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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL-3 (Emergency Planning)

SUFFOLK COUNTY BRIEF IN OPPOSITION
TO FEMA'S APPEAL OF THE MAY 18 ASLB ORDER
COMPELLING PRODUCTION OF DOCUMENTS
BY FEMA

Pursuant to this Board's Memorandum and Order dated May 24, 1984, Suffolk County submits this brief in opposition to the merits of FEMA's May 21, 1984 Appeal of the ASLB's May 18, 1984 Memorandum and Order Ruling on Suffolk County Motion to Compel Production of Documents by FEMA (hereinafter, "ASLB Order"). The arguments and background materials contained in the Suffolk County Memorandum in Opposition to FEMA's Appeal and Request for Stay of May 18 Board Order Compelling Production of Documents by FEMA, dated May 23, 1984 (hereinafter, "County Memorandum"), are not repeated herein; the County Memorandum and its attachments are hereby incorporated by reference. In addition, due to other obligations of counsel and time constraints, the County does not address in this brief the

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issue identified in the Board's oral order which was read to counsel at approximately 5:00 p.m. on May 30. As contemplated in that May 30 order, the County will address that issue in a supplemental pleading to be filed June 5.

For the reasons set forth below and in the County Memorandum, the ASLB's May 18 Order should be affirmed.

I. The Facts

This dispute arises in the middle of an adjudicatory hearing on one aspect of LILCO's application for an operating license -- specifically, the hearings dealing with whether LILCO's proposed offsite emergency plan provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at Shoreham. The portion of the Shoreham licensing proceeding dealing with offsite emergency preparedness began in May 1983, when LILCO submitted to the ASLB a proposed offsite emergency plan (referred to as the "LILCO Transition Plan"). That Plan provided that in the event of a Shoreham accident, LILCO employees would assume the command and control functions, as well as all other functions such as making protective action recommendations to the public, traffic control, security, and public health activities, that

are within the scope and authority of local and state governments and their respective police powers.1/ In proposing its own offsite Plan for Shoreham, arrogating to itself governmental powers, LILCO asserted that in the event of an accident its plan (1) could and would be implemented by LILCO alone, without any participation by either Suffolk County or the State of New York, and (2) could and would provide adequate protection to the public.

Following LILCO's submission of its proposed Plan to the ASLB, Suffolk County and the other Intervenors submitted 97 contentions for litigation, most of which were admitted by the ASLB. The contentions covered all aspects of the proposed LILCO Plan, and set forth specific reasons why various provisions of the Plan are inadequate and not capable of being implemented by LILCO, and why those provisions violate

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1/ In the exercise of its police powers and its obligations under the State Constitution and the Suffolk County Charter, the Suffolk County Legislature, in February, 1983, determined, following an intensive nearly year long study, that due to the configuration of Long Island and other local conditions near the Shoreham plant, no offsite emergency plan could adequately protect the public in the event of a Shoreham accident. The State of New York reached the same conclusion in December, 1983, following a 6 month investigation by a special commission appointed by Governor Mario Cuomo.

particular requirements set forth in 10 CFR § 50.47 and NUREG 0654.

Shortly after the original version of the LILCO Plan was submitted to the ASLB, the NRC requested FEMA to review the Plan pursuant to the Memorandum of Understanding between FEMA and the NRC, 45 Fed. Reg. 82,713 (1980). See Memorandum for Richard W. Krimm from Edward L. Jordan dated June 1, 1983. In response to the NRC request, on June 23, 1983, FEMA submitted to the NRC a report containing its findings and determinations on the original version of the LILCO Plan. See Memorandum for Edward L. Jordan from Richard W. Krimm, dated June 23, 1983. As stated in Mr. Krimm's covering memorandum, in reaching its June 1983 findings on the LILCO Plan, FEMA:

> obtain[ed] the support of Argonne National Laboratories to assist and perform a technical review of the plan against the 16 planning standards and criteria (A-P) listed in NUREG 0654/FEMA-REP-1, Rev. 1. FEMA Headquarters, assisted by FEMA's Region II Regional Director and Staff, directed this technical review.

The June 22, 1983 "Element-By-Element Review of the LILCO Transition Module," by Argonne National Laboratory, which was attached to Mr. Krimm's covering memorandum, was submitted to the ASLB and the parties to this litigation, and those FEMA

findings are expressly referenced in several of the Intervenors' contentions.

During the pre-hearing discovery period established by the ASLB, Suffolk County and LILCO conducted extensive document and deposition discovery. Several formal document requests were sent by LILCO to the County, and by the County to LILCO. These formal requests were in addition to numerous informal requests which were also responded to by both parties. In addition, of the approximately 23 witnesses identified by LILCO, 11 were deposed by the County, and about 24 of approximately 29 witnesses identified by Suffolk County were deposed by LILCO, as were approximately 4 additional County employees.

During the pre-hearing discovery period, the County also served on FEMA interrogatories and requests for production of documents. The County also deposed three individuals who at that time were expected to submit testimony to the ASLB on behalf of FEMA, (two were FEMA employees and one was an employee of Argonne who had participated in the Argonne review of the LILCO Plan on behalf of FEMA), as well as an additional FEMA employee who had been involved in the June review of the LILCO Plan.2/

2/ Only one of those individuals -- Mr. Kowieski -- actually turned out to be a witness who did submit testimony. How-

(Footnote cont'd next page)

FEMA did not attempt to shield from discovery the individual comments, underlying documentation, or bases of the June 23 FEMA findings, or the Argonne Report. Indeed, in response to a County request for "copies of all correspondence or documents reflecting communications between representatives of [Argonne] and FEMA regarding the LILCO Transition Plan," FEMA produced, among others, the following documents:

1. Lists of deficiencies in the LILCO Plan, prepared by the Argonne reviewers prior to issuance of their report, and transmitted to FEMA on June 14, 1983.

2. A list of questions, written by Argonne reviewers, to be asked of Suffolk County and LILCO, transmitted to FEMA by the Argonne reviewers on June 14, 1983.

3. A June 17, 1983 version of the Argonne reviewers' review of the LILCO Plan, prepared and transmitted to FEMA by the Argonne reviewers.

4. A second copy of the June 17 version of the Argonne report containing handwritten notes.

5. A June 13, 1983 draft memorandum from one of the Argonne reviewers to FEMA regarding potential legal issues raised by the LILCO Plan.

(Footnote cont'd from previous page)

ever, at the time of Mr. Kowieski's deposition, he had not yet conducted any review whatsoever of the LILCO Plan.

6. A June 16, 1983 draft "discussion" sent by an Argonne reviewer to FEMA describing the process followed by Argonne in reviewing the LILCO Plan.

7. An October 10, 1983 letter from an Argonne reviewer to FEMA providing background information and the thoughts of Argonne reviewers concerning criticisms of the LILCO Plan contained in Intervenors' contentions. (According to the letter, upon re-examination based on the contentions, Argonne reviewers concluded that some elements of the LILCO Plan they had rated adequate were in fact inadequate, and that there were additional reasons for rating other items inadequate.)

The above documents and the bases for the conclusions in the Argonne Report and the June 23 FEMA findings were also discussed during the depositions of the FEMA representatives.

In late July, 1983, LILCO issued Revision 1 of its Plan, in November Revision 2, and in late December, Revision 3.3/ Pursuant to a September 15, 1983 request by the NRC for a review of Revision 1 by FEMA's Regional Assistance Committee, the RAC reviewed Revision 1 and later, Revision 3 of the LILCO Plan. On March 15, 1984, FEMA submitted to the NRC its findings and determinations relating to Revision 3. See March 15,

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3/ Apparently, Revision 4 is expected within a few weeks.

1984 letter from Samuel W. Speck to William J. Dircks. Attached to Mr. Speck's letter was a document entitled: "LILCO Transition Plan for Shoreham -- Revision 3, Consolidated RAC Review Dated February 10, 1984." The attachment to Mr. Speck's letter is "the RAC Report" or the "RAC Review" which has been referenced repeatedly in connection with this discovery dispute.

Meanwhile, direct written testimony addressing certain of Intervenors' admitted contentions was filed by witnesses representing LILCO, the NRC Staff, FEMA and Suffolk County on November 18, 1983. Additional testimony was filed by LILCO, Suffolk County, and the State of New York (which became an active participant in the proceedings in early January, 1984) from March 2 through April 2, 1984, and hearings for purposes of cross examining such testimony were conducted beginning on December 6, 1983. Throughout this period, as new witnesses were identified and testimony discussing new matters was filed by the parties, LILCO, the County and New York State engaged in further discovery. The parties routinely exchanged all documents which formed any part of the basis for witnesses' opinions, including those revealed for the first time in prefiled testimony, and following such document production, depositions were taken of newly identified witnesses.

In addition, on February 6, 1984, LILCO requested that New York State turn over to LILCO, copies of numerous documents which had been generated by staff members of the New York State Disaster Preparedness Commission for the ultimate consideration of the full Commission (although such consideration never occurred), concerning proposals by LILCO involving Suffolk County participation in implementing an offsite emergency plan for Shoreham. New York State asserted executive privilege with respect to many of the requested documents. See Memorandum of Governor Mario Cuomo, Representing the State of New York, in Opposition to LILCO's Motion to Compel Expedited Production of Documents by New York State, dated February 13, 1984. The ASLB ruled that New York had properly asserted the executive privilege, but after having reviewed the documents in camera, ruled that LILCO's need for the documents outweighed the State's interest in preserving their confidentiality. Thus, the State's executive privilege claim was overcome by LILCO's need for the documents to conduct cross-examination, even though the documents did not even relate to the Plan at issue in the ASLB proceeding, and were not produced or relied upon by the New York State witnesses in their testimony. A copy of the ASLB's order ruling on the New York State executive principal claims is part of Attachment 6 to the County Memorandum.

On April 18, 1984, FEMA submitted to the ASLB direct written testimony. See Letter to Messrs. Laurenson, Kline and Shon, from Stewart Glass. In the FEMA testimony, the FEMA witnesses state as follows:

> A copy of the RAC review is appended to this testimony and constitues a part thereof.
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> . . .
>
> The purpose of this testimony is to address the contentions relating to offsite preparedness at the Shoreham Nuclear Power Station as admitted by Board Order. . . .

FEMA Testimony at 2.

As noted in the County Memorandum, upon receipt of the FEMA Testimony, on April 20, 1984 Suffolk County served upon FEMA, among other things, a Request for Production of Documents. See Attachment 1 to County Memorandum. At the same time the County also filed an Application for Subpoenas, Notices of Deposition, and other discovery-related documents with a covering Memorandum Explaining Suffolk County Discovery Requests Relating to FEMA. After counsel for FEMA and the County had agreed on deposition dates for the FEMA witnesses, but before FEMA had responded to the County's document request,

FEMA filed a Request for a Protective Order, dated May 2, 1984. In that pleading, FEMA counsel sought a ruling that during the then scheduled FEMA depositions, the County would be prohibited from "attempting to explore the pre-decisional thought processes and input of the individual . . . RAC members," and from inquiry "as to discussions of and documents submitted by the . . . RAC members reflecting the individual viewpoints of the RAC members," even though all of the FEMA witnesses themselves participated in some way in the RAC review and relied upon that review for the conclusions set forth in their testimony. Counsel for FEMA subsequently withdrew that motion concerning future depositions because it was premature. However, the motion does indicate how, during depositions and cross examination in hearings, FEMA would pursue and apply the theory of "privilege" and "confidentiality" it has asserted with respect to documents, should this Board reverse the ASLB's ruling that the County is entitled to probe the bases of the witnesses' opinions and the conclusions of the RAC. Thus, not only would FEMA deny the County access to documents which form the basis for the RAC Report (and thus which are the basis for the witnesses' testimony), FEMA also would deny any probing cross examination on such matters. Thus, FEMA effectively has

taken the position that its testimony must be accepted as evidence but cannot be tested in the normal means by either discovery or cross examination.

Subsequent events concerning the County's document request, motions pertaining thereto, the ASLB's May 18 rulings, and the FEMA Motion for a Stay of the Board's May 18 Order are set forth in the County Memorandum, and are not repeated here.

II. Argument

A. The ASLB Ruling Should Be Affirmed

1. The ASLB's factual findings are unchallenged on appeal.

In making its ruling, the ASLB considered the County's Motion to Compel, FEMA's Response to the County's Request, the Affidavit of Louis O. Giuffrida, Director of FEMA, (which was identical to the one submitted to this Board with FEMA's Memorandum in Support of its Stay Motion and Appeal), and filings by the NRC Staff and LILCO, both of which supported the FEMA response and assertion of privilege. The positions and arguments of the parties in this appeal are no different from those taken and expressed in their pleadings filed below with the ASLB.

FEMA, the NRC Staff, and LILCO have not challenged, either below or on appeal, the legal principles which were identified and applied by the ASLB in making its May 13 ruling. Those principles -- that the executive privilege is a qualified privilege which can be overcome by a showing of compelling need, and that a balancing test must be applied to determine whether the demonstrated need outweighs the asserted interest in confidentiality or "chilling effect" -- are thus unchallenged here, and remain the standard to be applied in reviewing this appeal.

The only issue raised by FEMA in its appeal, and discussed by the NRC Staff and LILCO in support of the FEMA appeal, is whether the ASLB improperly balanced the competing interests asserted by FEMA and Suffolk County. No basis has been stated to support the suggestion that this Board should second guess, much less reverse, that essentially factual ASLB ruling which assessed the documents and found that the County had overcome the qualified privilege.

In its Appeal, FEMA makes no new arguments. Although it reiterates its allegation that the documents at issue are privileged -- an allegation with which the ASLB <u>agreed</u> -- it

never addresses at all either the County's demonstrated need as stated by the County and found by the ASLB, or the ASLB's balancing of interests, which is, in fact, the prime issue presented in this appeal. Accordingly, this Board is faced with a so-called "appeal," which in reality is nothing but a bald assertion, without any argument or legal authority, that the ASLB was wrong in reaching its essentially factual conclusion following its in camera review of the documents at issue.

As the Appeal Board stated in Toledo Edison Company (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 769 (1975):

> [T]he simple truth is that we are no better equipped to rule on [individual privilege claims] than the Licensing Board. Indeed, perhaps less so, for that Board has at least been educated on the relevant issues by participation in the proceeding before it; we would have to begin afresh.

Significantly, the ASLB's ruling was based upon its in camera review of the documents at issue and its balancing of interests in the context of its knowledge of this case, the pertinent issues, and the other procedural and substantive rulings that have been made in the case.

The County submits that in the absence of any argument or authority presented by FEMA in support of the issue decided against it by the ASLB -- that is, that the County's need for the documents outweighs the asserted "chilling effect" on FEMA, as opposed to the issue that the documents are privileged because, among other reasons, their release would or could have a "chilling effect" -- the ASLB's exercise of discretion should not be reversed by this Board.

2. If This Board Were to Consider Reversing the ASLB Findings, It Must First Review the Documents At Issue

As noted above and in the ASLB Order, the ASLB's ruling was based upon its in camera review of the documents at issue. Should this Board decide that it is proper to consider the correctness of the ASLB's finding as to the proper balancing of interests in this discovery dispute, despite FEMA's failure to state any basis for its assertion that that ASLB finding was incorrect, such consideration must begin with an in camera review of the documents in question. Clearly, this Board should not attempt to review the ASLB's factual findings without having first familiarized itself with the central facts -- the documents themselves. Accordingly, the County submits that a prequisite to any Board consideration of reversing the ASLB

ruling should be FEMA's submission and this Board's in camera review of the documents at issue.

3. The County is Entitled to Discovery of the Documents At Issue

The ASLB's ruling on the County's entitlement to the documents is discussed in the County Memorandum at 13-17 and 20-22. For the reasons stated by the ASLB, and those stated in the County Memorandum and in the County's Motion to Compel Production (Attachment 5 to the County Memorandum), the County submits that it is indeed entitled to the requested discovery and that the ASLB Order should be affirmed. We summarize the reasons below.

a. The executive privilege does not apply.

The executive privilege does not apply to the documents at issue because they have nothing to do with FEMA policy-making, or decisions or evaluations concering FEMA policies. See County Memorandum at 8-10. The documents which are identified as the RAC reviewers' "comments" or "notes," or "drafts" of the RAC Report, contain the technical findings of the RAC members -- most of whom are not even FEMA employees. Those comments and drafts were not submitted to FEMA executives or

policymakers to be used as input for decisions or deliberations concerning any agency policies -- they were merely packaged into the final RAC Report which is attached to and is the basis of, the testimony of the FEMA witnesses. And, the contents of the RAC Report are merely the compilation, in one place, of the reviewers' application of the NUREG 0654 checklist to the LILCO Plan. There is no "policy making" relevant to making check marks in the applicable blanks of NUREG 0654. Furthermore, as the FEMA witnesses themselves state in their testimony, the RAC Review was based solely upon the LILCO Plan and NUREG 0654; no other documents, such as FEMA policy statements or the like, were reviewed or relied upon by the reviewers. See FEMA Testimony at 7-8.

Moreover, there is no indication that FEMA executives had any involvement in the RAC review, the comments of reviewers, or the RAC Report itself. Thus, the FEMA testimony states:

> The RAC review of Revision 3 was discussed and consolidated at a meeting of the RAC which was held in the FEMA Region II office on January 20, 1984. These review comments were finalized and forwarded to FEMA Headquarters on February 21, 1984.

FEMA Testimony at 2. First, the only FEMA employees at the

meeting were Mr. Kowieski, Mr. Acerno, and Ms. Jackson, all of whom are RAC members according to the document listing provided by FEMA. Thus, the discussion at that meeting cannot be construed as constituting the conveyance of information from FEMA subordinates to FEMA executives for policy making purposes.

Second, according to the FEMA testimony, the January 20 review comments by RAC members were finalized by Mr. Kowieski -- a RAC member and a FEMA witness -- and then were forwarded to FEMA Headquarters on February 21, 1984. See FEMA Testimony at 2 and 6. Since the RAC Report upon which the FEMA witnesses rely is dated February 10, 1984, eleven days before any RAC comments even reached FEMA headquarters, it appears that FEMA executives had no involvement whatsoever in the production, discussion, or finalization of the pre-February 10, 1984 comments, notes or drafts which FEMA seeks to withhold. There is no indication in the listing of documents provided by FEMA that any of the RAC comments, notes or drafts were ever transmitted to, received by, or intended for, any FEMA employees (aside from other RAC members) much less FEMA policy makers. Thus, in the County's view, there is no basis for the assertion that these documents contain the type of input into policy-making decisions that the executive privilege was designed to protect.4/

4/ The preceding discussion applies to documents 1-23, 25, 26, 31, 34-37, all of which the ASLB ordered FEMA to produce.

b. Any privilege has been waived by FEMA.

Even if a privilege attached at one time to the documents at issue, FEMA has waived such privilege by itself placing into controversy the matters addressed therein. See County Memorandum at 11-14. For example, at page 16 of the FEMA Testimony, the FEMA witnesses discuss Contention 24.I. That Contention reads as follows:

> LILCO has failed to obtain agreements from several of the organizations, entities and individuals for performance of services required as part of the offsite response to an emergency pursuant to NUREG 0654, as follows:
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> . . .
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> I. The provisions of the LILCO Plan for evacuating persons without access to automobiles are premised on a system in which some buses pick up evacuees throughout evacuation zones and carry the evacuees to "transfer points." Other buses are expected to take the evacuees from these transfer points to relocation centers. According to the LILCO Plan, a total of 333 buses will be required to carry out this process. LILCO's estimated route times begin and end with the assumed transfer points. (See Appendix A, at IV-73 to IV-165; OPIP 3.6.4).
>
> However, the LILCO Plan does not include agreements with the owners of those designated transfer points not owned by LILCO permitting LILCO to use the facilities relied upon in the Plan as transfer points. In fact, such transfer

> points are likely to be unavailable for use by LILCO. Moreover, without transfer points, each bus route would have to terminate at a relocation center rather than at a transfer point, resulting in a substantial increase in the estimated route times. In the absence of such agreements, LILCO's proposed evacuation of people without access to cars cannot and will not be implemented.

In their testimony submitted to the ASLB relating to Contention 24.I, the FEMA witnesses state as follows:

> While there are no letters of agreement for the use of these facilities, the RAC, in its review of the LILCO Transition Plan, did not identify the lack of written agreements with the owners of non-LILCO facilities as an area of concern that would be sufficient to find the plan inadequate in this regard (see NUREG-0654 evaluation criteria C.4).

FEMA Testimony at 16. That is <u>all</u> the FEMA witnesses say about the matter. Clearly, <u>why</u> the RAC failed to identify this "as an area of concern" and <u>why</u> the RAC found the lack of agreements not "sufficient to find the plan inadequate" are issues that are directly raised not only by the FEMA testimony, but also by the contention those witnesses purportedly address. There are innumerable similar examples throughout the FEMA testimony. In light of the fact that such testimony was

voluntarily submitted in this proceeding by FEMA, any qualified privilege that may have existed with respect to materials reasonably calculated to lead to the discovery of the bases for such conclusory and unexplained testimony, has been waived.

c. The County's right to conduct cross examination outweighs any potential "chilling effect."

Even if the documents were assumed to be subject to a qualified privilege, the County's need for the documents in conducting cross-examination of the FEMA testimony outweighs any FEMA interest in confidentiality. See County Memorandum at 11-12, 14-17, ASLB Order at 8-9, and Attachment B to ASLB Order at 7-8. As noted in the County Memorandum, the County and the other parties are entitled to conduct "such cross-examination as may be required for full and true disclosure of the facts." 10 CFR § 2.743(a). A right to prior discovery of materials reasonably calculated to lead to admissible evidence is also guaranteed to parties by the NRC regulations. 10 CFR § 2.740. The ASLB explicitly found, based upon its familiarity with the facts and issues in this case and its review of the documents in question, that:

> The FEMA testimony incorporates numerous references to the RAC Report. Under these circumstances, it would be unfair to deny the County access to the underlying documents and processes by which the RAC Report reached its final form. . . . [T]he County should be able to discover the underlying documents that went into the formulation of the publicly disclosed RAC Report because the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence . . . . This litigation concerns the contentions of Suffolk County. Almost all of those contentions are founded upon the County's claim that the LILCO Transition Plan fails to comply with the regulations and NUREG-0654. The RAC Report evaluates the LILCO Transition Plan against the criteria in NUREG-0654. FEMA intends to present testimony of these RAC members on May 29, in support of its findings in the RAC Report. Thus, [w]e find that the documents which underlie the RAC Report are centrally important to the County's case in asserting that the LILCO Plan does not comply with NUREG 0654. We do not find that cross-examination alone, without access to these documents will be equivalent.

ASLB Order at 8, 9 (emphasis added). An example of the type of cross examination that will be necessary with respect to the FEMA testimony is discussed in Section II.A.3.b above.

Moreover, as noted in Section I above, FEMA has already indicated by its motion for a protective order relating to deposition inquiries, that it would use the same privilege argument -- that input to, or the bases for, the RAC Review

conclusions are "pre-decisional" and therefore entitled to secrecy -- as the basis for objecting to questions going to the bases for the FEMA witnesses' opinions and RAC Review conclusions if such questions were posed during cross examination, even without the benefit of prior discovery. If this Board were to reverse the ASLB Order, it would be upholding the FEMA claim that all underlying materials or information concerning how or on what basis the conclusions set forth in the final RAC Report were derived or formulated, are "pre-decisional," "privileged," and, by FEMA's analysis, entitled to total secrecy despite the County's demonstrated need and right to cross examination. Thus, a reversal of the ASLB Order would not only violate the County's right to discovery, but also would prohibit the County from making a true and complete factual record through cross-examination at the hearing.

d. The County's right to rebut the FEMA findings outweighs any potential "chilling effect."

Even if the documents were assumed to be privileged, because the ASLB must consider the FEMA findings in making its licensing decision, and those findings presumably constitute a rebuttable presumption, 10 CFR § 50.47(a)(2), both the parties and the ASLB must be able to probe the findings, determine

their bases, assess their accuracy and determine the weight to which they are entitled. See County Memorandum at 12-14; ASLB Order at 7. Clearly, if the FEMA witnesses are not required to answer questions concerning the "predecisional" processes and bases for the RAC conclusions, there would be, literally, no way to rebut or even to evaluate or assess the FEMA findings since no other RAC members or underlying documents are being offered as witnesses or evidence.

Moreover, the right of the County to pursue through cross examination the bases for the testimony of the FEMA witnesses and the RAC Report was emphatically affirmed last week by the United States Court of Appeals for the District of Columbia Circuit. In Union of Concerned Scientists v. NRC, No. 82-2053, May 25, 1984 (slip op.), the Court held that Section 189 of the Atomic Energy Act, 42 U.S.C. § 2239 (1976), requires that if requested by an interested party, a hearing, with an opportunity for submission and challenge of evidence, must be held on all material issues relevant to the NRC's licensing decision. Under 10 CFR § 50.47(a)(2), the FEMA findings, which in this proceeding are set forth in the RAC Report and sponsored by the FEMA witnesses, are required to be a basis of the NRC's findings on the adequacy and implementability of

emergency preparedness. Clearly, a reversal of the ASLB's ruling -- that is, holding inviolate and untouchable the FEMA testimony by prohibiting inquiry into the bases for the FEMA findings -- would in effect deprive the County of its right to a hearing.

e. The County's inability to obtain the information through other means weighs in favor of production.

There is no other means of obtaining the requested information. The ASLB expressly found that this fact weighs "in favor of piercing the privilege and releasing the documents" to Suffolk County. ASLB Order at 4. FEMA's position that it is entitled to keep secret the methods and findings involved in the RAC process, makes it literally impossible to obtain the information at issue by any legitimate means.

If this Board were to reverse the ASLB ruling, it would be sanctioning FEMA's inexplicable and groundless claim that the public is not entitled to know about, or inquire into, the workings or conclusions of the RAC -- a group comprising the public's representatives, responsible for determining whether the public can and will be adequately protected from a nuclear accident, and upon whose secret findings the NRC is to base its

conclusion that the operation of a nuclear power plant will not endanger the public health and safety. Such a ruling would defy logic as well as law.5/

Finally, the suggestion by FEMA and LILCO that the requested information can properly remain secret because FEMA has produced some documents in response to the County's document request or in response to an FOIA request made outside this proceeding is simply inapposite. First, FEMA's response to an FOIA request has absolutely no relevance to, or impact upon, either the rights of Suffolk County to discovery under the NRC rules, or the obligation of FEMA -- a party which has subjected itself to the NRC's jurisdiction by filing testimony, producing witnesses, and otherwise fully participating in this proceeding -- to comply with the NRC's discovery rules. Second, the fact that FEMA has properly responded to a portion of the County's discovery request by producing documents it did not want to keep secret, cannot be used to justify an improper response to other portions of that request. Third, the FEMA response to the referenced FOIA request included the same refusal to

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5/ We address in more detail in the County Memorandum at 21-24, the fact that FEMA's cover up attempt violates the public interest.

produce documents underlying the RAC review; that is, the same documents that are at issue in this Appeal were also withheld from the FEMA FOIA response. Fourth, none of the documents provided in response to the County's discovery request or the FOIA request, provide the information at issue in this Appeal -- that is, the bases and the underlying documentation for the conclusions set forth in the FEMA testimony and the RAC Report.

f. Prior rulings in this case require that FEMA produce the documents.

Denying the County access to the FEMA documents would be inconsistent with prior ASLB rulings in this case. See County Memorandum at 15-17; ASLB Order (Att. 6 to County Memorandum) at 4 and Appendix B. The ASLB expressly found that its "prior decision in the dispute between LILCO and New York State where [it] found that LILCO's need for the documents outweighed New York's claim of harm resulting from disclosure" weighed "in favor of piercing the privilege [asserted by FEMA] and releasing the documents" to the County. As noted in Section I above and in the County Memorandum, the situation here is even more compelling than that of LILCO with respect to the New York documents.

Furthermore, in 1982, the ASLB ruled that executive privilege claims properly asserted by Suffolk County with respect to documents concerning matters not even at issue in that proceeding, were outweighed by LILCO's asserted need for the documents. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144 (1982).

Clearly, fairness demands that the County's showing of need for the requested documents, and FEMA's asserted need for confidentiality be treated in the same fashion and accorded the same weight in a balancing test as was the applicant's asserted need for documents and the need for confidentiality asserted by the State of New York and Suffolk County. To reverse the ASLB's Order would constitute not only a violation of the rights of Suffolk County, but also a blatant and groundless awarding of preferential status in this proceeding to both LILCO and FEMA.

B. Judge Edles' Anonymity Question

During oral argument on the FEMA Stay Motion, there was some discussion of whether deleting the identities of individual RAC members from documents they had generated would be an appropriate resolution of this discovery dispute. See

Transcript of May 23, 1984 Hearing at 13-16, 74. Judge Edles asked that the parties address how the courts and federal agencies have dealt with the potential chilling effect of releasing documents with the names of the authors redacted.

In the County's view, the practice of deleting policy statements from a document that is primarily factual, and then producing the non-privileged factual portions of the document, is analagous to the name deletion suggested by Judge Edles. Such a practice is a well-established means of dealing with a document that contains both privileged and non-privileged information.

However, given the documents at issue here, and the context in which they are presented, the name deletion proposal is not appropriate. First, as FEMA's counsel stated, it "would not work" for most of the documents, because specific individuals reviewed particular subject areas and the identity of the reviewers would be obvious from the subject matter of the comments. See Transcript at 14-16. Second, as counsel for the County stated during the oral argument, the identity, qualifications, and expertise of the originator of a particular opinion, comment, or conclusion, could be very relevant to an

evaluation of the accuracy or weight to be attributed to a particular opinion or conclusion stated in the FEMA testimony or the RAC Report. See Transcript at 53.

Thus, in the County's view, the deletion of identities of the authors of particular comments would not be either a practical or appropriate resolution of this dispute.

C. Judge Edles' Attorney Work Product Analogy

During oral argument, Judge Edles asked the parties to address in their briefs whether the situation of an expert witness being asked to testify about conversations with attorneys which led to revisions in written testimony, is analagous to the situation presented in this appeal.

There is clearly one fundamental similarity in the two situations -- both involve the assertion of a qualified privilege (the attorney work product privilege and the executive privilege). Thus, the final determination as to whether the requested discovery (descriptions of conversations with attorneys and production of documents which form the basis of the RAC conclusions) is proper, must depend upon a balancing of the need for the information against the need for

confidentiality. Assuming that both privileges were properly asserted (i.e., showings were made that the conversations would reveal the litigation strategies and thought processes of the attorney, and that governmental agency policy making would be jeopardized), a case-by-case factual analysis of all the factors on both sides would be necessary. Clearly, there are cases where both types of qualified privileges have been overcome by showings of substantial need. See, e.g., Houston Light and Power Co. (South Texas Project, Units 1 and 2) LBP-79-30, 10 NRC 594 (1979), and the ASLB's prior rulings in this case requiring both Suffolk County and New York State to produce privileged documents to LILCO.

In the County's view, however, the analogy is inapposite here. Whether a work product privilege may apply in a hypothetical case has nothing to do with whether an asserted executive privilege has been overcome by the County's demonstrated need in this case. To resolve this appeal -- should this Board decide to question the factual determinations made by the ASLB -- requires a weighing of the facts presented here, in the context of this proceeding, in light of the particular documents at issue.

III. Conclusion

For the foregoing reasons, the ASLB Order should be affirmed.

Respectfully submitted,

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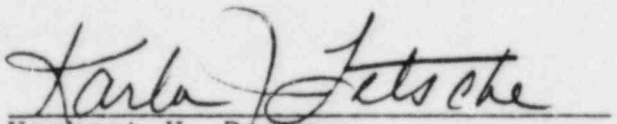

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Dated: June 1, 1984

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 (O.L.) (Emergency Planning)
(Shoreham Nuclear Power Station, Unit 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of Suffolk County Brief in Opposition to FEMA's Appeal of the May 18 ASLB Order Compelling Production of Documents by FEMA have been served on the following this 1st day of June 1984, by U.S. mail, first class, except as otherwise noted.

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