March 21, 1983

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)
(Shoreham Nuclear Power Station, Unit 1)	)	

NRC STAFF RESPONSE TO SUFFOLK COUNTY'S MOTION TO STRIKE PORTIONS OF THE NRC STAFF AND LILCO PROPOSED OPINION AND FINDINGS OF FACT

I. INTRODUCTION

On March 8, 1983, Suffolk County filed a Motion to Strike three discrete references made in the NRC Staff's Proposed Opinion and Findings of Fact. The County bases its motion to strike each of the references on the same ground: "each one refers to, and has the Board draw conclusions based upon data that are not on the record of this proceeding." The County cites 10 C.F.R. § 2.754(c). The NRC Staff opposes the County motion.1/

1/ Suffolk County also requests in the same motion that the Licensing Board strike 9 other references in LILCO's Proposed Opinion and Findings of Fact, and LILCO's Reply to the Proposed Opinion, Findings of Fact and Conclusions of Suffolk County and the Staff. The same arguments the Staff makes below also apply to the County's motion to strike these references.

DESIGNATED ORIGINAL

Certified By [signature]

II. DISCUSSION

A. The References Cited are Not Improper

The County's motion to strike is directed toward three different references made in the Staff's Proposed Opinion and Findings of Fact. The "extra-record" facts sought to be struck are as follows:

1. SNRC-812, submitted on December 15, 1982 included confirmatory stress analysis results (Contention SC 22, Opinion at Volume 1, p. 29, Findings at 22/28:20 and 22/28:22.

2. SNRC-816, submitted on January 7, 1983, included Applicant's commitment to implement lower MSIV set point (Contention SC 28(a)(vi), Opinion at Volume 1, p. 30, Findings at 22/28:38).

3. There was December 16, 1982 and January 10, 1983 correspondence between LILCO and the Staff on the definition of "important to safety" (Contention 7B, Opinion at Volume 2, p. 36, fn.13).

None of these references forms the basis for the proposed conclusion on the contention to which it is related. In fact, none of the references is even offered as support for the truth of the matters asserted in the proposed findings and opinions. Instead, they are all offered as mere follow-up to the information clearly on the record and serve only to indicate the status of various regulatory documents relevant and material to the contentions. It is the Staff's view that the Board should be kept apprised of regulatory developments that have occurred in the period between the hearings and the findings. See Duke Power Company (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625-26 (1973). Therefore, none of the references cited in the County's motion are improper.

Below the Staff briefly addresses each of the indicated items of extra-record information in order to put them into proper perspective.

Item 1: The record at the hearing established that LILCO would perform and submit a confirmatory analysis of pipe stresses. The record as established provides the rationale of the witnesses as to why the analysis was considered to be confirmatory in nature. This information alone is sufficient to support the proposed finding. However, the Staff considered it to be useful to merely point out that in the time since the hearing the confirmatory analysis has indeed been completed and submitted. This submittal had been made on the docket and served on the Board and all parties.

Item 2: The record at the hearing established that the Staff was satisfied with the steps being taken to reduce SRV challenges at Shoreham. That record supports the proposed findings and conclusions as written. However, it was also stated on the record that a further measure -- the lowering of MSIV reclosure set point -- was being considered for Shoreham. Merely as an update to this record, the Staff sought to call the Board's attention to a subsequent LILCO commitment to make that change. This commitment also had been served on the Board and parties.

Item 3: This item is merely a footnote referring to the ongoing regulatory process between LILCO and the Staff. The footnote is a direct response to Board inquiries into whether any efforts were made to resolve the issue raised by the contention outside the hearing process. The Staff calls the Board's attention to the specific correspondence that has been exchanged on the subject. The reference does not in any way purport to form the sole basis for a proposed finding or proposed conclusion.

B. The Board May Take Official Notice of the Existence of the References Cited

10 C.F.R. § 2.743(i) allows the presiding officer to "take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body." Even if the Board finds the above references otherwise improper, the Staff believes the Board has the authority to take official notice of these facts. The facts asserted are all limited to statements of the existence of various documents that have been prepared subsequent to the hearing. All the documents cited in the three references are on the Shoreham docket and have been served on the Board and parties. Therefore, the mere existence of these documents is easily verifiable. Section 201 of the Federal Rules of Evidence explicitly allows judicial notice to be taken of facts which may readily be verified.

Suffolk County argues that these regulatory documents do not constitute "technical or scientific facts within the knowledge of the Commission as an expert body" (Motion, at fn., p. 2). However, it has been held that the Commission may take official notice of agency records such as letters from an applicant or other material on file in the Public Document Room. Consolidated Edison Co. of N.Y. (Indian Point, Unit 2), ALAB-75, 5 AEC 309, 310 (1972). Furthermore, it is the Staff's position that official notice may be taken of the existence of the documents because the fact of their existence may be easily verified. Verification can be accomplished without an exercise of agency expertise.

The County also makes the argument that neither the Staff nor LILCO has invoked the official notice provision prior to this time. There is

no indication in 10 C.F.R. § 2.743(i), however, that a party motion is required for official notice to be taken. Furthermore, Section 201 of the Federal Rules of Evidence explicitly states that judicial notice may be taken by the court whether or not it is requested by the parties.

III. CONCLUSIONS

For the reasons stated above, Suffolk County's Motion to Strike should be denied. In the alternative, the NRC Staff requests that the Licensing Board take official notice of the facts which Suffolk County moves to have struck.

Respectfully submitted,

David A. Repka

David A. Repka
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 21st day of March, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE TO SUFFOLK COUNTY'S MOTION TO STRIKE PORTIONS OF THE NRC STAFF AND LILCO PROPOSED OPINION AND FINDINGS OF FACT 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 21st day of March, 1983:

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