



without awaiting a Suffolk County prepared offsite plan. In a "Prehearing Conference Order" of April 20, 1982, the Board stated: "Emergency planning contentions based on LILCO's plan must be received by June 22, 1982." It further outlined what it views may be pertinent contentions for submission for this first phase of the hearing (at 7).

By "Prehearing Conference Order (Phase I--Emergency Planning)" of July 27, 1982, the Licensing Board stated in regard to emergency planning that it intended "to proceed with matters based on the LILCO plan, dealing primarily but not exclusively with onsite matters, rather than waiting for the submission of Suffolk County's radiological emergency plan before doing anything, as intervenors urged us to do at that time." (at 2). In a footnote the Board recognized a recent change in Commission regulations allowing the issuance of low power license prior to a determination of all offsite emergency planning matters, and indicated that it wished to litigate at that early stage of the proceeding those emergency planning matters that would allow LILCO to obtain a low-power license under 10 C.F.R. § 50.47(d), if LILCO were otherwise to be entitled to such a license. It further stated it would not be fruitful to discuss whether the resolution of matters then before the Board would support the grant of a low-power license (at 2, n.1). It then required that final Phase I emergency planning contentions setting forth the specific inadequacies in LILCO's onsite emergency response plan and other matters capable of resolution be submitted in final form by August 20, 1982 (at 3).

On August 20, 1982, "Phase One Consolidated Emergency Planning Contentions" were filed by Suffolk County and the other intervenors in

the proceeding encompassing LILCO's onsite emergency plan and other emergency planning matters necessary for a low power license. These contentions included the operability of the prompt notification system including sirens and tone alert radios (EP 2 and 6C), failure to have agreements with local organizations for emergency response (EP 2(D)(2) and 3(C)), adequacy of offsite support in dealing with an onsite emergency (EP 3, 6 and 18), lack of coordination of Federal response capabilities (EP 4), lack of guidelines and information for appropriate protective actions (EP 5), training of emergency workers (EP 7), failure to provide for proper public information including appropriate input from Suffolk County (EP 9), failure to have a proper emergency support facility (EP 10), failure to have a proper emergency classification system (EP 13), and failure to provide proper communication with offsite response organizations (EP 15 and 16).

By "Supplemental Prehearing Conference Order (Phase I--Emergency Planning)" of September 7, 1982 the Board ruled on these proffered contentions. It admitted certain of the emergency planning contentions, dismissed others, and ruled that others were more appropriate for consideration in connection with offsite emergency planning matters in Phase II of the proceeding. (See e.g. 14, 16 and 17). Among those admitted (as renumbered) were:

- EP 1: Prompt Notification System
- EP 3: Federal Resources
- EP 5: Offsite Response Organization and Onsite Response Augmentation
- EP 6: Training

- EP 7: Onsite Response Organization
- EP 8: Emergency Operations Facility
- EP 9: Radiological Exposure
- EP 10: Accident Assessment and Monitoring
- EP 11: Communication With Offsite Response Organizations
- EP 12: Personnel Assignments to Communication/Notification

See, Appendix B to September 7, 1982 Supplemental Prehearing Conference Order Phase I--Emergency Planning (October 4, 1982).

Stipulations were subsequently entered into, in October, 1982, settling and providing for the termination of litigation on Contentions EP 3, 6 and 9, and portions of Contentions EP 1, 5, 7, 10, 11 and 12 (Tr. 14,718 ff.).

On November 23, 1982 and November 30, 1982 the Licensing Board dismissed all remaining admitted Phase I emergency planning contentions for failure of the intervenors to comply with orders of the Board in relation to discovery, the filing of testimony and the conduct of the proceedings. Memorandum and Order Confirming Ruling on Sanctions for Intervenors' Refusal to Comply With Order to Participate in Prehearing Examination, LBP-82-115, 16 NRC \_\_\_\_ (December 22, 1982). The Licensing Board concluded:

As the Phase I emergency planning contentions have been effectively abandoned by intervenors, they are no longer "in controversy" among the parties. Accordingly there are no Phase I Emergency Planning Issues remaining before us for litigation. (slip op. at 23).

Thereafter, on February 17, 1983, Suffolk County Legislature adopted resolution No. 111-1983 in which it declared that the County would not adopt or implement a local radiological emergency plan for response to any incident at the Shoreham facility. The resolution further provided that no County agency was to provide any cooperation in regard to

emergency response planning for the Shoreham facility. See LBP-83-22, Appendix A, at A-9 - A-11.

On February 23, 1983, "Suffolk County Motion to Terminate" this proceeding was filed on the basis of the County resolution not to take part in emergency response planning. By "Memorandum and Order Denying Suffolk County's Motion To Terminate The Shoreham Operating Licensing Proceeding" of April 20, 1983 (LBP-83-22, 17 NRC \_\_\_), the Board denied the motion to terminate on the ground that LILCO must be given an opportunity to show that offsite emergency response planning could be provided without the cooperation of Suffolk County (slip op. at 7, 26-27, 42-43).<sup>1/</sup> In describing the course of further proceedings in regard to emergency planning, the Board made it clear that it regarded all contentions in regard to onsite emergency planning and other matters it desired to have litigated in Phase I of the proceeding concluded. As it stated:

We will not consider any contention addressed to Phase I emergency planning matters. While we have at times described the scope of Phase I matters using such shorthand terms as "onsite matters" or "LILCO's actions under its onsite plan," we consistently noted that we wished to litigate during Phase I all matters which were at that time capable of final resolution in advance of the then pending preparation of a local offsite plan by Suffolk County. . . . Therefore, Phase I emergency planning was defined to include not only onsite matters, but also matters such as gaps in siren coverage within 10 miles of the Shoreham plant, notification of and communications with offsite response organizations, arrangements and training for offsite assistance resources needed onsite (e.g., medical and fire services), and assessment and monitoring by LILCO of actual or potential onsite and offsite radiological releases and doses.

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<sup>1/</sup> This determination was affirmed by the Commission in CLI-83-13, 17 NRC \_\_\_, (May 12, 1983).

Accordingly, we will not consider any contention addressing LILCO's onsite plan or other matters which either were the subject of a previously admitted Phase I emergency planning contention or clearly were within the permissible scope of the Phase I emergency planning litigation. See Appendix B to our September 7, 1982 "Supplemental Prehearing Conference Order (Phase I--Emergency Planning)," issued separately from that order and dated October 4, 1982, and the list of subjects in the order of April 20, 1982, supra (slip op. at 7). This is because the parties remain bound by any stipulation regarding Phase I contentions which was approved by the Board, see Stipulations ff. Tr. 14,719, as well as by our order dismissing the remaining Phase I contentions "with prejudice" due to intervenors' intentional default in refusing to proceed with the examinations before hearing as ordered by the Board. . . . [Footnote omitted]

Id. at 64-65. See further LBP-83-22, Appendix A, at A-4.

On April 8, 1983, the Board closed the record herein on all but two matters -- a disagreement as to the wording of a number of operating quality assurance procedures (subsequently settled on June 20, 1983), and "Phase II emergency planning issues (a category of remaining offsite emergency planning issues) . . ." See "Memorandum and Order on Suffolk County's Motion To Admit New Contention," LBP-83-30, 17 NRC \_\_\_\_, June 22, 1983, slip op. at 2, n.1.<sup>3/</sup> Except for a short hearing in April, 1983 on an unrelated matter the evidentiary hearing had been completed on February 24, 1983. Id. Proposed findings have been filed on all issues for which the record was closed.

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<sup>3/</sup> In that Memorandum and Order the Board also granted in part a Suffolk County motion to reopen the record on issues involving diesel generators. Id. at 44. A possibility also exists to reopening the record in regard to quality assurance in light of the "Teledyne Report." Tr. 20,306-07.

LILCO, on May 26, 1983, filed an emergency response plan for the Shoreham facility. Incorporated therein was its previously submitted Onsite Emergency Plan, with some revisions -- upon which litigation was concluded by stipulations of the parties and by the December 22, 1982 order of the Board -- as well as an offsite emergency response plan incorporating certain options for the Shoreham facility.

In an "Order Limiting Scope of Submissions" of June 10, 1983, the Board limited the filing of contentions to the options provided in "The LILCO Transition Plan," and reaffirmed the date of June 23, 1983, for the filing of contentions on that plan. On that date a 170 page "Consolidated Draft Emergency Contentions" was filed by Suffolk County among others.

On June 27, 1983, the subject "Suffolk County Motion For Leave to File Contentions Regarding Onsite Emergency Preparedness" was filed. The premise of the motion is that only onsite emergency planning contentions capable of then being filed were barred by the December 22, 1982, Order of the Board dismissing Phase I Emergency Planning Contentions, and that the February 17, 1983 Suffolk County Resolution revealed other bases for contentions on LILCO's onsite plan in that it made plain that Suffolk County would not participate in overall emergency planning. (at 2-3). The contentions regarding onsite emergency planning are largely matters that are incorporated in the July 7, 1983 "Consolidated [Offsite] Emergency Planning Contentions" which Suffolk County maintains are also relevant to onsite emergency planning. See, Motion, Appendix A.

On June 30, 1983, the Commission issued CLI-83-17, 17 NRC \_\_\_\_, dealing with the need for an offsite emergency plan for a low-power operating license in the context of this proceeding where Suffolk County

has stated it will not adopt such plan. The Commission emphasized that approval of an offsite emergency plan is not a prerequisite to a low power license as long as other conditions for such license are met, including adequate onsite emergency preparedness. (at 3). No predictive findings as to "reasonable assurance" or the likelihood of offsite emergency planning is needed. Id. The Commission continued:

. . . Moreover, it seems apparent that the Licensing Board's preliminary doubt about whether there is reasonable assurance that a sufficient offsite emergency plan can and will be developed is no different from preliminary doubt about whether a safety issue can be adequately resolved which has significance for full-power operation but not for low-power activities. Interjection of such doubts into the low-power proceeding could create a limited full-power hearing, before authorization of the low-power license. Such a procedure would have little to commend it.

. . . We believe the better procedure is to reserve full-power issues, like offsite emergency planning, for the full-power authorization decision. Accordingly, if applicant Long Island Lighting Company (LILCO) can meet all the other requirements of the Atomic Energy Act and NRC regulations pertinent to the grant of a low-power license, it is entitled to that license despite the existing uncertainties about offsite emergency planning. . . . [Footnote omitted]. (at 4-5).

### III. DISCUSSION

#### A. Onsite Emergency Planning Contentions Are Precluded By The Default Dismissal and Stipulated Settlement of Such Issues

On November 23, 1982 and November 30, 1982 (Tr. 14,746-48) the Licensing Board dismissed Intervenor's Phase I-Emergency Planning Contentions. See "Memorandum and Order Confirming Ruling on Sanctions for Intervenor's Refusal to Comply With Order to Participate in Prehearing Examination," LBP-82-115, 16 NRC \_\_\_\_, December 22, 1982. As recognized in the Board's "Memorandum and Order Denying Suffolk County's Motion To

Terminate the Shoreham Licensing Proceeding," LBP-83-22, 17 NRC \_\_\_\_  
(April 20, 1983, Appendix A, slip op. at A-4): "These 'Phase I' issues were primarily those involving onsite emergency planning, with those offsite elements that could be litigated without waiting for a county plan." The fact that Phase I and the default dismissal encompassed all onsite emergency planning issues is further detailed in the body of LBP-83-22, supra, where the Board stated (at 64-65):

Accordingly, we will not consider any contention addressing LILCO's onsite plan or other matters which either were the subject of a previously admitted Phase I emergency planning contention or clearly were within the permissible scope of the Phase I emergency planning litigation. . . . This is because the parties remain bound by any stipulation regarding Phase I contentions which was approved by the Board, see Stipulations ff. Tr. 14,719, as well as by our order dismissing the remaining Phase I contentions "with prejudice" due to intervenors' intentional default in refusing to proceed with the examinations before hearing as ordered by the Board . . . . [Emphasis added].

In a "Prehearing Conference Order" of April 20, 1982, the Board had specified the type of issues that were to be heard on emergency planning. It stated (at 7):

Emergency planning contentions based on LILCO's emergency plan must be received by June 22, 1982. Tr. 802. Examples of subjects which would be included in this category, if parties wish to advance contentions on them, are:

1. Notification by LILCO of State and local response organizations
2. Communications between LILCO and State and local response organizations
3. Arrangements for assistance resources needed onsite, such as medical services.
4. The Emergency Operations Facility (EOF), including arrangements to accommodate representatives of response organizations.

5. Methods and equipment for LILCO to assess and monitor actual or potential onsite and offsite radiological releases and doses.
6. The siren notification system in the approximate 10 mile plume exposure emergency planning zone (EPZ) proposed by LILCO. (This does not preclude a possible later determination that the EPZ, and therefore the siren system, must be expanded or otherwise modified due to the effect of persons outside and to the east of the proposed EPZ choosing to evacuate through the EPZ.)

In a July 27, 1982, "Prehearing Conference Order (Phase I-Emergency Planning)" the Board said (at 2-3): "What we intend to proceed with at present are those emergency planning matters which are currently capable of final resolution. The Board deemed it logical . . . to proceed with matters based on the LILCO plan, dealing primarily but not exclusively with onsite matters, rather than waiting for final submission of Suffolk County's radiological plan before doing anything else, as intervenors have urged us to do." The Board recognized in a footnote (n.1 at 2) that in view of a recent amendment of the regulations a determination of these issues might be necessary in order not to preclude LILCO from obtaining a low power license. The Board then ruled on some present emergency planning contentions and directed the intervenors to set out all contentions based on LILCO's onsite plan and other emergency planning matters capable of resolution, by August 20, 1982 (at 3).

On August 20, 1982, the Intervenors filed "Phase One Consolidated Emergency Planning Contentions" directed to onsite planning and other matters predicate to the issuance of a low power license. In "Supplemental Prehearing Conference Order (Phase I--Emergency Planning)," September 7, 1982, the Board accepted the following onsite and offsite contentions, among others:

- EP 1: Prompt Notification System
- EP 3: Federal Resources
- EP 5: Offsite Response Organization and Onsite Response Augmentation
- EP 6: Training
- EP 7: Onsite Response Organization
- EP 8: Emergency Operations Facility
- EP 9: Radiological Exposure
- EP 10: Accident Assessment and Monitoring
- EP 11: Communication With Offsite Response Organizations
- EP 12: Personnel Assignments to Communication/Notification

See, Appendix B to September 7, 1982 Supplemental Prehearing Conference Order Phase I--Emergency Planning (October 4, 1983).

In the first two weeks of October 1982, the parties (including Suffolk County) entered into stipulated settlements providing for the termination of litigation on Contentions EP 3, 6 and 9, and portions of Contentions EP 1, 5, 7, 10, 11 and 12. (Tr. 14,718 ff.). Thereafter, as we have stated, a default judgment was entered against the Intervenors on the remainder of the Phase I--Emergency Planning Contentions. See "Memorandum and Order Confirming Ruling on Sanctions for Intervenors' Refusal To Comply With Order To Participate in Prehearing Examinations," LBP-82-115, 16 NRC \_\_\_\_, December 22, 1982, slip op. at 23-24.

Suffolk County quotes from a portion of LBP-83-22 at 63 in support of its claims that the default dismissal of Phase I emergency planning matters only included such matters as were capable of final resolution in advance of the preparation of a local offsite plan by Suffolk County. As we have indicated, the Memorandum continues and states: ". . . Phase I emergency planning was defined to include not only onsite matters, but also such matters as gaps in siren coverage . . ., notification of and communication with offsite responses organizations, arrangements and training for offsite assistance needed onsite . . ." Further, in

LBP-83-30, supra, at 2 n.1, the Board defined the "Phase II" emergency planning issues as a "category of offsite emergency planning issues." No onsite issues are included. Thus the default dismissal of Phase I emergency planning contentions was not limited to onsite emergency planning, but included all onsite planning matters as well as all other emergency planning matters necessary for a low-power license.

As can be seen from the foregoing, the Board's orders themselves, the actions of the parties, and the Board's subsequent interpretation of those orders all indicate that the Phase I--Emergency Planning litigation was to consider all onsite matters and all other emergency planning issues predicate to a low power license. The stipulation and the default dismissal thus disposed of all those issues in this proceeding.

Further, an examination of the particular matters sought to be raised in the subject Suffolk County motion show that they all involve the same subjects as the contentions settled by stipulation or dismissal. These contentions include, for example, such matters as: notification of the public and others by siren and radio (compare October 4, 1982, "Appendix B to September 7, Supplemental Prehearing Conference Order Phase I - Emergency Planning" Contentions EP 1, 5, and 6 with June 27, 1983 "Suffolk County Draft Contentions Regarding Offsite Elements of LILCO's Revised Emergency Plan" Contention A); notification and communication with state and local organizations (compare October 4, 1982 Appendix B Phase One Contentions, EP 5, 11 and 12 with June 27, 1982 Draft Onsite Contention B); training (October 4, 1982 Appendix B Phase One Contentions EP 6 and 16B with June 27, 1983 Draft Onsite Contention C); emergency operations center (compare

October 4, 1982 Appendix B Phase One Contention EP 8 with June 27, 1983 Draft Onsite Contention D); notification and communication with emergency personnel (compare October 4, 1982 Appendix B Phase One Contentions EP 1, 5, 7, 8 and 11 with June 27, 1983 Draft Onsite Contention E); and failure to identify offsite response organizations (compare October 4, 1982 Appendix B Phase One Contentions EP 3, 5 and 7 with June 27, 1983 Draft Onsite Contention F). While it is recognized that the lack of cooperation of Suffolk County is emphasized in the June, 1983 contentions in comparison with the August, 1982 contentions, the general subject matters were capable of being advanced for resolution at the time the Phase I contentions were submitted.

No good cause is shown to vacate the default dismissal of Phase I emergency planning contentions or relieve Suffolk County from its stipulations. Accordingly, Suffolk County should not now be allowed to raise any matter in regard to onsite emergency planning or predicate for a low power license.

In sum, each of the contentions now sought to be admitted were matters which were or could have been raised in Phase I of this proceeding covering all onsite emergency planning issues and such offsite issues as were necessary for a low power license. Suffolk County is barred by its default dismissal and its stipulation from raising these issues now.<sup>4/</sup>

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<sup>4/</sup> Although these matters may not be raised before the Licensing Board, the Staff must be satisfied with the state of onsite planning and pertinent offsite matters before a low power license may be issued. See 10 C.F.R. § 50.47(d) and 47 F.R. 30232, 234 (1982).

B. No Basis Is Shown To Permit Late Filing of Onsite Emergency Planning Contentions

The Commission's regulations provide that nontimely contentions will not be entertained absent a favorable balancing of the following five factors:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding. 10 C.F.R. § 2.714(a)(1).

As noted by the Appeal Board in Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC \_\_\_\_ (Dec. 21, 1982) (slip op. at 8):

While we recognize that "good cause", or its absence, is but one of five factors to be considered and not necessarily decisive, it nevertheless is one of the dominant criteria. In the absence of good cause, a petitioner must make a "compelling showing" on the other four factors in order to justify late intervention. Summer, supra, 13 NRC at 886. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC \_\_\_\_, \_\_\_\_ (Dec. 8, 1982) (slip op. at 8-9).

These standards for the late filing of contentions apply to Suffolk County participating in this proceeding under 10 C.F.R. § 2.715(a), as well as to other intervenors participating under 10 C.F.R. § 2.714. See LBP-83-30, supra at 8-11.

The Commission has recently emphasized, a contention sought to be filed after the times provided in 10 C.F.R. § 2.714 (whether or not the record need be reopened), must at a minimum be promptly filed upon learning of the factual predicate to that contention. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 18 NRC \_\_\_\_, (July 1, 1983, slip op. at 2, 3, 9 & 11). It there said in regard to emergency planning contentions: "Once an applicant has filed an on-site plan, contentions can certainly be based on those aspects that are not dependent on the off-site plan. Moreover, to the extent the applicant makes assumptions about those off-site response plans for the purpose of preparing its on-site plan, contentions can be raised on that basis. As for the temporary lack of such off-site response plan, USC is correct in stating that it would be fruitless to raise that temporary lack as a contention." (at 13). Thus, to the extent that LILCO made assumptions about the Suffolk County response plan prior to its existence, contentions could have been formulated without awaiting the County's February 17, 1983 action. As the Commission further stated:

In conclusion, intervenors are expected to raise issues as early as possible. To the extent that this leads to contentions that are superceded by subsequent issuance of license-related documents, those changes can be dealt with by either modifying or disposing of the superceded contention.

Id. at 13-14.

The County's new proffered contentions in regard to onsite emergency planning are late and no good cause has been made for this belated

filing. Onsite emergency planning contentions and other contentions germane to a low power license were known and filed prior to August 1982. Some were settled by stipulation. The remainder were dismissed in November 1982 for failure of the intervenors to comply with orders of the Board in regard to discovery and litigation of those matters. See Memorandum and Order, LBP-82-115, supra. Suffolk County argues that the pleading of onsite emergency planning contentions in August 1982 and the dismissal of such contentions in November 1982 could not have encompassed the contentions it now seeks to raise, as they did not exist prior to February 17, 1983, when the County refused to participate in emergency planning. However, nothing excuses the County's delay of over one-third of a year from February 17, 1983, when it claims the bases of the contentions arose, and its attempt to raise such matters on June 27, 1983, after it had even filed its offsite emergency planning contentions. The County knew on February 17, it would not cooperate in emergency preparedness matters. There was no need to await revisions to the onsite emergency plan to predicate contentions on the County's non-cooperation. The record may not be reopened to allow the filing of these contentions.

Further, as we have detailed, the dismissed Phase I Emergency Planning Contentions not only were to encompass the subject matter of the proffered contentions, but actually did. Suffolk County thus was not only able to file the subject contentions one year ago, but did file like contentions at that time. See Point III.A, supra. Thus no basis exists for the claim that they could not formulate the subject contentions until LILCO made revisions to its onsite emergency plan at the end of May 1983.

Suffolk County shows no change in the LILCO onsite plan. Nor is the lack of a County offsite plan new. The same situation was as true in the summer of 1982. Thus the County has shown no basis upon which to allow it to submit these contentions as new matters that were not known in August 1982, let alone four months ago when the County determined not to take part in emergency planning.<sup>5/</sup>

The second and fourth factors set out in 10 C.F.R. § 2.714(a)(1) for evaluation in determining whether to admit late filed contentions involve the availability of other means to protect the petitioner's interests and the extent to which other parties may represent petitioner's interest. As the Board recognized, in its December 22, 1982 "Memorandum and Order Confirming Ruling on Sanctions For Intervenors' Refusal To Comply with Order to Participate in Prehearing Examinations", LBP-82-115, the NRC staff is aware of the onsite issues and pertinent offsite matters raised by the intervenors and will appropriately address them prior to any approval to load fuel at Shoreham (at 18). Further, the very matters Suffolk County wishes to raise as onsite matters will be considered to the extent appropriate as offsite matters. The County indicates in the subject motion these purported "onsite" matters stem from Suffolk County's failure to adopt an offsite plan. See subject Motion at 3. Suffolk

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<sup>5/</sup> It should be noted that some of the proffered August 1982 contentions were deferred to the Phase II Offsite Emergency Planning Hearing. They were deferred not as onsite matters which were the responsibility of LILCO, but because they involved offsite planning matters ordinarily within the sphere of local government. See, Supplemental Prehearing Conference Order (Phase I--Emergency Planning), September 7, 1982, e.g. at 14-15. See Point B, infra.

County will obtain a hearing on these matters to the extent they were timely submitted as "offsite" contentions. The County by its prior default on Phase I contentions may not litigate these matters, in contrast to having the Staff evaluate them, in regard to a low-power license (Board Memorandum and Order, LBP-82-115, December 22, 1982, at 23-24). Thus, as here germane there are other means whereby the interests of Suffolk County will be protected and Suffolk County will be able to protect its interests by litigating these matter in regard to offsite emergency planning.<sup>6/</sup>

For much the same reasons, the third factor listed in 10 C.F.R. § 2.714(a)(1) does not weigh in favor of permitting the late raising of these issues as onsite emergency planning considerations. To the extent Suffolk County will be able to assist in the developing of a record on these issues, it will be able to do so in the offsite emergency planning litigation in this proceeding.

The fifth factor in 10 C.F.R. § 2.714(a)(1) also weighs against Suffolk County raising these late filed matters now. These issues would now broaden the proceeding and at least delay the issuance of a low-power operating license. Final onsite and low power emergency

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<sup>6/</sup> The Commission in CLI-83-17, 17 NRC \_\_\_\_, June 30, 1983, at 3-4, emphasized that no predictive findings of "reasonable assurance" are needed with regard to offsite emergency planning prior to the issuance of a low power license, and these issues should not be interjected into low-power proceedings. Thus no need exists to consider offsite matters and to create a limited full-power hearing before the issuance of a low-power license. The Commission further recognized the issues involving offsite planning are difficult in this proceeding but that they need not be resolved prior to a low power license because of the risks involved.

planning issues were due in August 1982 as part of Phase I of this proceeding. Many of the onsite emergency planning issues then filed involved the very issues Suffolk County now seeks to raise. Stipulated settlement was reached as to some of these issues. The remaining on-site emergency planning issues were the subject of a default dismissal in November, 1982. The County determined that it would not cooperate in February 1983, prior to the close of the record on Phase I issues in April 1983. The acceptance of these contentions as onsite planning issues would broaden the hearing and delay the issuance of a low-power operating license.

Based on the foregoing discussion, it can be seen that on balance there is no basis to admit the subject contention in regard to onsite emergency planning nor should the record be reopened for such a purpose.

C. No Basis Is Shown To Permit Reopening Of the Record to Consider Onsite Emergency Planning Contentions

In this proceeding the Licensing Board stated just last month:

Although the test for reopening the record in an NRC proceeding has been variously stated, it requires that 1) the motion be timely, 2) new evidence of a significant safety (or environmental) question exists, and 3) the new evidence might materially affect the outcome. See e.g., Diablo Canyon, CLI-81-5, supra, 13 NRC at 364-65; Detroit Edison Co. (Enrico Fermi, Unit 2), ALAB-730, slip op. at 10 n.7, 17 NRC June 2, 1983; Diablo Canyon, ALAB-728, supra, slip op. at 34 n.66, 17 NRC

Long Island Lighting Co. (Shoreham Nuclear Power Station), LBP-83-30, supra, at 12.

As here material, the evidentiary hearing was completed on February 24, 1983, and the record closed on April 8, 1983. See Id. at 2 n.1; supra at 6.

As we have indicated in the preceding point, this motion which seeks to reopen the record to litigate onsite emergency planning matter is not timely. Suffolk County determined not to cooperate in regard to offsite planning matters on February 17, 1983 over one-third of a year ago before the record was closed. Second, although the issues sought to be introduced as emergency planning might be significant in regard to a full power license, they are not significant in regard to a low power license because of the nature of the risks involved upon the grant of such a license. See CLI-83-17, supra at 3-4. Third, although the evidence Suffolk County proffers in connection with these contentions might affect the outcome of this proceeding for a full power license, it would not materially affect the determination of whether to issue a low power license. Id.

Based on the foregoing discussion, it can be seen that on balance the record may not be reopened to consider onsite emergency planning issues.

D. If Not Barred The Matters Raised Are Offsite Emergency Planning Issues For The Purposes of Litigation

Pursuant to 10 C.F.R. § 50.47(d) a low power license may be granted after findings on the state of onsite emergency planning, but the grant of a full power license must be predicated on findings on the state of offsite emergency planning as well. Suffolk County's proposed onsite emergency planning contentions should be rejected to the extent they are

offsite emergency planning contentions and not needed to be considered prior to the issuance of a low power license.<sup>7/</sup>

The dichotomy between offsite and onsite planning is indicated in 10 C.F.R. § 50.47, the documents referenced there, and the statements of consideration upon the adoption of that regulation in its amended form. Under 10 C.F.R. § 50.47(a)(2), the NRC is generally to evaluate an applicant's onsite emergency plan. The Federal Emergency Management Agency (FEMA) is to make findings and determinations on State and local plans and the NRC is to base its ultimate findings thereon. Although not explicit in the regulation this FEMA review is of offsite plans. As stated in the NRC Statement of Considerations upon adoption of 50.47 pursuant to Executive Order 12148, (1979), FEMA is to have lead responsibility for offsite emergency preparedness around nuclear plants. 45 F.R. 55406 (August 19, 1980). In the Memorandum of Understanding of November 4, 1980 between FEMA and the NRC, FEMA's expertise in regard to offsite emergency planning was recognized and it was provided that they were to review such matters. See Articles I & II, 45 F.R. 82713 (1980). Further, the Memorandum recognized that in keeping with 10 C.F.R. § 50.47(c)(1), FEMA would review offsite plans which might be submitted by an applicant upon the failure of local governments to prepare such a plan. See Article II, § 4.

Section 109(b)(1) of the NRC Authorization Act for fiscal year 1980, P.L. 96-295, 94 Stat. 780 (1980), similarly indicates that the offsite plan would be that part of an emergency plan ordinarily submitted by a State or local government, but which may be submitted by a utility in the

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<sup>7/</sup> As we have previously detailed the Consolidated Draft Emergency Planning Contentions of June 23, 1983, encompassed the same matters as here sought to be raised as offsite emergency planning issues. See subject Motion, p. 3.

absence of a State or local plan.<sup>8/</sup> See also 1982/83 NRC Authorization Act, P.L. 97-415, 96 Stat. 2076, § 5 (1983).<sup>9/</sup>

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8/ Section 109 provides in part:

(b) Of 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 --

(A) standards for State radiological emergency response plans, developed in consultation with the Director of the Federal Emergency Management Agency, and other appropriate agencies, which provide for the response to a radiological emergency involving any utilization facility,

(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, and

\* \* \*

9/ Section 5 provides:

Of the amounts authorized to be appropriated under section 1, the Nuclear Regulatory Commission may use

FOOTNOTE CONTINUED ON NEXT PAGE

In adopting 10 C.F.R. § 50.47(d) providing for low-power licenses before the approval of an offsite emergency response plan but after the approval of the onsite plan, the Commission again highlights that the requirements for onsite emergency planning are matters to be planned by an applicant, subject to review by the NRC. In contrast, matters offsite are usually to be planned by State or local government, and reviewed by FEMA.

In the Notice of the Proposed Rulemaking, 46 F.R. 61132, December 15, 1981, the Commission set out its reasons for proposing to allow low power licensing on only determinations relevant to onsite emergency planning. It stated:

. . . It is apparent to the Commission that the emergency preparedness requirements for a low power license need not be as extensive as those requirements for a full power operating license . . . The Commission's position is that several factors contribute to a substantial reduction in risk and potential accident consequences for low power testing as compared to the higher risks in continuous full power operation. First, the fission product inventory generated during low power testing is much less than during full power operation due to the lower level of reactor activity and short period of operation. Second, at low power, there is a reduction in the required capacity of systems designated to mitigate the consequences of an abnormal occurrence under full power operation. Third, the time scale for taking actions to identify accident causes and mitigate accident consequences is much longer than at full power. This means the operators should have sufficient time to prevent a

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9/ FOOTNOTE CONTINUED FROM PRECEDING PAGE

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.

release from occurring. In the worst case, the additional time available (at least 10 hours) even for a postulated low likelihood sequence, which eventually results in release of the fission products accumulated at low power into the containment, would allow adequate precautionary actions to be taken to protect the public near the site. Consequently, the Commission has determined that the degree of emergency preparedness that is necessary to provide adequate protection of the public health and safety is significantly less than that required for full operation.

See also Statement of Considerations, 47 F.R. 30232, 30233, July 13, 1982; CLI-83-17, supra.

The Commission, however, recognized that arrangements offsite to allow proper onsite precautions would have to be looked at in connection with onsite emergency preparedness before a low-power operating license might issue. As it stated in response to a comment on the amendment to 10 C.F.R. § 50.47:

. . . Prior to issuing an operating license authorizing low-power testing and fuel loading, the NRC will review the following offsite elements of the applicant's emergency plan:

(a) Section 50.47(b)(3). Arrangements for requesting and effectively using assistance resources have been made, arrangements to accommodate State and local staff at the licensee's near-site Emergency Operations Facility have been made, and other organizations capable of augmenting the planned response have been identified.

(b) Section 50.47(b)(5). Procedures have been established for notification, by the licensee, of State and local response organizations and for notification of emergency personnel by all organizations; the content of initial and followup messages to response organizations and the public has been established; and means to provide early notification and clear instruction to the populace within the plume exposure pathway Emergency Planning Zone have been established.

(c) Section 40.47(b)(6). Provisions exist for prompt communications among principal response organizations to emergency personnel and to the public.

(d) Section 50.47(b)(8). Adequate emergency facilities and equipment to support the emergency response are provided and maintained.

(e) Section 50.47(b)(9). Adequate methods, systems, and equipment for assessing and monitoring actual or potential offsite consequences of a radiological emergency condition are in use.

(f) Section 50.47(b)(12). Arrangements are made for medical services for contaminated injured individuals.

(g) Section 50.47(b)(15). Radiological emergency response training is provided to those who may be called on to assist in an emergency.

Knowing that the above elements of the applicants emergency plan have been reviewed by NRC should assure the public that, for low-power testing and fuel loading, adequate protective measures could and would be taken in the event of an accident.

See 47 F.R. at 30232-234; see also 46 F.R. at 6133.

As stated in Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC \_\_\_\_ (May 18, 1983, slip op. at 15-16):

Following the Commission's direction in 10 CFR. 50.47(d), we have based our review for purposes of low power testing solely on an "assessment of the applicant's emergency plan against the pertinent standards [of 10 C.F.R. 50.47(b) and 10 CFR. Part 50, Appendix E]" (emphasis supplied). While this primarily involves a consideration of applicant's capability to cope with an emergency onsite, the statement of considerations accompanying 10 CFR 50.47(d) makes clear that "review of [applicant's] onsite response mechanism necessarily involves aspects of some offsite elements: [c]ommunications, notification, assistance agreements, fire protection and medical organization, and the like. [Footnote omitted]

In this connection that Board assured itself that appropriate call lists and letters of agreement existed for offsite assistance needed for onsite emergencies, that pertinent communication could be established, and that appropriate training would be given to those who might come onsite in such eventualities. (At 17-20). The resources and planning looked at for the purpose of a low power license, because of the nature of the risk involved, was that which might be pertinent to matters onsite rather than

the protection of the public at large. Id. See also Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-82-3, 15 NRC 61, 185-197 (1982) (dealing the scope of emergency preparedness required for low-power licensing prior to the adoption of 10 C.F.R. § 50.47(d)).

An examination of Appendix A to the Suffolk County motion, "Suffolk County Draft Contentions Regarding Offsite Elements of LILCO's Revised Onsite Emergency Plan" shows that the elements there either need not be considered by this Board prior to the issuance of a low power license, were part of the specific onsite and other contentions dismissed for default in November 1982, or are otherwise defective.

Contention A1 avers that LILCO does not have authority under state law to classify an emergency for public notification. Considering the nature of the risk at low-power no showing is made that this is pertinent or is any statute cited to preclude such a determination by LILCO. The primary duty to classify an occurrence rests with utility. See 10 C.F.R. Part 50, Appendix E, Part IV B & C.

Contentions A2 & A3 avers that LILCO does not have authority to use the sirens or the emergency broadcast system. No showing is made that this offsite activity is necessary for the risks involved and in the substantial time available in low power operations to take any necessary protective action. Further, no statute is cited precluding the exercise of that authority by LILCO.

Contention A4 a, b & c avers that LILCO attempts to notify the public will be ineffective due to defects in its emergency control facility, company notification procedures and defects in sirens. These are matters included in the contentions settled or dismissed for default or which could have been then pled. See October 4, 1982, Appendix B contentions EP 1 and EP 10.

Contention A4d avers that LILCO relies on the Coast Guard who may not receive timely notice. No showing that this will be necessary considering the risks from low power operation or the times necessary to take action during low power operation. Further, a similar contention was settled by stipulation dealing with notification of the Coast Guard and Coast Guard response. See October 4, 1982, Appendix B contention EP 3; Tr. 14,718 ff.

Contention A4e avers that LILCO is not considered a credible source of information. This contention is vague and without basis. Further there is no showing of its relevance to a request for a low power license. See "Supplemental Prehearing Conference Order (Phase I--Emergency Planning)," September 7, 1982, at 39-40.

Contention B avers that LILCO will not be able to notify Suffolk County Response Organization of possible emergencies at Shoreham. In view of the time scales involved no basis is given for this contention. No showing is made that communications to the extent indicated is needed for low power operation. Further, similar contentions were settled or dismissed for default. See October 4, 1982, Appendix B contentions 1, 5, 6, 7, 8 and 11).

Contention C avers that local offsite support organizations will not receive proper training. This matter was settled. See October 4, 1982, Appendix B contention 6; Tr. 14,718 ff.

Contention D avers that LILCO does not have a proper emergency operations center. Regulations only provide for a licensee controlled emergency operations facility. See 10 C.F.R. Part 50, Appendix E, Part IV.E(8). Issues in regard to that facility were dismissed for default. See October 4, 1982, Appendix B contention 8, see further August 20, 1982 proposed contentions EP 2, EP 6C, EP 9, EP 11, EP 15, EP 17. See also "Supplemental Prehearing Conference Order (Phase I--Emergency Planning)," September 7, 1982, at 34, 39-42, 48-52 and 55-58. No showing is made that any county operated facility is necessary.

Contention E avers that LILCO does not have proper communication with emergency response personnel. This matter was dismissed for default. See October 4, 1982 Appendix B contentions EP 7, EP 5, EP 11, EP 12. Further, given the time involved in the development of low power occurrences, Suffolk County does not show the time available for notification of offsite agencies is not adequate.

Contention F avers that LILCO has not identified and made arrangements for assistance from offsite response organizations. This matter was settled or dismissed for default. See October 4, 1982, Appendix B contentions EP 5 and EP 3.

However, as we have stated the fact that offsite matters pertinent to onsite preparedness are no longer in issue before this Board in the context of this proceeding, does not lessen the Staff's duty to examine those matters to assure that the low power activities to be licensed can

be conducted without endangering the public health and safety and in conformity with regulations. 10 C.F.R. § 50.57(c) provides that the Director of Nuclear Reactor Regulation must make findings on all matters not subject to hearing to determine that the facility will operate in conformity with law and regulation, and that there is reasonable assurance that the low-power activities to be authorized can be conducted without endangering the health and safety of the public and in compliance with the Commission's regulations. Among those regulations is 10 C.F.R. § 50.47(d) which requires that:

. . . 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. The NRC will base this finding on its assessment of the applicant's emergency plans against the pertinent standards in paragraph (b) of this section and Appendix E of this part.

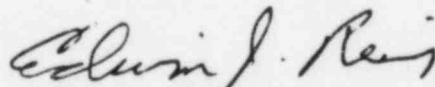
The Notice of Proposed Rulemaking, 46 F.R. 61132 (1981), and the Statement of Considerations, 47 F.R. 30232 (1982), both emphasized that because of the less risk and lower consequences of accidents of lower power, including the greater amount of time to provide to such accidents the offsite emergency preparedness requirements for full power licenses are not applicable to low power licenses. However, a determination must be made that sufficient offsite arrangements have been made to allow adequate onsite emergency preparedness and related matters. In this proceeding where the litigation as to onsite preparedness has been concluded, by stipulation settling various contentions and the dismissal of remainder of those issues for default those matters must be determined by the Staff before a low power license is issued. See Southern California

Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-680,  
16 NRC 127, 143 (1982).

IV. CONCLUSION

Suffolk County's motion to raise onsite matters as part of the hearing process herein should be denied as such matters were dismissed from and stipulated out of the hearing process, as the motion to raise such is untimely, and as these matters in large part involve offsite rather than onsite matters and will be considered in connection with the offsite litigation.

Respectfully submitted,



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Dated at Bethesda, Maryland  
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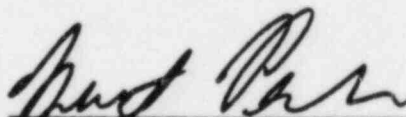
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