March 25, 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 BRIEF IN RESPONSE TO SUFFOLK COUNTY'S MOTION TO TERMINATE THE SHOREHAM OPERATING LICENSE PROCEEDING AND THE COUNTY'S MOTION FOR CERTIFICATION

I. INTRODUCTION

On February 23, 1983, Suffolk County ("County") filed a "Motion to Terminate the Shoreham Operating License Proceeding" ("Motion to Terminate"). The County's motion was based upon a decision by the County government that no local off-site emergency response plan for an accident at the Shoreham Nuclear Power Station would be adequate to protect the health and safety of the public. The County government therefore currently states that it is resolved not to adopt or implement any off-site emergency plan for Shoreham. In its Motion to Terminate, the County argues that without such a plan the Long Island Lighting Company ("LILCO" or "Applicant") will as a matter of law not be able to satisfy the Nuclear Regulatory Commission's (NRC) licensing requirements and, therefore, that this proceeding should be terminated.

Together with the Motion to Terminate, Suffolk County filed a "Motion for Certification" of the issues to the Commission. In this motion the

County argues that the issues raised in its Motion to Terminate are such important questions of law and policy that the interests of the public and the parties would best be served by an expeditious Commission decision.

On the record on February 24, 1983 (Tr. 20,274-20,275), and again in writing in a "Confirmatory Memorandum and Order Directing the Submission of Briefs Addressing Suffolk County's Motion to Terminate This Proceeding" ("Board Order"), dated February 28, 1983, the Atomic Safety and Licensing Board ("Licensing Board" or "Board") directed the County to submit a brief by March 4, 1983 discussing in greater detail the legal issues raised by the Motion to Terminate. The County provided this brief, entitled "Supplemental Brief of Suffolk County in Support of the County's Motion to Terminate the Shoreham Operating License Proceeding and the County's Motion for Certification" ("County Brief").[1/]

Specifically the County, in its brief, requests certification of the following two issues:

> Issue 1: Do Section 50.33(g) and 50.47 of the NRC's regulations require, as a precondition to issuance of an operating license for Shoreham, the [off-site emergency response plan] of the local government, Suffolk County?
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> Issue 2: If the answer to Issue 1 is affirmative . . . does Section 5 of the NRC Authorization Act for [for 1982/83] permit the NRC to disregard Section 50.47 and Section 50.33(g) of the NRC's regulations?

(County Brief, at 2-3).

Consistent with the schedule set out in the Board Order for responses by the other parties, LILCO filed its "Brief in Opposition to Suffolk

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1/ Due to the County's technical difficulties, the County Brief was actually provided to the NRC Staff, with the Staff's consent, on March 5, 1983.

County's Motion to Terminate This Proceeding and for Certification" (LILCO Brief) on March 18, 1983. Also on that date briefs supporting the County's Motions were filed by the Town of Southampton, jointly by the Shoreham Opponents Coalition (SOC) and the North Shore Committee (NSC), and by the New York State Department of Law as an amicus curiae. The New York State Disaster Preparedness Commission, Chairman David Axelrod, sent a letter to the Licensing Board indicating the view that this proceeding should go forward. Finally, pursuant to the Board's schedule, the NRC Staff responds to the County's Motions and the supplemental filings of all the parties with this brief.

II. STATEMENT OF FACTS

A. The Events Leading to the County's Motion to Terminate

Prior to March, 1982, Suffolk County and LILCO cooperated in an effort to develop an offsite emergency response plan for the Shoreham Nuclear Power Station. As a result of this cooperation an original "draft Suffolk County plan" was nearly completed. Copies of the draft plan were distributed to the Board and the parties to this proceeding, prior to the April, 1982 prehearing conference. However, on March 23, 1982, the County government repudiated this effort and adopted Resolution No. 262-1982 calling for an effort by the County to develop a new draft emergency plan independent of LILCO. Furthermore, the resolution stated that any plan resulting from the new effort "shall not be operable and shall not be deemed adequate and capable of being implemented until such time as it is approved by the Suffolk County Legislature."

As indicated in the County Brief, the County government proceeded to develop the new emergency plan. The effort was completed in the fall

of 1982 and their draft was submitted to the County Legislature on December 2, 1982. Copies of this draft plan ("County Plan") were also sent to the Board and the parties to this proceeding in December.

While the County was working on its plan, LILCO completed the work on the original draft off-site emergency response plan for Shoreham. On May 10, 1982, LILCO submitted this plan to the New York State Disaster Preparedness Commission (DPC). Copies of this emergency plan ("LILCO Plan") have also been sent to the Board and the parties to this proceeding. LILCO indicates that the DPC reviewed the LILCO Plan and made comments on it. Revisions were made by LILCO in response. However, before the DPC could take final action on the LILCO Plan, Suffolk County, the DPC, and LILCO, reached a stipulation in the Supreme Court of the State of New York, to delay action on the plan. The stipulation, dated December 15, 1982, stated that "[t]he DPC will take no further action regarding the LILCO submitted Off-Site Radiological Emergency Plan for the Shoreham Nuclear Power Station until February 23, 1983." Meanwhile, Suffolk County was to continue its efforts to gain government approval for its own off-site emergency plan.

From January 17 through January 27, 1983, the Suffolk County Legislature held hearings on the County Plan. Finally, on February 23, 1983 -- the last day of the grace period stipulated in State court -- the Suffolk County government adopted resolution No. 111-1983. The resolution denied approval to the draft County Plan, stating that the plan would not adequately protect the health and safety of the public in the event of a radiological accident at Shoreham. Similarily, the resolution denied approval to the LILCO Plan. The resolution goes on to state that no radiological response plan would be adequate, and therefore that none would be approved or implemented by Suffolk County. Suffolk County's Motion to Terminate this

proceeding and Motion for Certification of the issues to the Commission were filed with the Licensing Board the same day.

B. The NRC Staff's Plans for a Review of Off-Site Emergency Planning for Shoreham

Given Suffolk County's expressed intention not to prepare an emergency plan for Shoreham, the Board requested in its Order that the Staff response include a "definitive description and schedule of the review which the Staff and the Federal Emergency Management Agency (FEMA) will perform of LILCO's off-site emergency plan, should the board determine it to be inappropriate to terminate the consideration of off-site emergency planning matters at this time . . . ." (Board Order, at 4). As discussed below, the Staff believes the authority exists to conduct a review of a LILCO-submitted compensatory plan. To date, however, LILCO has not formally submitted their plan on the Shoreham docket and requested Staff review. Should LILCO take that action, the Staff plans for the review are as follows.

A LILCO off-site emergency plan would immediately be submitted by the Staff to FEMA. The "Memorandum of Understanding Between Federal Emergency Management Agency and Nuclear Regulatory Commission" states:

> Nothwithstanding the procedures which may be set forth in 44 CFR 350 for requesting and reaching a FEMA administrative approval of State and local plans, findings and determinations on the current status of emergency preparedness around particular sites may be requested by the NRC through the NRC/FEMA Steering Committee and provided by FEMA for use as needed in the NRC licensing process. These findings and determinations may be based upon plans currently available to FEMA or furnished to FEMA by the NRC.

45 Fed. Reg. 82713 (Dec. 16, 1980). FEMA indicated that its will respond to the NRC's request within 2 weeks of receipt of the plan.

The NRC Staff will use FEMA's response as an important consideration in its final review of the LILCO Plan against the criteria of 10 C.F.R. 50.47(b), and Appendix E. It should be noted however, that emergency preparedness excercises, required by § 50.47(b)(14), pursuant to § 50.47(a)(2) are not required to be completed prior to the initial licensing decision. The Staff review of the LILCO Plan, exclusive of the exercise, will be completed within one month of the submission to the NRC of FEMA's response.

The Board also requested in its Order that all parties, in their responses to the County Brief, address their "understanding of the position which the State of New York has taken or will take with respect to the review, litigation and/or implementation of LILCO's proposed off-site emergency plan." (Board Order, at 4). Mr. David Axelrod, Chairman of the New York State Disaster Preparedness Commission filed a letter with this Board, indicating that the DPC will not conduct a review of the LILCO Plan. Mr. Axelrod recognizes in his letter, however, that the federal review and hearing should proceed under the authority discussed below. Moreover, he expresses the hope that, while the review process continues, the state and federal governments "may play some role in achieving an accommodation between Suffolk County and LILCO." The NRC Staff encourages and is willing to assist in any such efforts toward accommodation.

III. ISSUES RAISED

A. Does Suffolk County Resolution No. 111-1983 -- concluding that adequate emergency planning for Shoreham is not possible -- preclude an NRC

determination of the adequacy of an off-site emergency response plan for Shoreham?

B. If not, do the NRC's regulations -- specifically § 50.33(g) and § 50.47 -- allow the NRC to review a substitute off-site plan submitted by the state or utility in the absence of a County off-site emergency plan?

C. Should the issues raised by Suffolk County immediately be certified by the Licensing Board to the Commission?

IV. ARGUMENT

A. Suffolk County Resolution No. 111-1983 is Not Binding in this Proceeding

By Resolution No. 111-1983 the Suffolk County government purports to make a final determination of the feasibility of all off-site emergency planning for the Shoreham Nuclear Power Station.[2/] In pertinent part, the resolution states that:

2/ In its brief LILCO questions whether Suffolk County's current expressed resolution with respect to emergency planning for Shoreham is indeed "final." For purposes of this brief the Staff assumes that the County position is final. The Staff points out, however, that in proceedings before this agency it has consistently been held that Boards should take cognizance of ongoing activities before other governmental and legal entities, but should not delay licensing proceedings or withhold a license merely because some later action by such an entity might conceivably impact upon the operation of a nuclear facility. Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 930 (1978); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974); and Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant, Units 1 and 2), 6 NRC 741, 748 (1977). These cases indicate that NRC proceedings should not be turned on and off with each change of events in the parallel proceedings.

> [S]ince no local radiological emergency response plan for a serious nuclear accident at Shoreham will protect the health, welfare, and safety of Suffolk County residents, and since the preparation and implementation of any such plan would be misleading to the public by indicating to County residents that their health, welfare, and safety are being protected when, in fact, such is not the case, the County's radiological emergency planning process is hereby terminated, and no local radiological emergency plan for response to an accident at the Shoreham plant shall be adopted or implemented.

This conclusion was apparently based upon a review of the draft emergency plan submitted to the County Legislature on December 2, 1982. The resolution also contains a finding that:

> [T]he document submitted by LILCO to the DPC without County approval or authorization, if implemented, would not protect the health, welfare, and safety of Suffolk County residents and thus will not be approved and will not be implemented.

Further, in an attempt to make the County's findings binding on the State and Federal governments, the resolution concludes:

> [S]ince no radiological emergency plan can protect the health, welfare, and safety of Suffolk County residents and, since no radiological emergency plan shall be adopted or implemented by Suffolk County, the County Executive is hereby directed to take all actions necessary to assure that actions taken by any other governmental agency, be it State or Federal, are consistent with the decisions mandated by this Resolution.

Based upon fundamental principles of law this Licensing Board must conclude that the County government findings of fact are not binding in this proceeding. The Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2282, placed the responsibility for licensing and regulating nuclear power plants into the hands of the Atomic Energy Commission and its successor the NRC. Through this Act of Congress the NRC has the power and the duty to make a final determination of whether or not an applicant for a reactor operating license can comply with the terms of the Act and with the agency's regulations.

Therefore, while the County resolution will be an important consideration for this Licensing Board, it cannot serve as a substitute for this Board's own fact finding process.

Where a state or local resolution is challenged under this doctrine of preemption, courts have been instructed to determine whether the Act of Congress explicitly or implicitly evidences an intent to prohibit local governments from regulating in the field. Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). The Court in Rice stated that:

> [The Congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Pennsylvania R. Co v. Public Service Comm'n, 250 U.S. 566, 569; Cloverleaf Butter Co. v. Patterson, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Hines v. Davidowitz, 312 U.S. 52.

Id. at 230. The Atomic Energy Act of 1954 evidences the congressional intent to preempt the field of nuclear licensing and regulation in both these ways. Following a strong federal interest in the field of nuclear power plant licensing and regulation the Act was passed establishing a pervasive federal regulatory scheme. See Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1146-50 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972); Train v.Colorado Public Interest Group, 426 U.S. 1, 15-16 (1976). Furthermore, where regulatory responsibility was intended to be divided between states and the federal government the Act is explicit. Section 271, 42 U.S.C. § 2018 provides that nothing in the Act be construed to regulate the "generation, sale, or transmission of electric power produced through nuclear facilities." Section 274, 42 U.S.C. § 2021,

authorizes the NRC to give to states responsibility for regulating radioisotopes and less hazardous nuclear materials. Nothing in these two sections, however, leaves room for state or local radiological health and safety determinations for a particular reactor site.3/

In the present case, the Suffolk County determination that emergency planning is impossible for Shoreham is based upon an assumption by the County that an area within a 20 mile radius around the plant must be evacuated. However, 10 C.F.R. § 50.47(c)(2) states that the evacuation zone for nuclear power plants "shall consist of an area about 10 miles in radius." As set out in the Statement of Considerations upon adoption of this regulation (45 Fed. Reg. 55402, 55406, Aug. 19, 1980), and the "Policy Statement on the Planning Basis for Emergency Responses to Nuclear Power

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3/ Cf., Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission, 659 F.2d 903 (9th Cir. 1981), cert. granted sub nom., Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, __ U.S. __., 102 S.Ct. 2956 (1982), in which the court found no preemption based on the express delegations of § 271 and § 274 of the Atomic Energy Act.

Reactor Accidents" (45 Fed. Reg. 61123, Oct. 23, 1979), the 10 mile radius was established on the basis of a weighing of radiological factors.[4/] A determination of what is required to provide for radiological health and safety is a matter solely within the jurisdiction of the Commission. Northern States Power Co. v. Minnesota, 447 F.2d 1143; Train v. Colorado Public Interest Research Groun, 426 U.S. 1. The County's assumption that an area 20 miles in radius should be evacuated would require that many times more people be evacuated than the NRC has determined to be necessary. The County's reevaluation of the radiological risks and the need for evacuation encroaches upon the very matters of public health and safety entrusted to federal determination under the Atomic Energy Act of 1954.[5/]

In conclusion, the findings of fact made in Suffolk County Resolution No. 111-1983 are not binding in this proceeding. It is the duty of this

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4/ The choice of 10 miles as the basic emergency planning zone called for in the regulation was not an arbitrary one. A joint NRC/ Environmental Protection Agency (EPA) task force was formed in 1976 to address the questions involved in preparing emergency plans. In December 1978, this task force issued its report, NUREG-0396/EPA 520/1-78-016, "Planning Bases for the Development of State and Local Government Radiological Emergency Response Plans in Support of the Light Water Nuclear Power Plant." The task force chose a spectrum of accidents to be covered by the planning basis, identified emergency planning zones, and gave guidance on time frames and types of radionuclides which should be considered in developing plans. The basis for the establishment by the NRC of a plume exposure pathway emergency planning zone is described in the report and summarized in NUREG-0654, Revision 1, "Criteria For Preparedness and Evaluation or Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," November 1980.

5/ In this regard see Ray v. Atlantic Richfield Co., 534 U.S. 151, 163 (1978). The Court there held that non-uniform local environmental regulations, more stringent than the national standards, were preempted by the Congressional action. The federal interest embodied in the Act of Congress is frustrated where local authorities continue to set their own standards.

Licensing Board, and not the Suffolk County government, to determine whether or not off-site emergency planning for Shoreham will adequately protect public health and safety, and whether or not a license should be granted. In order to make these determinations the Board must first compile a complete evidentiary record. The evidentiary record will include testimony from expert witnesses on behalf of the County and LILCO, in addition to those provided by the NRC Staff and FEMA. The Licensing Board must weigh all the evidence and make its decision by applying the standards established in the statutes of Congress and this agency's implementing regulations.

B. The Regulations Provide That a Substitute State or Utility Off-site Plan May Be Submitted to the NRC For Review

Under 10 C.F.R. § 50.47(a)(1) "no operating license for a nuclear power reactor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." It is undisputed that local involvement is an important part of the emergency planning process. Therefore, 10 C.F.R. 50.33(g) calls for applicants to submit "radiological emergency response plans of State and local governmental entities that are wholly or partially within the plume exposure pathway Emergency Planning Zone (EPZ)." Suffolk County asserts that this regulation establishes the Suffolk County government's emergency response plan as the prerequisite to an operating license for Shoreham. However, when read in their totality, the regulations do not make a county government emergency plan absolutely necessary for the issuance of license. Instead, the regulations allow states and utilities an opportunity to demonstrate that adequate measures can be taken to protect the health and

safety of the public, despite the failure of the county to adopt an off-site plan. An applicant has the ultimate burden of proof for the § 50.47(a)(1) finding, however, and the license application will be denied if an applicant fails in that burden.6/

1. The Requirements for State and Local Plans

Under 10 C.F.R. § 50.33(g) the Applicant bears the burden of providing emergency response plans with the license application. The regulation states that the Applicant shall submit the plans of "State and local governmental entities" within the EPZ. Normally state and local governments would aid in the preparation of these plans. However, the words of the regulation do not require that the local emergency plans be prepared and endorsed by each local government.

6/ 10 C.F.R. § 50.47(d) provides that regardless of the state of off-site emergency planning, the Commission may issue a license for operation up to 5% of the plant's rated power. The regulation states in part:

> [N]o NRC or FEMA review, findings, or determinations concerning the state of offsite emergency preparedness or the adequacy of and capability to implement State and local offsite emergency plans are required prior to issuance of an operating license authorizing only fuel loading and/or low power operations (up to 5% of the rated power). Insofar as emergency planning and preparedness requirements are concerned, a license authorizing fuel loading and/or low power operation may be issued after a finding is made by the NRC that the state of onsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

Prior to issuance of a 5% license pursuant to this section, however, the Board must complete its inquiry into all the other issues involved in this proceeding. See also Section 11 of the NRC 1982/83 Authorization Act, P.L. 97-415.

This view is consistent with the words of 10 C.F.R. § 50.47(a)(2) which calls for "State and local emergency plans", rather than specifically government-approved plans. The adjective "governmental" is included in § 50.33(g) as a description of the local entities within the EPZ which will have to be considered in the local emergency plan. The word was not included in the regulations with the intent that it establish approved county government plans as prerequisites to reactor licensing. The purpose of the regulation is to assure that the public health and safety is adequately protected by whatever means are chosen.

Section 50.33(g) and 50.47(a)(2) must also be read together with the rest of the regulations. 10 C.F.R. § 50.47(c)(1), promulgated by the Commission in response to Section 109 of the NRC Authorization Act of 1980, provides that applicants may submit their own plan or a state plan for review where a locally drafted plan is not available. A County radiological emergency response plan, in contrast to one drafted by others, is not a prerequisite to reactor licensing.7/

7/ If the Board narrowly construes § 50.33(g) to require an emergency plan from the State and the County -- with no utility substitutes under § 50.47(c)(1) -- an exemption to § 50.33(g) may be considered by the Commission under the blanket exemption provision of 10 C.F.R. § 50.12. LILCO, however, will have to show that the measures it proposes for emergency planning will be sufficient such that operation of the plant will "not endanger life or property." This is a factual determination for the Staff and the Board to make, and therefore a reason that this proceeding should not be immediately dismissed without a hearing on the merits. LILCO, as a party to this proceeding, would also be entitled to petition for an exemption from the regulations under 10 C.F.R. § 2.758(b).

2. 10 C.F.R. § 50.47(c)(1)

Section 50.47(c)(1) of the Commission's regulations provides applicants with a built-in mechanism for demonstrating to the Commission that deficiencies in emergency plans can be resolved or compensated for. The regulation states:

> Failure to meet the applicable [emergency planning] standards . . . may result in the Commission declining to issue an operating license; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have or will be taken promptly, or that there are other compelling reasons to permit plant operation.

Therefore, while the initial responsibility for local emergency plans may rest with the local government, the regulation provides that the final opportunity to provide an adequate plan be given to an applicant.

In this case the plan for Suffolk County is the missing portion of the emergency planning package.[8/] Under the regulation, this Licensing Board should give LILCO the opportunity to provide this piece, and to demonstrate that sufficient measures will be taken at Shoreham to satisfy the broad requirement of 10 C.F.R. § 50.47(a)(1). As stated by the Appeal Board "the Commission's regulations [§ 50.47(c)(1)] call upon us not only to look to the requirements that have been imposed, but also to exercise judgment as to the significance of whatever deficiencies there may be and the adequacy of interim measures to rectify them." Southern California Edison Co, et al. (San Onofre Nuclear Generating Station,

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8/ The emergency plan submitted to FEMA normally would have been the New York State plan with the local Suffolk County portion included.

Units 2 and 3), ALAB-680, Slip Op. at 4 (July 16, 1982). For these reasons, questions of fact remain for this Licensing Board to decide.

Suffolk County argues that § 50.47(c)(1) would not authorize a complete substitute of a utility plan for an absent local plan. This reading is unduly restrictive. In promulgating the regulation the Commission stated in the Statement of Considerations:

> In determining the sufficiency of 'adequate interim compensatory actions' under this rule, the Commission will examine State plans, local plans, and licensee plans to determine whether features of one plan can compensate for deficiencies in another plan so that the level of protection for the public health and safety is adequate. This interpretation is consistent with the provisions of the NRC Authorization Act of fiscal year 1980, P.L. 96-295.

45 Fed. Reg. 55402, 55403 (Aug. 19, 1980). The rule does not establish a hierarchy of deficiencies such that a deficiency in any one plan can be automatically so great as to negate the whole package. Instead the standard is whether or not the compensatory measures are sufficient to negate the deficiencies. The greater the deficiencies, the greater the requisite compensatory measures which may be required. Total planning must be considered in determining whether the plant can be operated without endangering public health and safety. See e.g., Southern California Edison Co., et al. (San Onofre Nuclear Generating Station, Units 2 and 3); ALAB-717, Slip Op. at 44-47 (March 4, 1983).

Moreover, the Statement of Considerations explicity states that it was not the intent of the Commission to automatically require the denial of a license or the shutdown of a nuclear facility upon the absence of state and local government response plans. Rather, in conformity with Section 109 of the NRC Authorization Act of 1980, P.L. 96-295, and the comments received on the proposed rule, the Commission stated that failure

to have a local plan is only one of the many factors which should be considered in determining whether a nuclear plant may operate. See 45 Fed. Reg. 55406-407. It cannot be held as a matter of law, prior to a hearing, that deficiencies in the local plan cannot be corrected by state or utility efforts.

3. The 1980 and 1982/83 Authorization Acts

10 C.F.R. § 50.47(c)(1) was promulgated by the Commission in response to the inclusion by Congress of Section 109 in the NRC's 1980 Authorization Act, P.L. 96-295. This Act authorized the NRC to issue an operating license in the absence of an approved state or local emergency plan if the Commission could find 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." The legislative history for this Act makes clear the Congressional intent that Section 109 allow states or utilities to compensate for deficiencies in emergency plans created by local government inaction. The Conference Report states:

> The compromise provides that the NRC is to issue an operating license for a new utilization facility only if the State or local plan, as it applies to such facility, complies with the NRC's current guidelines for such plans or the new rules when promulgated, except that if a state or local plan does not exist that complies with the guidelines or rules, the compromise provides that NRC still may issue an operating license if it determines that a State, local or utility plan provides reasonable assurance that public health and safety is not endangered by operation of the facility. . . .
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> The conferees sought to avoid penalizing an applicant for an operating license if a State or locality does not submit an emergency response plan to the NRC for review or if the submitted plan does not satisfy all the guidelines or rules. In the absence of a State or local plan that complies with the guidelines or rules, the compromise permits NRC to issue an operating license if it determines that a State, local or

> utility plan, such as the emergency preparedness plan submitted by the applicant, provides reasonable assurance that the public health and safety is not endangered by operation of the facility

H.R. Rep. No. 1070, 96th Cong., 2d Sess. 27 (1980). There is no indication that there is any deficiency so great such that compensating measures cannot be taken.

Suffolk County asserts that the language of 10 C.F.R. § 50.47(c)(1) is more restrictive than that of the enabling legislation. The fact is however, that § 50.47(c)(1) was promulgated to fully implement the statute, and the administrative record makes clear that the Commission fully intended that the regulation would allow a utility emergency plan to be submitted for review as a substitute for a local off-site plan. During a July 23, 1980 Commission meeting the intent of § 50.47(c)(1) was discussed with the General Counsel, Mr. Bickwit. See 45 Fed. Reg. 55402, stating that the transcipt shall constitute part of the administrative record for § 50.47. The relevant transcript passages read as follows:

> MR. BICKWIT: I guess it was approximately two weeks ago I had some telephone calls from the Senate Nuclear Regulation Subcommittee staff . . . expressing concern that the proposed final rule as they read it conceivably was not consistent with Congressional intent as it regards the licensing of new plants.
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> . . . .
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> Their concern was that under the rule as drafted it was not clear to them that the Commission contemplated that in the absence of a plan, of a state or local plan which fully complied with the requirements of the rule that the Commission intended to look at the utility's plan to see whether that plan could compensate for the deficiencies of the state and local plans.
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> They said it was a central feature of the agreement reached in conference that that would be the case.

> CHAIRMAN AHEARNE: Their concern was that our rule was too harsh?
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> MR. BICKWIT: That is true.
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> . . . .
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> I told them [the Senate Nuclear Regulatory Subcommittee staff] that I believed it was the Commission's view that one of the alternative compensatory actions that might be looked at would be the actions taken by a utility in any kind of utility plan that might compensate for the deficiencies. I asked them if the Commission were to include language that specifically stated that intent it would make the rule consistent in their view with the intent of the Congress as they saw it, and they said yes.
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> . . . .
>
> Now, I want to reiterate my view that whether or not the Commission chooses to do that is not a legal matter. As I read the legislation and the supporting legislative history, the Commission is free to go beyond the minimum requirements set by the Congress.
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> . . . .
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> However, if it is the Commission's view that alternative compensatory actions would include a look at the utility's plan to see whether that plan was in fact compensatory, then I would suggest stating that in the supplementary information associated with the rule. I have proposed some language which you have before you as Enclosure 1.

NRC July 23, 1980, Tr. 4-8. The language proposed by Mr. Bickwit to convey this intent (his Enclosure 1) was substantially adopted by the Commission and inserted into the Statement of Consideration for § 50.47(c)(1), as cited above. See 45 Fed. Reg. 55402, 55403. Given this background, it must be concluded that the regulation was intended to and does allow LILCO to submit their own compensatory off-site plan for review.

The authority extended to the NRC in the 1980 Authorization Act is again provided in Section 5 of the NRC's 1982/83 Authorization Act, Public Law 97-415, signed on January 4, 1983. This provision states as follows:

> SEC. 5. Of the amounts 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.

The Conference Report accompanying the 1982/83 Act expresses the Congressional intent to reiterate the provision of the 1980 bill.

> Both the House bill and the Senate amendment contained provisions reaffirming the authority granted to the Commission under section 109 of the NRC Authorization Act for fiscal year 1980 (Public Law 96-295). This authority 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. 884, 97th Cong., 2d Sess. 27 (1982).

Suffolk County argues that a reliance by the Board on the 1982/83 Authorization Act would constitute an illegal disregard by the NRC of its own regulations. However, the NRC would be acting pursuant to the regulations in conducting a review of the LILCO off-site plan. The

authority to conduct such a review is embodied in the regulations at 10 C.F.R. § 50.47(c)(1).[9/]

C. The Issues Raised by Suffolk County Do Not Require Immediate Certification to the Commission

Suffolk County has requested that, pursuant to 10 C.F.R. 2.718(i), the Licensing Board certify to the Commission the questions involved in the Motion to Terminate.[10/] The NRC Staff opposes that request.

The question before this Board is whether or not this hearing should be continued based upon an emergency plan other than that developed by Suffolk County. The Staff believes that the Licensing Board should be given an opportunity to decide this question and provide an opinion. Many questions of fact remain to be resolved concerning off-site emergency planning for Shoreham. Only after this Board has had an opportunity to develop the record on these questions can the entire issue be placed in

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9/ Southampton, SOC and NSC place great weight in their briefs on what they characterize as the "permissive" or discretionary nature of the Commission's authority to issue a license in the absence of an approved state or local plan. The NRC Staff does not dispute that the authority granted in Section 109 and Section 5 of the authorization Acts, and implemented in § 50.47(c)(1) of the regulations, is discretionary. A license can only be issued if the Commission finds, on the merits, that the state or utility plan is adequate to protect the health and safety of the public.

10/ Although 10 C.F.R. § 2.718(i) speaks in terms of certification to the "Commission," the Appeal Board would normally exercise the Commission's authority in the first instance on certified questions. 10 C.F.R. § 2.785(a)(1); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-56, 4 AEC 930 (1972). If certification were granted in this case there is no reason that this normal procedure should not be followed. In any case, the Appeal Board should first be given the opportunity to decide whether or not to immediately send the issues to the Commission.

proper perspective. The Appeal Board has stated that it "is not in the business of deciding abstract questions." Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-419, 6 NRC 3, 6 (1977). Although the pure legal questions raised by the County's Motion to Terminate provide much room for interesting legal argument, the factual setting is currently missing. It remains for this Licensing Board to determine on the record exactly what LILCO can and cannot do, given the County's current attitude of noncooperation on emergency planning. A complete evidentiary record on off-site emergency planning issues would enable the Appeal Board to avoid the business of hypothetical decision making.

Suffolk County supports its Motion for Certification by referring to the Appeal Board's standard for undertaking discretionary interlocutory review:

> In short, because the rulings sought by Suffolk County would "affect the basic structure of the proceeding in a pervasive or unusual manner," they are appropriate matters for certification to the Commission. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station), ALAB-405, 5 N.R.C. 1190, 1192 (1977); see also Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 N.R.C. 309, 310 (1981).

(County Brief, at 7). However, this standard is typically invoked in cases in which the Licensing Board has made a ruling. Only if that Licensing Board ruling is determined to have a "pervasive or unusual" effect on the proceeding would the Appeal Board undertake interlocutory review by directed certification. In this case the Licensing Board has yet to hear relevant facts and make a ruling, and therefore it is premature to argue that the ruling has such a pervasive or unusual effect.

V. CONCLUSION

For the reasons stated above, the NRC Staff concludes that the Licensing Board should deny both Suffolk County's Motion to Terminate this proceeding and the Motion for Certification of the issues to the Commission. The Applicant is entitled to an opportunity before this Board to attempt to meet its burden of proof with respect to off-site emergency planning. If the application is to be denied it should only be after a review against this agency's regulations and a hearing on the merits.

Sections 50.33(g) and 50.47 of the NRC's regulations do not require, as a precondition to an operating license for Shoreham, an emergency response plan of the Suffolk County government. 10 C.F.R. § 50.47(c)(1) expressly allows utilities the opportunity to compensate for an incomplete local plan. This conclusion, therefore, does not require the NRC to disregard the provisions of its regulations.

Finally, in its brief, LILCO suggests that the evidentiary hearing on the LILCO Plan be conducted in two phases. The first phase would focus on the plan itself, and the second phase on the implementation of the plan. The Staff believes that this division of the hearing would be an efficient course for the proceeding.

Respectfully submitted,

David A. Repka

David A. Repka
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 25th day of March, 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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN RESPONSE TO SUFFOLK COUNTY'S MOTION TO TERMINATE THE SHOREHAM OPERATING LICENSE PROCEEDING AND THE COUNTY'S MOTION FOR CERTIFICATION" 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, by hand, or as indicated by two asterisks, by Express Mail, or as indicated by three asterisks, through deposit in the Nuclear Regulatory Commission's internal mail system, this 25th day of March, 1983:

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