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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL-3 (Emergency Planning) (ASLBP No. 86-535-04-OLR) March 3, 1988

MEMORANDUM AND ORDER
(GRANTING LILCO'S MOTION FOR SUMMARY DISPOSITION
WITH RESPECT TO COMPLIANCE WITH SECTION 50.47(c)(1)(i) and (ii))

INTRODUCTION

On December 18, 1987 LILCO filed "LILCO's Motions for Summary Disposition of Contentions 1-2 and 4-10." The document contained numerous separate motions on specific contentions and other issues related to the legal authority issues and the realism assumption. Included was "LILCO's Motion for Summary Disposition of Contentions 1-10 with respect To 10 CFR § 50.47(c)(1)(i) and (ii)" which we consider herein. The motion requests the Board to find that LILCO has complied with sections (i) and (ii) of § 50.47(c)(1) of the Commission's new emergency planning rule insofar as the legal authority contentions (EP 1-10) are concerned. The motion included seven attachments in support of LILCO's position one of which was a "Statement of Material Facts as to Which There is no Genuine Issue to be Heard."

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Intervenors responded in opposition to LILCO's motion on January 18, 1988. Their response was accompanied by the affidavits of Lawrence Coe Lanpher, Frank R. Jones, Gregory J. Blass, Frank P. Petrone, and Fabian G. Palomino all attesting to LILCO's alleged lack of sustained good faith effort to obtain the State or County participation in emergency planning for Shoreham.

The NRC Staff filed their response supporting LILCO's motion on January 15, 1988. Subsequently on February 1, 1988 Intervenors filed a reply to "NRC Staff Response to LILCO Motion for Summary Disposition with Respect to Compliance With Section 50.47(c)(1)(i)&(ii)". This reply included an attachment consisting of a letter to Victor Stello of the NRC Staff signed by two officials of Suffolk County Government. Finally LILCO submitted a motion on February 5, 1988 seeking leave to reply to Intervenors response of January 18, 1988.

APPLICABLE LAW

The Commission's new emergency planning regulation which became effective December 3, 1987 provides in pertinent part:

Where an applicant for an operating license asserts that its inability to demonstrate compliance with the requirements of Paragraph (b) of (Section 50.47) results wholly or substantially from the decision of state and/or local governments not to participate further in emergency planning, an operating license may be issued if the applicant demonstrates that:

(i) The applicants inability to comply with the requirements of paragraph (b) of (Section 50.47) is wholly or substantially the

result of the non-participation of state and/or local governments.

(ii) The applicant has made a sustained, good faith effort to secure and retain the participation of the pertinent state and/or local government authorities, including the furnishing of copies of its emergency plan.

(iii) The applicants emergency plan provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned.....

LILCO'S POSITION

LILCO filed this motion because Intervenors had stated in previous briefs to the Board that they intended to contest LILCO's compliance with paragraphs (i) and (ii) In those briefs Intervenors allege that LILCO must concede that it cannot comply with § 50.47(b) before it can invoke the new provisions of § 50.47(c)(1). LILCO argues that this would be most unfair because it believes that it is in compliance with NRC regulations but to the extent there is disagreemnt with such compliance it is entitled to plead in the alternative. The regulations do not require LILCO in its view to confess noncompliance or to litigate to a final agency decision of noncompliance before invoking the new rule.

LILCO claims that it is self evident that it has complied with the provisions of § 50.47(c)(1)(i) based on the Boards decision in its Concluding Partial Initial Decision where we found that two fatal flaws precluded a reasonable assurance finding. Both flaws, lack of legal authority, and uncertainties created by State and County opposition are

the result of nonparticipation by the governments according to LILCO. Accordingly LILCO requests summary disposition with regard to subpart (i) of the regulation cited based on the existing record which contains no material fact in dispute.

LILCO also claims that undisputed facts of record show that it has complied with paragraph c(1)(ii). In support of its view LILCO cites the history of the Shoreham construction case dating to 1970 in support of its view that it has made a sustained good faith effort to retain the cooperation of Suffolk County. In the years between 1970 and 1982 it claims that the County executive supported the construction of Shoreham, and that there was cooperation between LILCO and the County on the matter of emergency preparedness planning. A contract was executed between LILCO and the County for emergency planning in September 1981 and LILCO agreed to pay $245,000 to produce an emergency plan. LILCO payed the County a down payment of $150,000 to begin the work. The County later returned the check which LILCO has not cashed. A working relationship between LILCO and the County existed till the spring of 1982. In March 1982 the County embarked on a new planning effort using different consultants. LILCO asserts that it sought to persuade the County to resume joint planning efforts but that its overtures were rebuffed.

In May 1982 LILCO submitted a plan designed to be implemented by the County to the New York State Disaster Preparedness Commission (DPC). Thereupon relationships deteriorated seriously and the County sued the DPC to prevent it from reviewing the plan that LILCO was sponsoring. The matter was resolved by stipulation of the parties which provided

that DPC would take no further action until a specified date to permit the County time to consider its consultants plan. However the agreed date came and went with no further action by the DPC on the LILCO plan. The County draft plan was reviewed in public hearings before the Suffolk County Legislature in early 1983. LILCO participated by submitting testimony attempting to persuade the Legislature of the feasibility of emergency planning and offering to cooperate with the County in further planning. Subsequently the Legislature rejected the draft County plan concluding not only that it was inadequate but that adequate emergency planning for Shoreham was impossible. LILCO then submitted five different versions of its plan to the NRC for review. The versions differed from one another only with respect to the entity designated to perform the command and control function in an emergency. A version with the State and one with the County in that role was submitted and LILCO's utility plan contained provisions for State and County participation if they chose to do so.

LILCO asserts that in 1983 it presented testimony to Governor Cuomo's Marburger Commission which in its view demonstrated the feasibility of emergency planning at Shoreham. It further attempted to persuade the Governor to participate in emergency planning but without effect and the State announced that it would oppose the license in early 1984.

LILCO finds further evidence in its favor from its actions and attitudes taken during litigation of its emergency plan; from the fact that it has participated in court proceedings in which various parties have attempted to compel the County to participate and failed; from the

inability of a representative to gain admission to a recent meeting of State groups dealing with radiological preparedness and from the fact that it has served numerous copies of its plan on State and County officials.

INTERVENORS' POSITION

Intervenors oppose LILCO's motion on the basis that it is procedurally and substantively defective; it is conclusory and not supported by affidavits; and it is laden with self servicing (sic) selectivity. The Intervenors claim that LILCO's conduct was neither sustained nor in good faith and it was not designed to secure the Governments participation in emergency planning.

Intervenors see procedural error in LILCO's motion arising from two sources. The motion they say does not comply with the requirement of Section 2.749(a) to set forth a statement of material facts not in dispute. Instead LILCO has set forth only two alleged facts both of which consist of no more than a paraphrase of the applicable regulation (50.47(c)(1)(i)-(ii)). Citing Federal Court caselaw they claim that conclusions of ultimate fact cannot support summary judgement. This they claim LILCO has presented and therefore its motion should be rejected.

Next Intervenors claim that NRC regulations prohibit LILCO from pleading alternative theories. There is no right to plead in the alternative when relief is sought under section 50.47(c)(1) since to seek that relief applicant must assert that its inability to comply with the requirements of paragraph (b) results wholly or substantially from a

decision of a state and/or local government not to participate further in emergency planning. LILCO declines to admit that its plan does not comply with paragraph (b) and according to Intervenors it is not entitled to seek the relief it requests until it does so. LILCO is obligated by NRC case law to state the particular respects in which it is unable to comply with NRC regulations before it can seek an exemption from applicable regulations. LILCO's motion must be dismissed by Intervenors because it is not possible for the Board or parties to identify specific deficiencies from which it seeks exemption.

LILCO is not entitled to summary disposition with respect to paragraph (i) because its lack of legal authority to implement its plan arises from the decision in Cuomo v. LILCO and not from non-participation of the Governments according to Intervenors.[1] Furthermore they claim there are multiple defects in LILCO's plan that arise apart from lack of legal authority. This being so there is no basis for the Board to find that LILCO's failure to comply with paragraph (b) results wholly or substantially from LILCO's lack of legal authority.

Intervenors oppose summary disposition of the issue of compliance with paragraph (ii) of the subject regulation on the grounds that

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[1] LILCO recently advised the Board by letter that the New York Court of Appeals had reversed Cuomo v. LILCO and it requested the Board to set a briefing schedule to allow the parties to state their views on the impact of this development on this case. Intervenors responded with a letter stating that there is no significant impact. However, we find it possible to decide the motion before us without regard to this development and accordingly do not consider it herein.

summary disposition is legally inappropriate for resolving issues where good faith is in question; that applicants past dealings with the County government have not been sustained or in good faith as required by the regulation; that there has been no opportunity to conduct discovery on the issue of LILCO's past efforts to secure government cooperation in planning or the good faith of its efforts.

Intervenors cite several Federal Court cases where the courts have ruled that summary judgement is: "notoriously inappropriate" and virtually per se improper where "good faith" is in question; notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles; not appropriate where motive and intent play leading roles. Moreover, claim Intervenors, summary disposition standards must be applied more stringently against the movant where good faith is the issue. Given the facts asserted by the Governments and the requirement that they be construed in a light most favorable to the opponents, governments claim LILCO cannot obtain summary disposition.

Intervenors cite further Federal Court cases for guidance as to how material facts are to be utilized where good faith is the issue. We are told that " good faith can be determined only after combing the factual record for all evidence of motive and intent....; issues of due diligence and constructive knowledge depend on inferences drawn from the facts.....; "good faith," "reasonable diligence" "intent" determined by inferences drawn from facts.... Affidavits accompanying the Governments' opposition establish in their view that LILCO's efforts to

obtain government cooperation were neither sustained nor in good faith and that summary disposition is inappropriate.

The facts alleged by Intervenors in support of their view are diverse and numerous. We are told that LILCO was not cooperative when the County was preparing its draft plan in 1982 but was hostile and belligerent towards the County. LILCO's submission of a plan to the DPC was not authorized by the County and was falsely labeled as a Suffolk County emergency plan. The County protested but without effect and LILCO allegedly compounded the misrepresentation by filing a supplement to the false document with the NRC. Thus say Intervenors the atmosphere between LILCO and the County was poisoned. Further says the County LILCO attempted to undermine the decision process of the Suffolk County Legislature by persuading particular persons to testify in a manner favorable to LILCO in hearings held by members of the Legislature in Middletown Pennsylvania to explore questions related to role conflict and shadow evacuation.

The list of misdeeds lengthens further with allegations that LILCO in 1984 refused to pay $130 million of property taxes to the County in an effort to coerce the County to engage in planning thus causing great harm to the County and its citizens. Furthermore LILCO sued the County to attempt to compel it to adopt and implement an emergency plan and LILCO engaged in efforts in Washington D.C. seeking the federal governments' assistance in circumventing the lawful actions of the County and State. Affidavits of the County and State further attest that since the summer of 1985 there has been no attempt by LILCO to secure State or County participation in emergency planning. Intervenors

conclude that summary disposition on LILCO's compliance with paragraph (ii) must be denied because factual issues remain in dispute whether there has been a sustained effort or a good faith effort on LILCO's part to obtain the Governments' participation in emergency planning.

DECISION

PROCEDURAL CHALLENGES

We find frivolous Intervenors' assertion that LILCO failed to comply with § 2.749(a) because it filed a statement of material facts not in dispute consisting of only two items, both in the nature of ultimate conclusions. LILCO's statement of material facts is consistent with its view that its compliance with paragraphs (i) and (ii) is self evident from the existing record. Certainly the Board has no doubt as to what LILCO seeks with this motion or what basis it relies upon. Its motion taken as a whole makes clear to any reader what must be controverted to defeat the motion. In any event it is LILCO alone that risks not prevailing if its statement of material facts proves too general to be useful in deciding the motion. No harm will come to Intervenors if that occurs and it should be self evident that there is no basis to reject the motion based on the interpretation presented here.

We are likewise not impressed with Intervenors' legal argument that LILCO is somehow prohibited by regulation from pleading an alternate theory or that it must confess its inability to comply with § 50.47(b) before it can invoke § 50.47(c)(1). Nothing in the motion before us turns on LILCO's willingness or unwillingness to confess anything

regarding its emergency plan because issues raised by the legal authority contentions and government non-participation have been adjudicated against LILCO by this Board. The matter has been remanded for further consideration now under the mandate of new emergency planning rules. The Commission has assumed in its own orders that LILCO lacks legal authority to implement essential features of its plan all of which are provisions required by § 50.47(b). (CLI-86-13). It promulgated its new rule precisely to afford applicants who have reached an impasse regarding compliance with paragraph (b) because of government non-participation in an alternate procedure for licensing that can be pursued.

Contrary to Intervenors' perception the Board perceives with clarity from LILCO's motion the deficiencies from which it seeks exemption. First from the title of its motion we find that it seeks relief afforded by the Commission's new emergency planning rule with respect to the 10 legal authority contentions (now eight contentions) which are familiar to all parties in this case and which have been the subject of extensive litigation and innumerable motions. Second its motion seeks to obtain a Board ruling that it has met two of the three criteria specified in the revised portion of the new rule. Of these three criteria only the third (which LILCO does not mention) deals with substantive matters of public health and safety.

The Board concludes that Intervenors' legal challenges to LILCO's motion are without merit. Given LILCO's unquestioned position in this case it is entitled to request the relief afforded by the Commission's new emergency planning rule 50.47(c)(1)(i)-(ii). Furthermore the relief

it seeks in this motion is adequately specific to enable the Board and parties to identify the specific deficiencies from which it seeks exemption. Finally we find no prohibition to consideration of the motion in § 2.749(a) resulting from the manner in which LILCO constructed its statement of material facts not in dispute. We therefore proceed to consider the merits of the dispute.

CHALLENGES TO COMPLIANCE WITH PARAGRAPH (c)(1)(i)

LILCO asserts that it self evidently complies with paragraph (i) based on the overall factual record in this case and the Concluding Partial Initial Decision of the Board which found fatal flaws in LILCO's plan based on non-participation of the governments. Intervenors proffer two factual assertions to controvert LILCO's assertions: LILCO's inability to comply with paragraph (b) derives independently from Cuomo v. LILCO and not from non-participation of governments; there are flaws in the plan that arise apart from government non-participation in planning.

Intervenors assertion concerning Cuomo v. LILCO cannot be regarded as a controverting fact to LILCO's assertions because it is an excessively narrow view of both the regulations and a complex record. The decision cited is not the first event of significance in this case. A fair reading of § 50.47 and NUREG-0654 will reveal the Commission's expectation that governments would play a participating role with utilities in emergency planning. Had planning progressed according to that expectation there is no basis for believing that an issue of legal authority of a utility to implement a plan would ever arise. The fact

that emergency planning did not occur according to expectation in this case is indisputably traceable to the fact that the governments decided not to participate in planning. There is therefore no issue of material fact in dispute as to why LILCO stands at its present impasse. We add here that neither the lawfulness nor the correctness of the Government's position on ultimate issues in this case are material to the determination we make. Even if the governments position is ultimately vindicated in further proceedings there is no material fact in dispute regarding LILCO's present situation. Additionally, the fact that LILCO's plan has been found to have flaws not arising directly from government non-participation is not material to our decision. Those flaws have been identified on the record, and issuance of an operating license has been conditioned on their correction. That is a settled matter that has no role to play in the issue we now consider.

The Board concludes that with respect to LILCO's compliance with paragraph (i) there is no material fact in dispute and summary disposition should be and hereby is granted.

CHALLENGES TO LILCO'S COMPLIANCE WITH PARAGRAPH (c)(1)(ii)

The parties to tnis dispute present in their filings an extended tale of woe, setting forth in detail the origins of the dispute between them over emergency planning and making clear beyond question that each party feels aggrieved by the others' actions during the planning process. That the parties are now adversaries is demonstrated without question. Each party claims that the other is responsible for the current sorrowful state of conflict between them while maintaining that

its own past actions related to emergency planning for Shoreham were taken in good faith. Intervenors claim that resolution of a question of good faith requires the Board to hold evidentiary hearings and then weigh in the balance the totality of evidence of good faith or lack of it demonstrated by LILCO in all of its past actions related to emergency planning. The Board concludes that it is not necessary to follow that course in this instance and that the matter can be resolved on the basis of the papers filed by the parties on this motion.

10 CFR § 50.47 provides two methods by which an applicant may develop an emergency response plan for a nuclear plant. Section (b) provides that such a plan should be developed as a cooperative enterprise between the utility and state and local government. Section (c), which is recently revised, provides that if state and/or local government participation is not forthcoming a utility may develop a plan by itself and rely on an assumption that governments will participate in an actual emergency with their best efforts generally following the utility plan for guidance and information. It is evident from the statement of considerations that accompanied the recent rule change on emergency planning that these methods are not equally desirable from the standpoint of protection of public health and safety. The preferred method of fully assuring emergency preparedness is that prescribed by section (b). The method outlined by section (c) is a permissible alternative in that it might be found to protect public health and safety adequately even though it does not achieve all that a plan with full government cooperation could. The revised regulation in part (c) is therefore constructed so as not to create an incentive or an

unwarranted opportunity for a utility to invoke section (c) before all reasonable efforts to pursue plan development under section (b) have been exhausted. When an applicant invokes Section (c)(1) to attempt to gain approval of its plan the provisions of section (c)(1)(i) and (ii) operate as threshold tests which, if met, assure that there has been no unwarranted or premature abandonment of the preferred procedures for planning specified in section (b).

Applying these principles to the motion before us we conclude that the good faith test specified in section (c)(1)(ii) can be met with a showing that the need of the utility to invoke the alternate procedures provided by regulation is genuine and that in the case before us there is no realistic opportunity remaining to pursue a cooperative planning effort between the utility and the government. The factual bases required for such a finding are that the governments know and understand the provisions of section (b); that there has been a reasonable opportunity for the governments to pursue that course; that the utility remains open to the possibility of government cooperation and would accept and participate in a joint emergency planning effort if the governments agreed to do so.

The facts submitted by both parties demonstrate that early in the planning process the County government knew and understood the provisions of section (b) since it had a joint working relationship for drafting an emergency plan which included financial assistance to the County from LILCO. However, before the draft plan could be agreed to the County began to have doubts about the effectiveness of emergency planning for Shoreham, and it undertook an independent review of its own

after terminating the joint effort with LILCO. LILCO then sought review of the jointly prepared draft plan from the State DPC, an action which precipitated open dispute between the parties. Subsequently the County's independently produced plan was finished and was reviewed in hearings on the feasibility of emergency planning before the County Legislature where LILCO testified in support of the feasibility of emergency planning for Shoreham. The hearings however resulted ultimately in a resolution by the County Legislature terminating County participation in emergency planning for Shoreham. LILCO in turn submitted a utility plan to the NRC under then existing provisions of part 50.47 which were, to say the least, ambiguous regarding the legal acceptability of a utility plan because even though NRC was obligated to consider such a plan it appeared that there could be difficulty in meeting the substantive requirements of either section (b) or (c). There followed extensive and hostile litigation which continues to the present time. The State joined with the County against LILCO in 1984 but there is no evidence that it played any important role in the earlier disputes between LILCO and the County. The State, however, remains opposed to participation in emergency planning for Shoreham and there is no reason to draw a distinction between the State and County in the final conclusions we reach herein.

The Board concludes that LILCO and the County initially engaged in a joint good faith effort to produce a radiological response plan for Shoreham that would be acceptable to the NRC. LILCO had a reasonable expectation early in the planning process that the joint planning effort with the County would continue until an acceptable plan was produced

even if the task proved difficult. However, substantive disputes arose during the joint effort which were aggravated in LILCO's view by the County's second thoughts on the feasibility of protecting public health and safety and its ultimate choice of another method of planning that apparently excluded LILCO. Such disputes are understandable simply because the stakes were high for both parties, but they are not evidence of bad faith. In the climate of dispute then prevailing it was not bad faith for LILCO to seek plan review by the cognizant State agency although it may have been bad judgement considering the impact this action had on further aggravating the climate of dispute between the parties. Finally LILCO was entitled to take seriously the action of the County Legislature which terminated County participation as being the County's firm and considered position on the matter of planning. LILCO therefore acted in good faith in redirecting its efforts towards gaining approval from the NRC for its utility plan and away from further focused effort to gain County participation. It is unrealistic to think that LILCO would perceive anything to be gained in continuing to press the governments to participate in planning in the face of the County resolution against it. It is sufficient under that circumstance simply to hold open the opportunity for the governments to participate if they should change their views. LILCO did this by serving its plan on the governments and by providing in it for their participation in an emergency. Allegedly it still does so today.

We find no evidence that the County undertook its own substantive review of planning or drew its conclusions as to the feasibility of emergency planning for Shoreham for reasons other than a genuine concern

for protection of public health and safety. NRC regulations give a prominent role to local governments in emergency response planning and do not require that those governments give pro forma approval of any plan without review. Controversy erupted when the County reached a different conclusion from LILCO's on the feasibility of emergency planning for Shoreham. However up to the point of the legislative resolution that ended County participation there is no material evidence of bad faith from either party even though the climate in which they worked was full of storm clouds. The controversy between the parties traces fundamentally to their genuine substantive disagreement about the feasibility of emergency planning for Shoreham in circumstances of high stakes for both. The County confirms this by asserting that the action of the Legislature was taken for substantive reasons and not specifically because of anything LILCO did during the early joint planning process.

Once the Legislature acted and the parties were in open controversy however, the possibility for resumption of the joint planning process virtually disappeared. The evidence suggests that thereafter both parties attempted coercive acts on one another which could hardly meet a test of good faith by any definition. We need not make findings on these acts however, because true or not they are not material to the decision we make. Neither is it material to our decision that the parties may now hold ill feelings or diminished affections for one another. Therefore we need not pursue the course urged by Intervenors who cited court precedent in which the resolution of controversy turned in some central way on court determinations of good faith. In this case

no substantive question of public health and safety turns on a finding of good faith or on the matters we find immaterial and we cannot agree with Intervenors that summary disposition would be "notoriously inappropriate" for resolving whether a test for invoking a particular provision of a regulation is met and the test of adequacy on health and safety matters is yet to be made.

According to the principles discussed earlier we find that the governments fully understand the provisions of part (b) of 50.47; know of their opportunity to participate in planning if they wish and are aware that LILCO would accept government participation in planning if it were offered. The resolution of the County Legislature stands as the formal barrier to joint planning and all that is required for joint planning to resume is for the governments to consent to it. Thus the intent of the threshold test in section (ii) has been met. The opportunity for LILCO to gain approval of its emergency plan under the preferred method specified in part (b) has been exhausted and LILCO has met the test for invoking the provisions of § 50.47(c)(1). The Board concludes that there is no material fact in dispute regarding whether LILCO has met the test specified by part § 50.47 (c)(1)(ii) and that LILCO's motion for summary disposition with respect to that section should be and hereby is granted.

In view of the result we reach on LILCO's motion for summary disposition we find "LILCO's Motion To Reply In Part To The Intervenors Response On 10 CFR § 50.47(c)(1)(i) and (ii)" moot. It is denied on that basis.

ORDER

For all of the foregoing reasons it is hereby

ORDERED

1. LILCO's Motion For Summary Disposition Of Contentions 1-10 with Respect To 10 CFR § (c)(1)(i) and (ii) is granted.

2. LILCO's Mo To Reply In Part To The Intervenors' Response On 10 CFR § 50.47(c)(1)(i) and (ii) is denied.

THE ATOMIC SAFETY AND
LICENSING BOARD

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 3rd day of March, 1988.