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)	)	
	)	

UTILITY SAFETY CLASSIFICATION GROUP'S BRIEF AMICUS CURIAE

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Gulf States Utility Co.
Houston Lighting & Power Co.
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Public Service Electric & Gas Co.
Rochester Gas & Electric Corp.
Southern California Edison Co.
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SNUPPS
(representing Union Electric Co., Kansas Gas & Electric Co., Kansas City Power & Light Co., and Kansas Electric Power Coop., Inc.)

USCG, December 23, 1983

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I. INTRODUCTION

The Utility Safety Classification Group ("Utility Group" or "Group") consists of 39 electric utility companies who own over half of the planned or operating commercial nuclear units in this country. The Group formed in June 1983 to address the safety classification issue; its members were concerned that activities of the NRC Staff in various contexts were inconsistent with the historical interpretation of the regulatory term "important to safety." The Group seeks a reasoned generic resolution of the safety classification issue.1/

In the present proceeding,2/ the Group objects to the Licensing Board's distinction between the regulatory terms "important to safety" and "safety related" and, in particular, to the Board's imposition of a license condition embodying a broad, new definition of "important to safety." The Utility Group members will be harmed by this decision and have not yet had an opportunity to defend their interpretation of "important to safety" in an appropriate forum. The Group believes it must make its views known here because, to date, the NRC Staff has not solicited the views of industry on this important issue.

1/ See, e.g., letter to Shoreham Licensing Board from Edwin J. Reis, NRC Staff Counsel (Sept. 16, 1983) (forwarding Utility Group letter to William J. Dircks (Aug. 26, 1983)); letter to Shoreham Appeal Board from Richard J. Rawson, NRC Staff Counsel (Dec. 20, 1983) (forwarding information relating to the Utility Group).

2/ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC ___ (1983) (Partial Initial Decision Sept. 21, 1983) (hereinafter cited as PID).

II. SUMMARY

There are four crucial points:

(1) Group members have interpreted the terms "important to safety" and "safety related" as synonymous, and the NRC has licensed plants based on this interpretation.

(2) Any application of a broader definition of "important to safety" to Shoreham will have a substantial adverse impact on the nuclear power industry as a whole. As past practice indicates, the license condition imposed on Shoreham will very likely be imposed on other plants as well, resulting in vague and unnecessary requirements.

(3) There is no demonstrable basis for such a drastic regulatory development.

(4) If a change of such magnitude is nonetheless to occur, it should not be enacted via adjudicatory proceedings or Staff demands involving individual plants.

The Utility Group is committed to complying with NRC regulations and to ensuring that nuclear power plants are constructed and operated safely. Group members can and have been accomplishing these goals by interpreting the term "important to safety" synonymously with the term "safety related." This interpretation, the Group believes, is faithful to the original intent of the regulations, confirmed by longstanding practice, and safe. While "important to safety" and "safety related" are synonymous, the Group recognizes that the NRC's statutory authority3/ is not limited to safety related structures, systems and components. Where a specific need for broader regulation exists, the NRC has in the past regulated specific non-safety related areas (e.g., those involving fire protection and security).4/

3/ In this brief, the terms "NRC" and "Commission" are used to refer to both the Nuclear Regulatory Commission and the Atomic Energy Commission.

4/ Moreover, while industry does not believe that an expanded definition of "important to safety" is a necessary regulatory development, utilities agree

The license condition imposed on Shoreham presupposes acceptance of an expanded interpretation of "important to safety." While the Group's members have often voluntarily exceeded NRC requirements in order to give added assurance of safe and reliable operation, they have justifiably relied on the NRC's long-standing equation of "important to safety" and "safety related" in complying with the Commission's regulations. This is not a matter of little consequence. "Important to safety" appears throughout the NRC's regulations and guidance documents; thus an expansion of the term's scope would substantially affect diverse and important aspects of the design, construction and operation of nuclear power plants.

Past NRC and industry practice in interpreting these terms synonymously has permitted their application with the certainty and consistency necessary for any regulatory requirement. In contrast, the Shoreham Licensing Board, in endorsing a broader interpretation of "important to safety," has not provided guidance on what the new reading actually means -- on how industry and the NRC Staff are to comply with the expanded regulatory concept of "important to safety." It comes as no surprise, accordingly, that the NRC Staff is now beginning to apply inconsistently the vague definition endorsed in the Shoreham proceeding to other plants. Moreover, license conditions similar to that imposed by the Shoreham Board are likely, in view of the Staff's prior

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(footnote continued)

with the concept embodied in the Denton Memorandum (see section V.B. below) that non-safety related structures, systems and components can and do play a role, in varying degrees, in the safe and reliable operation of nuclear plants and that they should be treated accordingly. But the NRC Staff has made no convincing showing that this concept needs to be elevated to the level of a broad regulatory requirement under the rubric of "important to safety" in order to provide reasonable assurance of no undue risk to the public health and safety.

practice, to become part of future licenses with or without additional adjudication.

Finally, proceedings focusing on individual plants are not the place for the NRC to make radical, generic regulatory changes capable of affecting the licensing and operation of every nuclear power plant in the United States. Such regulatory changes should be the subject of generic proceedings adequate to engage their complexities and potential impacts. Expansion of the scope of "important to safety" in an ad hoc fashion results in confusion and uncertainty for the NRC Staff and industry. Such expansion is also inconsistent with the procedural requirements of NRC precedent and the Administrative Procedure Act.

III. REGULATORY HISTORY AND INDUSTRY PRACTICE CONFIRM THAT THE TERMS ARE SYNONYMOUS

The terms "important to safety" and "safety related" were first used in the NRC's regulations in the early 1970s. Since then the Utility Group's members have interpreted and applied the terms synonymously. Nuclear power plants were designed, built, licensed and operated in reliance on the equality of these terms. Regulations and guidance documents issued by NRC have been interpreted and used on this basis. Commitments and information have been provided to and accepted by the NRC using this language. As demonstrated in LILCO's brief, the record in the Shoreham licensing proceedings makes unmistakably clear that the industry's interpretation of these two terms as synonymous was justified and inevitable given the NRC's use and application of them.

A. NRC Regulations

The record reflects that LILCO provided numerous examples of NRC regulatory history and regulations equating the terms "important to safety" and "safety related." The Group endorses the pertinent analysis in LILCO's brief and believes the following three examples are particularly compelling.

First, "important to safety," as used in the final version of Appendix A to 10 CFR Part 50, was substituted for a variety of other terms that had previously appeared in the proposed version of Appendix A, all of which referred to features in the safety related set. Compare 32 Fed. Reg. 10,213-18 (1967) with 36 Fed. Reg. 3255-3260 (1971). The Federal Register notice accompanying the final rule did not mention the substitution as a substantive change. 36 Fed. Reg. 3256.

Second, Appendix B to 10 CFR Part 50 applies solely to activities affecting the safety related functions of structures, systems and components that prevent or mitigate the consequences of an accident that could cause undue risk to the public health and safety. PID at 173, 209. The Appendix B rulemaking and related NRC regulations imply that Appendix B is simply a more detailed specification of the requirements contained in General Design Criterion (GDC) 1 of Appendix A to 10 CFR Part 50. See 34 Fed. Reg. 6599 (1969); 10 CFR § 50.34(a)(7). Thus, the term "important to safety" in Appendix A, GDC 1, must be synonymous in scope and meaning with the term "safety related." See also 10 CFR § 72.15(a)(14); 48 Fed. Reg. 1026 (1983) (to be codified at 10 CFR § 50.54.5/

5/ The Utility Group also notes that the report of the Kemeny Commission concluded that the NRC's regulations only require the application of quality assurance to "safety related" equipment. PID at 564 (J-278). This conclusion confirms the historical interpretation of these terms shared by the industry and, until recently, the NRC Staff.

Third, the proposed version of Appendix A to 10 CFR Part 100 clearly equated the terms "safety related" and "important to safety," and used them interchangeably. See 36 Fed. Reg. 22,601, 22,604 (1971). Because there is no indication in the preamble to the final Appendix A to Part 100 that the NRC either intended to alter the scope of its proposals or to distinguish between "important to safety" and "safety related," see 38 Fed. Reg. 31,279 (1973), no substantive change from the proposed version can be inferred.

B. NRC Guidance Documents and Reports

Many NRC regulatory guides either explicitly or implicitly equate "important to safety" with "safety related." Regulatory Guide 1.105, "Instrument Setpoints" (Rev. 1, Nov. 1976), which defines "important to safety" in terms of the Part 100, Appendix A safety functions, provides an unmistakable example of this equivalence.6/ A very recent example appears in Regulatory Guide 1.151, "Instrument Sensing Lines" (July 1983). The introduction to this guide explains that 10 CFR § 50.34 and 10 CFR Part 50, Appendix A, GDC 1, contain certain requirements for structures, systems and components important to safety. After stating these pertinent regulatory requirements, the guide describes an acceptable method for complying "with the Commission's regulations with regard to the design and installation of safety related instrument sensing lines . . . ." Regulatory Guide 1.151 at 1.

Similarly, Staff safety evaluation reports (SERs) routinely include statements equating "safety related" and "important to safety." For example, in discussing GDC 2's seismic design requirements, the Staff typically states in SERs that this GDC

6/ Regulatory Guide 1.105, Rev. 1, at 1.105-2; accord Regulatory Guide 1.105, Rev. 2 (issued for comment Dec. 1981); Regulatory Guide 1.118, Rev. 2 (June 1978) (adopting definition in Regulatory Guide 1.105).

> requires that nuclear power plant structures, systems and components important to safety be designed to withstand the effects of earthquakes without loss of capability to perform their safety function. These plant features are those necessary to assure (1) the integrity of the reactor coolant pressure boundary, (2) the capability to shut down the reactor and maintain it in a safe shutdown condition, or (3) capability to prevent or mitigate the consequences of accidents which could result in the potential offsite exposures comparable to 10 CFR 100 guideline exposures.7/

Thus, the Staff has defined "important to safety" plant features as those covered in Appendix A of Part 100, which are the "safety related" set of structures, systems and components. See also NUREG-0420 at 3-8 and NUREG-0528 at 3-6 (equating the terms in the context of missile protection under GDC 4).

Another recent example is I&E Information Notice 83-41 (June 22, 1983), entitled "Actuation of Fire Suppression System Causing Inoperability of Safety-Related Equipment" (emphasis added). The stated intent of the notice is to "alert licensees to some recent experiences in which actuation of fire suppression systems caused damage to or inoperability of systems important to safety" (emphasis added). This notice clearly uses the terms "important to safety" and "safety related" interchangeably.

C. Industry Practice

There has been a startled reaction by industry to the NRC Staff's recent efforts to apply the term "important to safety" to non-safety related equipment and functions. The Committee on Reactor Licensing and Safety of the Atomic Industrial Forum (AIF) sent William J. Dircks a letter stating, in pertinent part:

7/ E.g., NUREG-0420 at 3-1, NUREG-0899 at 3-1, NUREG-0528 at 3-1, NUREG-0742 at 3-1, NUREG-0422 at 3-1 (emphasis added); see also NUREG-0968 at 33-34 (analogous equation of terms in the Clinch River Breeder Reactor SER).

> Our [safety classification] subcommittee is virtually unanimous in its agreement that, with regard to interpretation of the regulations, the terms "important to safety" and "safety related" have been considered synonymous.

Letter from M. R. Edelman (AIF) to W. J. Dircks (NRC) (Aug. 29, 1983).8/

Similarly, the Nuclear Power Engineering Committee of IEEE wrote Robert E. Minogue, Director of the Office of Nuclear Regulatory Research, in May 1982,9/ making clear its view that expanding the scope of "important to safety" to encompass non-safety related systems would be contrary to the long-standing interpretation of NRC regulations by both industry and the Staff. Yet another example is a recommendation by the Nuclear Standards Board (of the American National Standards Institute) Ad Hoc Committee on "Important to Safety" that states as follows:

> The current practice utilizing two major classifications, safety related and nonsafety related, for design, construction, testing and operation of nuclear power plants is acceptable and appropriate. This has occurred with a general understanding and usage that the terms "Important to Safety" and "Safety Related" are equivalent in meaning.

Letter from Walter H. D'Ardenne to George L. Wessman (Mar. 30, 1983) (emphasis added).10/ These industry statements of the historical equality of the terms are also reflected in recent NRC Licensing Board and Appeal Board rulings discussed in section V.D.4.

8/ See letter to Shoreham Licensing Board from Edwin J. Reis, NRC Staff Counsel dated Sept. 20, 1983 (forwarding AIF letter).

9/ Burns et. al, ff. Tr. 4346, at Attachment 4.

10/ LILCO Exhibit 76. Although this exhibit was not admitted into evidence, LILCO is appealing its exclusion.

IV. THERE IS NO NEED TO EXPAND "IMPORTANT TO SAFETY"

The NRC Staff has not advanced any detailed basis for concluding that "important to safety" must be expanded beyond "safety related" equipment and systems in order to provide reasonable assurance of no undue risk to the public health and safety. To the contrary, after extensive scrutiny, the Shoreham Licensing Board concluded that LILCO, using the long-standing interpretation of "important to safety," had designed and constructed Shoreham safely, meeting or exceeding NRC requirements. PID at 148, 200. Thus a utility equating "important to safety" with "safety related" can meet the regulations, even as the Staff would now interpret them, by according appropriate significance to non-safety related structures, systems and components. Moreover, the utilities in this Group who operate plants do so premised upon the same definitions LILCO used, and the Staff has not found safety problems as a result.11/

Utilities have always recognized that non-safety related structures, systems and components do play a role in the safe, reliable operation of nuclear plants. As a matter of good engineering judgment and management, utilities apply quality measures to these non-safety related items commensurate with the function each performs.

11/ The Staff's recent notification to this Appeal Board confirmed the lack of any safety problem. See letter to Shoreham Appeal Board from Richard J. Rawson, Staff Counsel (Dec. 20, 1983) (enclosing, inter alia, Minutes of CRGR Meeting Number 50 (Nov. 14, 1983)). The NRC's Committee to Review Generic Requirements (CRGR) reviewed the safety classification issue and concluded that "[t]here is no clear and present safety problem that exists as a result of the blurred usage of the terms 'important to safety' and 'safety related' and the frequent interchangeable and synonymous use of these terms in licensing safety reviews." Minutes of CRGR Meeting Number 50, at 2; see id. at 3.

Also, the NRC has imposed precise requirements on particular non-safety related structures, systems and components when specific needs to do so have been identified. Significantly, in many instances, the non-safety related requirements focus on protecting safety related equipment rather than on imposing requirements on non-safety related equipment for its own sake. For example, fire protection equipment is not generally safety related but is covered by 10 CFR Part 50, Appendix R in order to protect structures, systems and components important to safety (i.e., safety related).12/ Similarly, certain design recommendations are made in Regulatory Guide 1.29, "Seismic Design Classification" (Rev. 3, Sept. 1978), for non-safety related (non-seismic category I) equipment that could adversely affect safety related equipment in a seismic event. Regulatory Guide 1.29 at 1.29-2.

Section § 50.59 also bears on a facility's non-safety related aspects. This section requires licensees throughout the life of the plant to notify the NRC prior to making certain changes in the facility or its procedures, and prior to conducting tests or experiments. Safety related and non-safety related modifications, tests and experiments must be evaluated under this provision whatever definition of "important to safety" is used.

Another example, Regulatory Guide 1.70, "Standard Format and Content of Safety Analysis Reports for Nuclear Power Plants," (Rev. 3, Nov. 1978), results in a large number of non-safety related structures, systems and components being addressed in safety analysis reports (SARs) in varying degrees. See, e.g., PID at 714 (J-695). The Staff conducts its review of these SARs in accordance with the Standard Review Plan. Thus, the Staff reviews the design

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12/ Appendix R uses "important to safety" and "safety related" interchangeably. 10 CFR Part 50, App. R, § I.

and quality of a number of non-safety related items. See, e.g., PID at 798 (J-883, -884); 802 (J-895 to -898). Further, once a plant operates, as do many plants owned by Utility Group members, technical specifications govern the types of equipment that must be operable for a given plant condition. The technical specifications include requirements for certain non-safety related equipment. See, e.g., PID at 640-41 (J-498) (non-safety related turbine bypass); 656-57 (J-546) (non-safety related drywell coolers).

In addition to NRC-sponsored measures, the industry is also taking steps that will improve performance in non-safety related areas. INPO's Significant Event Evaluation and Information Network (SEE-IN) Program, endorsed by the NRC in Generic Letter 82-04,13/ provides for the central collection and screening of all events reported from both U.S. and foreign nuclear plants. This program is not limited to safety related structures, systems and components. See, e.g., PID at 898 (K-126); 901 (K-136); 902 (K-137). INPO is now also responsible for the Nuclear Plant Reliability Data System (NPRDS). This computerized system, currently under development, contains data on the reliability of plant equipment that will allow all nuclear plants to introduce and receive failure data on individual pieces of safety related and certain non-safety related equipment. See, e.g., PID at 899-90 (K-131); 918-19 (K-178); 919 (K-182).

Finally, individual utilities, recognizing the role of non-safety related equipment in the safe, reliable operation of their plants, apply quality measures to non-safety related equipment. As LILCO's testimony in this case reflects, utilities impose certain controls on maintenance performed in non-safety related areas. Although practices vary among utilities, common

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13/ See Burns et al., ff. Tr. 4346 at 61.

measures include: (a) preventive maintenance programs for non-safety related structures, systems and components, see, e.g., PID at 918-19 (K-176 to -182); (b) internal controls for procurement and testing of non-safety related equipment, see, e.g., PID at 889 (K-104); 892-93 (K-115); (c) the same or similar work procedures for safety related and non-safety related activities, see, e.g., PID at 588-89 (J-347); 599-600 (J-375, -379); (d) the same maintenance control forms for safety related and non-safety related items, see, e.g., PID at 890-91 (K-107 to -110); (e) audit/review of non-safety related maintenance and maintenance records, see, e.g., PID at 891 (K-111); 893-94 (K-116, 117); (f) the same process for safety related and non-safety related design activities/modifications, see, e.g., PID at 861-67 (K-33 to -47); and (g) training on subjects relating to non-safety related maintenance activities, see, e.g., PID at 599-600 (J-375, -379).

In addition, plant start-up test programs generally include integrated tests of major plant systems, both safety related and non-safety related. See, e.g., PID at 600-01 (J-383). Moreover, during plant operation, on-site safety evaluation groups generally review, among other matters, operating experience, both plant-specific and industry-wide. In many instances, these reviews explore the role of non-safety related equipment in the event under investigation. See, e.g., PID at 895 (K-120); 898 (K-128).

It must be emphasized that: (1) the activities discussed above provide only representative examples of non-safety related quality measures, and (2) the activities discussed do not necessarily reflect what any particular utility does for non-safety related items; individual utilities exercise their judgment in selecting the measures they believe to be appropriate. It is apparent, however, that utilities do take steps to ensure the safe and reliable operation of non-safety related items. Given this reality, no need exists to

impose new regulatory requirements on non-safety related equipment by expanding the definition of "important to safety."

V. NRC STAFF EFFORTS TO CHANGE THE MEANING OF "IMPORTANT TO SAFETY" HAVE PRODUCED CONFUSION AND INCONSISTENCY

A. TMI-1

The first prominent indication that the Staff believed "important to safety" should be construed more broadly than "safety grade" (or "safety related") came in the restart hearing for Three Mile Island Unit 1 (TMI-1).14/ Although both the Licensing Board and the Appeal Board accepted the Staff's new definition of "important to safety" in TMI-1, they apparently did not have the benefit of testimony from either the licensee or the rest of industry on the historical interpretation and application of this term.15/ Also, because the TMI-1 hearing focused narrowly on particular components and design requirements, the record did not consider the larger regulatory implications of an expanded definition of "important to safety."

B. The Denton Memorandum

The Denton Memorandum16/ elaborated on Staff testimony in the TMI-1

14/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 NRC 1211 (1981), aff'd, ALAB-729, 17 NRC 814 (1983). The Staff may have been moved in part by the criticism leveled at it in the wake of TMI. See PID at 564 (J-278); see also NRC Regulatory Agenda (Quarterly Report June-September 1983), NUREG-0936, Vol. 2, No. 3, at 99 (Nov. 1983).

15/ There is no indication in the Licensing Board and Appeal Board opinion that any evidence was presented on the licensee's or industry's interpretation of "important to safety."

16/ Goldsmith et al., ff. Tr. 1114 (Exhibit 1).

proceeding. It meant to establish a new and expanded (but hopelessly vague) definition of "important to safety" for use by all NRR personnel. The Shoreham Licensing Board found, as the record required, that the Denton Memorandum's expanded definition of "important to safety" differed from the historical construction of the term. PID at 546 (J-229), 547 (J-230), 549-51 (J-235 to -241), 554-55 (J-248 to -252), 749 (J-770). The Denton Memorandum was never officially promulgated to the industry or even widely circulated within the NRC. PID at 169. Thus, the memorandum was not the product of the sort of process essential to determining whether an expansion of "important to safety" was warranted, what the details of that expansion might be, and what effects such a change would have.17/

C. Shoreham

The Licensing Board did not adequately explain its reasons for imposing the resulting condition on Shoreham, especially given the Board's conclusion that LILCO had more than adequately ensured the safe, reliable operation of the plant. E.g., PID at 177-78, 180. Nor did the Board provide LILCO with useful guidance as to what it must do in the future to comply with the condition. This vagueness will be even more troublesome when there are attempts to apply the Shoreham condition to other, dissimilar plants.

The imposition of a license condition on Shoreham foreshadows significant adverse effects on the members of this Utility Group. And while the new definition of "important to safety" will not cause "backfitting" problems at

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17/ Mr. James Conran, who contributed substantially to the memorandum, claimed to have consulted with industry on the broader definition of "important to safety," but that testimony was refuted on the record, PID at 549-50 (J-237, -238), and is further refuted by the existence of this Utility Group.

Shoreham, PID at 178, the same will not necessarily be true at other plants, especially those which are currently operating. Operating plants may have been designed and reviewed to meet industry standards and NRC guidance documents older than those used at Shoreham. Thus, if Shoreham is the yardstick, older plants may have to backfit. At a minimum, each operating plant, as well as each operating license applicant, may have to undergo the exhaustive scrutiny of the impact of the definitional controversy that was conducted on the Shoreham record. Such plant-by-plant scrutiny would severely tax finite industry and NRC resources, yet would not result in any apparent safety benefits. See note 11 above.

Finally, by imposing a license condition on Shoreham, the Licensing Board has created a situation that may effectively deprive subsequent applicants of an opportunity to be heard on the safety classification issue. In the Group's experience, it is the NRC Staff's practice to use previously issued operating licenses as the basic model for new licenses. Thus, if left standing, the Shoreham condition will almost certainly be included in subsequent operating licenses issued by the NRC. This would place many utilities who have plants nearing completion in an untenable situation. Faced with the imposition of a definition of "important to safety" broader than the definition used for the design and construction of the plant in question, a utility would have to pay a significant price to obtain a hearing on the issue. Since operating licenses are generally issued on the eve of plant operation, the utility would have to forego operation or accede to the definition while being heard.18/ The former course would impose substantial costs. The latter might

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18/ Even if utilities receive adequate notice of an imminent license condition, the precedent and regulatory momentum created by the Shoreham condition, if left standing, are likely to dictate the result of any challenge to a like condition imposed elsewhere.

require extensive changes in programs19/ (and, perhaps, the plant) despite a well-founded belief in the adequacy of the original design and construction. Agency action that imposes substantial costs on members of the regulated public in the exercise of their rights is, at best, bad policy. It is particularly distasteful when the regulated public has justifiably relied on a long-standing interpretation of a regulatory term -- an interpretation fostered by the NRC's own official pronouncements.

D. Recent Ad Hoc Efforts to Expand "Important to Safety"

1. ATWS Rulemaking

Preliminary versions of the Anticipated Transient Without Scram (ATWS) rule contained supplementary information that would have classified some non-safety related ATWS prevention and mitigation equipment as "important to safety."20/ Such a requirement, had it been adopted, could have created substantial confusion. For example, the ATWS rule places certain requirements on the standby liquid control system in BWRs but does not require the system to have automatic start capability. If the ATWS rule had nonetheless classified the standby liquid control system as "important to safety," GDC 20 would

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19/ See PID at 733-34 (J-736) (documentation changes costly). As the Shoreham Board noted, these expenses have already been borne by LILCO because of its earlier FSAR commitment to go beyond what it believed was required by the regulations. Id.

20/ See Enclosure A to SECY-83-293, dated July 19, 1983. A table entitled "Guidance Regarding System and Equipment Specifications" indicates that certain equipment need not be "safety related," but a footnote to the table states that "this equipment is in the broader class of structures, systems and components important to safety." This footnote appeared for the first time in this SECY document; the proposed ATWS rule made no mention of "important to safety." See 46 Fed. Reg. 57,521 (1981).

appear to have required automation in conflict with the apparent intent of the ATWS rule itself. By the same token, other GDCs using the term "important to safety" may have imposed additional unintended requirements. Thus, the attempt to inject "important to safety" into the ATWS rulemaking provides a prime illustration of disjointed and unreviewed efforts to define, on a case-by-case basis, a new category of equipment to which NRC regulations will apply. Fortunately, the reference to "important to safety" has been removed from the approved, but not yet published ATWS rule.

2. EQ Rulemaking

In contrast, on January 21, 1983, the NRC promulgated a final rule on environmental qualification of electric components (EQ), which by its terms applies to electric equipment "important to safety," including safety related electric equipment and certain non-safety related equipment. 10 CFR § 50.49(b)(2)(3). The addition of the term "important to safety" in defining the scope of the rule, and the addition of §§ (b)(2) and (3), were made after the close of the public comment period. 47 Fed. Reg. 2876 (1982); 48 Fed. Reg. 2729 (1983).

The environmental qualification rulemaking does not provide an adequate basis for expanding the definition of "important to safety" to any equipment and functions other than, perhaps, those directly involved in that rulemaking. Most important, the EQ rule provides a functional definition of a much narrower set of structures, systems and components than the broad category endorsed (without a functional definition) by the NRC Staff in the Shoreham proceeding and apparently embodied in the Shoreham license condition.21/

21/ Compare Tr. 19,529-30 (Noonan) (little or no equipment in (b)(2) category) with PID at 551-52 (J-242) (almost everything in the plant).

3. NRC Staff Actions

A new, expanded concept of "important to safety" also appears in Generic Letter 83-28, dated July 8, 1983, issued as a result of the Salem incident. See Generic Letter 83-28, at § 2.2.1.6. This letter indicates that utilities should have a broader classification category. Not surprisingly, the letter gives no guidance on the boundaries of this broader class. None exists.22/ Moreover, as already noted, utilities do not have, nor has the NRC previously required, such a "broader class." Nonetheless, each utility is now apparently expected to develop its own functional definitions of structures, systems and components "important to safety," and then apply some as yet undefined set of standards to that set. In a similar vein, NRC Staff reviewers of operating license applications have begun to ask questions implying that applicants should have a broad classification category "important to safety." These recent questions appear designed to "encourage" applicants to abandon the traditional two-tiered safety related/non-safety related classification scheme.

4. Licensing and Appeal Board Actions

The issue of important to safety has also been raised in a number of individual proceedings with results inconsistent with the Shoreham Licensing Board opinion. For example, the Appeal Board in the Diablo Canyon proceeding confronted contentions that "important to safety" had a broader meaning than "safety related." In discussing issues to be litigated in the case during a prehearing conference, the Appeal Board noted that historically

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22/ See PID at 551-52 (J-242, -243); see also note 32 below.

there had been no distinction between "safety related" and "important to safety":

> We reviewed the history of this particular application, and whereas in the letter that was written in 1981, which makes a distinction between items which are important to safety and items which are safety-related, and to the extent that such a distinction now exists, we do not believe that such a distinction was intended between General Criterion A and the items covered by Appendix B.
>
> . . . .
>
> So at that time [1974], the Staff explicitly and using the terminology "important to safety," agreed with the categorization of equipment, structures, systems and components [Seismic Category I] established by the Applicant. I think the regulatory history is fairly well defined here. If there is now to be a distinction made between safety-related items and important to safety, it is our opinion that it should not be applied retrospectively to the design phase of the Diablo Canyon plant.

Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), Docket Nos. 50-275 and 50-323, Tr. D-67 to -68 (Aug. 23, 1983) (emphasis added); see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), Memorandum and Order (slip. op.), at 2-3 (May 13, 1983).23/

In sum, the NRC Staff's ad hoc efforts to expand "important to safety" underscore the regulatory chaos that now exists with respect to the term. Inconsistencies also exist among recent NRC decisions. These developments reflect the inevitable confusion created by attempts to make sweeping generic regulatory changes through case-by-case adjudications.

23/ In the Seabrook case, intervenors also attempted to raise a contention concerning systems interaction and the classification of equipment "important to safety" identical to the contention litigated in the Shoreham proceeding. In contrast to Shoreham, the Licensing Board rejected this contention. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1061-62 (1982).

VI. EXPANSION OF IMPORTANT TO SAFETY SHOULD NOT BE ATTEMPTED IN INDIVIDUAL ADJUDICATIONS

The Staff's efforts to revise the regulatory definition of "important to safety" may be viewed from two perspectives: either the Staff is attempting to create binding policy through individual adjudications (TMI-1 and Shoreham) or through informal promulgation of a binding "rule" (the Denton Memorandum). In either case, the NRC's actions run afoul of NRC precedent and the Administrative Procedure Act. In addition, the "important to safety" condition imposed on Shoreham offends due process. It is far too vague to provide adequate guidance on what is required for the design, construction and operation of nuclear power plants.

A. NRC Regulations Should Be Expanded Only through Rulemaking

The redefinition of "important to safety" advocated by the Staff and endorsed by the Licensing Board constitutes a change in the NRC's regulations and amounts to the formulation of new rules for industry-wide application. This redefinition should have occurred, if at all, in a notice and comment rulemaking. It is well to be clear that the Utility Group is not yet endorsing rulemaking as a means of resolving the "important to safety" issue; to date, the Group has not filed a petition for rulemaking. Our point is this: if a change in the meaning of a regulatory term is to be made, thereby expanding the scope of every regulation in which it appears, that change should be accomplished only through rulemaking.24/

24/ If the NRC Staff were to recognize the historical equality of "important to safety" and "safety related," any concerns it has about quality measures for non-safety related items should be capable of resolution without rulemaking. The NRC Staff has, in the past, resolved issues of generic appli-

(footnote continued)

The NRC has long recognized that individual adjudications, which consider the views of an intervenor group, an applicant and the NRC Staff, are generally inadequate to resolve generic issues:

> In our view, a generic subject . . . should be resolved with the benefit of a wider spectrum of views. This is not feasible in the confines of one adjudicatory record.

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 814-15 (emphasis added), clarified, CLI-74-43, 8 AEC 826 (1974). The NRC's practice of addressing "environmental issues common to many applications and handl[ing] them in 'generic' proceedings" has been applauded by federal courts. Ecology Action v. AEC, 492 F.2d 998, 1002 (2d Cir. 1974).

The policy considerations identified in Vermont Yankee are considerably more compelling where, as here, a significant change in long-standing industry and NRC interpretation and application of a regulatory term is sought. The Appeal Board has recognized this:

> [W]here, as here, the interpretation in issue is of long standing, and has received the endorsement of several different appeal and licensing boards, the rulemaking route makes especially good sense.
>
> . . . [W]hether or not this belief [in the inadequacy of the long-standing interpretation] is meritorious is a question more appropriately explored in rulemaking where (1) all information bearing upon the matter can be received and evaluated (as it should be) on a generic basis; and (2) be it then concluded that [a change should be made] specific standards can be prescribed for determining . . . whether and to what the applicant must concern itself . . . .

(footnote continued)

cability through the use of NUREGs or Regulatory Guides when the matter was clearly within the scope of existing NRC's regulations and limited in impact. Thus, if the Staff could identify very precise safety concerns in the non-safety related area, it could determine whether it is appropriate to proceed through the use of guidance documents (NUREGs, Regulatory Guides or the like) rather than rulemaking. Even this process, however, should include an opportunity for industry participation.

New England Power Co. (NEP Units 1 and 2), 5 NRC 733, 742-43, review declined CLI-77-14, 5 NRC 1323 (1977). In view of the long-standing synonymous treatment of "important to safety" and "safety related," the rulemaking route would have made "especially good sense" before the NRC Staff attempted a change in the NRC's regulations.25/

Finally, engaging essentially generic issues in individual licensing proceedings is inappropriate where, as is now apparently the case, rulemaking is about to begin. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814, 889 (1983), quoting Potomac Electric Co. (Douglas Point Generating Station), ALAB-218, 8 AEC 79, 85 (1974). Recently, the NRC has expressed an intent to include, as part of a rulemaking on the scope of Appendix B, an effort to "eliminate any possible confusion over the definition of the terms 'important to safety' and 'safety related.'" NUREG-0936, Vol. 2, No. 3, at 99 (Nov. 1983). According to this regulatory agenda, the rulemaking is scheduled to start in January 1984. The availability of a forum in which all interested parties can participate militates strongly against changing the historical interpretation of "important to safety" in the Shoreham proceeding or any other individual case.

Quite apart from NRC practices, general principles of administrative law favor rule-making in resolving issues affecting large segments of the public. As Professor Davis has emphasized, rulemaking allows (a) agencies to gauge the impact of their action on all affected parties and (b) all members

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25/ In New England Power, the Board was apparently influenced by at least four Appeal Board decisions endorsing a particular interpretation. Although TMI-1 and Shoreham do endorse a broader interpretation of important to safety, many cases, some involving members of this Group, have explicitly or implicitly endorsed the equality of important to safety and safety related by licensing plants designed and built using this assumption. Cf. Diablo Canyon and Seabrook, page 19 above.

of the regulated public to participate. Davis, 1 Administrative Law Treatise § 6:38, 625 (2d ed. 1979). Professor Davis concludes by observing that, since "rulemaking procedure has been so much strengthened during the 1970s, the reasons for substituting rulemaking procedure for adjudication procedure for major policymaking that needs a factual foundation have become overwhelming." Id.

Moreover, although the NRC has discretion to change its regulatory requirements in individual adjudications,26/ this discretion must not be abused. NLRB v. Bell Aerospace, 416 U.S. 267, 294 (1974). Significantly, a recent series of Ninth Circuit cases reversed agency policymaking that occurred in individual cases rather than rulemaking. Ford Motor Company v. FTC, 673 F.2d 1008 (9th Cir. 1981), reh'g and reh'g en banc den. 673 F.2d 1010 (1981), cert. den. 103 S.Ct. 358 (1982); Patel v. Immigration and Naturalization Service, 638 F.2d 1199 (9th Cir. 1980). In Ford the Ninth Circuit ruled that FTC efforts to revise (and in doing so to establish new) rules of widespread applicability had to be undertaken through rulemaking in view of the "national interpretation" of the Uniform Commercial Code the agency was seeking to develop. Id. at 1010.27/ NRC's actions in the TMI and Shoreham proceedings raise substantially similar concerns.

Consequently, if expansion (or clarification) of the scope and meaning of "important to safety" is appropriate -- and the Utility Group thinks it is not -- only a rulemaking addressing all aspects and impacts of a new

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26/ SEC v. Chenery, 332 U.S. 194, 203 (1947).

27/ The court may have also been troubled by the FTC's election to proceed through adjudication even though rulemaking proceedings had been commenced. Id. at 1012 n.2 (Reinhardt, J., dissenting from denial of rehearing en banc). Analogous circumstances exist here since the NRC's Regulatory Agenda indicates that relevant rulemaking proceedings are imminent. See page 22 above.

definition can do the job. The complexities created by changing a term that pervades the NRC's regulations and guidance documents demand this treatment. Continued efforts to address this issue on an ad hoc, fragmented basis will exacerbate the existing confusion and inconsistency. Moreover, expansion of "important to safety" on a plant-by-plant basis or through narrowly focused, piecemeal rulemakings would be an unjustifiable waste of time and resources.

B. The Commission's Redefinition of "Important to Safety" Constitutes Informal Rulemaking Conducted in Violation of the Administrative Procedure Act

As noted on page 20 above, the Shoreham record suggests that the NRC's redefinition of "important to safety" in the Denton Memorandum amounted to de facto rulemaking, conducted in violation of the Administrative Procedure Act.

Under the APA, agency action is a "rule" if it constitutes

> the whole or part of [1] an agency statement of general or particular applicability and [2] future effect designed to [3] implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency . . . .

5 U.S.C. § 551(4)(1982) (emphasis added). Viewed in light of these criteria,28/ the development and promulgation of the "important to safety" redefinition in the Denton Memorandum amounted to the adoption of a rule. First, the Denton Memorandum reinterpretation now constitutes the NRC Staff's statement of the regulatory requirements applicable to all owners and operators of nuclear power plants.29/ Second, the redefinition was undoubtedly

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28/ The APA's definition should be broadly interpreted. American Postal Workers Union, AFL-CIO v. United States Postal Service, No. 81-2174, slip op. at 20 n.8 (D.C. Cir. May 6, 1983).

29/ The NRC Staff's position in Shoreham that LILCO must embrace the Denton Memorandum reflects a clear intent on the part of the Staff to implement the memorandum as a binding rule. See PID at 726-27 (J-721).

intended to have prospective effect.30/ Finally, the memorandum interprets the legal obligations governing plant design, construction and operation, and in altering those requirements, prescribes new substantive criteria that must be met. PID at 554 (J-249).

Since promulgation of the Denton Memorandum constituted de facto rulemaking, the promulgation must pass muster under the APA's procedural requirements. It obviously cannot. The APA requires that agencies publish notice of proposed rules in the Federal Register and provide interested parties with an opportunity to comment. 5 U.S.C. §§ 553(b), (c) (1982). These procedural safeguards are not mere window dressing; they represent the principal means through which the public can participate in the formulation of regulatory policy. See National Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978). In disregard of these requirements, the Denton Memorandum "rulemaking" was largely a private matter; little advice or counsel was solicited of parties outside the NRC, e.g., PID at 549-50 (J-237), 563 (J-275). This privacy cuts against the core of the APA. See, e.g., Trans-Pacific Freight Conference v. Federal Maritime Commission, 650 F.2d 1235, 1245 (D.C. Cir. 1980), cert. den. sub nom. Sea Land Service, Inc. v. Federal Maritime Commission, 451 U.S. 984 (1981).

Nor does the Denton Memorandum "rule" fall within any of the exemptions to the APA's notice and comment requirements.31/ Exemptions are

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30/ See PID at 547 (J-230) (Mr. Denton's description of rationale in issuing memorandum); 554-55 (J-250, 251) (Staff headed towards systematic application).

31/ Exemptions are disfavored, since they serve to insulate agency decisions from public scrutiny. State of New Jersey v. EPA, 626 F.2d 1038, 1045-46 (D.C. Cir. 1980); accord American Federation of Government Employees v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

authorized if (1) good cause exists for dispensing with the rulemaking procedures, or if (2) the rule interprets (but does not alter) existing regulations, sets forth agency practices or procedures, or enunciates a non-binding statement of general agency policy. 5 U.S.C. § 553(b) (1982). The first exemption requires that the agency explicitly find that good cause for dispensing with rulemaking exists, and that the finding and its explanation accompany publication of the rules. 5 U.S.C. § 553(b)(3)(B) (1982). The Denton Memorandum has not done this.

The other exemptions are also inapposite. Agency actions which "substantially [affect] the rights of persons subject to agency regulations," as does the Denton Memorandum, should be subject to public comment. Pickus v. United States Board of Parole, 507 F.2d 1107, 1112 (D.C. Cir. 1974). Reviewing courts look to the practical effect of agency action; if it establishes a "binding norm," it is not a mere policy statement. Guardian Federal Savings & Loan Ass'n v. Federal Savings and Loan Insurance Corp., 589 F.2d 658, 666 (D.C. Cir. 1978), quoting Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974). In light of the Staff's demand for a license condition based on the Denton Memorandum, PID at 726-27 (J-721), it is clearly intended to be a "binding norm."

Finally, any claim that the NRC's redefinition is merely an "interpretive rule" must also fail. Interpretive rules serve only to clarify existing regulatory and statutory authority; if a rule creates new requirements or expands existing obligations, it will be deemed legislative and subject to § 553. Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952), cited with approval in Cabais v. Egger, 690 F.2d 234, 238 (D.C. Cir. 1982). Since the Denton Memorandum's self proclaimed "clarification" fundamentally altered the rules that have guided applicants and licensees since 1971 (see, e.g., PID

at 553 (J-247); 554 (J-249); 555 (J-251)), the memorandum could not have been simply interpretive.32/ This exemption may not be used to shield the memorandum from public scrutiny because, "although it serves as an interpretation of existing law, it also effectively enunciates a new requirement heretofore nonexistent for compliance with the law." Chamber of Commerce v. OSHA, 636 F.2d 464, 471-72 (D.C. Cir. 1980) (Bazelon, J. concurring in result only).

C. The New Definition of "Important to Safety" is Unconstitutionally Vague

Due process requires that regulations and agency interpretations of these must be sufficiently clear and precise to allow a reasonable man to know what is required, and to permit the regulations to be applied consistently. E.g., Montgomery Ward Co. v. FTC, 691 F.2d 1322, 1332 (9th Cir. 1982); Tenneco Oil Co. v. FEA, 613 F.2d 298, 303 (TECA 1979).

Years of working with the historical definition of "important to safety" and of equating it with "safety related," have enabled industry and the NRC Staff to identify with sufficient clarity the requirements imposed on plant design, construction and operation. In contrast, the vague Shoreham license condition fails to provide LILCO with any clearly discernable guidance on future obligations. See, e.g., PID at 177, 722 (J-711), 731-33 (J-731 to -734). More important to the Utility Group, the new definition fails to provide any guidance to companies who operate or are attempting to license other, different plants. As the Licensing Board found, the Denton Memorandum does

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32/ Significantly, the NRC's CRGR concluded "that the proposed generic letter to licensees [requiring a broader important to safety set] represents imposition of a previously unimposed requirement of indeterminate magnitude with an undefined burden on the resources of both industry and Staff." Minutes of CRGR Meeting Number 50, note 11 above, at 3.

not advance "any reasonably precise definition of what is included in the category of important to safety," and is "wholly silent on what quality standards and quality assurance should be applied to that category of structures, systems and components." PID at 552 (J-243). As such, the memorandum fails to afford a reasonable warning of proscribed conduct, as due process requires.33/ PBR, Inc. v. Secretary of Labor, 643 F.2d 890, 897 (1st Cir. 1981). Like a motorist in a speed zone where the posted limit says "don't go too fast," the utility is at the mercy of the subjective whims of the regulator. This is impermissible. The breadth and complexity of the issue demand that guidance on the term's new scope and meaning be provided through a generic proceeding, if there is to be a change in the historical practice.

VII. CONCLUSION

The expanded definition of "important to safety" endorsed by the Shoreham Licensing Board substantially alters the requirements applicable to the design, construction and operation of nuclear power plants. The definition was first hastily adopted by the NRC Staff in the TMI-1 case in disregard of the plain language and history of the Commission's regulations. The error was then compounded by the issuance of the Denton Memorandum without benefit of notice and comment rulemaking. Now the Staff is attempting to implement the ill-conceived, vague definition in an ad hoc manner in individual licensing cases such as Shoreham. The Licensing Board's endorsement of these Staff efforts should be reversed. This is of particular concern to the Utility Group because the extraordinarily vague, open-ended license condition imposed by the Shoreham Board fails to identify what steps LILCO, much less other

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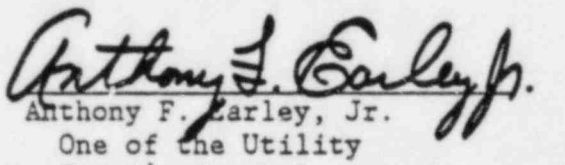
33/ See note 32 above.

applicants, licensees, and the NRC Staff, must take to comply. In view of the broad spectrum of plants subject to the new "important to safety" definition, its potentially severe impact upon the regulated public and the confusion currently surrounding enforcement efforts, the Appeal Board should acknowledge the historical interpretation of "important to safety" as synonymous with "safety related," and remove the Shoreham license condition.

Respectfully submitted,

UTILITY SAFETY CLASSIFICATION GROUP



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December 23, 1983