would it take to mobilize and dispatch personnel into the field to direct traffic?

11. Would that timing be adequate?
12. Whether LILCO can contact the State or County promptly.
13. If a "best efforts" government response did not use LILCO's traffic control schemes, how could evacuation be evaluated, or selected as a viable protective action, in the absence of valid evacuation time estimates?
14. Whether a "best efforts" government response would be coordinated and integrated with other organizations?
15. Whether such a response would comply with regulatory requirements?
16. Under a "best efforts" government response, would a sufficient number of qualified personnel be available, willing, and able to implement necessary evacuation routing and/or traffic control strategies to protect the public?
17. Whether County or State personnel would ever be assisted by LILCO's amateur emergency workers?
18. Whether the recent Exercise Decision would alter that assessment in any way?

19. Whether the State or County would ever attempt to implement LILCO's traffic control scheme?