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\*\*1 In the matter of  
LONG ISLAND LIGHTING COMPANY  
(Shoreham Nuclear Power Station, Unit 1)  
NUCLEAR REGULATORY COMMISSION

CLI-89-02  
Docket No. 50-322-OL-3 and OL-5

March 3, 1989

**\*211 COMMISSIONERS:** Lando W. Zech, Jr., Chairman; Thomas M. Roberts; Kenneth M. Carr; Kenneth C. Rogers; James R. Curtiss

On directed certification from the Appeal Board on the question of whether the conduct of the Intervenor Governments in the Shoreham proceeding warrants their dismissal from the proceeding, or some other sanction, the Commission concludes that the Intervenor's willful defiance of Licensing Board orders caused great harm and delay to Applicant's efforts to demonstrate the sufficiency of its emergency plan as to the integrity of the Commission's adjudicatory process. Accordingly, in view of all of the circumstances, the Commission dismisses Suffolk County, the State of New York, and the Town of Southampton as parties from all pending proceedings.

**NRC: POLICY STATEMENT ON CONDUCT OF LICENSING PROCEEDINGS (SANCTIONS)**

In its statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), the Commission established a graduated scale of sanctions including, in severe cases of participant's failure to meet its obligations, dismissal from proceeding.

**\*212 NRC: POLICY STATEMENT ON CONDUCT OF LICENSING PROCEEDINGS (SANCTIONS)**

In its statement of Policy on Conduct of Licensing Proceedings, the Commission identified the following factors to consider in deciding what sanctions to impose: "the relative importance of unmet obligation, its potential for harm to other parties of the orderly conduct of the proceedings, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety of environmental concerns raised by the party, and all of the circumstances." 13 NRC at 454.

**NRC: POLICY STATEMENT ON CONDUCT OF LICENSING PROCEEDINGS (SANCTIONS)**

The Commission finds that the County's production of a detailed emergency plan

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dating back to 1983 and its announcement that it would no longer comply with the Board's discovery orders, both events occurring in June 1988, constitute a hearing in which one party controls the information to be disclosed and the evidence that may be produced to be grossly unfair and biased as to amount to hardly any hearing at all.

#### NRC: POLICY STATEMENT ON CONDUCT OF LICENSING PROCEEDINGS (SANCTIONS)

The Governments' obstructionist tactics and refusal to comply with discovery obligations as ordered by the Board were patently unfair to the Applicant and effectively "stalled the the proceedings in its tracks." Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1417(1982).

#### NRC: POLICY STATEMENT ON CONDUCT OF LICENSING PROCEEDINGS (SANCTIONS)

In determining whether sanctions should be imposed against the Intervenor Governments, the Commission notes that the record amply demonstrates that the Governments have engaged in a pattern of resistance to Board orders and authority.

#### \*213 NRC: POLICY STATEMENT ON CONDUCT OF LICENSING PROCEEDINGS (SANCTIONS)

\*\*2 Taking into account all the circumstances, the Commission fashions a sanction that will, if possible, mitigate the harm caused by the parties' failure to fulfill their obligations and that will bring about improved future compliance not just for this case but for future cases and parties as well.

#### RULES OF PRACTICE: INTERVENTION BY A STATE

Even though NRC regulations recognize a distinct role for state and local governments in NRC proceedings, the Commission has always held that all parties, including interested states and local governments, must strictly adhere to NRC requirements, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760(1977).

### DECISION

#### I. Introduction

This matter is before the Commission pursuant to our Order of November 9, 1988, directing that the Atomic Safety and Licensing Appeal Board certify to us the appeals of Suffolk County, the State of New York and the Town of Southampton ("Governments" or "Intervenors") from the Atomic Safety and Licensing Board's decision dismissing them from the proceeding, LBP-88-24, 28 NRC 311. Extensive litigation has already been completed on most of the controverted issues raised on the application for an operating license for the Shoreham facility. Over the years this litigation has involved several hundred hearing days, testimony from over 200 witnesses, and over 60,000 pages of transcript. All technical health and

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safety issues have been resolved in favor of the applicant. [FN1] Long Island Lighting Co. ("LILCO") currently holds a low-power license, pursuant to 10 CFR § 50.47(d), authorizing operation up to five percent of rated power. Only off-site emergency planning issues remain to be decided. [FN2]

The case that the Commission decides today presents difficult and sensitive issues of law and policy. We are called upon to decide whether the conduct of three intervenors in this proceeding--Suffolk County, the State of New York, \*214 and the Town of Southampton--warrants the imposition of sanctions, and if so, what sanction is appropriate. The ultimate sanction, dismissal from the proceeding, would mean the termination of the entire Shoreham formal hearing.

The imposition of sanctions on a party is never an action to be taken lightly. In the first place, sanctions amount to the public censure of a party's conduct, and before rendering such a judgment on any party, we should be sure that the criticism is deserved. Where the penalty results in ending an adjudicatory hearing, we must be especially circumspect, for the opportunity for public hearings on nuclear power plant licensing is a central element of the NRC's governing statute, the Atomic Energy Act of 1954. Finally, there is especially good reason not to be precipitous in dismissing a state or local government from our proceedings. Though no one argues that different parties should be held to different standards of conduct, we cannot ignore the fact that where a state or local government is a party, the dismissal question touches upon Federal-State relations that should in the ordinary course be marked by mutual cooperation rather than confrontation.

\*\*3 But while all these factors suggest the imprudence of imposing sanctions lightly, an unwillingness ever to punish misconduct would be worse than imprudent: it would be an abdication of responsibilities owed to the parties and the public. For on the other side of the scale from the considerations mentioned above, there are also powerful reasons for levying sanctions when sanctions are deserved.

There is, first of all, the obligation to take account of the rights of any party harmed by another party's misconduct. In addition, if misconduct in Commission proceedings is to be deterred, it must be shown to be ultimately counterproductive. Last and perhaps most important, the Commission must ensure that it is not prevented, through a party's misconduct, from performing the task assigned it by Congress, that of making health and safety decisions about nuclear power plants.

In the present case, we conclude with regret that the Intervenor's conduct in this proceeding not only permits the imposition of a heavy sanction but compels it. Our judgment is based on a careful review of the decision of the Atomic Safety and Licensing Board and the filings of the parties. Oral argument has also helped to illuminate further the issues in dispute.

We emphasize that in placing sanctions on the intervenor Governments, we are not penalizing them for having opposed the Shoreham plant, or for having refused to

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cooperate in developing an emergency plan for Shoreham. Our sanctions are not directed at the Intervenor's ends, which we assume to have been motivated by their view of what would be best for their citizens, but only at the means used to achieve those ends in our proceedings.

As we shall describe below, those means included the willful refusal to obey orders of the Licensing Board in the "realism remand" proceeding, and a serious \*215 failure to meet obligations to produce witnesses and documents in the discovery process. The latter is no mere procedural trifle. Rather, it is the linchpin of the fact-finding process, for the ability of an adjudicator to arrive at the truth depends on the parties' willingness to produce relevant information and witnesses. When parties refuse to meet that obligation, they cripple the adjudicator's ability to make sound and just decisions.

It is worth focusing on the particular issue which brought the proceeding to an impasse in June 1988 and led to the imposition of sanctions. The impasse arose over the Intervenor's assertion that the Licensing Board had no legal authority to question or allow any inquiry into their claim that they would never plan for a radiological emergency, but would instead decide ad hoc what to do if an accident occurred. When the Licensing Board ordered the Intervenor to produce witnesses to be deposed as to what they would do in an emergency, the Intervenor declared that the Licensing Board had made it impossible for the proceeding to continue. Thus the proceeding came to an end not because Intervenor was being forced to prepare an emergency plan or take any other affirmative act, but rather because Intervenor insisted that their claimed response to an accident--unlike any other factual issue in the adjudication--was off limits for further inquiry.

\*\*4 The purpose of an adjudicatory process should be to find truth, and all parties to a proceeding should be contributing to that process. Of course, parties will disagree as to where the truth lies. The adversary process is premised on sound decisions emerging from the vigorous clash of opposing views of what is correct. But when parties cross the line from vigorous advocacy to willful disobedience of Licensing Board orders, they disable the fact-finding process and prevent the truth from being ascertained. At that point, it is the duty of an adjudicator to take whatever action is needed to protect the integrity of the process. We believe, for the reasons that follow, that the point has been reached where dismissal from the proceeding is the only appropriate sanction.

## II. Immediate Procedural Background

On September 23, 1988, the OL-3 Licensing Board in the Shoreham proceeding issued its Concluding Initial Decision (CID) on Emergency Planning, LBP-88-24, 28 NRC 311 (1988). [FN3] The Board granted LILCO's motions for summary disposition \*216 on emergency broadcast system, bus driver and hospital evacuation issues. The Board found Suffolk County, the State of New York and the Town of Southampton ("Intervenor") in default of Board orders on discovery on the realism issue and dismissed them from the proceeding.

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Just prior to the Licensing Board's decision, on September 20, 1988, the Appeal Board remanded to the Licensing Board in the OL-5 docket, which had presided over the hearings on the 1986 Shoreham emergency planning exercise, any issues raised in connection with the 1988 exercise at the Shoreham facility. ALAB-901, 28 NRC 302 (1988).

In an expedited response to an appeal by the Intervenor of the Licensing Board's CID, the Appeal Board concluded that the OL-3 Board did not have the authority to dismiss Intervenor from parts of the proceeding pending before another Board. Consequently, because issues remained to be resolved in the proceeding, no full-power license could yet be authorized. ALAB-902, 28 NRC 423 (1988). The correctness of the OL-3 Board's decision on the merits, including whether the OL-3 Board's sanction against the Intervenor was appropriate, remained before the Appeal Board.

On November 9, 1988, the Commission directed that the Intervenor's appeal of their dismissal from the proceeding be certified to it for decision. The Commission stated that it would decide "whether Governments' conduct was such as to warrant their dismissal from the entire proceeding [FN4] and whether, if dismissal from the entire proceeding is not warranted, what other sanction, if any, is appropriate." Order of the Commission, November 9, 1988, at 2.

Following the Appeal Board's vacation of the full-power license authorization, LILCO filed a motion before the OL-3 Board for authorization of 25% power operation. The Board granted LILCO's motion, not on the merits, but because it was unopposed, as Intervenor had been dismissed from proceedings before it. LBP-88-30, 28 NRC --- (November 21, 1988). The Board also concluded that as the sanction issue was now pending before the Commission, its decision should be referred to the Commission. In ALAB-908, the Appeal Board certified to the Commission, (1) the Board's authorization of the 25% license, (2) the Intervenor's appeal of that decision and motion for stay of that decision, and (3) the Appeal Board's views on whether under 10 CFR § 50.57(c), the Licensing Board could authorize the issuance of a 25% license as long as emergency planning contentions were pending before another Board. ALAB-908, 28 NRC --- (December 9, 1988).

**\*\*5 \*217** In considering the questions before it, the Commission has received voluminous briefs from all of the parties and has carefully considered the record before the Licensing Board. [FN5]

### III. Detailed Background

Suffolk County, the Government most directly affected by the emergency planning for Shoreham, did not oppose licensing of Shoreham and withdrew support for emergency planning only when the plant was well under construction and LILCO, for better or for worse, had committed itself deeply to the project. Following the decision by Suffolk County to withdraw its support for emergency planning at the Shoreham facility, the Commission considered a utility-only emergency plan. CLI-83-13, 17 NRC 741 (1983). After LILCO submitted its plan for NRC

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consideration, Suffolk County submitted a number of contentions, several of which asserted that LILCO lacked the legal authority to implement certain features of its radiological emergency plan, including the authority to control traffic and to inform the public. In August 1984, LILCO filed a Motion for Summary Disposition on the legal authority contentions arguing, among other things, that even if LILCO lacked legal authority, the State and the County would respond in a real emergency either by implementing the plan themselves or by deputizing LILCO personnel to implement the plan. The Licensing Board denied the motion, finding, in part, that even assuming an emergency response by the State and County, there was no assurance that the response would be other than ad hoc and uncoordinated with LILCO's actions. LBP-85-12, 21 NRC 644 (1985), aff'd, ALAB-818, 22 NRC 651 (1985).

In CLI-86-13, 24 NRC 22 (1986), we directed the Licensing Board to evaluate the adequacy of the LILCO emergency plan assuming that the State and County would exercise their best efforts to respond in the event of an accident and that such response would involve the use of the LILCO plan as the best source for emergency planning information and options since it was superior to no plan at all. With these assumptions the Board was directed to develop a record regarding the adequacy of the LILCO plan assuming a best-efforts government response.

\*218 Following the Commission's remand, LILCO filed its second motion for summary disposition of the legal authority contentions. On September 17, 1987, the Licensing Board denied LILCO's motion. LBP-87-26, 26 NRC 201, 227 (1987). But the Board went on to state that, while Intervenor's response was sufficient to defeat the motion, "we expect that in connection with the remand hearing where the Commission requires that it be established what the State and County response would be, Intervenor will be fully forthcoming so that the facts will be developed." 26 NRC at 216.

On November 3, 1987, the realism principle stated in CLI-86-13 was codified, in somewhat modified form, through amendment of 10 CFR § 50.47(c)(1). 52 Fed.Reg. 42078. The rule embodies a presumption that governments will use the utility plan as the best source of guidance to respond to an emergency in the absence of a state or local plan. The presumption may be rebutted by "for example, a good faith and timely proffer of an adequate and feasible state and/or local radiological emergency plan that would in fact be relied upon in a radiological emergency." 10 CFR 50.47(c)(1)(iii)(B). This rule was upheld by the U.S. Court of Appeals for the First Circuit after challenge by Suffolk County and others. *Massachusetts v. U.S.*, 856 F.2d. 378 (1st Cir.1988).

\*\*6 On December 18, 1987, LILCO again moved for summary disposition of the realism contentions on the basis of the assumption embodied in the new rule, 10 CFR § 50.47(c)(1). The Board again denied summary disposition of the realism contentions because LILCO had not established the adequacy of its plan assuming a best-efforts government response. [FN6] But the Board also held that the Intervenor's case on the merits must include positive statements of the projected behavior of the governments. "A determination to respond ad hoc would be acceptable only if accompanied by specification of the resources available for

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such a response, and the actions such a response could entail including the time factors involved." Order at 4. The Board's Order also put the parties on notice that under the regulation it was bound to determine the adequacy of the best efforts response by state and local governments and that the parties were equally bound to supply the information necessary to make that determination if they wanted their views to be heard. Id. The Board expanded its rulings in a written opinion issued April 8, 1988. LBP-88-9, 27 NRC 355 (1988).

On March 10, 1988, the Board issued an order establishing the final dates for the discovery period and a hearing schedule for the remaining issues in the proceeding. The discovery period was to end April 15. On March 9, 1988, LILCO had filed interrogatories seeking information about Intervenor's testimony and witnesses. Its Second Set of Interrogatories, filed on March \*219 24, 1988, sought information from the Intervenor on the nature and adequacy of a County and State response to a Shoreham emergency not involving the LILCO plan. The interrogatories sought copies of all plans and procedures for responding to emergencies, radiological or nonradiological, affecting Suffolk County and plans and procedures that New York State would use in responding to radiological emergencies at other nuclear facilities with EPZs within New York State. The State and County responded to the first set of interrogatories on March 23, stating that they had not identified any witnesses. On April 5, 1988, LILCO noticed depositions for six County employees and five State employees. [FN7] In response to Intervenor's request, the Board twice extended discovery, ordering Intervenor to complete depositions by April 29 and to respond to interrogatories.

In responses to LILCO's interrogatories, filed on April 20 and 22, 1988, Intervenor objected to most of the document and information requests asserting that plans or resources for nonradiological emergencies or for other nuclear facilities were irrelevant.

On April 1, 1988, LILCO filed its prima facie case on the legal authority issues. On April 13, Intervenor filed an Objection to the Board's February 29 and April 8 Orders and an offer of proof of testimony. [FN8] The Intervenor objected to the Board's rulings as erroneously interpreting section 50.47(c)(1) and precluding relevant testimony by the governments' witnesses. The County's proffered testimony stated, essentially, that they could not lawfully implement or use LILCO's plan or delegate legal authority to LILCO; they would not cooperate with LILCO or use its plan because they have found it unworkable and LILCO incompetent. Moreover, it would be "unproductive to engage in make-believe by pretending how the County would act under the hypothetical circumstances of an accident at Shoreham after the plant were somehow licensed by the NRC." Testimony of P. Halpin at 8. Nor did Mr. Halpin know what resources would be available to respond to a Shoreham emergency. Id. In testimony on behalf of the State of New York, Dr. Axelrod stated that he could not speculate on what resources might be available in the hypothetical situation that Shoreham were licensed. Testimony at 4.

\*\*7 LILCO conducted depositions of several panels of State and County representatives and the two designated witnesses, County Executive Halpin and Dr.

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Axelrod, Chairman of the New York State Disaster Preparedness Commission, between April 19 and April 29. Intervenor terminated the depositions of \*220 Mr. Halpin and Dr. Axelrod after permitting only two hours of questioning and engaging in a pattern of objections and interruptions "designed to impede the discovery process." [FN9] The depositions of the Assistant to the County Executive (Petrone), County Assistant Police Chief (Roberts) and the State REPG panel (Papile, Czech and Baranski) were also peremptorily terminated. Deponents were generally unresponsive to questions concerning Intervenor's response to a radiological emergency at Shoreham, were unfamiliar with County general disaster plans with any applicability to Shoreham or refused to "speculate" about a response to a Shoreham emergency.

LILCO filed a motion on May 2nd describing Intervenor's obstructionist behavior during depositions and requesting either dismissal of the realism contentions or an order to compel discovery. At the prehearing conference on May 10, the Board ordered the depositions of Halpin and Axelrod reopened, characterizing Intervenor's conduct during the depositions "to be almost a deliberate obstruction effort of the discovery process." Tr. 19381. The Board also ruled that all emergency plans in New York State including plans of the State and subsidiary governments such as Suffolk County were relevant to the proceeding. Tr. 19381-82.

On May 26th, the Board issued a bench ruling on applicant's motion to compel discovery. It ordered depositions continued for witnesses identified by LILCO in its May 2nd filing and again ordered responses to LILCO's interrogatories. Tr. 20432-36. The Board declined to reconsider its previous rulings interpreting the new rule and denied as premature the motions to dismiss the realism contentions on the basis of Intervenor's evidentiary default.

On May 25, 1988, the County produced to LILCO, as part of the discovery ordered by the Board on May 10th, a document which had a dramatic impact on the course of the proceeding. The document, approximately 760 pages long, was entitled the Suffolk County Emergency Operations Plan ("SCEOP"). Counsel for LILCO served the Plan on the Board and other parties on May 27th during the hearing on other remand issues. The document consisted of a Basic Plan and a series of Annexes which described responsibilities and procedures of various governmental sectors such as police, fire and rescue, and social services in the event of emergencies. After reviewing the materials briefly, the Board indicated it viewed the sudden appearance of this information very seriously, in light of previous responses by Intervenor representatives during depositions indicating lack of knowledge of plans like this. The Board again ordered Intervenor to respond to interrogatories and to arrange depositions requested by LILCO and directed the Intervenor to file by June 1 a paper describing the SCEOP and \*221 why it had not been provided previously. Tr. 20549-50. After reviewing those filings, on June 3, the Board directed that any discovery, interrogatories and depositions of persons identified by the applicant be concluded by June 20th. Tr. 20835-36, 20840-41.

\*\*8 On June 9, 1988, the Intervenor's filed a "Notice That the Board Has Precluded Continuation of the CLI-86-13 Remand." They asserted that the

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proceeding "cannot continue" because the Board's interpretation of the new rule in its February 29th and April 8th Orders had framed the litigation in such a way as to compel testimony "contrary to their lawful sovereign decisions and has directed wasteful discovery into irrelevant matters." Notice at 1. They stated that they have lawfully declared they will not use LILCO's plan (thus, rebutting the presumption of the rule) or interface with LILCO; consequently, "no rationale can justify any inquiry whatsoever ... into a point of fact that has been categorically ruled out of the realm of possibility." Notice at 5.

At a teleconference on June 10th, previously scheduled to deal with discovery disputes, the Board questioned Intervenor on the Notice and confirmed that the Notice meant that the Intervenor was not going to comply with Board orders on discovery. Tr. 20852, 20860-61. The Board stated that it would take action to impose appropriate sanctions against Intervenor. Tr. 20862. But in any event, it was retaining jurisdiction over the discovery issues surrounding the production of the SCEOP. [FN10]

Between July 11-19, 1988, the Board conducted an inquiry on the production of emergency plans, whether they should have been produced earlier and the circumstances of nonproduction. The Board heard testimony from 12 witnesses. The Board found that the SCEOP had existed in essentially its present form since 1983.

While the County maintained the SCEOP was produced in 1982-83, it had no records to establish that it was produced then or at any time prior to 1988 nor witnesses who could remember specifically that it was produced. LILCO had detailed discovery records which showed that it received about 160 pages of the SCEOP in several different submittals in 1982-83. The Board concluded that the SCEOP should have been provided in response to discovery requests in 1982-83; those sections added or updated after 1983 [FN11] should have been provided under Intervenor's duty to amend prior discovery responses, 10 CFR § 2.740; however, a number of existing sections of the SCEOP were not produced prior to 1988.

\*222 On September 23, the Licensing Board issued its decision dismissing Intervenor from the proceeding. The Board concluded that the Intervenor's refusal to comply with Board orders was an act of willful disobedience which constituted bad faith. It found Intervenor's position, that the Board's orders coerced actions legally precluded, totally unacceptable. It noted that it had ruled that the realism contentions would not be dismissed due to Intervenor's failure to produce some evidence of an emergency plan. Neither its rulings nor the new rule 10 CFR 50.47(c)(1) could compel Intervenor to develop a particular plan. But the Applicant was entitled to explore through discovery the extent to which Intervenor had resources available and would respond in an emergency. Discovery became particularly important after the SCEOP was provided in light of previous uniform interrogatory replies that any State or County response would be speculative.

\*\*9 The Board viewed Intervenor's actions as the culmination of a pattern of conduct designed to prevent resolution of contentions regarding the adequacy of LILCO's emergency plan. The Intervenor created the situation which made the

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realism contentions important, but then refused to contribute to their resolution. They persistently relied on statements of noncooperation and policy statements that an adequate emergency plan was not possible in the face of NRC statements and federal caselaw that the adequacy of emergency planning is NRC's jurisdictional responsibility.

In evaluating all the circumstances surrounding Intervenor's actions, in an effort to tailor sanctions to mitigate the harm caused by their failure to comply with discovery obligations, the Board found no mitigating factors in the sequence of events leading up to its decision. No protective orders were sought, no advance warning was provided, and no subsequent offer of compliance was made beyond the unacceptable proffer of the two witnesses. [FN12] The Board also concluded that the failure to produce the SCEOP earlier resulted in three LILCO summary disposition motions being decided on an unnecessarily incomplete record. 28 NRC at 374-75.

The Board rejected dismissal of contentions as an adequate sanction both because of the above actions tainting the adjudicatory process itself and because a prior finding of default and dismissal of sanctions did not deter the current conduct. [FN13] Examining the actions, omissions and consequences cited, the Board found a "sustained and willful strategy of disobedience and disrespect for the Commission's adjudicatory processes." 28 NRC at 376. Having created the situation which gave rise to the realism contentions, fair practice on the part of Intervenor was of critical importance. And although the disobedience was narrowly and selectively applied, it had a significant impact on the factual inquiry \*223 into the adequacy of the LILCO plan. The Board concluded that the sanction of dismissal was the only appropriate remedy.

Judge Shon dissented from the Board's decision on sanctions. He would have dismissed the legal authority contentions but not the parties from the proceeding. While he found Intervenor's June 9 Notice objectionable, and their "steadfast reluctance" to disclose the SCEOP "clearly untenable after the issuance of CLI-86-13", he was unwilling to conclude that Intervenor had acted in bad faith. 28 NRC at 389-90.

#### IV. Commission Decision

##### A. Commission Policy on Sanctions

In our Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), we established a graduated scale of sanctions including, in severe cases of a participant's failure to meet its obligations, dismissal from the proceeding. We identified the following factors to consider in deciding what sanction to impose:

the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the

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safety or environmental concerns raised by the party, and all of the circumstances.

**\*\*10** 13 NRC at 454. Sanctions were to be tailored if possible to mitigate the harm caused by the conduct and to bring about improved future compliance.

We also made clear in our Statement of Policy that "fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations". 13 NRC at 454.

#### B. Applications of the Sanctions Policy to Shoreham

##### 1. The Importance of the Unmet Obligations and the Concerns Raised

As should be clear from the background, the discovery sought from Intervenor went to very heart of the remaining matters to be decided on Shoreham. After years of litigation, both before the Commission and in the courts, the critical issues remaining to be resolved for a final decision on LILCO's operating license application boiled down to these: would the Governments, especially Suffolk County, generally follow the utility plan if Shoreham were to go into operation and an accident were to occur, or would the Governments respond in some other manner other than in a completely ad hoc way which had been **\*224** dismissed previously as illogical and contrary to the safety of the citizens of Long Island; and, whatever the response anticipated, did the Governments have the resources and knowledge to implement the response in a reasonable fashion? After numerous filings and extensive argument before the Commission and its adjudicatory boards and the courts, the Intervenor finally reached the point last June when simple denials of cooperation and protestations of ignorance about what would happen if an accident were to occur would no longer hinder or delay a decision. Officials in responsible positions were to be put to the test in examination on depositions and interrogatories had to be answered.

At this critical juncture two extraordinary events occurred. First, a detailed county emergency plan dating back to 1983 was produced. More timely production of this plan would have dramatically altered the proceeding. Not only would the Governments' protestations of lack of knowledge about how they would in fact respond in the event of an emergency at Shoreham have been severely undercut, but the development and evaluation of LILCO's own utility plan would have been materially assisted. Second, Intervenor told the Board that they would no longer comply with its orders but would instead themselves decide what witnesses and information would be produced. Needless to say, a hearing in which one party controls the information to be disclosed and the evidence which may be produced is so grossly unfair and biased as to amount to hardly any hearing at all.

##### 2. Harm to the Other Parties and the Proceeding

Obstructionist tactics and refusal to comply with discovery obligations as ordered by the Board on May 26th and June 3, 1988 were patently unfair to the

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Applicant and effectively "stalled the proceeding in its tracks." Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1417 (1982). Our decision in CLI-86-13, the statements supporting adoption of the amendments to § 50.47(c)(1) and several Licensing Board rulings made it clear that one of the critical issues in litigating the realism contentions was what the Governments would do in the event of a radiological emergency at Shoreham. LILCO was entitled to pursue through discovery what the response capabilities and intentions of the Governments would be in order to establish the sufficiency under 10 CFR 50.47(c)(1) of an emergency response based on the LILCO offsite plan and LERO resources. Following the County's submission of the SCEOP, in the words of the Licensing Board, "the importance of discovery in being able to plumb the ramifications of the County EOP with State and County officials, in light of previous uniform discovery replies that any State and County response would be 'speculative', cannot be overestimated." LBP-88-24, 28 NRC at 365.

**\*\*11 \*225** The Board rejected Intervenor's argument that Board orders required them to take actions that are legally precluded or are an impossibility. We reject it also. [FN14] The Board's orders did not compel any particular response to discovery. [FN15] What the Board ordered was discovery to permit other parties to probe the basis of their statements and test the veracity of their statements of what they would or would not do, particularly in light of the SCEOP, in the event of a Shoreham emergency. But Intervenor refused to comply. Once a Board issues an order compelling discovery, the party to whom it is directed has no option but to comply with discovery or seek a protective order. Intervenor did neither. Instead, they refused to comply or even to continue with the proceeding.

As the Appeal Board noted many years ago, "American jurisprudence has long passed the point where a party--particularly one represented by experienced counsel--may refuse to participate in a case because the presiding official ruled in a manner it did not like. There are appropriate ways of preserving objections to such rulings; going home is not one of them." Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 251 (1974).

### 3. Pattern of Conduct

We have examined the record of this proceeding to assess whether the actions of Intervenor are part of a pattern of behavior to delay or divert the proceeding. The record amply demonstrates that Suffolk County has engaged in a pattern of resistance to Board orders. During an earlier phase of the Shoreham proceeding, Suffolk County refused to comply with a Board order requiring public prehearing depositions on emergency planning contentions. Then as now the County contended that the Board ruling was illegal and refused to participate further in the matter. The Board dismissed their contentions as sanction for their conduct. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1935-36 (1982), aff'd, ALAB-788, 20 NRC 1102 (1984). In 1983, the same Licensing Board issued a decision on other emergency planning contentions that suggests that its 1982 sanctions had brought no change in Suffolk County's conduct. The Board declared: "The difficulty of our task, \*226 trying to be objective in consideration of each of the parties' submissions, is further

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compounded by the County's misrepresentation of the complete record--by omission, selective citations and distortion of recorded testimony." LBP-83-57, 18 NRC 445, 579 (1983). At another point, the Licensing Board commented, "The County's misreading of the record in this instance can only be viewed as being intentional...." 18 NRC 445, 515.

The County's failure to produce the Emergency Operating Plan in a timely manner is even more serious. The question of County plans to respond to emergencies, including nonnuclear ones, has been an issue in this proceeding since 1982. [FN16] It has continued as an issue in this proceeding since that time and has been the central one since our remand in CLI-86-13. Yet the Board found that a number of existing sections of the County's SCEOP were not produced until May 1988. The County acknowledges that the Government's emergency planning information was requested in 1982 and 1983 and should have been produced then. The County maintains that it did provide its plans in response to discovery in the 1982-1983 period. But that argument only gets them so far. If they did submit the SCEOP earlier, then they had a duty to amend their responses as parts of the plan were added or updated. 10 CFR 2.740(e). Had they done so, LILCO, the Staff and the Board would have been alerted to the fact that the underlying document was not in their possession. LILCO has consistently sought to have Intervenor's resources which could be used to respond to an emergency disclosed. Three summary disposition motions by LILCO have been rejected because no evidence was presented to show what the Governments' response in an emergency would be. The County's failure to submit the plan, or additions or updates, clearly affected the basis for the decisions on the summary disposition motions.

**\*\*12** In April and May 1988 the County resisted providing any but their own designated witness for deposition and obstructed LILCO's questioning of witnesses during depositions. Finally, when ordered by the Board to provide witnesses for deposition following disclosure of the SCEOP, the County filed the June 9 Notice refusing to continue with discovery, or even with the proceeding itself which was being conducted at great expense to all of the parties largely at the County's own insistence.

The State of New York engaged in similar tactics during the remand proceeding. Despite the identification by the Board of the relevance of emergency plans in other areas or at other New York State nuclear facilities as one of the material issues to be heard, the State resisted providing any information on other plans in **\*227** both depositions and responses to interrogatories. [FN17] The State attempted unilaterally to limit deposition discovery to their designated witness. [FN18] When directed by the Board to proceed with all noticed depositions [FN19] counsel for the State of New York unjustifiably obstructed questioning of witnesses and the witnesses, often cued by counsel, were generally nonresponsive regarding information on the means by which the State would respond to a radiological emergency at Shoreham. [FN20] Despite repeated orders from the Board on May 10, May 26 and June 3, State witnesses were not made available for deposition. Instead, on June 9 the State along with Suffolk County and the Town of Southampton submitted their notice to the Board that the proceeding could not

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continue. While the Town of Southampton had not responded separately to any interrogatories, identified any witnesses of their own or been subject to deposition discovery, they nevertheless declared on June 9 along with the other Intervenorors that the proceeding could not continue.

#### 4. The Governments' New Position On Appeal

The Governments have now argued before the Commission that the June 9th Notice was merely a good faith attempt to obtain appellate review of the Licensing Board's February 29th and April 8th decisions interpreting 10 CFR 50.47(c)(1). They assert that the Board refused to rule on their offer of proof or to issue a final ruling dismissing the legal authority contentions. Thus the only way they could obtain appellate review was to refuse to comply with the discovery order. [FN21] But this is nothing more than an effort at rationalization after the fact.

First of all, as Intervenorors acknowledged during oral argument, refusal to comply with the Board's order was not the only way Intervenorors could obtain appellate review of the Board's rulings. The ordinary and proper response in the face of disagreement with a Board decision is to abide by the Board's order and seek relief on appeal. In addition, under Commission practice interlocutory review of Licensing Board rulings may be sought through a motion for directed certification pursuant to 10 CFR § 2.718(i), 2.785(b)(1) where the Board ruling, \*228 absent immediate appellate review, threatens a party with serious irreparable impact or affects the structure of the proceeding in a pervasive or unusual manner. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478 (1975); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367 (1981). Secondly, nowhere in the text of the Notice nor in the transcript of the teleconference on June 10 in which the parties discussed the Notice is there an indication that Intervenorors were merely trying to obtain an expedited appeal of the Board's earlier rulings. As the Board indicated in its decision, it received no advance warning that Intervenorors did not intend to comply with the discovery; no protective orders were sought. [FN22] Rather, Intervenorors waited for two months after issuance of the second order which they allege infringed on their "sovereign rights", until after the appearance of the Suffolk County Emergency Plan and the onset of discovery into its significance, and until the eve of litigation of the realism contentions, before taking any action that could conceivably lead to appellate review of the rulings. The Intervenorors' pleadings before us cannot alter history.

**\*\*13** Intervenorors make the further argument that their defiance of the Licensing Board's discovery orders was appropriate because the Board, in a misinterpretation of the Commission's new emergency planning rule, was attempting "to compel the Governments to submit an "adequate and feasible plan" that they would follow, or to agree to implement either the LILCO Plan or some other plan." Governments' October 27, 1988 Brief at 11, n. 29. This argument fails on several counts, factual and legal. First, the Licensing Board was not seeking to compel the Governments to submit a plan. Rather, it was saying that in accordance with the rule's presumption (a presumption upheld by the First Circuit Court of Appeals) it would rule that the Governments would follow LILCO's plan in an emergency unless

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the Governments offered evidence that they would follow a different but adequate and feasible plan or offered other evidence of like kind. [FN23] What the Licensing Board was not prepared to accept was the Governments' assertion that they had no idea what they might do in an emergency, and that any attempt to pursue the issue was improper.

We do not view the Licensing Board's approach as contrary to the letter or spirit of the 1987 emergency planning rule, though we need not reach that issue today. Even if the Licensing Board's interpretation had been in error, however, there would have been no justification for the Intervenor's refusal to comply \*229 with discovery. All that was being sought in discovery was information. If the Intervenor truly had no plans to respond to a radiological emergency, all the documents and all the deposition testimony LILCO might obtain would simply have reinforced the Intervenor's position. If questions asked in depositions turned out to be pointless, because they sought information about non-existent planning, it is difficult to see how the mere taking of depositions could have harmed the Intervenor.

In sum, there was no excuse for the Intervenor to arrogate to themselves the right to interpret the Commission's rules and to determine what discovery was or was not irrelevant. There were avenues for seeking review of decisions with which they disagreed; they chose not to use them. The Licensing Board's rulings placed them under no compulsion other than to provide truthful information. This obligation, which rests on every participant in an administrative or judicial proceeding, they were unwilling to meet.

Intervenor would also dissuade us from dismissing them from the proceeding because a pattern of misconduct has not been established for all of them, particularly the Town of Southampton. While it is true that no depositions were sought from the Town, it chose to sign the June 9th Notice declaring that the proceeding could not continue under the circumstances prescribed by the Board. We regard that prospective refusal to comply with the Board's authority to be as much an act of willful disobedience as the additional refusal by the other two parties to comply with Board ordered discovery. Moreover, given the lack of separate contribution by the Town on the issues before the Board, we find that the participation in the June 9th Notice outweighs the other factors which might counter a decision to dismiss.

\*\*14 The Intervenor also assert that dismissal is unjustified because they have committed no sanctionable conduct in other proceedings; to the contrary, they say that during seven years of litigation, they have made significant contributions to the Shoreham proceeding and to the safety of the Shoreham plant. [FN24] They point, for example, to their pursuit of diesel generator safety issues, the applicability of General Design Criterion 17, 10 CFR Part 50, Appendix A, to low power operation, as well as a number of emergency planning issues, such as the failure of LILCO's 1986 exercise to comply with regulatory requirements for a full participation exercise. It is true that the Intervenor have on occasion made a useful contribution. But this is not to say that the sum of their actions related

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to the Shoreham licensing controversy has necessarily been positive. For example, in 1986, a new law took effect in Suffolk County, enacted only weeks after the Federal Emergency Management Agency announced, over the objections of Suffolk County and New York State, that LILCO's emergency \*230 plan would be tested in February 1986. [FN25] The February 1986 exercise, required by NRC regulations, was designed to test the adequacy of the emergency plan by simulating the responses of LILCO personnel and responsible officials. In view of the refusal of state and local officials to participate, their roles were to be played by federal and utility personnel. The new law made it a crime, punishable by a year in prison and a fine of one thousand dollars, "for any person to conduct or participate in any test or exercise of any response to a natural or man-made emergency situation if that test or exercise includes as part thereof that the roles or governmental functions of any Suffolk County officials will be performed or simulated [without County approval]." [FN26] In short, compliance with a federal regulation had been made a local crime.

LILCO immediately sought a preliminary injunction, and on February 10, 1986, the United States District Court for the Eastern District of New York struck down the law as an unconstitutional interference with a preempted federal area. The court commented that "there is hardly any more effective way to interfere with an activity than to arrest the participants and subject them to criminal prosecution." LILCO v. County of Suffolk, 628 F.Supp. 654, 665 (E.D.N.Y.1986). The court described the law's effect: "In sum, if the enforcement or specter of Local Law 2-86 prevents LILCO from participating in the test, then Suffolk County will have impeded the NRC's fact gathering and licensing authority under the Atomic Energy Act." Id. Finally, in words which are directly applicable to the issue before us today, the court declared:

States and localities are not required to develop emergency evacuation plans and a refusal to do so can be based on any reason or no reason. It is quite another matter, however, for a local government affirmatively to obstruct the information gathering process of the NRC for a reason that lies within the NRC's congressionally-mandated sphere of authority. [FN27]

**\*\*15** Whatever Intervenor's contributions to this proceeding may have been, the fact remains that on the central issues left to be resolved in this proceeding, Intervenor has refused to comply with Board ordered discovery as detailed above. Significantly, Intervenor did not indicate in either their pleadings or oral argument that they regretted their conduct or would refrain from such conduct in the future. As the Licensing Board stated, "Intervenor created the situation that gave rise to the realism contentions, which were sufficient in themselves to \*231 block issuance of an operating license if there were further rulings adverse to LILCO. Fair practice in their resolution was of extraordinary importance in the case." 28 NRC at 376. But Intervenor's conduct did not comport with such fair practice. In our view, the most recent actions by Intervenor far outweigh any earlier contributions to the proceeding.

Conclusion

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Taking into account all the circumstances, we must fashion a sanction which will if possible mitigate the harm caused by the parties' failure to fulfill their obligations and which will bring about improved future compliance not just for this case but for future cases and parties as well. We also consider the views of our Licensing Board which has evaluated this case. The Licensing Board has had day-to-day contact with the parties and therefore is in an excellent position for concluding what sanction is appropriate for the actions and omissions which occurred before it.

In sum, we are driven to much the same conclusions as the Licensing Board: that the Intervenor chose to willfully disobey Board orders compelling discovery and refused to continue with the proceeding under the Board's direction, that the County and the State unjustifiably obstructed discovery prior to the filing of the Notice, and that the County, by not submitting the complete SCEOP until May 1988, exhibited at a minimum careless disregard for its obligations to provide relevant information in response to discovery requests and to amend their responses on the County's nonnuclear emergency planning. Under the circumstances, we conclude the Intervenor should be dismissed from the Shoreham proceeding.

We find that the actions of the Intervenor before the OL-3 Licensing Board warrant their dismissal as parties from all proceedings pending before the Commission. Their refusal to comply with the Board's orders or to continue with the proceeding in the manner prescribed by the Board strikes at the heart of the authority of the Board to conduct a duly authorized proceeding and challenges the integrity of the Commission's adjudicatory process itself. We have considered the various options short of dismissal available to us, including a formal reprimand and warning and dismissing the Intervenor's realism contentions. But our evaluation of the circumstances set forth above compels us to conclude that dismissal is appropriate and necessary. We would be remiss in our obligation to assure that our licensing proceedings are managed fairly and with due regard for the rights of all the parties before us if we were to permit a party to arrogate unto itself the power to decide which of a Board's orders it will or will not comply with.

**\*\*16 \*232** Judge Shon in the decision below disagreed with his colleagues' conclusion that dismissal from the proceeding was the only appropriate penalty. He would have taken note of the fact that the parties subject to sanction were governments, that the Commission's rules provide for special treatment of states and that in view of this special treatment extended by the Commission to state and local governments, particularly in regulations bearing on emergency planning, the Board should have been more reluctant to bar the Governments from the proceeding than they would be to bar private parties. We cannot (nor did the parties to this proceeding when questioned during oral argument) agree with Judge Shon that willful defiance of Board orders and Commission requirements by parties who are governments should be treated differently from misconduct committed by non-governmental parties. While our regulations do recognize a distinct role for state and local governments in our proceedings, we have always held that all parties, including interested states and local governments, must strictly adhere

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to NRC requirements. Gulf States Utilities Co., (River Bend Station, Units 1 and 2, ALAB-444, 6 NRC 760 (1977)). If anything, we would have expected a greater respect for the orders of duly authorized adjudicatory boards from fellow governments.

We have examined the practice in federal courts to assess whether our action here is inconsistent with that of others in analogous situations. We conclude that it is not. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642-43 (1976) (per curiam); Jones v. Niagara Frontier Transp. Authority, 836 F.2d. 731, 734-36 (2d. Cir.1987), cert. denied, 488 U.S. 825, 109 S.Ct. 74 (1988); Chapman v. U.S. Commodity Futures Trading Commission, 788 F.2d. 408 (7th.Cir.1986).

We conclude that Intervenor willfully defied the Licensing Board's orders, thereby causing great harm and delay to the efforts of LILCO to demonstrate the sufficiency of its emergency plan under the 10 CFR § 50.47(c)(1) and to the integrity of the Commission's adjudicatory process. Accordingly, in view of all of the circumstances before us, we hereby dismiss Suffolk County, the State of New York and the Town of Southampton as parties from all proceedings pending before the Commission or any of our subordinate adjudicatory Boards. All contested proceedings are now at an end; the proceeding on the 1988 emergency planning exercise before the OL-5 Licensing Board is terminated. As this decision constitutes the final adjudicatory decision in this matter, we also direct the following actions to assure that no safety issues remain unexamined before issuance of an operating license for the Shoreham facility. The Director of Nuclear Reactor Regulation shall evaluate each contention which remains outstanding as a result of this decision and explain to us in a public meeting whether, and if so, how, each has been resolved. Only after the conclusion of such a briefing, after the necessary findings of 10 CFR § 50.57 have been \*233 made, and after an affirmative Commission vote to authorize issuance, would a license for operation above 5 percent power be issued for the Shoreham facility.

**\*\*17 It is so ORDERED.**

For the Commission [FN28]

Samuel J. Chilk

Secretary of the Commission

FN1 LBP-83-57, 18 NRC 445 (1983); LBP-84-45, 20 NRC 1343 (1984); LBP-85-18, 21 NRC 1637 (1985).

FN2 A number of questions concerning the adequacy of emergency planning have been decided in LILCO's favor as well. LBP-85-12, 21 NRC 644 (1985).

FN3 The Commission has used several licensing boards to resolve discrete segments of the Shoreham operating licensing proceeding as a case management tool. 48

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Fed.Reg. 22,235 (1983); 51 Fed.Reg. 37,682 (1986). The OL-3 Board has jurisdiction over all matters related to emergency planning, except for matters relating to the pre-license emergency exercise requirement, 10 CFR 50.47(b)(14), 10 CFR Part 50, Appendix E, § IV.F, which have been assigned to the OL-5 Licensing Board. See ALAB-901, 28 NRC 302, 308 (1988). The OL-3 Board established the subdocket "OL-6" for filing of papers related to LILCO's request for authorization to operate at 25% power.

FN4 If the parties are properly dismissed from the entire proceeding, the remaining issues will be resolved by the Director of the Office of Nuclear Reactor Regulation like any other uncontested matter prior to license issuance.

FN5 The Intervenor's have argued that by taking review of their appeals of the Licensing Board's decision dismissing them from the proceeding, the Commission has somehow violated the Intervenor's "due process rights." Governments' Motion For Reversal of Commission Order of November 9, 1988, dated November 23, 1988. This is a frivolous argument. The Commission decision to direct certification of this matter to it for review is explicitly permitted by our Rules of Practice. 10 CFR § 2.785(d). The November 9 Order created no new issues for decision. The Intervenor's were afforded a hearing on the only disputed factual matters which form the basis of this decision. See Tr. 20944 et seq. (July 11, 12, 14 and 19, 1988). Our decision relies exclusively on sworn testimony before the Licensing Board and matters of record in this proceeding. Moreover, the Intervenor's have been given every opportunity to present their case through extensive briefs and oral argument. See Commission Orders, dated December 16, 1988, December 22, 1988, and January 24, 1989.

FN6 Confirmatory Memorandum and Order (Ruling on LILCO's Motions for Summary Disposition of Contentions 1, 2, 4, 5, 6, 7, 8 and 10, and Board Guidance on Issues for Litigation), February 29, 1988. In the February 29, 1988 Order, the Board also issued guidance on further litigation of the realism contentions.

FN7 By letter to counsel for LILCO dated April 14, 1988 and letter to the Licensing Board dated April 15, 1988, Intervenor's sought to cancel, as unnecessary, all depositions other than those for their two proffered witnesses, Dr. Axelrod and Mr. Halpin. The County did not produce the Director of Emergency Preparedness (Regan) until the July discovery abuse hearing and never did produce the County Health Commissioner (Dr. Harris).

FN8 The Intervenor's chose not to file a motion for reconsideration because they believed that in view of the many filings already made on the subject of the rule, such a motion would be futile. Governments' Objection to Portions of February 29 and April 8 Orders in the Realism Remand and Offer of Proof, April 13, 1988, at 12.

FN9 Memorandum and Order (On Board Ruling of Various Motions Relating to Pending Realism Issues), June 21, 1988, at 8. Counsel objected to about every third question to Mr. Halpin; counsel objections appear on 42 of 108 pages of Dr. Axelrod's deposition.

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FN10 In a teleconference on June 17, 1988, the Board confirmed that the Board had decided not to proceed further with the realism contentions, but had not yet determined the basis on which they would be disposed of. During a teleconference on June 24, in response to a request by LILCO, the Board indicated that it would consider dismissing the Intervenor from the proceeding. Tr. 20923.

FN11 See, e.g., list of pages added or updated after 1983, LILCO's Supplement to its June 15 Brief on Discovery Sanctions In Light of Subsequent Developments, July 26, 1988, p. 26 n. 20.

FN12 The Board also noted that Intervenor refused to permit discovery by LILCO on the EBS issue.

FN13 Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1935 (1982).

FN14 Intervenor rests their argument on County Resolutions that the County will not expend resources to test or implement an emergency response plan for the Shoreham facility. But they cite no law which prohibits disclosure of information on possible emergency responses or on resources available to respond in the event of an emergency. In any event such county law cannot interfere with the NRC's jurisdiction to carry out fact finding necessary to determine matters material to licensing a power plant. See LILCO v. Suffolk Co., 628 F.Supp. 654, 664-66 (E.D.N.Y.1986)

FN15 Memorandum and Order (on Board Ruling of Various Motions Relating to Realism Issues), June 21, 1988, at 6.

FN16 Prehearing Conference Order, (Phase I--Emergency Planning) July 27, 1982, at 23-24.

FN17 In discovery rulings on other emergency planning contentions, Licensing Boards had consistently ruled that information on other plants in New York was relevant. See e.g., Memorandum and Order (Ruling on Governments' Motion to Strike Portions of LILCO's Testimony on the Suitability of Reception Centers) at 8 (May 7, 1987); Memorandum and Order (Ruling on LILCO's March 18, 1987 Motion to Compel), at 4 (Mar. 25, 1987); Memorandum Memorializing Ruling on Motion to Compel Response to LILCO's Interrogatories and to Produce Documents (Mar. 17, 1987); Memorandum and Order (Ruling on LILCO's Motions to Compel New York State to Answer LILCO's First Set of Interrogatories and for a Protective Order) at 5-6 (Dec. 19, 1986).

FN18 See note 7, supra.

FN19 Confirmatory Memorandum and Order, dated April 12, 1988, and Confirmatory Memorandum and Order, April 18, 1988.

FN20 See, e.g., Deposition of David Axelrod, April 22, 1988 at 65-76, 93-107.

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FN21 Governments" Reply Brief on Issue Identified in Commission's November 9 Order, January 3, 1989, at 13-14.

FN22 28 NRC at 368.

FN23 Confirmatory Memorandum and Order (Ruling on LILCO's Motions for Summary Disposition of Contentions 1, 2, 4, 5, 6, 7, 8 and 10, and Board Guidance on Issues for Litigation), February 29, 1988, at 2. In its written opinion expanding on these rulings the Board stated "the Commission had no intent to have specified in complex detail what responsive measures a nonparticipating government--state or local--will provide in an emergency. However, whatever measures are planned, the Commission's rules do require that that plan be produced and evaluated for adequacy." LBP-88-9, 27 NRC 355, 369 (1988).

FN24 See Governments" Reply Brief on Issue Identified in Commission's November 9 Order, January 3, 1989 at 32-35.

FN25 An earlier test of the LILCO plan had been scheduled for February 1985, but was cancelled after Suffolk County, New York State, and the Town of Southampton obtained a declaratory judgment that LILCO lacked the legal authority to conduct the test, because as a private company it could not perform public functions traditionally reserved to state and local governments. *Cuomo v. LILCO*, No. 84-4615 (N.Y.Sup.Ct. Suffolk Cty. Feb. 20, 1985). The Commission subsequently decided that LILCO should be permitted to test those parts of the plan which it could legally exercise, and FEMA informed the NRC that it would be able to conduct the test. *LILCO v. County of Suffolk*, 628 F.Supp. 654 (E.D.N.Y.1986).

FN26 Quoted in *LILCO v. County of Suffolk*, supra, 628 F.Supp. at 659.

FN27 628 F.Supp. 654, 666.

FN28 Commissioner Curtiss did not participate in this decision.

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