UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

SUFFOLK COUNTY BRIEF IN RESPONSE TO LILCO'S BRIEF ON APPEAL

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I. Introduction

On December 23, 1983, the Long Island Lighting Company ("LILCO") appealed from the Licensing Board's imposition of an operating license condition. See LILCO's Brief on Appeal, December 23, 1983. That condition, set forth in the Licensing Board's September 21, 1983 Parital Initial Decision ("PID"), imposed requirements on LILCO premised on the Licensing Board's decision that the term "important to safety" as contained in the NRC's regulations (particularly in Appendix A to 10 CFR Part 50) pertains to a class of structures, systems and components ("SS&Cs") which includes but is larger than those SS&Cs which are "safety-related."

Pursuant to the Appeal Board's October 26, 1983 scheduling order, Suffolk County now responds to LILCO's appeal. To the extent necessary, the County also responds to the Brief Amicus Curiae filed on December 23 on behalf of the Utility Safety Classification Group (hereafter "Utility Group").

For reasons discussed in the Appeal Brief of Suffolk County filed with this Appeal Board on December 23, 1983, Suffolk County clearly believes that regulatory action was required due to LILCO's misinterpretation of the term "important to safety." Equally clearly, Suffolk County believes that the license condition to which LILCO objects was, in fact, not sufficient. See, e.g., County December 23 Brief, pp. 11-17. Since the County has already provided this Board with its views on the need for a more stringent license condition, these arguments will not be repeated in the instant filing. Rather, the sole issue which is addressed herein is whether the Licensing Board was correct in the main premise which underlies the need for the license condition: namely, whether the term important to safety is broader in meaning than the term safety-related.

II. Discussion

A. NRC Precedents Establish that the Term "Important to Safety" is Broader than the Term "Safety-Related"

There is a short -- and in the County's view compelling -- answer to the issue whether "important to safety" is broader in meaning than the term "safety-related": three separate NRC adjudicatory boards, the TMI-1 Licensing Board,[1] the TMI-1 Appeal Board,[2] and the Shoreham Licensing Board[3] have each ruled that the term important to safety as contained in the NRC's regulations is broader than just those SS&C's which are classified as safety-related. This case law precedent issued by eight separate NRC administrative judges[4] renders essentially irrelevant LILCO's extensive arguments regarding alleged past regulatory history and past industry and Staff practice. Rather, the decisional law of the NRC which NRC adjudicatory

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1/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-59, 14 NRC 1211, 1342-46, 1352 (1981).

2/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814, 873-77 (1983).

3/ PID at 164-71.

4/ In the Shoreham PID, only two judges participated in the portion of the PID which is the subject of LILCO's appeal. See PID at 10.

boards traditionally follow has settled the issue now on appeal.

LILCO argues, however, that the prior decisions, especially those of the TMI-1 boards, are not persuasive precedents because the utility in the TMI-1 proceeding did not vigorously contest the issue by presenting an analysis of past regulatory history, because there allegedly was no evidence presented of allegedly inconsistent past NRC Staff practice, and because the TMI-1 Appeal Board did not, in LILCO's opinion, "make a detailed analysis of the pertinent regulations and regulatory history." See LILCO Brief, pp. 6, note 6, 38-40. Of course, this LILCO argument requires this Appeal Board to find, in essence, that the TMI-1 Boards, particularly the TMI-1 Appeal Board, issued their decisions on this issue without careful consideration of the meaning and implications of their decisions. The County submits that there is no basis to support the view that the TMI-1 decisions were not carefully considered. At any rate, Administrative Judge Edles is a member of the Shoreham Appeal Board and also was a member of the TMI-1 Appeal Board. In these circumstances, Administrative Judge Edles is in the best position to consider whether any of the alleged distinctions raised by LILCO are at all pertinent. The County submits they are not.

It bears noting, however, that the TMI-1 Appeal Board clearly did not just blindly accept the TMI-1 Licensing Board's decision that the term "important to safety" is broader than "safety-related." Rather, the Board also found that the Standard Review Plan and Regulatory Guide 1.29 supported the conclusion that the term "important to safety" included both safety-related and nonsafety-related SS&Cs. 17 NRC at 875-76. Thus, from the face of the Appeal Board's TMI-1 decision, it appears clear that careful consideration was given to this issue.5/ Under these circumstances, it was certainly appropriate for the Shoreham Licensing Board to follow the TMI-1 Appeal Board guidance.6/

Finally, if any final clarification of the scope of the term "important to safety" were needed, that has been provided by the Commission in its Environmental Qualification ("EQ")

5/ The TMI-1 Licensing Board also carefully considered the implications of its decision. See, e.g., 14 NRC at 1346.

6/ LILCO has cited one instance where another board allegedly may not have interpreted the term important to safety in the sense adopted by the Shoreham Board. See LILCO Brief at 40, note 37, citing the Diablo Canyon proceeding. LILCO provides no details of that purported "decision." The County understands, however, that LILCO is citing only to an oral ruling of the Diablo Board in the context of that Board's ruling on the scope of contentions and that there was no detailed reasoning provided by the Board.

rulemaking. In the EQ proceeding, the NRC stated that the rule covered "that portion of equipment important-to-safety commonly referred to as 'safety-related' . . . ." 48 Fed. Reg. 2728, 2730 (1983) (emphasis supplied). This statement makes clear that the Commission, similar to the Staff, Suffolk County, and three NRC adjudicatory boards, interprets the term "important to safety" more broadly than LILCO does.

It must be stressed that the Licensing Board's decision regarding the term important to safety represents a clearly logical interpretation of the NRC's regulations, an interpretation which serves to ensure that the regulations accomplish their intended purpose. The TMI accident and various studies have demostrated the dangers of strict reliance on only a narrow set of safety-related SS&Cs. Goldsmith et al., ff Tr. 1114, at 12-16, 70. Indeed, from the Shoreham record, it is further clear that reactor operators will in fact likely rely on many nonsafety-related SS&Cs in responding to transients and accidents. E.g., Speis, et al., ff. Tr. 6357, at 20, 22; Tr. 4502, 4769-70 (McGuire); Tr. 7126 (Rossi). In the County's view, any SS&C so relied upon by an operator is at least "important to safety." Under LILCO's view, however, if the SS&C was not classified as safety-related, no QA at all would be

required under the NRC's regulations for the SS&C. This would result in an untenable gap in the NRC's regulations. The Licensing Board's interpretation seeks to ensure that no such gap exists. See PID at 178.

Further, the Board's decision on important to safety is consistent with the very words of the regulation. Thus, the definition of SS&Cs which are "important to safety," as set forth in the Introduction to 10 CFR Part 50, Appendix A, is:

> structures, systems, and components that provide reasonable assurance that the facility can be operated without undue risk to the health and safety of the public.

This definition certainly encompasses those Part 100 functions which frame the definition of the term safety-related. However, while safety-related SS&Cs focus on three specified safety functions, the definition of important to safety SS&Cs is not so limited. Hence, from the very words of the regulation, the term important to safety implies a broader coverage than the term safety-related.

LILCO further argues against the interpretation reached by the Licensing Board by asserting that the meaning of the term important to safety is too vague. E.g., LILCO Brief at 45-54. This argument is unconvincing. First, LILCO asserts that the

license condition is vague for failing to define "important to safety." LILCO Brief at 45-46. This is no proper objection since the term already is defined in the Introduction to 10 CFR Part 50, Appendix A. Second, as described by the TMI-1 Licensing Board, the NRC's regulations are typically broadly drawn so as to not be too prescriptive and thus to permit flexibility in implementation of regulatory compliance. See 14 NRC at 1346. The term important to safety is no more vague than many other terms used in the regulations -- such as the "reasonable assurance" standard. This is not to say that more definition could not and should not be provided; in this regard, the County is on the record as being critical of the Staff's failure to pursue vigorously the enforcement of all regulatory requirements pertaining to SS&Cs important to safety. E.g., County Proposed Findings, 5/9/83, at 47-49.7/ The

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7/ LILCO argues that it is not credible that the Staff would have done so little to regulate QA for SS&Cs important to safety but not safety-related if the NRC Staff had believed that the terms important to safety and safety-related actually differed in scope. LILCO Brief at 42. The County disagrees. It is credible but points to the fact that the Staff has been far less than diligent in carrying out its regulatory responsibilities. This is one reason why the County has argued that little weight can be given to Staff views on the adequacy of the LILCO QA program. See County Proposed Findings, 5/9/83, at 47-49.

fact is, however, that with diligent effort and a commitment to regulatory requirements, there is no reason to believe that compliance with the Shoreham PID definitions is impossible. This especially is the case since the regulatory requirements permit and encourage a range of safety requirements dependent on function, rather than a single requirement for all SS&Cs important to safety. See PID at 177.

B. LILCO's Discussion of Past Regulatory History and Industry and NRC Staff Experience is Irrelevant

LILCO argues at length concerning the history of various regulations, especially Appendices A and B to Part 50 and Appendix A to Part 100, and the alleged past industry and NRC Staff practice of equating the term "important to safety" with the term "safety-related." E.g., LILCO Brief at 6-24, 40-45. There several brief answers to these arguments.

First, they are irrelevant because binding NRC precedent, discussed in Section II.A hereof, have resolved the issue. Further, the EQ rulemaking sets forth the up-to-the-date Commission statement on the issue and thus effectively negates any interpretation which would hold important to safety to be equivalent to safety-related. Second, as noted by the Shoreham Board, the past regulatory history is not at all clear. See

PID at 120. Under these circumstances, the Shoreham Board was perfectly justified in following the Appeal Board TMI-1 decision.

Finally, LILCO has argued that the record is essentially undisputed that the NRC Staff has always in the past interpreted the term important to safety in a restrictive, narrow sense to mean only safety-related. E.g., LILCO Brief at 31, 41, 43. In fact, however, Staff witness Conran testified that while there has been some confusion among the Staff regarding these terms, this has been primarily a terminology problem; Staff practice has been consistent to interpret the regulations in a manner consistent with the definitions adopted by the Shoreham Licensing Board in the PID. Tr. 7736-37 (Conran); Conran, ff. Tr. 6368, at 3-6. Accordingly, there clearly is evidence in the record which refutes LILCO's factual arguments and which supports the decision of the Board.8/

8/ In addition, Mr. Conran testified that he discussed the Denton Memorandum definitions with industry representatives and that no fundamental disagreements resulted. Conran, ff. Tr. 6368, at 5-6. If these definitions represented such a radical departure as LILCO portrays, a fundamental disagreement should have arisen from industry during these discussions.

C. Large Portions of the Utility Group Brief May Not Be Considered

The Utility Group Brief does not raise any legal issues which merit separate discussion by the County. However, the County objects to repeated efforts by the Utility Group: (a) to rely on data not in the evidentiary record; and (b) to have the Board rely on factual assertions regarding actions of the Utility Group or its members when those factual assertions again are not part of the evidentiary record. Such matters could only be considered by this Board if there were a motion to reopen the record granted by this Board. Since no such motion to reopen even has been filed, the Utility Group's citation of and reliance on these data are improper.

This Appeal Board thus should disregard the following portions of the Utility Group Brief which fall within (a) above:

page 1, footnote 1
page 6, Reg. Guide 1.151 discussion
pages 6-7, SER discussion
page 7, I & E Information Notice 83-41 discussion
pages 7-8, AIF letter discussion
page 8, March 1983 IEEE letter
page 9, footnote 11
page 16, footnote 20
page 18, Generic letter 83-28 discussion
page 27, footnote 32

This Board should likewise disregard the following portions of the Utility Group Brief which fall within (b) above:

page 2, ¶2, lines 3-4

page 3, footnote, line 1
page 4, last ¶, lines 2-7
page 9, ¶1, lines 12-13
page 9, last ¶
page 11, last ¶, continuing to top of page 13, to extent discussion applies beyond actions alleged to have been taken by LILCO
page 15 bottom - page 16 top, discussion of costs to utilities.

To a lesser degree LILCO has also improperly gone beyond the evidentiary record as well. The following portions of LILCO's Brief must be disregarded:

page 21, footnote 13
page 26, footnote 18
page 31, last line, through page 32, line 3 and footnote 26
page 47, footnote 43

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CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY BRIEF IN RESPONSE TO LILCO'S BRIEF ON APPEAL, dated March 2, 1984, have been served to the following this 2nd day of March 1984 by U.S. mail, first class.

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