

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

BRIEF OF THE TOWN OF SOUTHAMPTON IN SUPPORT  
OF SUFFOLK COUNTY'S MOTION TO TERMINATE THE  
SHOREHAM OPERATING LICENSE PROCEEDING  
AND THE COUNTY'S MOTION FOR CERTIFICATION

Introduction

Pursuant to the Board's request as stated during the Shoreham licensing hearing on February 24, 1983 and as confirmed in a Memorandum and Order dated February 28, 1983, the Town of Southampton submits this brief in support of Suffolk County's Motion to Terminate the Shoreham Operating Licensing Proceeding and its Motion for Certification to the Commission (both Motions are dated February 23, 1983).

In its February 28, 1983 confirmatory Memorandum and Order, the Board stated that it would permit Southampton to participate in off-site emergency planning matters pursuant to 10 C.F.R. §2.715(c) pending its ruling on Southampton's status (Order at p. 3 fn.). In a Board Memorandum and Order, dated March 10 1983,

Southampton's participation as an interested municipality pursuant to 10 C.F.R. §2.715(c) on, inter alia, the matters raised by the County's Motion to Terminate the Shoreham Licensing Proceedings and its Motion for Certification to the Commission was confirmed.

The Town of Southampton strongly concurs in the County's determinations concerning off-site emergency planning and the future course of the Shoreham licensing proceeding. Accordingly, the Town will not reiterate the County's cogent presentation in support of terminating the Shoreham proceedings and for certification of that question to the Commission. The Town further understands that counsel for SOC has briefed in further detail the question of certification and the Town joins in those comments. The Town does wish, however, to set forth its specific interest in seeking a prompt decision by the Commission in favor of the County's Motion as well as the Town's view that the questions presented by the County's Motion to Terminate should be decided by the Commission without any litigation of factual issues.

The Town's Interest in  
Off-Site Emergency Planning

The Town of Southampton fully supports the County Legislature's adoption of Resolution No. 111-1983, by

which the Legislature specifically declined to adopt or implement the draft County Radiological Emergency Response Plan ("RERP"). In that same Resolution, the Legislature determined that no RERP could adequately protect the health, welfare and safety of County residents and that no plan would be implemented (see County Supplemental Brief, March 4, 1983, at p. 12).

As set forth at page 8 of the County's Supplemental Brief, the County's emergency planning determinations (culminating in Resolution No. 111-1983) have been made in furtherance of the County's police power responsibilities as derived from Article IX of the Constitution of the State of New York and Section 10 of the New York State Municipal Home Rule Law. That same responsibility for protecting the health, safety and welfare of its citizens applies to the Town.

During the two weeks of legislative hearings on the County's draft RERP, a meeting of Town residents and officials was convened at the Southampton Town Hall on January 24, 1983 to discuss the County's draft RERP. Approximately two hundred residents and elected officials were in attendance.

On February 8, twelve days after the County Legislature concluded its hearings on the draft RERP, the

Southampton Town Board unanimously recommended that the County's draft RERP be disapproved, since, in its view, the draft RERP could not adequately protect the health and safety of Southampton residents. The Town Board further resolved to oppose any effort to substitute LILCO's unauthorized "off-site plan" as a basis for licensing the Shoreham nuclear plant.

Of particular concern to the Town was that the County's proposed EPZ bisected Southampton virtually in half, with all Town residents east of the Shinnecock Canal left outside the County's EPZ. In spite of careful and exhaustive investigation, the County could not demonstrate that the health and safety of Southampton residents would be protected in the event of a serious accident at Shoreham.

The Town's support for the County's adoption of Resolution 111-1983 rests principally on the recognition that only Suffolk County could develop and implement a local, off-site RERP. The Town and its residents are the direct beneficiaries of the County's action. Without the County's ability to protect the health, welfare and safety of Southampton residents, Southampton must oppose the licensing of Shoreham.

On The Basis of The NRC's Regulations  
and The Legislative History Surrounding  
Section 5 of Public Law 97-415, The  
Shoreham Proceeding Must Be Terminated

The County's Supplemental Brief clearly establishes that an approved and implementable local emergency plan is a requirement for the issuance of a license for Shoreham (see County Supplemental Brief, pp. 15 et. seq.). The County's presentation of the Commission's regulations and the legislative history leading to the adoption of those regulations do not need repeating here. However, in view of the assertions of Staff and LILCO (see Tr. 20,249-51) that Section 5 of the NRC Fiscal Year 1982-83 Authorization Act (Pub. L. 97-415, 96 Stat. 2067, 2069; January 4, 1983) permits the issuance of a license for Shoreham, further examination of that legislation is warranted.

As noted at pages 33-34 of the County's Supplemental Brief, the NRC's adoption of 10 C.F.R. §§ 50.33(g) and 50.47 was made in full recognition of the provision of Section 109 of the NRC Authorization Act for FY 1980 (Pub. L. 285, 94 Stat. 780 (1980)). Included in that recognition was the fact that a State or local government's lawful exercise of its emergency planning responsibilities under the Commission's regula-

tions might preclude the licensing or continued operation of a nuclear plant (see 45 Fed. Reg. at 55,404; SECY-80-275, June 3, 1980, Enclosure L, "Analysis of ACRS Comments" at p. 9).

It is clear that Section 5 of the 1982-83 NRC Appropriations Bill merely reaffirms the authority granted under the prior Section 109. That authority "allowed" (but did not require) the Commission to issue an operating license in the absence of an approved State or local emergency preparedness plan

. . . only if determines that there exists a State, local or utility emergency preparedness law which provides reasonable assurance that the public health and safety is not endangered by operation of the plant.

See Conference Report to accompany H.R. 2330, Report No. 97-884, September 28, 1982, at p. 27.

The Conference Report on Section 5 concludes by stating:

Finally, the conferees reiterate and emphasize the congressional intent expressed upon enactment of Section 109 of P.L. 96-295 that ultimately every nuclear power plant will have applicable to it a state emergency response plan that provides reasonable assurance that the public health and safety will not be endangered in the event of an emergency at such plant requiring protective action.

Conference Report, at pp. 27-28.\*

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\* This same intent is expressed in the "Joint Explanatory Statement of the Committee on Conference" concerning Section 109 of Pub. L. 285 (see, p. 28 of that Statement.

To the extent Staff or LILCO view Section 5 as requiring some action by the Board or Commission, it must be noted that the differences in wording between the House and Senate version of Section 5 of Pub. L. 97-415 (i.e., Section 8 of H.R. 2330 and Section 302 of S.1207) were resolved in favor of the House version. Thus, the last sentence of S.1207 Section 302 ("The Commission's regulations shall be interpreted in accordance with this section.") does not appear either in Section 8 of H.R. 2330 or the final Section 5.\*

Similarly, Conference Report No. 97-884 essentially adopts\*\* the "permissive" language of the original House Report (Report No. 97-22, Part 2, June 9, 1981, at p. 27) rather than the mandatory language of its Senate counterpart (Report No. 97-113, May 15, 1981 at p. 17-18). (compare: ". . . whether the Commission, in the absence of a State or local emergency preparedness plan approved by the Federal Emergency Preparedness

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\* Neither Section 302 nor Section 8 would have required the Commission to issue a license in the absence of a State or local plan if it were to find that a State, local or utility plan provided reasonable assurance that the health and safety of the public would be protected.

\*\* Conference Report 97-884 states, in explaining Section 5: "This authority allows the Commission . . ." (Conference Report 97-884 at p. 27).

Agency, could issue an operating license . . ." (House); and ". . . whether the NRC, in the absence of an approved State or local emergency plan, will nevertheless issue an operating license . . ." (Senate; emphasis added)).

That fact that the House version of Section 5 of Pub. L. 97-415 prevailed was acknowledged by Senator Alan Simpson, in his presentation of H.R. 2330 for approval by the full Senate:

I should like to make one final point, Mr. President, regarding the issue of legislative history. As you know, now that the House has stricken a provision in the conference report adopted by the Senate and sent to the House for action, we no longer have a conference report, but rather are now being asked to concur in the House message on the measure H.R. 2330. For all purposes, however, it is our intention that the joint explanatory statement of the committee of conference serve as the legislative history for this legislation and the explanation of the intent of the conferees, as set forth in the document House Report 97-884, shall serve this purpose.

Remarks by Hon. Alan Simpson, Cong. Rec. S.15314, December 16, 1982.

This legislative history clearly established that Section 5 does not require the NRC to issue a license in the absence of an approved State or local RERP simply if the NRC finds that a state, local or utility plan provides reasonable assurance that public health and



safety is not endangered by operation of the facility concerned. More importantly, after careful consideration, the Commission expressly declined to permit the substitution or litigation of bogus, local "off-site" plans submitted by a utility to support the issuance of a license (see County Supplemental Brief at pp. 31-34). As the County notes (pp. 26-7 of its Supplemental Brief), the regulations do permit deficiencies in local or state plans to be corrected or compensated for in a utility's on-site plan, but no such corrective action is possible here given the total absence of any State or local plan.

The Legal Issues Raised By The  
County's Motion to Terminate Should  
Be Immediately Certified To The  
Commission for Prompt Resolution

As the County explains at pp. 2-3 and 6-7 of its Supplemental Brief, the County's Motion to Terminate raises strictly legal issues which all parties and the Board acknowledge to be of first impression. In the face of the County's unequivocal determination that no local RERP will be developed, approved or implemented for the Shoreham nuclear plant and the equally firm support for the County's position expressed by Governor Cuomo (see Exhibit 5 to the County's Supplemental Brief).

there are no issues of fact to be decided by the Board or in need of litigation. For compelling practical and legal considerations, the County's Motion to Terminate must be certified to the Commission without further delay.\*

Assuming that LILCO and/or the Staff recommend litigation of LILCO's purported plan in proceedings before this Board, such an exercise would be futile and, the Town believes, legally impermissible. There is no basis for litigation of any purported LILCO plan given the clear requirements of 10 C.F.R. §§ 50.33(g) and 50.47 that there must be RERP's of the State and local government (see County's Supplemental Brief at pp. 15-17). Without such local and State plans, the submissions required by 10 C.F.R. §50.33(g) would be deficient as a matter of law. The same would be true of any Board findings which purported to satisfy 10 C.F.R. §50.47 but which were based solely upon LILCO's purported plan. The Board must also recognize that any effort to litigate LILCO's purported plan under present circumstances would simply result in the filing of a contention reiterating the legal question posed by the

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\* The Town concurs with the County's argument, set forth at p. 7 of its Supplemental Brief, that the Appeal Board should be bypassed on the question of certification.

County's Motion to Terminate, namely, that the utility plan is defective as a matter of law for failure to comply with 10 C.F.R. §§ 50.33(g) and 50.47.

The Commission has determined to implement the discretionary authority given to it by Section 109 of Public Law 96-295 by adopting §§50.33(g) and 50.47. The Commission having exercised that authority, the Board's obligation now is to follow the Commission's regulations (see County Supplemental Brief at p. 5). Were the Board to proceed with litigation of a "purported local RERP" other than one approved by the local government responsible for its implementation, it could only do so in defiance of the regulations it is presumably sworn to uphold. If Suffolk County and the intervenors are mistaken as to the plain legal ramifications of §§50.33(g) and 50.47, that is matter of "first impression" for the Commission, not the Board to decide. The Commission, not this Board, determines what standards and regulations must govern the issuance of operating licenses under the Atomic Energy Act (see 42 U.S.C. §§ 2133(b)(2); 2201(p); 2241(a)).

#### Conclusion

For the reasons set forth above, the Town of Southampton requests that the NRC grant Suffolk County's

Motion to Terminate the Shoreham Operating License Hearing and that it deny LILCO's request for an operating license. Southampton further urges the Board to recognize the urgent need for a prompt resolution of this matter by certifying the County's Motion to Terminate directly to the Commission.

Respectfully submitted,



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Dated: March 17, 1983

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'83 MAR 21 11:52

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
LONG ISLAND LIGHTING COMPANY )  
(Shoreham Nuclear Power Station,) )  
Unit 1) )

DOCKETING AND SERVICE  
BRANCH  
Docket No. 50-322 (OL)

CERTIFICATE OF SERVICE

I hereby certify that copies of "BRIEF OF THE TOWN OF SOUTHAMPTON IN SUPPORT OF SUFFOLK COUNTY'S MOTION TO TERMINATE THE SHOREHAM OPERATING LICENSE PROCEEDING AND THE COUNTY'S MOTION FOR CERTIFICATION", dated March 17, 1983, submitted by the Town of Southampton, in the above captioned proceeding, have been served on the following, by deposit in the United States mail, first class, this 17th day of March, 1983, and by Federal Express on those parties whose names are preceded by an asterisk.

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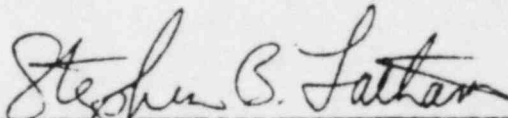
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