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USNRCUNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARDOFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

NRC STAFF RESPONSE TO GOVERNMENTS MOTION FOR
RECONSIDERATION OF RULING AS TO COMPLIANCE
WITH 10 C.F.R. § 50.47(c)(1)(i) AND (ii)

I. INTRODUCTION

On December 18, 1987, the LILCO filed "LILCO's Motion for Summary Disposition of Contentions 1-10 With Respect to 10 CFR § 50.47(c)(1)(i) and (ii)" ("SD Motion"). In that motion, LILCO asked the Board to summarily dismiss the legal authority contentions with respect to the issue of whether LILCO had complied with the provisions of (i) and (ii) in the new Emergency planning rule. ^{1/} Specifically, LILCO alleged that there

^{1/} 10 C.F.R. § 50.47(c)(1) provides, in relevant part, that:

Where an applicant for an operating license asserts that its inability to demonstrate compliance with the requirements of [Section 50.47(b)] 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 applicant's inability to comply with the requirements of [Section 50.47(b)] is wholly or substantially the result of the non-participation of state and/or local governments.

(FOOTNOTE CONTINUED ON NEXT PAGE)

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was no genuine issue of material fact as to whether (1) LILCO's inability to comply with 10 C.F.R. § 50.47(b) because it lacks legal authority is wholly or substantially the result of the non-participation of the Suffolk County and New York governments and (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. SD Motion at Attachment 1.

In a Memorandum and Order, dated March 8, 1988 ("Order"), the Licensing Board granted LILCO's motion for summary disposition of Contentions 1-10 with respect to its compliance with 10 C.F.R. § 50.47(c)(1)(i) and (ii). Subsequently, on March 15, 1988, Intervenor (Suffolk County, the State of New York, and the Town of Southhampton) filed a motion for reconsideration of that Order. Governments' Motion for Reconsideration of Board Ruling on Section 50.47(c)(i)-(ii) Compliance ("Motion"). ^{2/} As grounds for their request that the Board reconsider its ruling on Section 50.47(c)(1)(ii), Intervenor state: (1) the Board ignored the requirement of the regulation that LILCO must demonstrate a

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

(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.

52 Fed. Reg. 42078, 42086 (November 3, 1987).

^{2/} While the title of the pleading suggests that Intervenor request reconsideration of the Board ruling on compliance with 10 C.F.R. § 50.47(c)(1)(i) and (ii), the text of the motion addresses 50.47(c)(1)(ii) only. See e.g., Motion at 1, 5.

"sustained" good faith effort to secure and retain Intervenor's participation; (2) the Board incorrectly concluded that LILCO had not acted in bad faith during 1982 and should have determined whether LILCO action's constituted sustained good faith; and (3) the Board ruled in favor of summary disposition despite the existence of disputed material facts. Motion at 1-4. For the reasons set forth below, the Staff believes the Board's grant of summary disposition was proper and, thus, the Staff opposes Intervenor's Motion.

II. DISCUSSION

A. The Board Correctly Found that LILCO Complied with the Good Faith Requirements of Section 50.47(c)(1)(ii)

(1) LILCO made a sustained, good faith effort.

Intervenor's argue that the Board "ignored the plain language and requirements" of 50.47(c)(1)(ii) that LILCO must show a "'sustained' good faith effort" to secure and retain Intervenor's participation. Motion at 1-2. The Staff believes the Board properly found that LILCO's conduct satisfies the good faith requirement of the regulation.

The Board reasoned that the purpose of the good faith test in subsection (c)(1)(ii) is to assure that there has been no premature abandonment of joint utility and government planning. Order at 14-15. The good faith test can be met with a showing that the utility's need to invoke Section 50.47(c) procedures is genuine and that:

[T]here 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 [50.47(b)]; that there has been a reasonable opportunity for the governments to pursue that course; [and] 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.

Id. at 15. The Board found that both LILCO's and Intervenor's filings demonstrate that the County government knew and understood the provisions of Section 50.47(b) as shown by the initial joint working relationship towards a draft plan (which included financial assistance to the County from LILCO). In addition, prior to the passage of the County Legislature resolution which ended County participation in joint planning, the substantive disputes between, and actions taken by, LILCO and the County were the result of good faith efforts to pursue differing views as to the feasibility of emergency planning for the plant. Id. at 16-19. Moreover, despite the dissension and the legislative barrier to joint planning, LILCO continues to display good faith in that it stands ready to cooperate with the governments (whenever they consent) by distributing copies of its plan and providing for emergency government participation within the plan. Id. at 17-19.

The Staff believes that the Board finding that LILCO has demonstrated that it would participate in joint planning, but for the refusal of the Intervenor's shows that LILCO has made sustained, good faith effort toward joint planning with the governments. Thus, the Board's ruling should stand.

(2) LILCO's actions in 1982 were taken in good faith.

Intervenor's argue that Board's finding that LILCO's attempt to seek a review of the plan by the New York State Disaster Preparedness commission "was not bad faith," was incorrect and unfairly shifted the burden on summary disposition to Intervenor's. Motion at 3.

Intervenors misunderstand the Board's ruling. The Board found that LILCO's submission of the jointly prepared draft to the DPC in May 1982, while possibly bad judgment in that it resulted in further deterioration in relations with the County, was not bad faith. Id. at 3-5, 15-17. ^{3/} That is, the action was a good faith attempt to obtain plan approval based on a differing opinion as to the feasibility of emergency planning in light of the County's abandonment of joint planning. The Board's ruling does not shift LILCO's burden, as movant of the motion, to Intervenors. Therefore, there is no need for the Board to reconsider this aspect of its summary disposition ruling and Intervenors' Motion should be denied.

B. The Board Correctly Found a Lack of Disputed Material Facts

Intervenors argue that the Board should have denied summary disposition because their filings demonstrated "that material facts are in dispute." Motion at 3-5. Intervenors also argue that the Board impermissibly reached the merits of the facts presented and should have limited its ruling to whether there are "material facts in dispute regarding LILCO's conduct." Id. at 3-4. Contrary to Intervenors' assertion, the Board correctly concluded that it was not necessary to consider at

^{3/} The Board also concluded that LILCO acted in good faith in redirecting its efforts toward NRC approval once local legislation terminated County participation in planning (and the State thereafter joined in the County's opposition) since it would have been useless to press for County participation in the face of a resolution against it. Id. at 17. Thus, under the third part of the good faith test, it was sufficient for LILCO to hold open the opportunity for the governments to participate and to continue to serve on Intervenors copies of the LILCO plan, which provided for emergency government participation. Id. at 18.

hearing the totality of evidence of good faith or lack thereof because the matter was capable of resolution based on the parties' filings since the filings showed that there is no genuine issue as to a material fact concerning LILCO's compliance with 10 C.F.R § 50.47(C)(1)(ii). Order at 14-19.

The Commission and the Appeal Board have encouraged the use of summary disposition to avoid unnecessary hearings on contentions for which an intervenor has failed to establish the existence of a genuine issue of material fact. See, e.g., Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981); Houston Lighting and Power Company (Aliens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550-551 (1980); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 194 (1973), aff'd, CLI-73-12, 6 AEC 241, 242 (1973), aff'd sub nom, BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974). A material fact is one that may affect the outcome of the litigation. Mutual Fund Investors Inc. v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977). A "genuine issue" of material fact exists when the factual record, considered in its entirety is enough in doubt so as to warrant a hearing to resolve the issue. E.g., Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-46, 18 NRC 218, 223 (1983).

The Board concluded that there was no genuine issue of material fact as to whether the governments fully understand the provisions of 50.47(b), 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. Order at 19. In addition, there is no genuine dispute concerning the fact that the County Legislature resolution 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. Id. While the filings suggest that, after the County resolution, both parties attempted coercive acts on one another which would not withstand the good faith test, the Board deemed those acts as not material to the good faith test. Id. at 18. Thus, the Board the found that there is no genuine issue as to a material fact concerning whether LILCO meets the test in Section 50.47(c)(1)(ii). Id. at 19.

Because the good faith test is intended to show that a utility has exhausted all reasonable opportunities for joint government planning, the Staff believes that the Board was correct in concluding no genuine issue of material fact existed as to LILCO's compliance with the 50.47(c)(1)(ii). No realistic opportunity remains for LILCO to gain approval of its emergency plan via joint planning under 50.47(b). This conclusion is reinforced by the County Ordinance which prohibits County cooperation. Clearly, under these circumstances, LILCO has done all it possibly could to make a "sustained, good faith effort" to secure and retain the participation to the pertinent state and/or local governmental authorities. Intervenor's filings in opposition to summary disposition fail to show any genuine dispute as to the salient facts under the good faith test outlined by the Board.

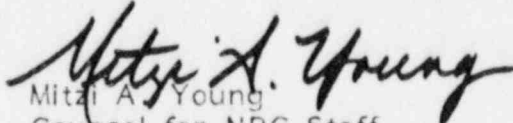
Intervenors are unwilling to participate in emergency planning. LILCO's actions in serving the plan on, and providing for the emergency participation of, Intervenor's show that LILCO continues to "hold open the

opportunity for the governments' participation should they change their views [on emergency planning]." Id. at 17. ^{4/} Thus, Intervenor's request that the Board reconsider its ruling on summary disposition should be denied.

III. CONCLUSION

Because the Board's ruling on summary disposition was proper, the Board should reject Intervenor's Motion for reconsideration of the ruling on legal authority contentions with respect to LILCO's compliance with 10 C.F.R. § 50.47(c)(1)(ii).

Respectfully submitted,


Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of March, 1988

^{4/} The Staff notes that nothing in the papers filed on summary disposition shows the County would engage in emergency planning under the Commission's regulations. While Intervenor's claim that LILCO has not made a sustained, good faith effort, Intervenor's fail to indicate that any LILCO effort to get the County to submit a joint plan per Section 50.47(b) would be successful.

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Docket No. 50-322-OL-3
(Emergency Planning)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO GOVERNMENTS MOTION FOR RECONSIDERATION OF RULING AS TO COMPLIANCE WITH 10 C.F.R. § 50.47(c)(1)(i) AND (ii)" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 30th day of March 1988.

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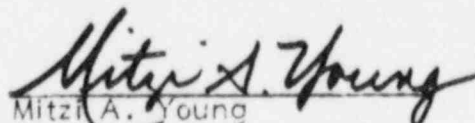
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