UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

MEMORANDUM OF SHOREHAM OPPONENTS COALITION AND NORTH SHORE COMMITTEE IN SUPPORT OF SU.FOLK COUNTY'S MOTION TO TERMINATE THE SHOREHAM OPERATING LICENSE PROCEEDING

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I. INTRODUCTION

The Shoreham Opponents Coalition ("SOC") and the North Shore Committee Against Nuclear and Thermal Pollution ("NSC") submit this memorandum in support of the SUFFOLK COUNTY MOTION TO TERMINATE THE SHOREHAM OPERATING LICENSE PROCEEDING ("Motion to Terminate"). We endorse the arguments made by the County in the supplemental brief that it submitted to the Atomic Safety and Licensing Board ("Board") on March 4, 1983. Herein we make additional arguments to the effect that the Board has no legal authority under the Nuclear Regulatory Commission ("NRC" or "Commission") authorization acts for fiscal years 1980 and 1982-83 to issue an operating license for the Shoreham nuclear power plant. In addition, we discuss the nature of the Board's authority and obligation to "cert-

ify" or "refer" to the Commission the issues raised by the County's motion.

II. NRC Rules Prohibit the Issuance of an Operating License for Shoreham in the Absense of State and Local Radiological Emergency Response Plans

In its supplemental brief the County has demonstrated convincingly that §§50.33(g) and 50.47 of the Commission's rules require, as a legal prerequisite to the issuance of a operating license, the submission of local radiological emergency response plan ("RERP"). We concur fully in the County's interpretation of the Board's limited powers under the rules. Keeping in mind the Board's admonition against duplication of argument, we add only that NRC Chairman Hendrie, in testimony before Congress, has taken the same view of the NRC's regulatory requirements.[1/]

While the absence of a local RERP clearly precludes the issuance of an operating license under the terms of §§50.33(g) and 50.47, it also presents a more fundamental

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1/ Radiological Emergency Planning and Preparedness: Hearing Before the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works, 97th Cong., 1st Sess. 3 (1981)(hereinafter Emergency Planning Hearings)("We have no statutory authority over these State and local jurisdictions and cannot force them to develop [emergency] plans, but we can and do make this a condition of licensing").

legal barrier to the issuance of an OL. Under its rules the NRC is required, in addition to making specific findings concerning the adequacy of emergency planning for proposed nuclear plants, to make an overall finding that it has "reasonable assurance ... that the activities authorized by the operating license can be conducted wihout endangering the health and safety of the public." 10 CFR §50.57(a)(3). Even before the post-Three Mile Island enactment of detailed emergency planning requirements, the NRC recognized that the requisite safety findings cannot be made (and thus an OL cannot issue) where there is a "serious deficiency" in emergency preparedness.[2/] This is a reflection of the fact that a nuclear power plant simply cannot be operated safely without the active cooperation and support of state and local governments.[3/]

This was emphasized by the Commission once again last summer when it promulgated a rule concerning low-power licenses. 47 Fed. Reg. 30232 (July 13, 1982). The preamble to the rule, after explaining that full-scale emergency response

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2/ Three Mile Island Nuclear Plant Accident: Hearing Before the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works, 96th Cong., 1st Sess. (1979)(NRC response to Committee question 57).

3/ Emergency Planning Hearings, supra at 23 (statement of John McConnell, Acting Director, FEMA)("[Offsite emergency] plans must, of necessity, as you know from your local government experience, be prepared by those local governments and with dedicated participation by the officials who rule the resources in those local areas as well as the Governor and his departments.")

exercises involving state and local governments must be conducted prior to the issuance of a low-power license, added that

> the Commission does not intend to authorize the issuance of a full power operating license if there has been a full-scale exercise which raises significant deficiencies...which go to the fundamental nature of the emergency plan itself. Such a deficiency calls into question whether reasonable assurance may be found that public health and safety will be adequately protected in a radiological emergency.

Id. at 30234 col. 1(emphasis added). In sum, the Commission's regulations demonstrate repeatedly that the required "reasonable assurance" that a proposed plant will be acceptably safe can never be found unless the affected local government or governments have submitted some form of an RERP and remain willing to cooperate in emergency planning matters. And, as shown below, recent congressional enactments have not relaxed this fundamental limitation on the NRC's licensing powers.

III. Relevant Provisions Of The NRC Authorization Acts f[illegible] 1980 and 1982-83 Are Consistent With 10 CFR §§50.33(g) and 50.47 And Thus Do Not Authorize the Issuance of an Operating License for Shoreham in the Absence of a State or Local Radiological Emergency Response Plan

A. The 1980 Authorization Act

In the wake of the accident at Three Mile Island, it was the judgment of Congress "that NRC was not prepared to deal with nuclear power plant emergencies." S. Rep. No. 196,

96th Cong., 1st Sess. 29 (1979). In an effort to prod parties from all quarters to expedite the development, improvement, and approval of non-federal radiological emergency response plans ("RERPs"), the House and the Senate passed tough legislation requiring, respectively, that operating licenses be issued only upon a showing that the non-federal RERPs for a given plant were adequate, and that operating reactors be shut down where non-federal RERPs had not received NRC approval by June, 1980. See H. R. Rep. No. 194 pt. 1, 96th Cong., 1 Sess. 9 (1979); S. Rep. No. 176, 96th Cong., 1st Sess. 26 (1979). When representatives of the House and Senate met to harmonize the two bills in conference committee, both of these provisions were rejected. The compromise which was ultimately enacted into law provides that

> [o]f the amounts authorized to be appropriated under section 101(a), such sums as may be necessary shall be used by the Nuclear Regulatory Commission to-
>
> (1) establish by rule-
>
> ...(B) a requirement that-
>
> (i) the Commission will issue operating licenses for utilization facilities only if the Commission determines that-
>
> (I) there exists a State or local radiological emergency response plan which provides for responding to any radiological emergency at the facility concerned and which complies with the Commission's standards for such plans under subparagraph (A) or
>
> (II) in the absence of a plan which satisfies the requirements of subclause (I), 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. No. 96-295, §109, 94 Stat. 780, 784 (1980).

This provision is notable, for present purposes, in two respects. First, it is couched in permissive language: the Commission may issue an operating license if the requirements of the provision are met. Second, the term "reasonable assurance" was employed in subsec. (II) purposefully. This was the standard historically applied by the Commission when judging the adequacy of emergency plans, see 10 CFR §50.57(a)(3) (1979), and Congress intended that it remain the standard. Thus, even though §109 authorized the Commission to issue an operating license where the applicable state or local plan had certain deficiencies, the overall level of safety, provided perhaps by some amalgamation of state, local, and utility plans, was still required to be such that the Commission could make a finding of "reasonable assurance that the public health and safety would not be endangered by operation of the facility." H. R. Rep. No. 1070, 96th Cong., 2d Sess. 27 (1980).

B. The Commission's 1980 Rulemaking

Just under two months after the enactment of the 1980 authorization Act the NRC promulgated amendments to its emergency planning rules that are now codified at 10 CFR §§50.33(g) and 50.47. The "administrative history" of the rule change, which is described thoroughly in the County's

supplemental brief at 32-34, makes it plain that the Commission fully intended the rules to implement §109's requirements.[4/]

The Commission's intent that the 1980 rules implement the 1980 authorization act was revealed, among other places, at hearings held by the Senate Environment and Public Works Committee in 1981. When questioned as to how the NRC had implemented §109, Chairman Hendrie responded that while he would have simply incorporated the language of §109 directly into the 1980 rules, a majority of the Commission preferred the more restrained approach that is now codified at §§50.33(g) and 50.47:

> Mr. Hendrie: As I recall the arguments in the Commission about it, I would have been pleased to have [the 1980 act's] language repeated in our [1980] rule but was not able to carry a majority of my colleagues with that view....I guess my colleagues felt that [the 1980 rule's] language was consistent with section 109.

Emergency Planning Hearings, supra, at 11-12(emphasis added); see also the authorities cited in Suffolk County's supplemental brief at 32-34.

4/ Therefore, doubts as to the meaning of §109 should be resolved in light of the requirements of the Commission's current rules, which stand as an authoritative interpretation of the provision. See Power Reactor Development Co. v. Electrical Workers, 367 U.S. 396, 408 (1961).

C. The 1982-83 Authorization Act

In §5 of the 1982-83 NRC authorization act Congress "reiterated" §109 of the 1980 act. Although in its wisdom Congress chose to explain neither the rationale behind nor the significance of its reenactment of §109, clues as to its motives can be garnered from a close reading of the legislative history.

In the Emergency Planning Hearings in 1981, Environment Committee Chairman Simpson, after expressing regret that the 1980 NRC rules had not explicitly authorized the wholesale substitution of a utility's emergency plan for state and local plans, stated that in his view that had been the purpose of §109 of the 1980 act:

> Recognizing the real problems, the authentic problems, the actual problems in obtaining the full cooperation from all of the States and the local governments in the vicinity of a nuclear plant, the Congress in the 1980 authorization, as I say, set that up so there could be a fulfilling of the requirement by a utility plant [sic] as well as the State and local.

Id. at 12. Therefore, he continued to have concerns over the possibility that non-cooperation by a State or local government might stalemate the issuance of an operating license:

> Senator Simpson: ... Have there been instances thus far in which a utility has had to submit an offsite emergency plan in lieu of the State and local plan? Do you know of any situations where it will be necessary, in order to avoid delays in the issuance of new licenses or to avoid the possible shutdown of an existing plant, where that will have to be?
>
> Mr. Hendrie: We haven't come to that situation yet, Mr. Chairman, but we are getting close. There are clearly going to be some cases that are going to be a problem....

> We are going to have some problems down the line, and it will not surprise me if the Commission finds itself in a position in the not-too-distant future when it may just want to reconsider the language of [its 1980] regulation.
>
> Senator Simpson: But you think we are coming close to a time when we are going to find-
>
> Mr. Hendrie: Sure....

Id. See also id. at 31 (issue pursued with FEMA representative).

These concerns were addressed in §302 of S.1207, 97th Cong., 1st Sess. (1981). The committee report accompanying the bill suggests that the NRC improperly interpreted §109 in its 1980 rules. Further, the report reveals an intent to impose upon the Commission a mandatory duty to issue operating licenses where offsite plans submitted by utilities are deemed adequate:

> This provision seeks to clarify a potential ambiguity in the NRC's emergency planning regulations (45 Fed. Reg. 55402, August 19, 1980) over whether the NRC, in the absence of an approved State or local emergency preparedness plan, will nevertheless issue an operating license for a power plant if it determines that there exists a State, local or utility emergency preparedness plan which provides reasonable assurance that public health and safety will not be endangered by operation of the plant.
>
> By requiring that the NRC regulations be interpreted in accordance with this section, the Committee seeks to underscore the intent of Congress, as evidenced by section 109 of Public Law 96-295, that the NRC, in the absence of an approved State or local emergency preparedness plan, issue an operating license for a nuclear plant if it determines that a State, local or utility emergency preparedness plan, or some integration of these plans, provides reasonable assurance that public health and safety is not endangered by operation of the plant.

S. Rep. 113, 97th Cong., 1st Sess. 17-18 (1981)(emphasis

added). Thus, the intent of the Senate bill was to (1) overrule the NRC's 1980 rules to the extent that they do not permit an operating license to issue in the complete absence of a state or local RERP, and (2) place an affirmative duty upon the NRC to issue an operating license even where only the utility has come forward with an offsite "emergency plan.

The Senate version of the 1982-83 NRC authorization act was rejected by the Conference Committee. The House version was selected in its place, and the conference report shows that the intent of the full Congress was to ratify the NRC's 1981 rules and preserve the Commission's discretionary authority under §109.

First, the House bill must be examined briefly. Unlike S.1207, which was addressed to the question whether the NRC, in the absence of an adequate state or local RERP, "will nevertheless issue" an operating license after making the requisite findings, H. 2330 was concerned solely with whether the NRC "could" issue an OL under the same circumstances. H. R. Rep. No. 22, Part 2, 97th Cong., 1st Sess. 28 (1981). Evidently the House preferred the NRC's approach to the Senate's approach.

The conference report, which explicitly rejected the language of the Senate bill in favor of that contained in the House bill, states that §5 of the final enactment

> "allows the Commission, in the absence of an approved State or local emergency preparedness plan, to issue an operating license for a nuclear power plant only if it determines that there exists a State, local, or utility emergency preparedness plan which provides reasonable assurance that the public health and safety is not endangered by operation of the plant.

H. R. Rep. No. 97-884, 97th Cong., 2d Sess. 27 (1982)(emphasis added). This shows that the intent of Congress was to preserve the Commission's discretion not to issue an operating license in the absence of a State or local RERP and, more specifically, to ratify the Commission's 1981 rule. In sum, the 1982-83 authorization act represents a rejection of Senator Simpson's reading of §109, and an endorsement of the NRC's 1980 implementation of it.

IV. The County's Motion for Certification Should be Granted

SOC and NSC support the County's motion to certify to the Commission the issues raised in its Motion to Terminate. The issue of certification, however, in not a simple one, and we write in an attempt to clarify some of the subtleties which arise under the Rules of Practice.

Section 2.718(i) of the Commission's Rules explicitly authorizes the Board to certify controlling questions of law to the Commission for resolution. This provision authorizes licensing boards to certify questions in their discretion, i.e., voluntarily. Duke Power Co. (Catawba Nuclear Sta., Units 1 and 2), LBP-82-50, 15 NRC 1746, 1754 and n. 7 (1982). It also provides for compulsory certification, upon order of

the Commission or, through the powers delegated to it pursuant to §2.785(b), the Appeal Board. Public Service Co. of New Hamphire (Seabrook Sta., Units 1 and 2), ALAB-271, 1 NRC 478, 482 (1975). Under a technical reading of the rules, once a board has issued a ruling upon a disputed issue, it loses its authority to certify the question voluntarily. Instead, the board must make a referral pursuant to §2.730(f). Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-152, 154 n.6 (1970). Yet whenever the Appeal Board or the Commmission directs a board to certify an issue, a §2.718(i) certification is called for, regardless of whether the board may have passed upon the question previously. Seabrook, supra, 1 NRC at 482.

As will be shown below, for most purposes these distinctions elevate form over substance. Nevertheless, if the Board were to pass upon the merits of the County's Motion to Terminate, it might justifiably conclude that it lacks power to entertain a motion for voluntary certification. Accordingly, SOC and NSC urge the Board, should it decide to render a ruling on the merits of the County's Motion to Terminate, to treat the County's motion as a motion for referral under §2.730(f). SOC is not filing a motion for referral at this time on the assumption that it is unnecessary.

The differences between certification and referral fade from view when one examines the substantive standards that must be applied by the Board when deciding whether to seek Commission guidance on the questions raised by the County's

motion. Both procedures constitute exceptions from the general prohibition against interlocutory review of licensing board decisions, 10 CFR §2.730(f), and both are thus subject to the same standard. Catawba, supra, 15 NRC at 1754 n. 7.

Section 2.730(f) provides that certification may be ordered where it will "prevent detriment to the public interest or unusual delay or expense." This standard has been refined by decision into a two-part test under which certification is deemed appropriate where:

(1) an adverse ruling on the merits of the substantive issue threatens the moving party "with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or

(2) [the issue affects] the basic structure of the proceeding in a pervasive or unusual manner."

South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Sta., Unit 1), ALAB-663, 14 NRC 1140, 1162 (1981)(citing Public Service Co. of Indiana (Marble Hill Nuclear Generating Sta., Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977)). Accord, Cleveland Electric Illiminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1110 (1982); Public Service Electric and Gas Co. (Salem Nuclear Generating Sta., Unit 1), ALAB-588, 11 NRC 533, 536 (1980) (citing cases); 10 CFR Part 2 App. A §V(f)(4). In the present context the County's motion meets both of these standards.

Whenever an adjudicatory panel erroneously admits a contention or group of contentions, the aggrieved party can

fashion an argument under §2.730(f) that it will suffer undue and irreparable expense and that the proceeding will be unduly delayed as a result. But this is not enough to satisfy the first part of the two-part test; unusual expense or delay must be shown. Thus, in the routine case where a licensing board admits a single contention to which the Staff or an Applicant has a legal objection, certification is inappropriate. Perry, supra, 15 NRC at 1113-14; Houston Power and Light Co. (Allens Creek Sta.), ALAB-635, 13 NRC 309, 310-11 (1981). Where, on the other hand, the dispute centers on a broad issue "affecting most of the contentions" in the proceeding, certification (or referral) is appropriate. Duke Power Co. (Catawba Nuclear Sta., Units 1 and 2), LBP-82-50, 15 NRC 1746, 1754-55 (1982). In other words, parties are entitled to interlocutory appellate rulings on controlling questions of law where the denial of review would give rise to a risk that much of the effort in prosecuting the litigation will otherwise be wasted.

Obviously, where a party has filed the unusual (if not unprecedented) motion to terminate a proceeding, the erroneous denial of that motion would render all of the parties' as well as the Board's subsequent efforts completely superfluous. In the instant case this is so not only with respect to emergency planning issues, but all other pending issues as well. Moreover, the granting of the County's motion would obviate the substantial delay in the resolution of this proceeding that would otherwise result from the months of

intensive litigation that we are now facing. In short, the claim that this proceeding must be terminated is the epitome of an issue appropriate for certification under the first part of the two-part test.

As noted above, the second part of the two-part test provides that certification is appropriate where the issue in dispute "affects the basic structure of the proceeding in a pervasive or unusual manner." Applying this standard, the Appeal Board noted that a licensing board's decision to call its own witnesses had a "potential effect upon the basic structure of the proceeding." South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Sta., Unit 1), ALAB-663, 14 NRC 1140, 1162 (1981). See also Catawba, supra, 15 NRC at 1754-55 (three rulings concerning the admission of more than 15 contentions deemed certifiable under part two of two-part test). But see Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982)(the admissibility of a contention which is the subject of a pending generic proceeding is not an issue fit for certification)

It is beyond dispute that the question whether this licensing proceeding must be terminated goes to the "basic structure" of the proceeding, and we will not belabor a point which is essentially self-evident. The County's motion seeks not only to modify the structure of the proceeding, but to eliminate it. The Rules of Practice suggest that this is precisely the kind of situation in which the Commission

wishes an opportunity to exercise oversight of licensing board decisions, i.e., before the proceeding itself embarks on a legally questionable course.

The Commission made itself clear on this point in its Statement of Policy on Conduct of Licensing Proceedings, 46 Fed. Reg. 28533 (May 27, 1981), in which it notified licensing boards that

> [i]f a significant legal or policy question is presented on which Commission guidance is needed, a board should promptly refer or certify the matter to the Atomic Safety and Licensing Appeal Board or to the Commission. A board should exercise its best judgment to try to anticipate crucial legal issues.

Id. at 28535 col. 2. The Statement of Policy went on to encourage referrals "if a significant legal or policy question is presented." Id. at 28535. See also Catawba, supra, 15 NRC at 1754(interpreting Statement of Policy).

The County's motion to terminate raises major issues concerning the scope of the Commission's regulations as well as the meaning of two recent congressional enactments dealing with emergency planning. These issues go not only to the viability of the instant licensing proceeding; they have important implications for other proceedings in which fundamental emergency planning conflicts have arisen. These matters of first impression will undoubtedly be resolved by the Commission at some point. It is in the interest of the Board as well as all of the parties to see that they are decided sooner rather then later.

Respectfully submitted,

Dated this 17th
day of March, 1983

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

CERTIFICATE OF SERVICE

I certify that copies of the foregoing "MEMORANDUM OF SHOREHAM OPPONENTS COALITION AND NORTH SHORE COMMITTEE IN SUPPORT OF SUFFOLK COUNTY'S MOTION TO TERMINATE THE SHOREHAM OPERATING LICENSE PROCEEDING" were served on March 17, 1983 by first class mail, except where otherwise noted, upon the following:

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