

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

BRIEF OF ROBERT ABRAMS, ATTORNEY GENERAL
OF THE STATE OF NEW YORK, AS AMICUS CURIAE,
IN RESPONSE TO SUFFOLK COUNTY'S MOTION TO
TERMINATE THE SHOREHAM LICENSING PROCEEDING

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STATEMENT

This Brief is submitted by Attorney General Robert Abrams in response to Suffolk County's motion to terminate the Nuclear Regulatory Commission ("NRC" or "Commission") proceedings in connection with the application of the Long Island Lighting Company ("LILCO") for a license to operate the Shoreham Nuclear Power Station ("Shoreham").

ISSUE PRESENTED

Does the NRC have authority to grant LILCO a license to operate the Shoreham plant when there is no State and local off-site emergency preparedness plan?

INTEREST OF AMICUS

Suffolk County's motion raises important legal issues concerning the licensing of the Shoreham plant. As the chief legal officer of the State of New York, the Attorney General has an interest in protecting the public health and welfare of the people of the State of New York, and can provide the Commission with valuable guidance on these issues.

The Attorney General has a particular interest in the resolution of this motion, which not only will have an impact on the health and welfare of those situated within the general vicinity of the Shoreham plant, but also will have consequences for all persons situated near other nuclear power plants in the State. The Attorney General is currently a participant in the NRC proceeding concerning the safety and emergency preparedness at the Indian Point nuclear power plants. Docket Nos. 50-247, 50-286. On March 11, 1983, the Attorney General filed an amicus brief in the United States Court of Appeals, Second Circuit, in support of Rockland County's petition to review the NRC's decision to permit the resumed operation of Indian Point 2, despite the lack of preparedness to deal with a severe nuclear accident at the plant.

Further, the Attorney General is an active participant in the State Public Service Commission proceedings concerning Shoreham. One will determine the ultimate cost to ratepayers of the Shoreham plant and the second will develop a plan to charge LILCO ratepayers for the costs of the plant. NRC determinations in this proceeding will have a major impact upon the outcome of those two proceedings.

THE RELEVANT STATUTES AND REGULATIONS

The Atomic Energy Act, 42 U.S.C. § 2011, et seq., conditions the development of nuclear energy upon protection of public health and safety. Id. at § 2012(d), 2013(d).

Initially, planning and preparedness for accidents at commercial nuclear power plants was voluntary. Under Section 201 of the Disaster Relief Act of 1974, 42 U.S.C. § 5131, the Atomic Energy Commission (later the NRC) established an optional program of grants and technical assistance for states preparing radiological emergency response plans.

The Three Mile Island accident caused a major reconsideration of emergency planning and preparedness. On December 7, 1979, the President, acting on recommendations of the President's Commission on the Accident at Three Mile Island (Kemeny Commission), designated the Federal Emergency Management Agency (FEMA) to lead mandatory off-site emergency planning. As the President explained:

The [Kemeny] Commission found that at all levels of government, planning for the off-site consequences of radiological emergencies lacked coordination and urgency. Their recommendations call for significant change: an improved State response plan as a requisite for granting an operating license; FEMA should have the lead responsibility, in consultation with NRC and other appropriate agencies, for radiological emergency planning; emergency response plans should be based on various classes of accidents and local communities should have funds and technical assistance for local planning; research on medical means of mitigating radiation effects should be expanded; a program is needed to educate the public on nuclear plant operation, health effects from radiation and protective actions against radiation; further study on mass evacuation is necessary; and plans for providing Federal emergency support should be revised to assure improved coordination and more effective capabilities. ("The President's Report to the Recommendations of the President's Commission on the Accident at Three Mile Island," Dec. 7, 1979).

The NRC also enacted rules after the March 1979 accident at Three Mile Island and subsequent evacuation. Emergency preparedness is now a prerequisite to the issuance of an operating license:

No operating license for a nuclear power reactor will be issued unless a finding is made by NRC that the state of on-site and off-site emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.
10 CFR § 50.47(a)(1).

These regulations require applicants for an operating license to submit an emergency preparedness plan which includes local government participation:

If the application is for an operating license for a nuclear power reactor, the applicant shall submit radiological emergency response plans of State and local governmental entities in the United States that are wholly or partially within the plume exposure pathway Emergency Planning Zone (EPZ) as well as the plans of State governments wholly or partially within the ingestion pathway EPZ. 10 CFR § 50.33(g).

Both the NRC and the Federal Emergency Management Agency (FEMA) are required to review emergency preparedness plans:

The NRC will base its finding on a review of the Federal Emergency Management Agency [FEMA] findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented and on the NRC assessment as to whether the applicant's on-site emergency plans are adequate and capable of being implemented. In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on a question of adequacy. 10 CFR § 50.47(a)(2) (Emphasis added)

Section 5 of the NRC Authorization Act for 1982-1983 permits licensing on the basis of plans not approved by FEMA in certain circumstances. Section 5 provides:

Of the amount authorized to be appropriated under section 1, the Nuclear Regulatory Commission may use such sums as may be necessary, in the absence of a State or local Emergency Preparedness Plan which has been approved by the Federal Emergency Management Agency, to issue an operating license (including a temporary operating license under section 192 of the Atomic Energy Act of 1954, as amended by section 11 of this Act) for a nuclear power reactor, if it determines that there exists a State,

local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned. Pub. L. 97-415, 96 Stat. 2068 (1982) (Emphasis added).*

In New York State, the State and Local Natural and Man-Made Disaster Preparedness Law sets forth detailed guidelines for the development of off-site emergency preparedness plans. N.Y. Exec. Law §§ 20 et seq. Local governments play an integral part in the preparation and adoption of plans designed to handle a radiological accident at a nuclear power plant:

...local plans constitute an essential part of the state wide disaster preparedness program ... without local disaster planning, no state disaster program can be fully effective. Legislative Findings Chapter 640, Laws of 1978, Section 1.

Emergency response plans are developed in consultation with every local government agency including planning departments, police and fire companies and organizations for the elderly and handicapped. § 23(5). Thus, local planning is an essential and integral part of New York State's emergency planning.

* Section 5 adopts and continues in effect a provision which originated in Section 109 of the NRC Authorization Act for fiscal year 1980. Pub. L. 285, 94 Stat. 780 (1980).

ARGUMENT

I

NRC REGULATIONS PROHIBIT ISSUANCE OF A LICENSE TO OPERATE SHOREHAM WITHOUT STATE AND LOCAL EMERGENCY PLANS.

NRC regulations provide that the Commission cannot issue a license where no State and local emergency plans exist. The regulations state clearly that no operating license for a nuclear reactor can be issued unless the NRC reviews a Federal Emergency Management Agency determination "as to whether State and local emergency plans are adequate and capable of being implemented." 10 CFR § 50.47(a)(2).

To provide further guidance to state and local governments preparing emergency preparedness plans, NRC and FEMA published Criteria for Preparation and Evaluation of Radiological Emergency Response Plan and Preparedness in Support of Nuclear Power Plants, NUREG-0654, FEMA-REP-1 Rev. 1, October, 1980. ("NUREG-0654").

Here NRC and FEMA point out:

Local government plans and response mechanisms are particularly important for the 10-mile EPZ.... State government resources may be too far away from the involved local jurisdictions to be of much immediate help for a plume exposure problem in the early hours of an accident. Local government emergency plans should be made a part of the State emergency plan. (At 21.)

...Planning for the implementing of protective measures associated with the ingestion exposure pathway is best handled by the State governments, with support from local governments, particularly at the county level, with backup from the federal government. (At 22.)

State and local participation in emergency planning is essential because of the many services that are locally organized:

[It] is a necessary part of the facility emergency planning to make advance arrangements with State and local organizations for special emergency assistance such as ambulance, medical, hospital, fire and police services. (at 25.)

If there are no State and local plans in existence, this Commission has no factual basis for a determination that "the state of on-site and off-site emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency," as required by 10 CFR § 50.47(a)(1). The NRC Authorization Act does not alter this Commission's regulatory requirement that it determine that public health and safety not be endangered. The Authorization Act is merely permissive -- the Commission may license a reactor if it determines a non-FEMA-approved plan assures public safety. But this Commission prudently retained its regulations which require State and local plans which are "adequate and capable of being implemented."

The NRC, like other agencies, is required to comply with its own regulations. Nader v. Nuclear Regulatory Commission, 513 F.2d 1045, 1051 (D.C. Cir. 1975); Local 1219, Am. Fed. of Gov. Employees v. Donovan, 683 F.2d

511, 516 (D.C. Cir. 1982). Thus, the NRC cannot issue an operating license for Shoreham when there are no State and local emergency plans.

II

THE NRC AUTHORIZATION ACT REQUIRES
ASSURANCE THAT PUBLIC HEALTH AND
SAFETY ARE NOT ENDANGERED. SUCH
ASSURANCE IS NOT POSSIBLE IN THE
ABSENCE OF STATE AND LOCAL PLANS.

Section 5 of the NRC Authorization Bill for 1982-1983 (P.L. 97-415, 96 Stat. 2068) provides that the NRC can issue an operating license in the absence of a State or local emergency plan which has been approved by FEMA "if it determines that there exists a State, local or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned." But such assurance is impossible unless State and local governments are actively involved in the development and implementation of emergency plans.

Both the NRC and FEMA recognize that State and local government emergency planning and preparedness are essential to assuring health and safety. "Successful off-site emergency preparedness requires the full participation of all levels of governments as well as utility support." FEMA letter to William J. Dircks, Executive Director of Operations for NRC, dated December 17, 1982, in docket nos. 50-247 and 50-286 (Indian Point), attached hereto as Exhibit 1. "Any radiological emergency

planning and preparedness program that is conceived must depend ultimately on an adequate general emergency planning base at Federal, State, and local governmental levels."

Report to the President--FEMA--State Radiological Emergency Planning and Preparedness in Support of Commercial Nuclear

Power Plants, p. I-3. "The initiative for planning must come from state and local government." Beyond

Defense-In-Depth, NRC, October, 1979, NUREG/0553, p. III-7.

Unless State and local governments develop and can implement emergency plans, there can be no assurance of public health and safety.

In a similar context -- Indian Point -- Roger B. Kowieski, Chairman, Regional Assistance Committee of FEMA, Region I, testified that local government cooperation in implementing emergency preparedness is essential. He told the New York State Assembly Special Committee on Nuclear Power Safety that:

... withdrawal of Rockland County from this State/County coordinated planning process undermines overall off-site preparedness for this site.

While in the event of a declaration of an emergency by the Governor of New York State, the Governor can direct the use of local resources and can order the County Chairman of the Legislature to follow the State Radiological Emergency Plan, FEMA is concerned that Rockland may be unable to implement that plan in the absence of commitment of resources for required equipment, adequate staffing, and the lack of participation in training and drills and exercises. (September 2, 1982, At 383.)

In promulgating emergency planning regulations after the Three Mile Island accident, the Commission underscored "the significance of adequate emergency planning and preparedness to ensure adequate protection of the public health and safety" and found that on-site and off-site emergency preparedness "are needed to protect the health and safety of the public." 45 Fed. Reg. 55403. The Commission concluded that, "[i]n order to discharge effectively its statutory responsibilities, the Commission must know...that adequate protective actions in response to actual or anticipated conditions can and will be taken." Id. Without State and local emergency plans for Shoreham, there can be no such assurance. Under the State's disaster preparedness law, State and local governments prepare an integrated emergency response plan. Without this plan, any State plan is incomplete and ineffective in responding to a radiological accident.

In sum, the Commission cannot issue a license to operate Shoreham until State and local emergency plans are in place.

CONCLUSION

For the reasons stated above, the NRC has no authority to approve LILCO's application for a license to

operate the proposed Shoreham nuclear power plant where there are no State and local off-site emergency preparedness plans.

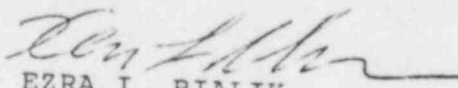
Dated: New York, New York
March 18, 1983

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DEC 17 1982

Mr. William J. Dircks
 Executive Director for Operations
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

Dear Mr. Dircks:

The purpose of this letter is to apprise the Nuclear Regulatory Commission (NRC) of the current status of offsite emergency planning at the Indian Point Nuclear Power Station. This information was requested in your letter of November 17, 1982, in connection with the Commissioners' regulatory responsibilities with regard to these plants.

This letter is the result of an extended exchange between the Federal Emergency Management Agency (FEMA) and the Commission with regard to these plants. On June 16, 1982, NRC requested a FEMA finding on the adequacy of offsite preparedness around the Indian Point site. The NRC staff indicated that this review was needed in connection with the Commission's ordered review of Indian Point operations being conducted by an Atomic Safety and Licensing Board. (In re Consolidated Edison Co. of New York, Inc., and the Power Authority of the State of New York [Indian Point Units 2 and 3, Nos. 50-2475P-286SP].)

As a result, FEMA Region II prepared and furnished to me an "Interim Findings Report" which was subsequently forwarded to NRC on August 2, 1982. At that time, FEMA indicated that plans and preparedness were inadequate. On August 3, 1982, the NRC notified the reactor licensees that, should the significant deficiencies identified by FEMA not be corrected within 120 days, the NRC would consider whether enforcement action was appropriate.

Following the start of the 120 day clock, FEMA Region II and the State of New York developed a schedule of remedial actions designed to correct the significant deficiencies. FEMA determined, as outlined in my letter to you of October 18, 1982, that it was "unrealistic" in light of the plan-related activities that were underway to conduct an exercise for the purpose of evaluating preparedness within this 120 day period. Following discussions between our respective Agencies, it was agreed that the focus of FEMA's status report following the conclusion of the 120 day period would relate principally to the "plan review" element of our process with a statement by FEMA of the feasibility of plan implementation. This is to be followed by an evaluation of preparedness by FEMA at an exercise to be held in March 1983.

Successful offsite emergency preparedness requires the full participation of all levels of government, and particularly local government, as well as utility support. To assure a coordinated effort, a task force approach to the upgrading effort was initiated by FEMA and the State of New York at a meeting on August 18, 1982, to help foster the development and implementation of a remedial action schedule for the five deficient planning standards (composed of 34 specific remedial actions).

Five task forces, consisting of personnel from FEMA, the U.S. Environmental Protection Agency, the U.S. Food and Drug Administration, New York State, the Power Authority State of New York, Consolidated Edison Company of New York, and three counties located in the 10-mile emergency planning zone (Westchester, Orange, and Putnam) were organized to address these elements. Rockland County was an observer at several sessions.

Bi-weekly status meetings were held to track progress made in the development and implementation of remedial actions. This approach resulted in significant progress being made and provided the basis for the three briefings which FEMA made to the Commission.

The "Update Report" from FEMA Region II, reflecting what has been accomplished, is enclosed. This report discusses the status of remedial actions, public meeting concerns, and provides an updated plan review. All thirty-four (34) sub-element deficiencies that resulted in five (5) "planning standards" being rated as significantly deficient have been addressed in this report. During the 120 day clock, major improvements in offsite planning have occurred with much continuing work effort still ongoing. However, it should be noted that the 120 day time frame in NRC's regulations is not keyed to the FEMA planning and preparedness evaluation process and has not been adequate to encompass all of the actions necessary to bring all five (5) planning standards into compliance with NRC/FEMA guidelines.

The current status of the five (5) planning standards is discussed below; however, it should be noted that all parties continue to upgrade these standards, even those already in compliance, on a continuing basis. The "Report" from FEMA Region II identifies the corrective actions that will continue after the 120 day clock. These "training" and "public education" activities will be monitored by FEMA and evaluated during the exercise in March. Please note that a detailed account of the activities associated with these standards is included in the "Report" from the Region.

E. Notification Methods and Procedures.

All eight (8) sub-element deficiencies that resulted in this standard being rated as significantly deficient have had adequate remedial actions and now meet the planning standard set forth in NUREG-0654-FEMA-REP-1. However, training of Public Information Officers and Emergency Broadcast System station staff will continue. Significant accomplishments under this standard include FEMA/State funds being furnished to Rockland County for "Paging Equipment" and the addition by the utilities of seventeen (17) sirens to the original system.

G. Public Education and Information.

All six (6) sub-element deficiencies that resulted in this standard being rated as significantly deficient have had adequate remedial actions and now meet the planning standard set forth in NUREG-0654-FEMA-REP-1. The distribution of posters, pamphlets, and telephone inserts will continue well into 1983. The significant accomplishment under this standard involves the commitment of the utilities to furnish a new joint media facility outside of the 10-mile emergency planning zone.

J. Protective Response.

Ten (10) of the eleven (11) sub-element deficiencies that resulted in this standard being rated as significantly deficient have had adequate remedial actions occur during the 120 day period. The eleventh sub-element involves the "possible" non-response by private and public bus operators in Westchester County. The State has developed a compensatory plan utilizing National Guard drivers in the event that the bus operators do not respond to an event. This is a temporary measure. However, under this plan the evacuation will require a minimum of an additional four to five hours to complete because of the mobilization time required for the National Guard drivers. This is not an acceptable evacuation capability during a very rare, fast moving event.

K. Radiological Exposure Control.


All five (5) sub-element deficiencies that resulted in this standard being rated as significantly deficient have had adequate remedial actions and now meet the planning standard set forth in NUREG-0654-FEMA-REP-1. A major accomplishment in this area has been the State's immediate commitment of funds to purchase "film badges" in ample quantity for emergency workers.

P. Planning Responsibility.

All four (4) sub-element deficiencies that resulted in this standard being rated as significantly deficient related to Rockland County's non-participation in the process. FEMA feels that this situation has improved significantly since the initiation of the 120 day period. The State has developed a compensatory plan (generic) to handle any county with an inadequate plan or that elects not to participate. This generic plan is supplemented by site-specific planning for Rockland County. A senior management team (comprised of six (6) State agencies) has been identified and training initiated. This team and Rockland County personnel had a tabletop exercise on November 30, 1982. Other training has also occurred within the county. The State has furnished funds to the county for use in offsite plans and preparedness during the 120 day clock. Also, the county has initiated action on its own plan which is to be furnished in preliminary draft form to FEMA in January 1983. The county also passed a resolution on December 7, 1982, that improves the relationship between FEMA, NRC, and Rockland County (see the enclosed report for details). FEMA recognizes that the status of plans and preparedness in Rockland County is not up to the standards both it and FEMA desire, but action is ongoing to remedy the situation. FEMA is prepared to assist Rockland County in any way it can in the development of its plan, to satisfy our goals to protect the health and safety of the the public.

It is my belief that this report provides an adequate factual basis for the Commission to perform its tasks resulting from the August 3, 1982, issuance of a 120 day letter.

Sincerely,



Lee M. Thomas
Acting Deputy Director

Enclosure

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(Shoreham Nuclear Power Station,)
Unit 1))
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Docket No. 50-322 (OL)

CERTIFICATE OF SERVICE

I hereby certify that copies of "Motion of Robert Abrams, Attorney General of the State of New York, for Leave to File a Brief Amicus Curiae" and "Brief of Robert Abrams, Attorney General of the State of New York, as Amicus Curiae in support of Suffolk County's Motion to Terminate the Shoreham Licensing Proceeding" were sent on March 18, 1983 by first class mail, except where otherwise noted, to the following:

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