January 18, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

SUFFOLK COUNTY, STATE OF NEW YORK, AND TOWN OF SOUTHAMPTON RESPONSE IN OPPOSITION TO LILCO S MOTION FOR SUMMARY DISPOSITION OF CONTENTIONS 1-10 WITH RESPECT TO 10 CFR § 50.47(c)(1)(i) AND (ii)

LILCO has moved for summary disposition, alleging that LILCO has demonstrated compliance with 10 CFR § 50.47(c)(1)(i) and (ii) in connection with Contentions EP-1-10.[1/] Suffolk County, the State of New York, and the Town of Southampton (the "Governments") oppose LILCO's Motion.

The pertinent portions of 10 CFR § 50.47(c)(1) are as follows:

> Where an applicant for an operating license asserts that its inability to demonstrate

1/ LILCO's Motion for Summary Disposition of Contentions 1-10 With Respect to 10 CFR § 50.47(c)(1)(i) and (ii), December 18, 1987, (hereafter, the "Motion").

> compliance with the requirements of paragraph (b) of this section 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 to the Commission's satisfaction that:
>
> (i) The applicant's inability to comply with the requirements of paragraph (b) of this section 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 governmental authorities, including the furnishing of copies of its emergency plan.

LILCO's Motion is defective in several respects, substantive and procedural, and thus should be denied. Significantly, the Motion is conclusory and devoid of any supporting affidavits or verification of alleged facts. Moreover, the Motion conspicuously is barren of events that reveal a more complete but uncomplimentary picture of LILCO's conduct toward the Governments, thus resulting in a Motion that is lader with self-serving selectivity. The Governments demonstrate below that LILCO's conduct was not a "sustained, good faith effort" to secure the Governments' participation in emergency planning for Shoreham. Rather, LILCO's conduct exhibited a lack of good faith effort, repeatedly marked by elements of actual bad faith. For this and the following additional reasons, LILCO's Motion should be denied.

First, contrary to the requirement of 10 CFR § 2.749(a), LILCO has failed to annex a statement of "material facts as to which [LILCO] contends that there is no genuine issue to be heard." Rather, LILCO's "Statement" consists solely of a conclusory quotation/paraphrase of 10 CFR §§ 50.47(c)(1)(i) and (ii). No fact is cited or even referenced. This renders LILCO's Motion defective. The Motion must be rejected.

Second, LILCO may not seek relief under 10 CFR § 50.47(c)(1)(i)-(ii), because there has not been a final determination by the Board, or the express agreement of LILCO, that LILCO does not comply with 10 CFR § 50.47(b). LILCO's claim that it has a right to plead in the alternative begs the question. The fact is that Section 50.47(c)(1)(i)-(iii) by its own language prohibits such alternative pleading.

Third, LILCO's lack of legal authority to implement its emergency plan is not the result of governmental non-participation, and thus the Section 50.47(c)(1)(i) standard is not met. The Plan that LILCO has put before this Board is one which calls for LILCO to manage the emergency response, with or without the authorization of County and/or State officials supposedly providing official approval of LILCO actions. However, even if LILCO had the participation of the Governments, LILCO still would lack legal authority to take the actions called for in the Plan. Further, there are various defects in LILCO's

preparedness which derive from problems independent of LILCO's lack of legal authority. These defects are an additional reason that the Section 50.47(c)(1)(i) finding cannot be made.

Fourth, for multiple reasons, this Board cannot rule summarily that LILCO has satisfied the Section 50.47(c)(1)(ii) requirement that LILCO has "made a sustained, good faith effort to secure and retain the participation of the pertinent state and/or local governmental authorities . . . ."

a) Where subjective matters such as good faith, intent, and motive are at issue - and they expressly are at issue under Section 50.47(c)(1)(ii) which requires an assessment of an applicant's "sustained, good faith effort" -- summary disposition is inappropriate. LILCO ignores this rule of law, and wrongly bases its Motion on the assumption that the Board may consider summary disposition under the present circumstances.

b) The issue of LILCO's "sustained, good faith effort" became a part of this proceeding for the first time with the enactment of amended 10 CFR § 50.47(c)(1)(i)-(iii) on October 29, 1987. The Governments must have an opportunity for discovery, as recognized by 10 CFR § 2.749(c), before there could be any consideration of a ruling favorable to LILCO on the Motion. The need

for discovery is particularly acute in this instance because the legal standard of Section 50.47(c)(1)(ii) focuses on LILCO's alleged good faith efforts. LILCO can be expected -- as it has -- to make self-serving statements about its motives, intent, and good faith. The Governments must have a fair opportunity to gain access to the underlying facts which LILCO claims support its position and which are exclusively within LILCO's control. The Affidavit of Lawrence Coe Lanpher, Attachment 1 hereto, documents the need for such discovery.

c) Even without such discovery, the Governments demonstrate herein that there are many material facts in dispute regarding whether LILCO has made a sustained, good faith effort as required by Section 50.47(c)(1)(ii). The Governments' Statement of Material Facts as to Which There is a Genuine Issue to Be Heard, Attachment 2 hereto, documents that there are many material facts in dispute. Contrary to LILCO's assertions, the facts demonstrate that LILCO has not sought the Governments' participation but, instead, has followed a sustained course of hostility, misrepresentation, fearmongering, and coercion. As set forth in the attached affidavits of Frank R. Jones, Gregory J. Blass, Frank P. Petrone, and Fabian G. Palomino,

Attachments 3-6 hereto, LILCO's own conduct totally rebuts the self-serving assertion that LILCO has made a sustained good faith effort to obtain the participation of New York State and Suffolk County. Indeed, the affidavits show not only that LILCO has lacked good faith, but that it has on repeated occasions manifested actual bad faith.

I. LILCO's Motion Does Not Comply With 10 CFR § 2.749(a)

Section 2.749(a) requires a movant for summary disposition to annex to its motion a statement of the material facts as to which the movant alleges there is no genuine issue to be heard. The purpose of that requirement is plain: only by setting forth a detailed statement of material facts as to which there is alleged to be no dispute can the responding party be expected to set forth, as required by the fifth sentence of Section 2.749(a), a "separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be heard."

LILCO has failed to comply with the requirement of Section 2.749(a). Instead of setting forth the material facts as to which LILCO alleges there is no genuine dispute, LILCO's entire "Statement," as set forth in Attachment 1 to the Motion, is the following:

> 1. LILCO's inability to comply with 10 CFR § 50.47(b) because of lack of legal authority is wholly or substantially the result of the

non-participation of the Suffolk County and New York State governments.

2. LILCO has made a sustained, good faith effort to secure and retain the participation of the Suffolk County and New York State authorities, including the furnishing of copies of its emergency plan.

The foregoing does not constitute a statement of facts. Rather, it is simply a paraphrase and quotation of the legal standards established in Section 50.47(c)(1)(i)-(ii). By definition, LILCO's rehash of the legal standards does not, and cannot, constitute the factual representations required by the regulations. Since LILCO has failed to comply with Section 2.749(a), its Motion is defective and should be dismissed summarily.

The federal court case law[2/] is clear that conclusory statements of law or ultimate fact are insufficient to satisfy the movant's burden of establishing the absence of genuine issues of material fact. Galindo v. Precision American Corp., 754 F.2d 1212, 1221-22 (5th Cir. 1985) ("mere statements of conclusions of law or ultimate fact cannot shift the summary judgment burden to the nonmovant"); see, e.g., Gossett v. Du-Ra-Kel Corp., 569 F.2d 869, 872 (5th Cir. 1978) (conclusory, "bald assertions of ultimate facts are ordinarily insufficient to support summary judgment"); Benton-Volvo-Metarie, Inc. v. Volvo Southwest, Inc., 479

2/ Commission precedent recognizes that the NRC's standards for summary disposition are essentially the same as those applicable to motions for summary judgment in the federal courts. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-85-27A, 22 NRC 207, 208 (1985).

F.2d 135, 138-39 (5th Cir. 1973) (summary judgment denied despite respondent's failure to file response where motion and affidavits "set forth only ultimate facts or conclusions"; "[i]t should be remembered that in summary judgment proceedings affidavits containing mere conclusions have no probative value") (citation omitted). Therefore, LILCO's purported Statement is wholly inadequate and requires rejection of the Motion.

II. LILCO's Motion Must be Dismissed Because LILCO Cannot Here Plead Alternative Theories

LILCO continues to allege that it has legal authority to implement its emergency plan and, thus, that it can and will comply with the requirements of 10 CFR § 50.47(b). See LILCO Motion at 3. Nevertheless, LILCO claims that it also has a "right" to seek relief under 10 CFR § 50.47(c)(1). LILCO alleges that "[w]hat Intervenors seek to do is to eliminate LILCO's right to plead in the alternative by requiring it to make confessions against interest as a price for invoking the new rule. It would be most unfair, and improper, to curtail a party's rights in this way." Id. (emphasis added). LILCO's allegation begs the question, because the abstract concept of alternative pleading is not at issue here; the issue is simply LILCO's failure to meet the express standard of the regulation.

There is no "right" to plead in the alternative when relief is sought under 10 CFR § 50.47(c)(1)(i)-(iii). Indeed, the regulation specifies that it applies "where an applicant for an

operating license asserts that its inability to demonstrate compliance with the requirements of paragraph (b) of this section results wholly or substantially from the decision of state and/or local governments not to participate further in emergency planning, ..." (Emphasis added) Again, in Section 50.47(c)(1)(i), the rule speaks of the "applicant's inability to comply with the requirements of paragraph [b] . . . ." (emphasis added).3/ Clearly, a prerequisite for reliance on Section 50.47(c)(1) is either a final Licensing Board determination that the applicant does not comply with 10 CFR § 50.47(b), or the agreement by the applicant that it cannot demonstrate compliance with Section 50.47(b). The regulation creates no "right" for the applicant to do anything other than seek to comply with the content of the rule. LILCO's claim of alternative pleading "rights" here is an unfounded invention.

The inapplicability of 10 CFR § 50.47(c)(1) to the present facts is demonstrated by the Appeal Board's decision in Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2), ALAB-809, 21 NRC 1605 (1985), vacated as moot, CLI-85-16, 22 NRC 459 (1985). In Limerick, the Appeal Board was faced with a Licensing Board having taken action under Section 50.47(c)(1)

3/ Section 50.47(c)(1)(iii) also recognizes that the rule comes into play only when it is established that Section 50.47(b) compliance cannot be achieved. Thus, the rule addresses those elements of Section 50.47(b) "for which state and/or local non-participation makes compliance infeasible," "measures designed to compensate for any deficiencies," and "applicant's inability to comply with the requirements of paragraph (b) . . . ."

before there had been identification of the Section 50.47(b) requirements with which the applicant did not comply. The Appeal Board stated that Section 50.47(c)(1)

> presupposes identification of the particular respects in which an applicant is unable to comply with the regulatory requirements from which it seeks an exemption. Indeed, only after the asserted deficiencies in the . . . evacuation plan are identified, can [applicant] logically attempt to satisfy the various exemption criteria of the regulations.

Id. at 1613 (Emphasis added).

The same principle applies in the instant case. LILCO continues to assert that it complies with Section 50.47(b), which is contrary to what is required in order for LILCO to seek relief under Section 50.47(c)(1)(i)-(iii). Thus, it is impossible for the Licensing Board or the parties to identify the specific deficiencies from which LILCO seeks exemption. Accordingly, the LILCO Motion must be dismissed.

III. LILCO Does Not Satisfy 10 CFR § 50.47(c)(1)(i)

LILCO states that "it is self-evident that the lack of legal authority results wholly from government non-participation." LILCO Motion at 4. LILCO is incorrect. The emergency response plan before this Board -- the LERO Plan -- relies upon LILCO personnel to manage the emergency response. According to LILCO, the Governments' primary role is to provide a layer of official approval of LILCO's proposed actions, which approval is alleged

to "cure" LILCO's lack of legal authority. However, the settled fact is that even the Governments' participation would not alter LILCO's lack of legal authority. Indeed, as made clear in Cuomo v. LILCO, and as confirmed on at least two occasions by this Board,4/ LILCO lacks legal authority to implement the plan even if government officials were to participate. Accordingly, LILCO has failed to demonstrate that LILCO's lack of legal authority results from government non-participation. To the contrary, it results from LILCO's status as a private corporation to which police powers cannot constitutionally be delegated or authorized.5/

Further, LILCO fails to comply with 10 CFR § 50.47(c)(1)(i) for the additional reason that there are multiple defects in LILCO's plan that constitute failures to satisfy 10 CFR § 50.47(b) and preclude a finding of reasonable assurance. These defects arise from causes wholly apart from LILCO's lack of legal authority. They include LILCO's lack of an emergency broadcast system, LILCO's lack of a hospital evacuation plan, LILCO's failure to sustain its burden on school bus driver role conflict

---

4/ See Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 911 (1985); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-87-26, _____ NRC _____, slip op. at 25 (Sept. 17, 1987).

5/ The issue of LILCO's authority to implement its plan or portions thereof with the alleged "permission" of the Governments is an issue which permeates all of LILCO's December 18, 1987, summary disposition motions, particularly those for which responses are due on February 10, 1988. The Governments will address the matter in detail in their February 10, 1988, response.

issues, LILCO's failure to establish that it has sufficient buses for school evacuation, LILCO's failure to identify school reception centers, the lack of resolution of issues related to reception centers for the general population, LILCO's failure to have conducted a full participation exercise, and the compound fundamental flaws identified in the February 1986 limited exercise.6/ Thus, there is an independent basis for finding non-compliance with many of the Section 50.47(b) standards quite apart from LILCO's lack of legal authority. Accordingly, there is no basis for this Board to conclude that LILCO's failure to satisfy the Section 50.47(b) standards results wholly or substantially from LILCO's lack of legal authority. Rather, there are multiple independent reasons why LILCO does not comply with the regulations.

IV. LILCO Has Failed to Demonstrate Compliance With 10 CFR § 50.47(c)(1)(ii)

A. Summary Disposition is Inappropriate Given the Express "Good Faith" Standard of the Regulation

The chief legal issue which LILCO attempts to resolve through summary disposition is whether LILCO has made a

---

6/ LILCO has suggested that the multiple defects in LILCO's plan do not come into play concerning Contentions 1-10. LILCO Motion at 5, n.4. However, Contentions 1-10 cite the Section 50.47(b) planning standards and allege that LILCO has failed to comply with many of those standards, including Section 50.47(b)(1), (3), (5), (6), (10), and (13). This Board cannot ignore that LILCO's inability to comply with the Section 50.47(b) standards results also from defects in LILCO's plan that have nothing to do with LILCO's lack of legal authority.

"sustained, good faith effort" to secure and retain the Governments' participation in emergency planning for Shoreham. LILCO treats this issue as a routine matter, asserting that "the record already shows, beyond any doubt" that LILCO has made such an effort. LILCO Motion at 5.

LILCO's glib treatment of this serious issue ignores settled legal principle. Indeed, the law -- which LILCO does not even mention to this Board -- is that summary judgment is "notoriously inappropriate" and virtually per se improper where "good faith" is in question. See generally Hotel & Restaurant Employees and Bartenders International Union v. Rollison, 615 F.2d 788, 793 (9th Cir. 1980); United States v. Langley, 587 F. Supp. 1258, 1261 (E.D. Cal. 1984).

It is the established rule in federal courts that summary judgment is particularly inappropriate where the issue of good faith is determinative of the underlying claim. See McGee v. Hester, 724 F.2d 89 (8th Cir. 1983); Pfizer, Inc. v. International Rectifier Corp., 538 F.2d 180 (8th Cir. 1976), cert. denied, 429 U.S. 1040 (1977). As the U.S. Court of Appeals held in McGee, "[s]ummary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles." 724 F.2d at 91 (citing Pfizer, 538 F.2d at 185) (emphasis added).

LILCO seeks to establish that it has made "a sustained, good faith effort to secure and retain the participation of the pertinent state and/or local government authorities" within the meaning of the amended 10 CFR § 50.47(c)(1)(ii). The determination of whether LILCO's conduct constitutes a "good faith" effort necessarily must be made by applying subjective standards to the factual record and weighing considerations of actual conduct, intent, and motivation. Summary judgment is not the appropriate means to determine such factual intentions and inferences. Louis Schlesinger Co. v. The Kresge Foundation, 388 F.2d 208, 212 (3d Cir.), cert. denied, 391 U.S. 934 (1968); see White Motor Co. v. United States, 372 U.S. 253, 259 (1963) (summary judgment not appropriate where motive and intent play leading roles); Severson v. Fleck, 251 F.2d 920, 924 (8th Cir. 1958).

Moreover, where, as in the instant case, good faith is at issue, the normal summary disposition standards are applied more stringently against the interests of the movant, and summary judgment is granted more warily. Purdy Mobile Homes v. Champion Home Builders Co., 523 F. Supp. 56, 58 (E.D. Wash. 1981). Thus, here LILCO bears an even greater burden of establishing the absence of any genuine issue of material fact, and all evidence, as well as all reasonable inferences therefrom, must be construed in the light most favorable to the Governments. Given the facts asserted by the Governments and the inferences favorable to the

Governments that necessarily derive from these facts (see Section IV.C below and Attachments 3-6 hereto), it is clear that LILCO cannot obtain summary disposition on the issue of its "good faith."7/

B. Summary Disposition is Inappropriate in the Absence of an Opportunity for Discovery

The regulatory standard at issue here -- whether LILCO has made a "sustained, good faith effort" to secure and retain the participation of state and local governments in emergency planning for Shoreham -- is a standard which was added to the regulations on October 29, 1987. It has become an issue in this case only with the filing of LILCO's Motion. Accordingly, it is clear that the Governments have never had any opportunity to pursue discovery on this matter.8/

7/ The existence of good faith, motive, or intent as a controlling legal issue does not wholly preclude the granting of summary judgment. See Gard v. United States, 594 F.2d 1230 (9th Cir.), cert. denied, 444 U.S. 866 (1979). However, summary judgment is only appropriate in such circumstances where the undisputed facts clearly resolve the issue of good faith, motive, or intent, despite the construction of all reasonable inferences in the light most favorable to the party opposing summary judgment. See id. at 1234. The Gard Court noted its reluctance to approve summary judgment where willfulness was at issue, see 594 F.2d at 1234, and observed that questions of willfulness, motive, and intent must normally be determined by the trier of fact. See id. n.2. This stringent standard cannot be met by LILCO in the case at hand. The factual history traced below, and further detailed in the Jones, Blass, Petrone, and Palomino affidavits, compellingly supports the conclusion that LILCO has not engaged in a sustained, good faith effort to secure and retain the participation of the Governments.

8/ LILCO's assertion that LILCO's alleged good faith effort is clear on the record (Motion at 5) is frivolous. Since this issue has never before been a subject of litigation, it is clear that (footnote continued)

Discovery here is exceedingly important. The "good faith" standard focuses on LILCO's intentions, motives, and purposes. The standard not only requires good faith, but establishes the even more stringent standard of proving "sustained" good faith. By definition, this requires the examination of LILCO's conduct over time, not simply disjointed or isolated acts such as LILCO has presented in its Motion. While the Governments believe that the evidence described in Section IV.C below and Attachments 3-6 hereto demonstrates that LILCO has not made a good faith effort, and that it in fact has repeatedly even exhibited actual bad faith, it also is clear that additional material evidence which will need to be adduced on this issue is solely within the control of LILCO. It is LILCO's state of mind and intent, as well as its actions which exhibit that intent, that will have to be probed in order for the Board to make a determination whether LILCO made the required "sustained, good faith effort."

It is totally inappropriate for LILCO to suggest that the Governments could be in a position to respond fully to a summary disposition motion on LILCO's intent in the absence of having had any opportunity to pursue discovery concerning LILCO's intent. Accordingly, this is an instance where 10 CFR § 2.749(c) is particularly pertinent:

(footnote continued from previous page)
whatever record exists -- including LILCO's self-serving statements -- is clearly inadequate to provide a basis for any kind of factual finding.

> Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the presiding officer may refuse the application for summary decision or may order a continuance to permit affidavits to be obtained or make such other order as is appropriate and a determination to that effect shall be made a matter of record.

Attached hereto is the affidavit of Lawrence Coe Lanpher, one of the counsel for Suffolk County. In this affidavit, Mr. Lanpher makes clear that it is impossible for the Governments at this stage of the proceeding -- operating under a new regulatory standard -- to be in a position to counter fully LILCO's self-serving assertions regarding its "good faith" and "sustained" efforts to secure Suffolk County and New York State participation in emergency planning.

The instant facts are parallel to the EBS situation addressed previously by the Board. When LILCO sought summary disposition on its new EBS plan, the Board stated:

> It barely needs expression that summary disposition motions assume other parties in a proceeding have had an opportunity to determine and respond to matters potentially in controversy . . . .

Memorandum and Order (Ruling on Applicant's Motion of November 6, 1987 for Summary Disposition of the WALK Radio Issue), Dec. 21, 1987, at 4. The Governments have had no "opportunity to determine and respond to [the] matters potentially in controversy" on

the Section 50.47(c)(1)(ii) issue, particularly related to LILCO's motives, intent, and state of mind, all of which must be assessed by the Board in determining whether LILCO has met the "good faith" standard. Accordingly, consistent with other orders issued by this Board and 10 CFR § 2.749(c), the Board must deny summary disposition.

C. There are Material Issues of Fact in Dispute Regarding LILCO's Compliance with 10 CFR § 50.47(c)(1)(ii)

Notwithstanding the lack of opportunity for discovery, the Governments establish that there are material issues of fact in dispute regarding whether LILCO has made a sustained good faith effort to secure and retain the participation of the Governments in emergency planning for Shoreham. Facts relating to these matters are set forth in the affidavits of Frank R. Jones, Gregory J. Blass, Frank P. Petrone, and Fabian G. Palomino, Attachments 3, 4, 5, and 6 hereto, respectively. These affidavits, together with the Statement of Material Facts in Dispute which is Attachment 2 hereto, demonstrate that it is totally inappropriate to consider the grant of summary disposition.

"Good faith" can be determined only after combing the factual record for all evidence of motive and intent and then applying a subjective test to the facts discerned. Robertson v. Seidman & Seidman, 609 F.2d 583, 591 (2d Cir. 1978) ("[i]ssues of due diligence and constructive knowledge depend on inferences drawn from the facts of each particular case -- similar to the

type of inferences that must be drawn in determining intent and good faith"); Byrd v. Bates, 243 F.2d 670, 674 (5th Cir. 1957) ("good faith," "reasonable diligence," "intent" determined by inferences drawn from facts admitted or proven). The affidavits attached hereto and the discussion below demonstrate that the Governments have raised, at the very least, the inference that LILCO's efforts have neither been "sustained" nor in "good faith." Summary disposition, therefore, is clearly inappropriate.

In this Response, the Governments will not repeat the matters more fully detailed in the attached affidavits. Those affidavits, together with Attachment 2 hereto, establish that there are multiple material factual issues in dispute. However, it is important to highlight certain of the matters discussed in the affidavits and to make clear that LILCO's portrayal of "history" (see LILCO Motion at 6-15) is selective and exclusionary. Indeed, LILCO's recital leaves out many critical facts bearing on LILCO's manifest lack of good faith. In addition, LILCO mischaracterizes facts that it cites. Thus, the following matters are discussed to demonstrate even further that there are genuine issues of material fact regarding whether LILCO has made a sustained, good faith effort to secure and retain the Governments' participation in emergency planning for Shoreham.

1. LILCO asserts that during 1982, when County consultants were preparing a draft County emergency plan, LILCO was "cooperative." Motion at 7. The Governments dispute this assertion. As set forth in detail in the affidavits of Frank R. Jones and Gregory J. Blass, LILCO was not cooperative. In fact, LILCO's attitude and conduct toward the County's planning efforts in 1982 manifested sustained hostility and belligerency toward the County, and misrepresentation and falsification of County actions and documents to officials of other levels of government. Jones Aff. ¶s 16, 20, 24-28; Blass Aff. ¶s 9-10.

In particular, LILCO's Motion is conspicuously incomplete with respect to the document which LILCO falsely labelled the "Suffolk County Radiological Emergency Plan" and wrongly submitted to the New York State Disaster Preparedness Commission ("DPC") in May 1982. This document was not a "plan" of Suffolk County and was not authorized by Suffolk County. Indeed, the document was created by LILCO itself, fashioned from papers officially rejected by Suffolk County and from others prepared by LILCO's own consultants. LILCO, without the knowledge or authorization of Suffolk County, packaged these papers in official binders bearing the name of Suffolk County and submitted them to federal and state agencies as Suffolk County's emergency plan. LILCO did this with full and actual knowledge that the document

it falsely claimed to be Suffolk County's plan in fact was no such thing. Jones Aff. ¶s 18-21, 24, 26; Blass Aff. ¶ 9.9/

The County protested LILCO's conduct to no avail, including a letter from the Chief Deputy County Executive to LILCO, a major speech by the County Executive to a Special Session of the County Legislature, and telegrams and letters to state and federal agencies informing them of LILCO's misdeed. Still, LILCO persisted in its misrepresentation, and thereafter even filed with the NRC a supplement to its false document. LILCO took all of these actions with full knowledge that at the same time Suffolk County was engaged in a comprehensive effort to prepare a draft emergency plan for Shoreham. Jones Aff. ¶s 11, 13, 19, 21-23, 26; Blass Aff. ¶ 9.

LILCO's actions in 1982 were the antithesis of a "sustained, good faith effort" to obtain the County's participation in emergency planning. LILCO in 1982 demonstrated a total unwillingness to allow the County to proceed with emergency planning methodically and without distraction. Jones Aff. ¶s 16-28. Indeed, LILCO demonstrated repeated hostility toward the County's planning efforts. This poisoned the atmosphere between LILCO and the County. Jones Aff. ¶s 27-28.10/

9/ One year later, in May 1983, LILCO again submitted a County "plan" for review, this time by the NRC. LILCO's submittal was not part of a good faith effort. Jones Aff. ¶ 35.

10/ It is clear also that LILCO's unauthorized actions before (footnote continued)

2. LILCO asserts that in early 1983, it worked cooperatively with the Suffolk County Legislature in legislative hearings and in other contexts to try to persuade the County to adopt an emergency plan for Shoreham. See LILCO Motion at 8-9. Nothing could be further from the truth. LILCO omits material facts.

As part of the Suffolk County Legislature's efforts to decide whether to adopt or implement an emergency plan for Shoreham, members of the Suffolk County Legislature traveled to Middletown, Pennsylvania, the vicinity of the TMI accident, to hold public hearings and gain input from persons, including emergency response personnel, with actual experience during the TMI accident. One purpose of these hearings was to learn whether in a nuclear accident there might be serious problems related to matters such as role conflict and voluntary evacuation. Blass Aff. ¶s 4-5; Jones Aff. ¶ 14.

Unbeknownst to the Suffolk County Legislators, however, LILCO personnel had traveled in advance to Middletown, Pennsylvania, and had solicited and persuaded particular persons to come forward and testify on matters in a manner favorable to LILCO. LILCO asked these persons not to disclose LILCO's actions to the Legislature. Thus, LILCO attempted to bias the hearing

---

(footnote continued from previous page)
the State DPC in 1982 constituted no part of an effort to secure the State's participation in planning for Shoreham. Palomino Aff. ¶ 3, n.1.

record and data upon which the Legislature would base its decision. Such an act was neither the inspiration nor conduct of a company making a "sustained, good faith effort" toward Suffolk County. Again, this poisoned the atmosphere between Suffolk County and LILCO. Blass Aff. ¶s 6-8; Jones Aff. ¶ 30.

3. LILCO suggests that during the litigation of Phase 2 emergency planning issues -- that is, the late 1983 and 1984 time period, LILCO was cooperative with Suffolk County and was willing to go forward in a cooperative effort. Motion at 11-12. These allegations, again, are selective and exclusionary. The facts are to the contrary.

For example, LILCO does not disclose that beginning in early 1984 and continuing until June 1985, LILCO refused to pay $130 million of property taxes that it owed to Suffolk County. LILCO's refusal was premised fundamentally upon its disagreement with the County's lawful determination not to adopt or implement an emergency plan for Shoreham. Thus, in a plainly coercive act, LILCO refused to abide by its civic duty and to pay its taxes unless the County would back-away from its lawful convictions and make concessions which LILCO insisted upon to serve its self-interests at public expense. In the process, LILCO -- as Suffolk County's largest taxpayer -- attempted to wreak financial chaos on Suffolk County, totally disregarding the welfare of Suffolk County's 1.3 million citizens and the public services upon which

they depend. In fact, LILCO succeeded in causing damage to the County and its citizens. This was not the act of a company making a "sustained, good faith effort." It was a company manifesting actual bad faith. Jones Aff. ¶s 4, 41-45; Blass Aff. ¶s 11-12.

Similarly, in April 1984, LILCO sued Suffolk County to attempt to compel Suffolk County under federal law to adopt and implement an emergency response plan for Shoreham. Such a suit by LILCO cannot under any stretch of the imagination be termed to be part of a "good faith" effort to obtain Suffolk County's participation. Indeed, LILCO's choice of going to court was but an extension of the company's belligerency. Jones Aff. ¶ 37. At the same time, LILCO was busy in Washington, D.C., seeking to the federal government's assistance in circumventing the lawful actions of the County and the State. LILCO had evinced no effort to secure the participation of the State or local government. Jones Aff. ¶s 38-39; Palomino Aff. ¶ 10.

4. LILCO's Motion is totally lacking in data concerning any effort by LILCO during the last 2-1/2 years -- since summer of 1985 -- to attempt to secure the participation of Suffolk County or the State of New York.11/ Mr. Petrone and Mr. Jones

---

11/ LILCO mentions on page 13 of the Motion that on May 19, 1987, a LILCO employee attempted to attend a meeting of the New York Power Pool Emergency Preparedness Subcommittee. She was refused admission to that meeting. LILCO fails to explain how that attempted attendance at that meeting has anything whatsoever
(footnote continued)

confirm that there have been no recent efforts of any kind related to the County. Petrone Aff. ¶s 2-3; Jones Aff. ¶ 46. Similarly, Mr. Palomino demonstrates that LILCO has never made any serious effort -- much less a sustained, good faith effort -- to secure the participation of New York State, since over the last five years, even LILCO cites only three alleged "efforts," none of which withstand scrutiny. Palomino Aff. ¶s 3-9; see Jones Aff. ¶ 34.12/

In conclusion, it is clear from the foregoing, and from Attachments 2-6 hereto as well, that material, factual issues remain in dispute regarding whether LILCO has made a sustained good faith effort to secure and retain the participation of the

---

(footnote continued from previous page)
to do with whether LILCO has made a sustained good faith effort to secure and retain the participation of New York State in emergency planning. LILCO also fails to reveal that admittance was refused because the meeting was scheduled to address emergency planning matters involving the operating plants in New York State. Since LILCO's plant was not operating at a level which requires offsite emergency preparedness, the meeting was simply not of pertinence to any matters relating to LILCO. Palomino Aff. ¶ 7, n.2.

12/ LILCO's claim that as required by Section 50.47(c)(1)(i), it has furnished copies of its emergency plan to the Governments misses the substantive point at issue. Neither Suffolk County nor New York has received copies of LILCO's plan for any administrative or operational purpose related to emergency planning. Limited copies of the plan are used by the Governments only for purposes of permitting the Governments to be involved in litigation concerning the plan before the NRC and other legal forums.

Governments. With such factual issues in dispute, it is per se impossible for this Board even to consider the grant of summary disposition.

Respectfully submitted,

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

Lawrence Coe Lanpher
Herbert H. Brown
Lawrence Coe Lanpher
Karla J. Letsche
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
South Lobby - 9th Floor
Washington, D.C. 20036-5891

Attorneys for Suffolk County

Fabian G. Palomino (LCL)
Fabian G. Palomino
Special Counsel to the Governor
of the State of New York
Executive Chamber, Room 229
Capitol Building
Albany, New York 12224

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

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

Attorney for the Town of
Southampton