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LBP-87-26

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

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In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL-3 (Emergency Planning) (ASLBP No. 86-540-08-OL) September 17, 1987

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)

Introduction

On March 20, 1987 LILCO filed a motion, pursuant to 10 C.F.R. 2.749 for summary disposition of Contentions 1 through 10, the "legal authority" issues. It requests that the Board decide the issues in LILCO's favor, on the ground that no genuine triable issue of material fact exists and that LILCO is entitled to a judgement as a matter of law. As part of its motion, Applicant requested that the Board allow it to file a reply, within ten days of receipt of Intervenors' answer, in order for it to address "whatever novel theory the Intervenors create."

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Intervenors on May 11, 1987 filed an answer alleging that the motion for summary disposition is defective and frivolous and requesting that it be denied. In a separate response filed the same date, Intervenors asserted that Applicant's request to file a reply to Intervenors answer was premature and that, inter alia, the way for Applicant to proceed was by a motion for leave to reply, filed after Intervenors had answered Applicant's motion for summary deposition.

On May 22, 1987 LILCO filed a motion for leave to file a reply to Intervenors' answer to Applicant's motion for summary disposition. The motion renewed LILCO's request to file a reply. Attached to the motion was its proposed reply.

Intervenors on June 1, 1987 filed a response to the LILCO motion for leave to file a reply. The Governments asserted that the reply is unauthorized and must be rejected summarily and that no consideration should be given to the proposed reply.

Staff, which had not responded to the March 20, 1987 motion for summary judgement, filed a response to the LILCO motion to file a reply. It supported the motion, alleging that there was good cause to permit the filing of the reply.

In this Memorandum and Order, the Board rules that LILCO not be granted leave to file a reply to Intervenors' answer to the motion for summary disposition. The Board further rules that the March 20, 1987 motion for summary disposition be denied. In so ruling, the Board interprets Commission holdings in Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986), the

decision that remanded to the Licensing Board the matter of LILCO's realism argument and its effect on the legal authority issues.

A. THE LILCO MOTION FOR LEAVE TO FILE A REPLY

In its May 22, 1987 motion to file a reply LILCO concedes that Intervenors' answer says little that is new as to the facts. It premises its request on other grounds that there is good cause for the Board to accept a reply. Applicant states it could not have anticipated in its motion that Intervenors would ignore the requirements of the summary disposition regulations as to issues of fact and would instead try to recast the issues into legal ones. Further it claims that a reply is necessary to help make sense of the Intervenors' answer, and to focus the issues and to correct statements. Also, Applicant claims it could not have anticipated that Intervenors' arguments would for the most part challenge the Commission's decision in CLI-86-13, supra, as well as other Commission decisions and regulations and federal court decisions. Attached to Applicant's motion is the proposed reply, which it seeks permission to file.[1]

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1 Intervenors introduced the procedure in this proceeding of attaching to a motion for leave to file a reply the proposed reply sought to be introduced. See Suffolk County and State of New York Motion for Leave to File Reply to LILCO's Answer and NRC Staff's Response to Motion to Admit New Contention, March 20, 1985.

In their answer of June 1, 1987, Intervenors claim that 10 C.F.R. 2.749(a) bars the filing of reply. They further assert that even assuming that the Board has authority to consider LILCO's motion it must be denied because LILCO has demonstrated no compelling need to overcome the 10 C.F.R. 2.749 prohibition on replies. Intervenors contend that the Board has no need for additional assistance from LILCO to make sense of Intervenors' answer and to focus the issues. They further contend that legal argument is the essence of summary disposition filings, LILCO having to prove that as a matter of law it is entitled to a ruling in its favor.[2] They state that if Applicant could not, or did not anticipate that legal argument would be included in the Governments' answer then LILCO must face the consequences as set forth in the regulations governing summary disposition. Intervenors further contend that Applicant's proposed reply contains incorrect and misleading factual and legal assertions and that the Governments must reply to them "unless the Board provides assurance that It will not review the proposed Reply at all." Intervenors ask that in addition to denying the LILCO motion and rejecting the proposed reply, "the Board make it clear that it will give absolutely no consideration to the proposed Reply."

Staff in a June 8, 1987 response to the LILCO motion to file a reply supports Applicant for the reasons offered by LILCO. Staff concludes that Intervenors' answer to the motion for summary disposition

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2 10 C.F.R. 2.749(d).

raises legal issues which could not have been anticipated and which must be resolved in deciding the subject motion; and that there are compelling reasons for permitting LILCO to file a reply to address Intervenors' legal arguments.

Based upon the authorized filings, the Board denies Applicant's motion to file a reply and rejects the proffered proposed reply.

Pertinent to the issue of the possible granting of leave to file a reply to an answer to a motion for summary judgment is 10 C.F.R. 2.749(a). It provides:

> Any party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding . . . . Any other party may serve an answer supporting or opposing the motion, with or without affidavits within twenty (20) days after service of the motion . . . . The opposing party may within ten days after service respond in writing to new facts and arguments presented in any statement filed in support of the motion. No further supporting statements or responses thereto shall be entertained.

Also pertinent is 10 C.F.R. 2.718(e) which provides Boards with the general authority to "regulate the course of the hearing and the conduct of the participants" in the proceeding.

The Board has in the past modified the application of the provisions of 10 C.F.R. 2.749(a). Using the authority in 10 C.F.R. 2.718(e), we granted Intervenors an extension of time beyond the 20 day period for the regulations to serve an answer opposing the motion for summary disposition. Memorandum and Order (Ruling on Intervenors' Motion to Convene Conference of Counsel, and Other Relief), April 10,

1987 at 7-8. It is noted that Intervenors in seeking the extension of time to file an answer beyond that prescribed in 10 C.F.R. 2.749(a) did not consider the matter of permitting the filing of a reply to an answer to the motion to be jurisdictional. Intervenors took the position that should the Board grant Intervenors the extension they requested," the Governments have no objection to LILCO being granted an opportunity to reply." Suffolk County, State of New York, and Town of Southampton Motion for Conference of Counsel and for Licensing Board Clarification of Procedures, or In the Alternative, For Additional Time to Respond to LILCO's Summary Disposition Motion, April 7, 1987, at 11, n.6.

In response to a Staff motion filed April 8, 1987 seeking permission to reply to both LILCO's motion for summary disposition of March 20, 1987 and Intervenors' answer to the motion, this Board ruled that as a threshold requirement before considering the matter of whether the Board could grant leave for filing a reply, there should be established by the movant that it have a compelling reason for doing so. Staff never satisfied the threshold requirement and the motion was denied. Memorandum and Order (Ruling on Staff's Motion of April 8, 1987 to File Reply), April 22, 1987 at 3-4.

The procedure previously employed by this Board, of requiring a movant to establish a compelling reason to lift the prohibition in 10 C.F.R. 2.749(a) against the filing of replies, before the Board decides whether it has the authority to do so, is a reasonable approach and we will continue to follow it here. The Board does not find, after considering the authorized filings of the parties, that the Applicant

has made the threshold showing, so that we need make the decision on our jurisdiction to do so.

Applicant's asserted need to file a reply is premised on its inability to have anticipated Intervenors' answer to its motion for summary disposition and in order to focus issues and to correct misstatements. The claim of surprise and the need to correct the record should be viewed in the context of the history of the legal authority and realism issues.

The very caption of Applicant's motion, "LILCO's Second Renewed Motion for Summary Disposition of the 'Legal Authority' Issues (Contentions EP-1)" indicates a long and repetitive history. LILCO's original motion for summary disposition was filed in August 1984 and its first renewed motion in February 1985. Much involving the current motion for summary disposition repeats what has gone before. It extends to LILCO filing on March 26, 1985 a motion seeking leave to reply to Intervenors' response to Applicant's first renewed motion for summary disposition and to Intervenors proffering on April 8, 1985 an answer to Applicant's motion for leave to file a reply.

The Board found there was no need for a reply by LILCO because of the already exhaustive filings and arguments on the issue. Therefore, it denied the motion. The proffered document of Intervenors was found to be without a useful purpose and was rejected. LBP-85-12, 21 NRC 644, 899 (1985).

The current situation is not dissimilar to the prior one. The parties have been afforded the opportunity called for by the regulations

to make their cases and the Board has sufficient information to reach a decision in the matter. The parties do not propose to present to the Board anything by way of additional facts but of argument of which we have had enough. It should be remembered that a primary purpose of summary disposition is to avoid the cost and delay of unnecessary litigation. Summary disposition should not be employed in a way that would add to cost and delay.

The most important occurrence involving the legal authority issue since the Board decided the last renewed motion for summary disposition was the Commission's issuance on July 22, 1986 of its decision CLI-86-13, supra, in which the Commission expressed new views on the realism issue, which affects the legal authority question. Of course, from the history of the proceeding, it could only be expected that Applicant and the Intervenors would interpret the Commission's holdings differently and that they would emphasize different areas in making their cases on summary disposition.

Applicant construed CLI-86-13 as limiting Intervenors to utilizing the LILCO plan. Intervenors interpretation, with its unbridled resistance to the plan, is to the contrary. Applicant emphasized from a factual standpoint Intervenors' capacity to implement the utility plan while Intervenors relied extensively on legal interpretations that do not require them to do so.

The positions the parties took were quite predictable. There are no surprises. Each side made its strongest case in the single pleading allowed by the regulation. The Board has no need for additional

argument to reach its determination. At this point, we need no assistance in keeping the record straight on the issues, this third time around on the motion for summary disposition on the legal authority issues. Applicant has not provided the Board with a compelling reason for the need to file a reply and the motion is denied.

Similarly, we have no need for a filing from Intervenors to set the record straight. Further, the denial of Applicant's motion renders moot any requirement for a further filing by Intervenors on the subject. The request is denied. As to Intervenors' other pleas, which in effect proclaim to the Board not to include extra record matters (Applicant's proposed reply) in our considerations and to confirm we have not done so, those unnecessary pleas are patently ridiculous and denied.

B. THE SECOND RENEWED LILCO MOTION FOR SUMMARY DISPOSITION OF THE LEGAL AUTHORITY ISSUES

1. Background

The legal authority issues are those contained in Intervenors' first ten contentions which allege that LILCO lacks under New York law legal authority to perform ten functions that had been relied upon by Applicant to carry out the offsite emergency plan for the Shoreham Nuclear Power Station.[3]

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[3] They are: (1) guiding traffic; (2) blocking roadways, ejecting (Footnote Continued)

Applicant has, inter alia, defended against the legal authority issues on the basis of its realism argument. The argument is that the legal authority issue is an academic issue of no practical importance. It asserts the local governments in an emergency would try to protect the public and that since those with legal authority to protect the public would respond to the emergency, there would be no gaps in legal authority.

The legal authority issue was twice litigated before this Board. In the first instance, the Board on October 22, 1984 issued a Memorandum and Order (unpublished) finding that seeking summary disposition at that time was premature. On February 27, 1985 LILCO renewed its motion and after review we decided against the Applicant, as reported in the Partial Initial Decision of April 17, 1985, LBP-85-12, 21 NRC 644, 919.

The Board found on the basis of Cuomo v. LILCO, Consol. Index No. 84-4615, (N.Y. Sup. Ct., slip op., Feb. 20, 1985), that the actions cited in Contentions 1-10 to be implemented in the emergency plan were

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(Footnote Continued)
barriers in roadways, and channeling traffic; (3) posting traffic signs in roadways; (4) removing obstructions from public roadways, including towing private vehicles; (5) activating sirens and directing the broadcasting of emergency broadcast system messages; (6) making decision and recommendatons to the public concerning protective actions; (7) making decisions and recommendations to the public concerning protective actions for the ingestion exposure pathways; (8) making decisions and recommendations to the public concerning recovery and reentry; (9) dispensing fuel from tank trucks to automobiles along roadsides; and (10) performing access control at the Emergency Operations Center, the relocation centers, and the EPZ perimeters.

prohibited by state law.[4] The Board further found that LILCO's realism argument was predicated on the State and County authorizing LILCO to act as called for in the emergency plan and that because under New York law the utility could not be authorized to exercise police powers the realism argument was without merit. The Board concluded, based on the Governments' opposition to the plan, that any Government response would be on an uncooperative, uncoordinated ad hoc basis which did not provide reasonable assurance that adequate protection measures could and would be taken in the event of a radiological emergency.[5]

LILCO pressed its realism argument before the Appeal Board, which then upheld the Licensing Board. ALAB-818, 22 NRC 651, 673-676. LILCO petitioned the Commission for review of ALAB-818, and the Commission approved. It resulted in the Commission, on July 24, 1986, reversing and remanding for further evidentiary hearings issues raised by LILCO's realism argument.[6]

The Commission in CLI-86-13 said that the LILCO plan should be measured against a standard that would require protective measures that are generally comparable to what might be accomplished with Government cooperation. The Commission assumed that should the plant go into operation and were there to be a serious accident requiring protective

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4 LBP-85-12, supra, 21 NRC at 899.

5 LBP-85-12, supra, 21 NRC at 909-912.

6 CLI-86-13, supra, 24 NRC at 24.

actions, there would be a "best effort" State and County response and that as part of the "best effort" they would utilize the LILCO plan as the best source for emergency planning information and options. Statements by the Governor of New York and the County Executive of Suffolk County denying that they ever would or could cooperate with LILCO were not accepted by the Commission at face value. The statements caused the Commission to view the LILCO plan as an interim plan which will be superseded or supplemented by the State and County if Shoreham is permitted to operate at full power.

The Commission would not assume, as LILCO would have it do, that the assumed "best effort" Government response would necessarily be adequate. In its decision, the Commission saw that there were open questions as to the effectiveness of a Government response. The Commission concluded that to answer those questions more information was needed about the shortcomings of the LILCO plan in terms of possible lesser dose savings and protective actions foreclosed, assuming a "best effort" State and County response using the LILCO plan as the source for basic emergency planning information and options. The Board was directed to use the existing evidentiary record to the maximum extent possible but to take additional evidence where necessary.

2. The LILCO Position on Summary Disposition

For purposes of its motion, LILCO considers itself prohibited by state law from performing the ten functions enumerated in Contentions

1-10.[7] LILCO asserts that the Commission accepted LILCO's realism argument in CLI-86-13, Applicant stating that "since everyone with 'legal authority' would respond to the emergency, there would be no gap in legal authority."

Applicant argues that, considering the presumptions in CLI-86-13 that the State and County would use their best efforts, and that the LILCO plan, if allowed to operate without the State and County, complies with NRC requirements, therefore, the State and County cannot oppose the motion without showing how they themselves, doing their best, would spoil an adequate plan and harm the public. LILCO further argues this is something Intervenors cannot do considering the governments' resources.

Applicant contends that all that it needs from the State and County is the intangible resource of legal authority and that can be provided by telephone. LILCO asserts that so long as there is a means of contacting the State and County in an emergency, the "best efforts" presumption compels the conclusion that the emergency response would be about as prompt as under the LILCO only response already litigated.

Applicant stated it wished it were understood realism does not mean that the State or County would step in at the time of an accident and

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7 The New York State Supreme Court, Appelate Division, Second Department, in 511 N.Y.S. 2d 867 (1987) affirmed the lower court decision, Cuomo v. LILCO, supra, that held LILCO lacks the legal authority to perform the functions. LILCO will appeal.

take over the plan using State and County employees and send LERO home. It stated that realism contemplates a partnership in which LERO would continue, with emergency approval, to manage the emergency response, with the State and County providing legal authority and whatever resources they could provide on short notice. The utility's position was that the local governments could override a LERO decision, and that ultimate authority resided with the governments.

Attached to Applicant's motion is a statement alleging 63 material facts as to which LILCO contends that there is no genuine issue to be heard on Contentions 1-10.[8] They pertain to State and County resources employable in a radiological emergency that relate to the functions described in the legal authority contentions. In its motion Applicant describes how the State and County, making a best effort, and employing their resources in conjunction with LILCO, will provide a satisfactory emergency response in the areas encompassed by the legal authority contentions.

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8 Applicant asserts Contentions 3, 9 and 10 have been mooted either wholly or substantially. Contention 3 addresses the posting of traffic (trailblazer) signs on the roadways. This has been eliminated from the plan. Contention 9 relates to dispensing fuel from tank trucks to automobiles along the roadway. The Licensing Board has ruled that this function is not required by NRC regulations or guidelines. Contention 10 concerns performing "access control" at the Emergency Operations Center, the relocation centers and the EPZ perimeter. The Emergency Operations Center and the relocation centers are on LILCO property and it can control access to its own facilities. (If security difficulties arose, it would call the police.) As to the EPZ, LILCO has not proposed

(Footnote Continued)

3. The Governments' Position on Summary Disposition

Intervenors assert that LILCO's renewed motion does not address the issues raised in Contentions 1-10 and does not support summary disposition of those contentions. They allege that Staff, the Licensing Board, the Appeal Board, as well as the Commission in CLI-86-13 have rejected the realism argument. The Commission is said to have done so by concluding that LILCO could not perform those functions and thereafter focusing its attention on the adequacy of a hypothesized Government response. Intervenors assert that Applicant's motion essentially reargues its realism position ignoring its conceded lack of authority and that LILCO without legal justification claims that the present record establishes that a hypothesized ad hoc "best effort" governmental response would be adequate under NRC regulations and that, on that basis, LILCO is entitled to summary disposition of Contentions 1-10.[9]

The State of New York and Suffolk County claim that LILCO's realism argument has no fixed meaning and that it has been consistently rejected in all of its permutations. The realism argument is said to have taken the form that (1) LILCO will implement its plan under a delegation of

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(Footnote Continued)
stopping anyone from entering but only discouraging them from doing so.

9 Intervenors and Applicant agree that Contention 3 is moot because it is no longer part of the LILCO plan to post traffic signs on highways.

powers by or pursuant to a deputization from the State or County; (2) LILCO and the Governments will engage in a spontaneous cooperative effort in which the Government will provide LILCO with an umbrella of legal authority; (3) that the Governments would in fact implement the LILCO plan using LILCO's advice and LERO resources or even permitting LILCO to make all necessary decisions; or (4) that the Governments will respond to an emergency on their own and that LILCO's lack of legal authority to carry out its own plan would be rendered academic.

It is alleged that LILCO's latest version of the realism argument is inconsistent with the holding in Cuomo v. LILCO because the State cannot authorize LILCO to implement its plan or to perform the functions embraced by Contentions 1-10. Further, it is asserted that LILCO's realism argument is inconsistent with the Commission's decision in CLI-86-13, in that nowhere was it said the governments would implement the LILCO plan. Intervenors claim that presumptively the Commission felt it could not predict, much less declare as a presumption, what sovereign governments would do in exercising their police powers on an ad hoc basis.

Intervenors additionally assert that LILCO ignored the Commission's clear acknowledgement that more information is needed and questions must be answered about what an ad hoc "best effort" Government response would be and whether it would be adequate.

The State and County claim that the affidavits submitted by the governments and the existing evidentiary record not only establish the existence of factual disputes on material issues but demonstrate that

summary relief should be granted to the Governments. They state that the present evidentiary record does not indicate how the State and County would respond in an emergency or what effect that response might have upon the overall implementation of LILCO's offsite plan. It is asserted that to make rulings concerning the nature, adequacy, or regulatory compliance of a plan, other than for the already litigated LILCO plan, would constitute a violation of due process and deprive the Governments of their right to a hearing.

Intervenors argue that in CLI-86-13, the Commission itself identified specifically the need for more information on factual issues in order to rule on the remanded realism issue. They state that LILCO would require the Board to answer, without factual or record basis, not only the questions the Commission identified as requiring more information but also innumerable additional questions as to which there are no facts in the record or otherwise available to the Board.

The State and County assert that the affidavits submitted by the Governments, and the existing evidentiary record demonstrate 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 upon LILCO recommendations or advice; and would not authorize LILCO personnel to perform the functions in Contentions 1-10. They say they would likely respond to a Shoreham emergency in ways, not further identified, that are very different from those set forth in the LILCO plan. In support of the foregoing assertions, Intervenors rely on affidavits from the Governor of the State of New York, the Suffolk County Executive and

the Presiding Officer of the Suffolk County Legislature to that effect. Also appended is an affidavit of the Deputy Chief Inspector with the Suffolk County Police Department stating reasons why the police department could not effectively utilize or be integrated into the LILCO plan.

Intervenors claim that testimony in this proceeding prohibits the finding sought by LILCO. They point to testimony from State and County witnesses to the effect that the LILCO plan is seriously and fundamentally flawed and is inadequate and unworkable. They state that in the face of consistent testimony of Government officials, over a period of three and a half years that the LILCO plan is no good, no reasonable person could conclude that ir a radiological emergency those officials would turn around and attempt to implement the very proposals which they or their staffs have determined would not protect the public. (Much of the testimony relied upon to establish that the plan is unworkable was found not to be meritorious in the Licensing Board's prior decisions, but Intervenors' position is that regardless of the Board's findings, one could not rely on the officials to implement proposals they deem worthless.)

Intervenors further claim LILCO's material facts fail to support its motion because the recitations of Intervenors' capacities have nothing to do with whether the State or County would or could implement the provisions which are referenced in Contentions 1-10, as LILCO assumes in its motion. Intervenors assert that several of LILCO's material facts are wrong. They further claim that the underlying

premise of LILCO's motions that its plan has been approved or found adequate is without basis. The State and County list issues that were resolved against Applicant or remain open, including the litigation concerning the results of its February 13, 1986 exercise of its plan.

In opposing the motion, Intervenors also rely on Guard v. NRC, 753 F.2d 1144 (1985) for the proposition that the Court rejected the concept that the basic licensing standard established by the Commission can be satisfied by "assumptions" that currently unidentified resources and responses will be provided to protect the public.

In their answer, Intervenors go through each of the legal authority contentions (except Contention-3) alleging where the Applicant misstates the issues and ignores the record.

Attached to Intervenors' answer as its statement of material facts to which there exists a genuine issue to be heard is a listing of 54 issues. Most of these pertain to whether assuming an ad hoc best efforts Government response, certain regulations, NUREG-0654, or provisions of the plan would be complied with.

4. Applicable Law on Summary Disposition

The following discussion of the law on summary disposition succinctly sets forth its requirements. It is contained in an unpublished Memorandum and Order (Ruling on Motion for Summary Disposition of Contention 8 re: Vogtle Quality Assurance), October 3, 1985, at 2-3, in Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), Docket Nos. 50-424-OL and 50-425-OL.

The law pertaining to summary disposition under 10 C.F.R. 2.749 is well established. Licensing Boards are empowered to grant summary disposition on the pleadings on motion of a party to a proceeding if materials before the Board show that there is no outstanding genuine issue of material fact and that the moving party is entitled to a decision as a matter of law. The Commission has encouraged the use of summary disposition so that hearing time is not unnecessarily devoted to matters as to which no genuine issue of material fact exists. Statement of Policy in Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).

The party seeking summary disposition must carry the burden of proving the absence of any genuine issue of material fact, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753 (1977), with the record viewed in the light most favorable to the motion's opponent, Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982). A party opposing a motion may not rely upon a simple denial of material facts stated by the movant, but must set forth specific facts showing that there is a genuine issue of fact remaining. Virginia Electric Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980).

A party cannot avoid summary disposition on the basis of guesses or suspicions or on the hope that at the hearing the licensee's evidence may be discredited or that something may turn up. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 248 (1975).

All material facts adequately set forth in a motion and not adequately controverted by the responses are deemed to be admitted, 10 C.F.R. 2.749(a); however, the proponent of a motion must meet the burden of proof in establishing that there is no genuine issue of material fact, even if the opponent fails to controvert the conclusions reached in the motion's supporting papers. (Perry, supra, at 754).

5. CLI-86-13 and Its Effect on the Summary Disposition Motion

The Commission's decision in CLI-86-13 reversed the Appeal Board on LILCO's realism argument and remanded the matter to the Licensing Board for further proceedings. In so doing, the Commission made new rulings on the issue which require our analysis in order to determine whether or

not LILCO has sustained its burden on the motion for summary disposition.[10]

The Commission found that the Boards, in deciding that the LILCO plan does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency, presumed that the LILCO plan must essentially achieve all that a fully coordinated plan can achieve. It decided that was erroneous and that the LILCO plan should be measured against a more flexible standard that would require protective measures that are generally comparable to what might be accomplished with governmental cooperation.

LILCO's realism argument before the Commission was that if LILCO lacked legal authority, the State and County would respond in a real emergency either by implementing the plan themselves or by deputizing LILCO personnel to implement the plan.

In considering the LILCO plan under 10 C.F.R. 50.47(c), which provides for licensing notwithstanding noncompliance with the NRC's regular planning standards, if the defects are "not significant," if there are "adequate interim compensating actions," or if there are

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10 The Commission has inherent, sua sponte, authority to step into a proceeding and provide guidance on important issues of law if it concludes that guidance may be useful in avoiding error or misunderstanding. See Public Service Co. of New Hampshire, et al. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-517 (1977). See also Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685, 691 n. 3 (1986).

"other compelling reasons", the Commission found the LILCO plan to be an interim plan because the utility intended it as such and LILCO stands ready to cooperate with the governments in preparing a fully coordinated plan. The Commission looked upon the interim plan as one "which will likely be superseded or supplemented by the State and County if Shoreham is permitted to operate at full power."[11]

The Commission accepted LILCO's argument that in an emergency the governments would participate in responding to it. The Commission assumed it would be a "best effort" response and that the governments as part of that response would utilize the LILCO plan as the best source,[12] or the only available comprehensive compendium[13] of emergency planning information and options. No other statement was made by the Commission as to how a "best effort" response would utilize the LILCO plan.

The Commission was unwilling to assume, as LILCO would have it do, that the "best effort" Government response, as specified, would necessarily be adequate. It had questions directed at how effective the response of the State and County would be and what those results would be insofar as meeting emergency planning requirements. The Commission remanded the realism argument to the Licensing Board for further proceedings in accord with the decision. The Board was directed to use

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11 CLI-86-13, supra, 24 NRC at 29, n.9.

12 Id., 24 NRC at 31.

13 Id., 24 NRC at 33.

the existing evidentiary record to the maximum extent possible and to take additional evidence where necessary.

We conclude from the foregoing that the Commission's "best effort" assumptions, including the use of the LILCO plan for planning information and options, are not restrictive so as to make indisputable what the participation by the Government will be and what will be accomplished. Employing the assumptions as the Commission did, the assumptions leave open to question how the Governments will respond and whether that response will fulfill regulatory requirements. To answer the questions, we are directed to supplement the existing record by further proceedings to the extent necessary. Thus, we are fully satisfied that the "best effort" assumptions made by the Commission are not conclusive as to establishing a single method of response by Intervenors.

Because the Commission recognized that there are open questions pertaining to the realism argument and directed the taking of additional evidence where necessary, does not, ipso facto, mean that the parties are guaranteed a full evidentiary hearing on the matters. Successful employment of 10 C.F.R. 2.749, the regulation governing summary disposition, can result in dispensing with the holding of the hearing called for, but in order for this to be accomplished the regulatory requirements must be met. The resolution of the motion for summary disposition of the realism argument will affect the extent of any evidentiary hearing to be conducted under the remand.

The concept behind Applicant's motion for summary disposition must be viewed against the Commission's holding in CLI-86-13. As stated previously, LILCO argues that considering that the LILCO plan, if allowed to operate without the governments, complies with NRC requirements and that the presumptions in CLI-86-13 provide that the State and County would use their best efforts, the governments cannot oppose the motion without showing how they themselves, doing their best, would spoil an adequate plan and harm the public. Applicant contends that the governments cannot do this considering the extent of their resources.

This position of Applicant's is flawed in a number of respects. Its claim that its plan complies with NRC requirements is contrary to the record. This Board found that the LILCO plan was fatally defective on two grounds. The first was that it did not have the legal authority to implement all of the plan it submitted. The second was that the opposition of the State and County to the plan had created a situation where at any given time it is not known whether the plan will be workable. Although the Commission reversed these findings, which had been upheld by the Appeal Board, the matters were only remanded for further proceedings on the issues. The Commission in CLI-86-13 never resolved the issues in Applicant's favor. They remain open and are yet to be decided. Thus, it does not automatically follow that a "best effort" response by the Governments will assure the plan's adequacy, as Applicant would have us conclude.

6. Decision on the Issues

The crux of Applicant's motion is that LILCO has undisputed facts that establish what Intervenors' response would be if there were a radiological emergency at Shoreham and that response would overcome the deficiencies in the LILCO plan as established by the Legal Authority Contentions. These undisputed facts are said to establish: that Intervenors would act in partnership with the Applicant; that LERO would continue to act with Government authorization to manage the emergency response; that the Governments would bestow legal authority and whatever resources were needed on short notice; and that the State and County would retain veto power over LERO decisionmaking. (Motion at 9).

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 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.[14] Nothing in CLI-86-13 alters the Cuomo decision which so far has been upheld on appeal. See footnote 7 above. Applicant's claim that the Governments' response will be on a basis of what has been found contrary to law is meritless.

Further, Applicant's reliance on the "best efforts" assumptions in CLI-86-13 does nothing to support LILCO's claim that the only way

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[14] LBP-85-12, supra, 21 NRC at 911.

Intervenors will respond will be to cooperate with the Governments using the LILCO plan. As we discussed previously, the "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 Intervenors' 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.

Applicant has not submitted to this Board convincing evidence that there is no genuine issue of material fact on the question of what the State and County response to a radiological emergency would be and that as a matter of law LILCO is entitled to a decision on the Legal Authority Contentions by virtue of its realism argument.

No one has more knowledge than the State and County on how they would respond to an emergency at Shoreham. By affidavit they dispute each claim LILCO makes as to how they would react.

The Board recognizes that parties are capable of making self-serving statements. Also, that the Commission for the purposes of its decision in CLI-86-13 was unwilling to take at face value similar

but unverified statements that the State and County would not cooperate with LILCO in implementation of its plan. Despite the foregoing, there is a genuine dispute as to what the Intervenors will do and that also disqualifies Applicant from having its motion granted.

The Commission in its remand in CLI-86-13 expects the Board to determine what the Intervenors' response will be. We can only do that in hearing and weighing the positions of the parties on this disputed matter. It is evident that the Commission's refusal to take the prior statements of the Governor of the State of New York and the Suffolk County Executive at face value was not meant to be res judicata on this question.

The Board finds that on the record before us Applicant has not made a prima façie showing, as required by 10 C.F.R. 2.749 that there is no genuine issue of fact as to how Intervenors would respond to a radiological emergency at Shoreham. Further, Intervenors have established by sufficiently convincing direct evidence, i.e., the affidavits of State and County officials, that the material facts Applicant claimed to be without dispute are in fact disputed and there exists a genuine issue to be heard. This also requires denial of the motion under 10 C.F.R. 2.749.[15]

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15 There is no basis to grant the motion on the legal authority issues in Intervenors' favor as a matter of law. No one assumes at this stage of the proceeding that LILCO is not prohibited from performing the State or County roles as enumerated in the

(Footnote Continued)

A separate discussion is in order in regard to Applicant's claim that there is no material issue of fact as regards the capacity of Intervenors to respond to an emergency at Shoreham. The argument of the State and County that these material facts have nothing to do with how they will react in an emergency is erroneous. Intervenors' capacities have a direct bearing and are relevant in regard to the response the State and County are capable of making in an emergency. It is a matter fully at issue. The adequacy of a response is dependent on the capacity of the performers to conduct it. Although the motion for summary disposition does not turn wholly on whether Intervenors have an adequate capacity to conduct a response, it is a material fact at issue. To the extent Intervenors have not contradicted the capacities Applicant has established as to Intervenors' capabilities to respond, they will be made a matter of record.

In the following section, the Board will describe the factual disputes that continue to exist on Applicant's version as to how the State and local governments would respond to a radiological emergency at Shoreham in regards to the relevant contentions. At this stage of the proceeding, Intervenors did not go beyond stating that that which

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(Footnote Continued)
contentions. See CLI-86-13, supra, 24 NRC at 30. The matter for decision is whether the realism argument overcomes the LILCO disability. In Intervenors establishing that there are material facts in dispute on the issue, it helps defeat Applicant's motion for summary disposition but does not entitle Intervenors to judgement on that issue as a matter of law. The disputed issues are yet to be determined in accordance with the remand.

Applicant described as their response was not what they would do. This tack was sufficient to meet the requirements of 10 C.F.R. 2.749 in regard to overcoming Applicant's motion. We expect that in connection with the remanded hearing where the Commission requires that it be established what the State and County response would be, Intervenors will be fully forthcoming so that the facts will be developed.

The contentions involving the disputed responses are next considered in the basic order that the parties considered them.

7. The Contentions and the Disputed Response

Contention 5 (sirens)

We are here confronted with conflicting statements on the parts of Applicant and Intervenors concerning whether or not the sirens would be sounded and by whom. Applicant cites the fact that the sirens are already in place, the fact that they can be activated from several control points, and Applicant's own interpretation of the Commission's decision in CLI-85-12, 21 NRC 1587, 1589 (1985) as compelling the conclusion that the State and County would, in an emergency, promptly authorize the use of the existing siren system. (Motion at 9-11).

Intervenors, on the other hand, flatly deny that the Governments involved would simply authorize the sounding of the sirens, and they submit affidavits of the heads of those Governments to that effect. (Answer at 48-51). Intervenors take the position that the record is completely barren of any information on the exact response of the

Governments during an emergency, asserting that all that has so far been established is that the Governments would not use LILCO's plan. (Id.).

Intervenors further point out that there is inherent in their Contention 5 and the regulatory requirements cited therein a challenge to the entire process by which the sounding of the sirens would proceed, a process which includes various elements of information transfer and decision making, none of which have been elucidated on the record in the face of the affidavits they present. (Id. at 52-53).

It is true that the facts alleged by the Applicant (existence of the sirens and the RECS line, operability of the sirens) are uncontroverted. We cannot, however, 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 on this part of the contention.

Contention 5 (EBS Messages)

This portion of Contention 5 confronts us with essentially the same situation as that which we met in dealing with the question of sounding the sirens, viz., the Applicant believes that the Commission's directive to assume a "best efforts" reaction on the Governments' part and the availability of a group of acceptable EBS messages combine to assure an acceptable response, (Motion at 11-14) while the Intervenors point out that the affidavits of the Governor and the County Executive disclaim

the Governments' willingness to use any portion of LILCO's plan. (Answer at 50).

Here LILCO makes an additional point: There exists a New York State Emergency Broadcast System independent of the system developed by LILCO, that system has a Common Program Control Station and a large number of primary stations (including those in the LILCO plan) offering adequate coverage of the entire EPZ. (Motion at 12).

That may be true. Nonetheless, the presence in our record of the affidavits presented by the Intervenors 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.

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.

Contention 6 (Decisions and Recommendations)

LILCO asserts that the question concerning emergency decisions and recommendations "boils down" to whether the State or County would be able to make a timely decision regarding sheltering or evacuation in a

radiological emergency. LILCO then examines this limited question, again using its own interpretation of the Commission's "best efforts" assumption. The State, LILCO argues, is fully prepared to cope with a radiological emergency by virtue of its plan for such emergencies at other plants in New York. If the County is unable or unwilling to take charge, the State's plan requires that the State do so. In the event of a fast-breaking accident, the State would necessarily accept LILCO's recommendation, and in the event of a more slowly developing accident, there would be adequate time to consider alternative courses of action by County and State. In LILCO's view, the "best efforts" assumption would require that the State and County stay in "more or less continuous contact" with LILCO and would allow LILCO to guide the local officials through any unfamiliar procedures. (Motion at 16-22).

The Intervenors maintain that the State and County would not follow LILCO's recommendations nor would they respond in a manner that would be the same as, or even consistent with, the manner outlined in the LILCO plan. (Answer at 54-60). They offer, inter alia, the Governor's statement to the effect that "[T]he State could not and would not rely upon LILCO, its emergency plan, or its advice in the event of a radiological emergency at Shoreham." (Answer, Exhibit A to Attachment 1). The existence of a generic State plan for radiological emergency responses at other plants does not, in Intervenors' view, assure a response at Shoreham tailored to Shoreham. (Answer at 61). The Intervenors stress that there is again no clear definition in the record of the way in which the response to an emergency would be handled.

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 a 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?

Contentions 1 and 2 (Traffic Control)

LILCO assures us that there would be no delay in the start of traffic control, arguing that the LERO Traffic Guides would arrive at their posts but need not begin directing traffic; they could await the arrival of police, then either proceed themselves or let the police proceed. LILCO cites testimony by the Suffolk County Police Department to the effect that police could arrive on the scene at least as quickly as the LERO Guides. LILCO further opines that the police could easily assume the job of guiding traffic since the instructions concerning preferred traffic directions would be readily available to them and police officers are well-trained in directing traffic. For very fast-breaking accidents, LILCO argues, Traffic Guides would not arrive in time at any event, for other accidents participation by the police

could not hurt and might well help. Thus under the "best efforts" assumption the direction of traffic would be accomplished at least as well as in the LILCO plan and there could be no additional hazard to the public. (Motion at 23-25).

Intervenors first make the point that LILCO has really addressed only the Contention 1 (traffic guidance) aspect of the problem. Thus they see no ground for even considering disposition of the Contention 2 (blocking roads, channelization, road barriers) aspects. (Answer at 65). This seems to the Board to be splitting hairs. The traffic guidance and physical barrier aspects are fundamentally intertwined and equivalent as far as their implications for traffic control and their "legal authority" aspects are concerned. The Intervenors do, however, make other points: They assert that LILCO has not addressed the implications which the ad hoc response might have for evacuation implementability, evacuation time estimates, or regulatory compliance. Nor do they concede that the simple lack of additional "traffic delays" beyond those of the LILCO plan would assure dismissal of all implications inherent in the two contentions. They also assert that the LILCO reasoning is based on assumptions flatly contradicted by "sworn testimany in this record, and the law of Suffolk County". (Answer at 67). They urge us to reject "LILCO's assertion that the Suffolk County Police Department would implement the very traffic control scheme which it has rejected, which it has not been trained to implement, and which it cannot lawfully implement under County law." (Answer at 68, footnote omitted).

In dealing with Contentions 1 and 2 the Board finds some difficulty separating the Applicant's "realism" and "immmateriality" arguments. Clearly, if the guidance and control of traffic contributes little or nothing to the safety of the public, then the manner in which such guidance is accomplished is of no great consequence. When we last considered the notion that an uncontrolled evacuation might suffice to protect the public we found: "It is evident that the unplanned evacuation . . . will not meet the regulatory requirements . . . ." 21 NRC 644, 917. The Commission's subsequent remand of the issue of immmateriality has made that concept less "evident". Nevertheless, Applicant has not raised immateriality as a ground for summary disposition, and we are ruling solely on the Applicant's motion. Further, our previous statement was not made in a vacuum. We prefaced it with the notion, acknowledged by the Applicant, that the time differential between controlled and uncontrolled evacuation might serve to limit the optional protective measures in such a way as to increase dose. (Id.). We found that a guided evacuation is a safety feature, and that finding has not been overturned. The question of how traffic will be guided and by whom is indeed material, and we cannot rule on the ultimate issues in this case while so much uncertainty surrounds that question. Thus we cannot grant summary disposition on these contentions.

Contention 4 (Removing Road Obstructions)

Concerning this contention, LILCO rather perfunctorily states that, "The Suffolk County or State government would either take it upon themselves to remove obstructions, authorize LERO to do so, or use both their own resources and LERO's -- whichever was the 'best effort' . . . ." (Motion at 30). Intervenors note that LILCO's lack of authority makes it impossible to implement LILCO's plan. (Answer at 69-70).

We note that, as with Contentions 1 and 2, the ability to remove road obstructions is clearly a safety feature. Equally clearly, one cannot say from the present record how these obstructions would be removed, who would remove them, or how their removal would be coordinated with such other functions as guiding traffic and selecting alternate evacuation routes. It is not clear who would be in overall charge of a clear and well-planned response. We cannot grant summary disposition.

Contentions 7 and 8 (Post-Emergency Functions)

These contentions concern the implementation of protective actions for the ingestion pathway (Contention 7) and activities relating to recovery and reentry (Contention 8). LILCO argues that, to begin with, decisions connected with these activities will be made in an atmosphere without much time pressure, an atmosphere which does not entail immediately life-threatening situations nor require immediate response. (Motion at 26-27). Intervenors counter that the timing of the response and the pressure under which such a response must be made are irrelevant

to the principal matter at issue, viz., whether acceptable plans exist now for dealing with the post-emergency situation, the existence of such prepared plans being a regulatory requirement precedent to the issuance of a full power license. (Answer at 70-71).

We must agree with the Intervenors on this point. The timing has no bearing on the requirements that the regulations impose.

Applicant further argues that, with regard to Contention 7, there exist acceptable planned actions which, if implemented, would be effective in preventing the public from eating contaminated foodstuffs. (Motion at 26, citing the Partial Initial Decision, 21 NRC 644, 876). Thus LILCO reasons that the only bar to such actions is the lack of authority on the part of the utility to impose protective controls as a matter of law. That lack, LILCO argues, has already been considered and found to be no bar to a reasonable assurance finding. (Motion at 26, citing 21 NRC 644, 878).

We did indeed examine, under the rubric of Contention 81, whether the plan's provisions concerning the ingestion pathway could be implemented absent the legal authority to compel producers and processors of food to discard the food. We noted LILCO's stated willingness to purchase and destroy the food and concluded that the lack of legal authority was not a bar to implementation. 21 NRC 644, 877-78. The Appeal Board saw no inconsistency, and the New York Supreme Court, ruling on the legal authority issues, made no mention of the subtle difference which might be seen to exist between the status of Contention 7 and that of the other "legal authority" contentions. Now, however, we

are confronted with a question quite apart from the one that confronted us then. There we decided that LILCO, acting alone and armed only with the power to offer to purchase foodstuffs, could give reasonable assurance that contaminated food would not enter the general market. Here the question is one concerning exactly what would occur if LILCO proceeded independently while the State and local Governments did something unspecified to further the same ends.

It is by no means clear to the Board at this time that the two groups would not work at cross purposes, nor is it clear that if LILCO simply withdrew the resulting actions by the Governments, presently unspecified, would comply with NRC regulations. Thus we cannot grant summary disposition on Contention 7.

Addressing Contention 8, the Applicant alleges that this Board has already found that recovery and reentry decisions would be made by a committee, that LILCO would invite participation on that committee by State and local authorities, and that the committee would have time to deliberate and decide what it should recommend. Given these findings and a "best efforts" assumption, Applicant says, there exists no litigable issue over whether the plan would work. (Motion at 27, citing 21 NRC 644, 880). We see no logical nexus. The possible participation by local authorities and the "best efforts" assumption do not combine to assure that proper reentry and recovery procedures will either be evolved or enforced without some knowledge concerning who will decide and by what standards. We must agree with the Intervenors' position that the record does not support a conclusion that the proper decisions,

recommendations, or actions concerning recovery and reentry would materialize. (Answer at 70-73).

Contention 9 (Dispensing Fuel)

Here LILCO's argument is that the Board has already ruled that dispensing fuel is not required by the regulations and guidance. (Motion at 28, citing 21 NRC 644, 816). True enough, so we did. However, we also ruled that "Although the functions specified by Contentions 1-4, 9, and 10 are not specifically listed as regulatory requirements . . . they are material elements comprising the Plan LILCO submitted for the purpose of satisfying the regulations and guidelines . . . which LILCO cannot lawfully perform." 21 NRC 644 at 917-918. As with those other contentions, we regard the subject of Contention 9 as a safety feature. It is presently unclear how this safety feature would function, or, indeed, whether it would function at all. We cannot grant summary disposition.

Contention 10 (Access Control)

It appears that the Intervenors concede that the access control to such places as the relocation centers can be achieved by LILCO since the centers are now on LILCO property. The only thing at issue is the control of access to the EPZ during the time when people are supposed to stay out. LILCO points out, quite correctly, that we accepted the notion that LILCO does not intend to restrict access to the EPZ in any forceful way, intending only to "discourage" entry while the area is

contaminated. Intervenors argue, in effect, that LILCO only abandoned the idea of controlling access because it had no authority to do so. They believe that the notion of limiting action to "discouraging" entry is simply insufficient. Taken together these two arguments raise an issue which is essentially one of immateriality: whether it matters that LILCO cannot enforce the abandonment of a contaminated area, but can only urge people to stay out. We shall consider immateriality in all its aspects in connection with the remand of these issues, but we are not at that juncture yet. Whether or not the public can effectively be kept out of contaminated areas or areas threatened with imminent contamination is clearly a health and safety issue. What would occur if the local authorities were attempting to enforce one situation while LILCO was "advising" another; what standards would the local authorities use for exclusion and over how wide an area; how would these organizations interact and to what end? All these questions must be answered before we can properly decide whether we have reasonable assurance that health and safety will be protected.

8. LILCO's Statement of Material Facts

The ultimate standard that LILCO must meet to gain approval of its plan is set forth in 10 C.F.R. 50.47 (a)(1): ". . . no operating license for a nuclear power reactor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." We must apply that standard to LILCO's motion and also apply

the regulations and case law governing summary disposition cited above. Thus if we are to grant LILCO's motion we must find that there is no genuine issue to be heard with respect to whether the actions specified in Contentions 1-10 can and will be done adequately in a response to an emergency at Shoreham.

LILCO appended to its motion a "Statement of Material Facts As To Which LILCO Contends There Is No Genuine Issue To Be Heard On Contentions EP 1-10." The list contained 63 statements of fact. All of the facts stated by LILCO address the issue of capability of itself or of the State or County Governments to implement an effective emergency response under the Commission's assumption in CLI-86-13 that the Governments would respond to an emergency at Shoreham with their best efforts and that they would use the LILCO plan as the source for basic emergency planning information and options.

The Governments in their response take a two-fold approach in their opposition to LILCO's Statement of Material Facts. First they claim that LILCO's facts do not address the important issues that must be resolved before summary disposition could be granted and second they submit evidence that they claim controverts 5 of LILCO's facts and is in itself sufficient to deny the motion. Specifically Intervenors claim that LILCO's material facts do not establish LILCO's legal authority to implement the provisions of Contentions 1-10; the facts do not establish that the State or County could or would implement the plan; they do not establish that "best efforts" of the State or County would be adequate or sufficient to meet regulatory requirements set forth in Contentions

1-10. The Governments appended to their response 54 statements which they claim constitute genuine issues to be heard.[16] Each statement raises a separate question as to the nature and adequacy of an ad hoc "best efforts" Government response. In the Intervenors view it was unnecessary to specifically controvert all 63 facts posed by LILCO because "they simply do not advance LILCO's argument, because they are not the facts which are material to the decision being sought by LILCO . . . ." Intervenors then presented reasons that in their view controverted only five of LILCO's material facts; Nos. 40, 41, 42, 43, and 58. All of the remaining material facts asserted by LILCO went unanswered by the Governments. To the extent that the Governments addressed the remaining material facts asserted by LILCO they stated: "While some of these so-called facts are wrong (for the reasons discussed in section III.4.b below and in the Affidavits attached hereto), the majority of those facts, even if true, are irrelevant to the issues raised by Contentions 1-10 as to which LILCO seeks summary disposition."

Intervenors however submitted specific facts and affidavits to controvert LILCO's facts 40, 41, 42, 43, and 58 in which LILCO attempts

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16 The Governments' statement of issues to be heard are acknowledged here because they help confirm that LILCO's material facts were insufficient to warrant summary disposition even though they do not directly controvert LILCO's facts. It was unnecessary to consider the Governments' statement of issues further to reach a decision on this motion and we do not adopt the Governments issues as the ones which will be considered in any future hearing. The parties will be afforded an opportunity to advise the Board on the appropriate specification of issues for hearing at a later time.

to demonstrate that State and County Officials and the County police department are familiar with LILCO's plan and that they are in possession of a specified number of controlled copies. Intervenors replied with affidavits that assert that State and County officials have reviewed limited portions of the plan but that none is sufficiently knowledgeable to implement all or any portion of it with or without LILCO assistance. Furthermore, say the Governments, none of their personnel have been drilled or trained regarding the LILCO plan. In their challenge to LILCO's facts 42 and 43 Intervenors dispute LILCO's assertion of the number of controlled copies of the plan in their possession and further assert that none of the copies which they admit to possessing are possessed by State officials who would direct or participate in a response to a Shoreham emergency or by the County Executive or his staff. Intervenors also challenge LILCO's assertion in fact no. 58 that the Suffolk County police are familiar with the plan. They reply by affidavit that the Suffolk County police department is not familiar with the traffic control provisions of the plan. While certain police officers have testified to the inadequacies of the plan in this proceeding this does not mean that they are sufficiently knowledgeable to implement it.

Upon consideration of the foregoing arguments and affidavits of the parties, the Board concludes that Intervenors have controverted LILCO's material facts pertaining to the familiarity of State and County officials with the LILCO plan. Accordingly we cannot grant summary disposition relative to LILCO's material facts numbered 40, 41, 42, 43,

and 58. 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.

We turn next to LILCO's remaining facts which were not controverted by Intervenors. 10 C.F.R. 2.749(a) states: "All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." With the exception of the facts enumerated above none of LILCO's material facts have been controverted in the reply of Intervenors. Accordingly the action called for is to deem LILCO's material facts as admitted with the exceptions noted and we so find.

LILCO's facts which we have deemed to be admitted all go to establishing in one form or another the physical capability of LILCO the State or the County to take action essential to successful implementation of responses specified by the 10 legal contentions. We therefore disagree with Intervenors and find that the admitted facts are material to the resolution of the issues before us because they constitute new information which tends to show that the State and County have the capability to respond effectively in an emergency.

We agree with Intervenors however 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 <u>can</u> be done but do not establish what <u>will</u>

be done as required by 10 C.F.R. 50.47 (a) cited above. LILCO in its motion would have the Board accept that all questions related to how a response specified by the 10 contentions will be implemented is 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. LILCO's Statement of Facts contains nothing that would compel that conclusion.

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 response. We do not accept LILCO's argument 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 earlier in this decision 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 Intervenors in their response to LILCO's motion because while the State and County Governments do not deny that they would respond to an emergency with their best efforts they assert that there is no basis in this motion or

in the record thus far compiled for determining the nature and adequacy of their response.

We are also persuaded by Intervenors that LILCO's material facts do not resolve the question of how LILCO would acquire the legal authority to implement the actions specified in Contentions 1-10. The "best efforts" assumption is of no assistance to LILCO in the face of sworn Affidavits from Intervenors asserting that they would not and could not delegate their police powers to LILCO. Affidavit of Mario M. Cuomo, Governor of the State of New York. Affidavit of Michael Logrande.

We found no basis for concluding that an effective emergency response on Long Island is impossible in our Concluding Partial Initial Decision. 22 NRC 410, 427 (1985). Except to the extent we found that the plan was fatally defective in two areas and that there were other specifically identified deficiencies or omissions we found the LILCO plan otherwise workable. In answers to the motion for summary disposition, the Governments have urged us to accept positions on factual matters which they have taken before us in the past for which we had found that there was no merit and as to which the Board has not been reversed on appeal or had the issues remanded. For example, the affidavit of Karla J. Letsche includes two exhibits that cite in tabular form past testimony on numerous contentions which have been heard and ruled upon. Likewise the affidavit of Richard C. Roberts references such matters as evacuation shadow and inaccurate evacuation time estimates which we have considered and decided previously. (Answer,

Attachment 3, Exhibits B and C.) We consider these efforts to be improper.

It may well be that the Governments continue to believe that an emergency response in conformance with NRC regulations is impossible on Long Island. However to the extent that the Board has held to the contrary and has been upheld on appeal, those matters are now settled in this proceeding. The Governments are no longer free to press their views on matters that have been decided against them absent a successful motion to reopen the record. The matters in controversy now lie elsewhere and it will not advance the position of any party to attempt to relitigate previously decided issues. The Board will only hear evidence and decide issues on which the record remains open.

Any position of the parties in the motion for summary disposition or in the answer not responded to directly or inferentially by the Board is rejected as unsupported in fact or law or is unnecessary to the rendering of this decision.

The parties will be afforded, at the appropriate time, the opportunity to present their views on the issues which are to be heard in the remanded CLI-86-13.

C. ORDER

Based upon all of the foregoing, the Board hereby ORDERS:

1. That "LILCO's Second Renewed Motion for Summary Disposition of the 'Legal Authority' Issues (Contention EP 1-10)" of March 20, 1987, be, and is hereby denied; and

2. That the LILCO "Motion for Leave to File a Reply on 'Realism'" of May 22, 1987, be, and is hereby denied and the attached tendered Reply is rejected.

THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
ADMINISTRATIVE LAW JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 17th day of September, 1987