

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

'86 JAN -8 11:42

Before the Atomic Safety and Licensing Appeal Board

OFFICE OF SECRETARY  
OF THE BOARD  
OF NUCLEAR REGULATORY COMMISSION

\_\_\_\_\_  
In the Matter of )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station, )  
Unit 1) )

) Docket No. 50-322-OL-3  
) (Emergency Planning)

SUFFOLK COUNTY, STATE OF NEW YORK, AND  
TOWN OF SOUTHAMPTON REPLY BRIEF ON APPEAL  
OF LICENSING BOARD AUGUST 26, 1985 CONCLUDING  
PARTIAL INITIAL DECISION ON EMERGENCY PLANNING

January 6, 1986

8601090572 860106  
PDR ADOCK 05000322  
G PDR

TABLE OF CONTENTS

I. INTRODUCTION. . . . .1

II. DISCUSSION . . . . .1

    A. Background and Overview . . . . .1

    B. The ASLB's Errors . . . . .4

        1. The ASLB's Error in Barring Discovery . . . . .4

        2. The ASLB's Error in Denying Admission  
           of Appellants' Testimony and in denying  
           Appellants' Motion to Reopen the Record . . . .5

    C. The Licensing Board's Error on the Guard Issue. . .9

TABLE OF AUTHORITIES

CASES

Citizens for an Orderly Energy Policy, Inc.  
v. Suffolk County, 604 F. Supp. 1084,  
(E.D.N.Y. 1985) . . . . .2

Cuomo v. LILCO,  
Consol. Index No. 84-4615 (N.Y. Sup. Ct., February 20,  
1985) . . . . .2

Guard v. NRC, 753 F.2d 1144  
(D.C. Cir. 1985). . . . .9, 10

In re Prospect v. Cohalan,  
65 N.Y. 2d 867, 493 N.Y.S. 2d 293 (1985). . . . .2

UNPUBLISHED SHOREHAM ORDERS

Memorandum and Order (Reopening of the Record)  
(May 6, 1985) . . . . .5

REGULATIONS

10 CFR § 2.743. . . . .9

10 CFR § 50.47(b)(12) . . . . .9, 10

MISCELLANEOUS

Commission Statement of Policy on  
Emergency Planning Standard 10 CFR  
Section 50.47(b)(12), 50 F.R. 20892  
(May 21, 1985). . . . .10

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-3
(Shoreham Nuclear Power Station, )	(Emergency Planning)
Unit 1) )	
_____ )	

SUFFOLK COUNTY, STATE OF NEW YORK, AND  
TOWN OF SOUTHAMPTON REPLY BRIEF ON APPEAL  
OF LICENSING BOARD AUGUST 26, 1985 CONCLUDING  
PARTIAL INITIAL DECISION ON EMERGENCY PLANNING

I. INTRODUCTION

Suffolk County, the State of New York, and the Town of Southampton ("Appellants") respond herein to certain matters raised in LILCO's Brief in Opposition to Intervenors' Appeal of the Nassau Coliseum and Guard Issues, December 11, 1985, (the "LILCO Brief"), and the NRC Staff Brief in Response to Intervenors' Appeal of Licensing Board's August 26, 1985 Concluding Partial Initial Decision on Emergency Planning, December 23, 1985, (the "Staff Brief").

II. DISCUSSION

A. Background and Overview

LILCO and the Staff argue that Appellants are responsible for LILCO's "difficulties" in finding facilities suitable for use as

relocation centers during a Shoreham emergency.<sup>1</sup> First, Appellants have acted lawfully, as found by the Courts.<sup>2</sup> The LILCO and Staff allegations, therefore, reflect nothing more than their disappointment that the law is not different. Second, LILCO has only itself to blame for any "difficulties" it has encountered on the relocation center issues. LILCO knew it had no real agreements with the owners of any of the facilities it had "designated" as relocation centers prior to the Nassau Coliseum. See Appellants' November 6 Brief at 8-16. LILCO nonetheless insisted upon "litigating" its three prior relocation schemes. That litigation, necessitated only by LILCO's refusal to acknowledge its failure to obtain agreements from facility owners before announcing its intention to use the facilities, resulted in LILCO's repeatedly having to face its failures. It could all have been avoided had LILCO bothered to obtain the necessary agreements prior to announcing its readiness to litigate.

Contrary to LILCO's assertion (LILCO Brief at 5), Appellants have not merely "suggested" that LILCO's witness, Mr. Rasbury, misspoke when he said that the Red Cross had agreements with congregate care centers. Rather, Appellants submit that the representations made by Mr. Rasbury

---

<sup>1</sup> See, e.g., LILCO Brief at 4 ("LILCO's difficulties over the Coliseum are the direct result of [Appellants'] own refusals to agree to let public buildings be used to help the public in an emergency"); Staff Brief at 21, n. 17 ("Nor can one ignore the history of this issue, with LILCO's attempting to identify facilities for use as relocation centers while the State and County encouraged facilities not to cooperate").

<sup>2</sup> Appellants have no duty to help LILCO or to adopt or implement a plan for Shoreham. See Citizens for an Orderly Energy Policy, Inc. v. Suffolk County, 604 F. Supp. 1084 (E.D.N.Y. 1985); In re Prospect v. Cohalan, 65 N.Y. 2d 967, 493 N.Y.S. 2d 293 (1985); Cuomo v. LILCO, Consol. Index No. 84-4615 (N.Y. Sup. Ct. Feb. 20, 1985).

concerning the alleged agreements with and availability of congregate care centers for use during a Shoreham emergency were false. See Appellants' November 6 Brief at 54-56.

Mr. Rasbury's testimony that there exist agreements for the use of facilities as congregate care centers was directly contradicted by undisputed facts known to the ASLB. The direct testimony of Suffolk County witness Leon Campo and the supplement thereto,<sup>3</sup> for example, documented that at least nine of the Nassau County school districts relied upon for use by LILCO and Mr. Rasbury as congregate care centers are, in fact, not available for such purpose. This evidence was part of that denied admission by the Margulies ASLB. Furthermore, 30 facility owners (out of the 52 facilities relied upon by LILCO and Mr. Rasbury), which collectively account for approximately 31,000 of the projected 48,000 capacity, sent letters to the ASLB stating that they never agreed to LILCO's or the Red Cross' use of their facilities in a Shoreham emergency. The Margulies ASLB also ignored this information which was presented directly to it. In addition, four other facilities, which account for an additional capacity of approximately 3,000, have notified the Red Cross of the unavailability of their facilities. And, during the reopened proceeding, after the ASLB precluded Appellants from cross-examining LILCO's witness on the existence or the adequacy of the proposed congregate care centers (see Tr. 15,932, 15,939-40), counsel for Suffolk County made an offer of proof which included letters from

---

<sup>3</sup> See Direct Testimony of Leon Campo on Behalf of Suffolk County Regarding LILCO's Proffered Evidence of January 11 (Feb. 12, 1985); Supplement to the Direct Testimony of Leon Campo Regarding LILCO's Proffered Evidence of January 11 (April 12, 1985).

facilities, with an aggregate capacity of about 33,000, affirmatively stating that they had not agreed to the use of their facilities in a Shoreham emergency. See Tr. 15,941-44; SC Ex. 97.

Thus, this is not a case where there is a "suggestion" that Mr. Rasbury's testimony regarding the alleged availability of congregate care centers during a Shoreham emergency was false, or one where different "interpretations" of events are offered by opposing parties, as LILCO asserts. See, e.g., LILCO Brief at 5, 17. Rather, this is a case of an ASLB closing its eyes to facts which demonstrate the falsity of evidence submitted by LILCO and adopted by the ASLB: the owners of LILCO-designated "congregate care centers" assumed to accommodate 33,000 evacuees, have stated unequivocally that there are no agreements authorizing the use of their facilities in a Shoreham emergency.

B. The ASLB's Errors

1. The ASLB's Error in Barring Discovery

Contrary to LILCO's assertion (LILCO Brief at 12), the information sought by Appellants in order to respond to LILCO's written evidence on the Nassau Coliseum was not "publicly accessible." Indeed, Appellants attempted to obtain such information through means other than formal discovery but were unable to do so. See, e.g., Appellants' November 6 Brief at 31, n.30. Moreover, LILCO's argument is beside the point. The ASLB's January 28 Order contemplated both the submission of cross-examination plans concerning LILCO's proffered evidence and the submission of direct testimony by other parties on the merits of LILCO's proposed use of the Nassau Coliseum. Accordingly, Appellants were

entitled under the NRC's regulations and fundamental principles of due process to discovery on the issues upon which they were expected to cross examine and submit testimony.

In addition, contrary to LILCO's suggestion (LILCO Brief at 12), the ASLB's error in precluding discovery was not somehow cured by the fact that Appellants were offered the opportunity to subpoena the General Manager of the Nassau Coliseum to testify at trial. The ASLB had no authority or basis for requiring Appellants to go forward on LILCO's new relocation center scheme without the benefit of any discovery. Suggesting that discovery could be conducted during the trial is no remedy.

2. The ASLB's Error in Denying Admission of Appellants' Testimony and in Denying Appellants' Motion to Reopen the Record

Neither LILCO nor the Staff addresses Appellants' assertion that, although the "rationale" for the ASLB's exclusion of essentially all Appellants' evidence was that it did not go to the issue of the "functional adequacy" of the Coliseum to serve as a relocation center,<sup>4</sup> in fact such testimony squarely addressed that very issue. See Appellants' November 6 Brief at 38-42. Because the ASLB's May 6 Order rejecting Appellants' evidence failed to apply its own admissibility criterion to Appellants' evidence, reversal by this Board is required.

LILCO and the Staff would have this Board believe that Appellants' proffered evidence was properly excluded because it was not raised in the proper procedural manner, i.e., under the guise of amended contentions or

---

<sup>4</sup> See Memorandum and Order (Reopening of the Record) (May 6, 1985) (hereafter, "May 6 Order") at 3, 4.

after petitioning for leave to file new contentions on the relocation center issues.<sup>5</sup> These arguments turn the NRC's procedures into an absurd Catch-22 morass under which only Applicants can prevail and Intervenors are bound and gagged. This Board must reject them.

Appellants submitted relocation center-related contentions -- which concededly were absolutely correct -- when LILCO's Plan first appeared. Some of those contentions became unrelated to the specifics of LILCO's Plan as LILCO kept changing its proposals; but, all the parties and the ASLB recognized that fact and understood that the litigation would continue based on the thrust of the contentions, even though they referred to specific facilities and proposals that were no longer being relied upon or pursued by LILCO.

When Appellants had prevailed on those contentions at the end of the litigation in 1984, it was decided to give LILCO one more chance: at LILCO's request, the record was reopened. LILCO was not required to submit contentions, however, even though it was the party seeking additional litigation; instead, the ASLB arbitrarily chose one of Appellants' contentions (Contention 24.0) which had nothing to do with LILCO's new Nassau Coliseum evidence, and ruled that only that contention would be the framework for the new litigation. The Margulies ASLB ignored the fact that Appellants' other admitted contentions were more relevant to LILCO's new evidence than was Contention 24.0.

---

<sup>5</sup> See, e.g., LILCO Brief at 15; Staff Brief at 5 ("[a]t no time did the State or County seek to amend the admitted contentions or move for permission to file additional contentions on relocation center issues") and 26 ("[n]o new contentions in this area were ever filed").

There. Appellants were not only barred from submitting any evidence relating the issues raised in their relevant admitted contentions to LILCO's Nassau Coliseum proposal; Appellants also were barred from submitting such evidence because they had not submitted totally new contentions on the new LILCO-requested relocation center litigation. And, to make matters even worse, Appellants also were barred from submitting evidence on the issue articulated by the ASLB as the subject of the new litigation (the functional adequacy of the Coliseum).

Thus, Appellants have been told that: (1) LILCO could submit any evidence it wanted, even four months after litigation had ended and it had lost; (2) in the LILCO-requested litigation, Appellants were limited to addressing only one contention, chosen by the ASLB and of no relevance; (3) Appellants' evidence which directly related to admitted and still very relevant contentions (as well as to the ASLB-defined functional adequacy issue) was barred because Appellants had not submitted new contentions; and (4) their submitted evidence was untimely because it related to earlier litigated contentions. None of this makes any sense. This Board cannot countenance the unlawful distortion of NRC procedure which the Margulies ASLB perpetrated at the urging of LILCO and the Staff. LILCO is right in asserting that this litigation is not a "game" (LILCO Brief at 10); however, the NRC's rules must be applied fairly to all litigants, and not in a way that precludes one set of litigants from exercising any of their due process rights.

On a related matter, LILCO's and the Staff's assertion that Appellants' motion to reopen was properly denied because the proffered

testimony was untimely should be summarily rejected. Appellants' evidence fell squarely within the ASLB's articulated reason for reopening, i.e., to address the functional adequacy of the Nassau Coliseum as a reception center in the LILCO Plan. The assertions of LILCO and the Staff that Appellants' testimony on that subject could have been filed in August of 1984 (when LILCO's third relocation center scheme was litigated) or even earlier (e.g., during litigation of evacuation shadow or the 50-mile EPZ contentions) are without merit. First, Appellants' testimony addressing the adequacy of LILCO's proposed use of the Coliseum could not have been filed until LILCO had made known its plan to use that facility, and the ASLB had decided to reopen the evidentiary record to consider that new proposal.

Second, the LILCO and Staff assertions that Appellants' testimony was "generic" and could have been raised about other relocation centers designated earlier (see, e.g., LILCO Brief at 20, 22, 29, 32-33; Staff Brief at 27-30) must be rejected. Before its designation of the Nassau Coliseum, LILCO had done nothing more than list facilities as relocation centers; Appellants knew, as they alleged in their contentions as early as June 1983, that LILCO would in fact never use those facilities because it had never obtained the permission of the facilities' owners for such use. Under such circumstances, there was simply no reason for Appellants to have submitted testimony concerning, for example, SPDES permits or groundwater contamination, with respect to other LILCO-proposed relocation centers. However, once LILCO asserted it had an alleged "agreement" to use the Nassau Coliseum, and the ASLB admitted LILCO's

evidence on that subject for litigation, Appellants' proffered testimony was submitted because it was probative and relevant to the Coliseum's "functional adequacy."

Finally, LILCO improperly disputes the merits of the testimony proffered by Appellants, rather than addressing the threshold issue of whether such testimony is admissible under the NRC's regulations. See 10 CFR § 2.743. LILCO makes factual allegations, draws conclusions and raises arguments concerning Appellants' proffered testimony which would properly be pursued (assuming Appellants' proffered testimony had been admitted by the ASLB) through cross-examination, rebuttal testimony, or in post-trial briefs after all relevant evidence had been considered. See, e.g., LILCO Brief at 25, 31, 38. Such allegations, conclusions and arguments that, in essence, the County and State witnesses were wrong in their factual assertions and expert opinions, amount to nothing but attempts by LILCO's lawyers to argue the merits of Appellants' proffered testimony, and, accordingly, should be disregarded by this Board.

C. The Licensing Board's Error on the Guard Issue

Appellants' November 6 Brief addresses the Guard<sup>6</sup> issue in detail and demonstrates the ASLB's errors. LILCO and the Staff do not effectively refute those arguments. But, two related points must be addressed.

LILCO and the Staff apparently believe that Guard gives the NRC unfettered discretion on how to apply 10 CFR § 50.47(b)(12). It does not. The Guard decision states that the NRC has broad discretion to

---

<sup>6</sup> Guard v. NRC, 753 F.2d 1144 (D.C. Cir. 1985).

change the regulation. See 753 F.2d at 1146. But, unless and until the regulation is changed, the decision does not grant the NRC discretion to disregard Section 50.47(b)(12) as construed in Guard, or to grant licenses and dismiss contentions based upon what might happen in the future. The NRC must apply its regulations, including Section 50.47(b)(12). Any interpretation of the NRC's May 16, 1985 Policy Statement (50 F.R. 20,892 (1985)) which results in the disregard of the regulation which is in effect is unlawful. That is what the ASLB did and what LILCO and the Staff urge this Board to affirm. This Board should refuse.

Second, the Staff argues that the ASLB was correct because there is no guidance regarding how Section 50.47(b)(12) should be applied. See Staff Brief at 41. This is wrong. Unless and until it is changed, Section 50.47(b)(12) must be interpreted and applied in a manner consistent with the Guard decision. This would result in no "broad debate" (Staff Brief at 42) over the meaning of the regulation; rather, it would result in focussed litigation pursuant to Appellants' proposed contentions regarding a regulation which the Court construed clearly. The fact that the NRC may later change the regulation does not mean that the regulation presently in effect is unclear in any way.

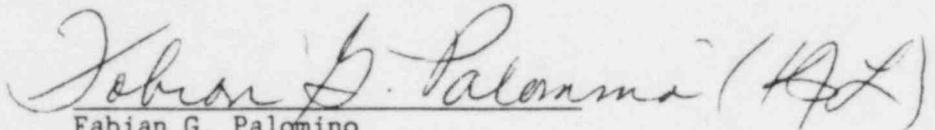
Respectfully submitted,

Martin Bradley Ashare  
Suffolk County Attorney  
Building 158 North County Complex  
Veterans Memorial Highway  
Hauppauge, New York 11788



Herbert H. Brown  
Lawrence Coe Lanpher  
Karla J. Letsche  
Michael S. Miller  
KIRKPATRICK & LOCKHART  
1900 M Street, N.W., Suite 800  
Washington, D.C. 20036

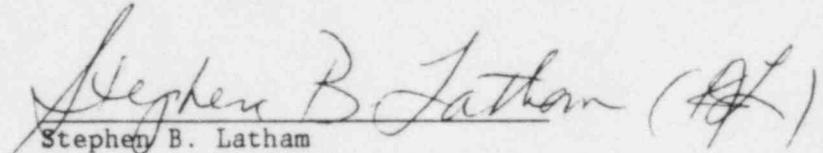
Attorneys for Suffolk County



Fabian G. Palomino  
Special Counsel to the Governor  
of the State of New York  
Executive Chamber, Room 229  
Capitol Building  
Albany, New York 12224

Robert Abrams  
Attorney General of the  
State of New York  
Two World Trade Center  
New York, New York 10047

Attorneys for Governor Mario M.  
Cuomo, and the State of New York



Stephen B. Latham  
Twomey, Latham & Shea  
P.O. Box 398  
33 West Second Street  
Riverhead, New York 11901

Attorney for the Town of  
Southampton

January 6, 1986

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

'86 JAN -8 11:42

Before the Atomic Safety and Licensing Appeal Board

OFFICE OF  
REGULATORY & SERVICE  
BRANCH

\_\_\_\_\_  
In the Matter of )  
 )  
LONG ISLAND LIGHTING COMPANY )  
 )  
(Shoreham Nuclear Power Station, )  
Unit 1) )  
\_\_\_\_\_)

Docket No. 50-322-OL-3  
(Emergency Planning)

Certificate of Service

I hereby certify that copies of SUFFOLK COUNTY, STATE OF NEW YORK, AND TOWN OF SOUTHAMPTON MOTION FOR LEAVE TO FILE BRIEFS with attached SUFFOLK COUNTY, STATE OF NEW YORK, AND TOWN OF SOUTHAMPTON REPLY BRIEF ON APPEAL OF LICENSING BOARD APRIL 17, 1985 PARTIAL INITIAL DECISION ON EMERGENCY PLANNING and SUFFOLK COUNTY, STATE OF NEW YORK, AND TOWN OF SOUTHAMPTON REPLY BRIEF ON APPEAL OF LICENSING BOARD AUGUST 26, 1985 CONCLUDING PARTIAL INITIAL DECISION ON EMERGENCY PLANNING have been served on the following this 6th day of January, 1986, by U.S. mail, first class.

Alan S. Rosenthal, Chairman  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Stuart Diamond  
Business/Financial  
NEW YORK TIMES  
229 W. 43rd Street  
New York, New York 10036

Mr. Howard A. Wilber  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Joel Blau, Esq.  
New York Public Service Comm.  
The Governor Nelson A.  
Rockefeller Building  
Empire State Plaza  
Albany, New York 12223

Mr. Gary J. Edles  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Morton B. Margulies, Chairman  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dr. Jerry R. Kline  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Mr. Frederick J. Shon  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Mr. L. F. Britt  
Long Island Lighting Company  
Shoreham Nuclear Power Station  
North Country Road  
Wading River, New York 11792

Nora Bredes  
Executive Director  
Shoreham Opponents Coalition  
195 East Main Street  
Smithtown, New York 11787

Ms. Donna D. Duer  
Atomic Safety and Licensing  
Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

MHB Technical Associates  
1723 Hamilton Avenue  
Suite K  
San Jose, California 95125

Stewart M. Glass, Esq.  
Regional Counsel  
Federal Emergency Management  
Agency  
26 Federal Plaza  
New York, New York 10278

Anthony F. Earley, Esq.  
General Counsel  
Long Island Lighting Company  
250 Old Country Road  
Mineola, New York 11501

W. Taylor Reveley, III, Esq.  
Hunton & Williams  
P.O. Box 1535  
707 East Main Street  
Richmond, Virginia 23212

Mr. Jay Dunkleberger  
New York State Energy Office  
Agency Building 2  
Empire State Plaza  
Albany, New York 12223

Stephen B. Latham, Esq.  
Twomey, Latham & Shea  
P.O. Box 398  
Riverhead, New York 11901

Docketing and Service Section  
Office of the Secretary  
U.S. Nuclear Regulatory Comm.  
1717 H Street, N.W.  
Washington, D.C. 20555

Hon. Peter Cohalan  
Suffolk County Executive  
H. Lee Dennison Building  
Veterans Memorial Highway  
Hauppauge, New York 11788

Dr. Monroe Schneider  
North Shore Committee  
P.O. Box 231  
Wading River, New York 11792

Martin Bradley Ashare, Esq.  
Suffolk County Attorney  
H. Lee Dennison Building  
Veterans Memorial Highway  
Hauppauge, New York 11788

Atomic Safety and Licensing  
Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Edwin J. Reis, Esq.  
Bernard M. Bordenick, Esq.  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Spence Perry, Esq.  
Associate General Counsel  
Federal Emergency Management Agency  
Washington, D.C. 20471

Mr. William Rogers  
Clerk  
Suffolk County Legislature  
Suffolk County Legislature  
Office Building  
Veterans Memorial Highway  
Hauppauge, New York 11788

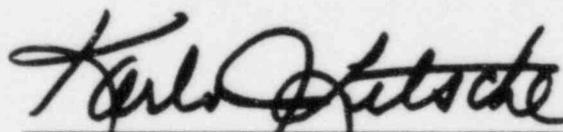
Jonathan D. Feinberg, Esq.  
Staff Counsel, New York State  
Public Service Commission  
3 Rockefeller Plaza  
Albany, New York 12223

Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory Comm.  
Washington, D.C. 20555

Fabian G. Palomino, Esq.  
Special Counsel to the Governor  
Executive Chamber, Room 229  
State Capitol  
Albany, New York 12224

Mary Gundrum, Esq.  
New York State Department  
of Law  
2 World Trade Center, Rm. 4614  
New York, New York 10047

David A. Brownlee, Esq.  
Kirkpatrick & Lockhart  
1500 Oliver Building  
Pittsburgh, PA 15222



Karla J. Letsche  
KIRKPATRICK & LOCKHART  
1900 M Street, N.W., Suite 800  
Washington, D.C. 20036

Date: January 6, 1986