5416

DOCKETED
USNRC

'88 JAN 26 A11:15

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

January 22, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL-6 (25% Power)

GOVERNMENTS' COMMENTS IN RESPONSE TO JANUARY 7, 1988 MEMORANDUM AND ORDER

The Governments (Suffolk County, the State of New York and the Town of Southampton) hereby respond to this Board's Memorandum and Order (In Re: LILCO's Request for Authorization to Operate at 25% of Full Power), dated January 7, 1988 (hereafter, the "Order"). The Board sought the parties' comments on "the relative advantages and disadvantages" of requesting that the Chief Administrative Judge appoint another Licensing Board, or in consultation with him and pursuant to 10 CFR § 2.722(a), a Special Master, or an Alternate Board Member, or a Technical Interrogator. Order at 11.

The Order also identified the future mission of the so-called "new forum":

8801270334 880122
PDR ADOCK 05000322
G PDR

DS03

> [T]he new forum would consider the discrete question of whether any of the contentions currently before this Board, including both the so-called legal authority contentions and the contentions before us on remand, are substantively relevant to the proposed operation at 25% of full power.

Order at 10. The Board explained that "[t]he question of which contentions currently in litigation are relevant in a substantive way to the activity to be authorized is a question that stands at the core of any litigation concerning the request for 25% power." *Id*. at 9 (emphasis added). It noted, however, that "[t]he matter of the validity of the technical analysis supporting LILCO's motion is a narrow one and constitutes only a small part of the total litigation." *Id*. at 9-10 (emphasis added). That is because, as the Board observed, LILCO's apparent intent is to attempt to show that unresolved contentions are immaterial to the provisions of Section 50.47(b), Appendix E, and NUREG 0654, or insignificant to public health and safety, based on its Shoreham-specific risk assessment for 25% power operation and "uncontested elements of emergency planning now in place." *Id*. at 10, n.2.

The Governments' comments on the advantages and disadvantages of the four alternate proposals for a "new forum," in light of the assignment proposed for that forum, follow.[1]

---

[1] In providing these comments, the Governments stress that they do not concede the correctness of the Board's basic ruling on January 7 -- that it is appropriate to proceed to consider LILCO's 25% power request. To the contrary, the Governments believe the Order was clearly erroneous. Thus, on January 21, the Governments filed with the Appeal Board a Motion for Leave to File Interlocutory Appeal of the January 7 Order. A copy of the Governments' Motion was served on this Board.

First, for the reasons set forth below concerning a new Board, an Alternate Board Member, and a Technical Interrogator, the Governments dc not consent to the appointment of a Special Master. Therefore, under Section 2.722(a)(2), that option cannot be adopted. Accordingly, the remainder of these comments addresses only the other three alternative proposals.

Second, the proposal to appoint a "new forum" to consider the relevance of admitted contentions to 25% power operation appears to be based upon fundamentally incorrect assumptions about the status of several Shoreham issues. As of October 6, 1987, when the Margulies Board sought the parties' views on several matters, the status of many issues was unknown or in a state of flux. Subsequent events, however, document beyond any question that LILCO's 25% power motion must be "denied" because the Governments' existing contentions, undeniably, "are substantively relevant to the proposed operation at 25% of full power." <u>See</u> Order at 10. We discuss some examples below.

For instance, it is clear beyond any question that there must be a "full participation exercise" <u>before</u> Shoreham can operate above 5% power. That is an <u>express</u> requirement of 10 CFR Part 50, App. E, § IV.F.1.[2] The Governments have contentions

---

[2] Appendix E, § IV.F.1 provides:

> 1. A full participation exercise which tests as much of the licensee, state and local emergency plans as is reasonably achievable without mandatory public participation <u>shall be conducted</u> for each site at which a power reactor is located for which the first operating

(footnote continued)

alleging that LILCO has failed to conduct the required exercise. Moreover, it is now established that, in fact, LILCO has not conducted such an exercise. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-732, ___ NRC ___ (Dec. 7, 1987). In that decision, the Governments' referenced contentions were held to be correct. There is no need, nor would it be appropriate, for another Board or special assistants to waste time examining the relevance of these contentions to 25% power: under Appendix E, it is undisputable that the contentions are relevant. And, LBP-87-32 makes it similarly undisputable that the Governments' contentions are correct.[3]

It is similarly clear that the "legal authority" contentions also are "relevant" to 25% power. LILCO maintains that its LERO organization and Plan will be in effect during 25% power operation; indeed, that is one of its so-called "compensating actions"

(footnote continued from previous page)

> license for that site is issued after July 13, 1982. This exercise shall be conducted within two years before the issuance of the first operating license for full power (one authorizing operation above 5% of rated power) of the first reactor . . . .

(footnote omitted; emphasis added).

[3] This Board's Order (at 10) suggests that the only inquiry would be whether any contentions "before this Board" are relevant to 25% power. It is obvious, however, that contentions in the OL-5 proceeding, whether already ruled upon or not, are just as relevant to 25% power operation as those in the OL-3 docket. They all allege failures of LILCO's emergency plan to comply with Section 50.47, Appendix E, and NUREG 0654. See NRC Staff Response to LILCO Motion for Designation of Licensing Board and Setting Expedited Schedule to Rule on LILCO's 25% Power Request (July 29, 1987) at 4 (potentially relevant contentions include those in both OL-3 and OL-5 proceedings).

which allegedly would address all its planning deficiencies. LILCO Request at 10, 84. Contentions EP 1-10 directly contest the legality of that Plan and the authority of LERO personnel to perform functions pursuant to that Plan. The legal authority contentions are fully relevant at any power level that involves the proposed activation of LERO and the LILCO Plan. Thus, it cannot be disputed that the legal authority contentions are "relevant" to 25% power operation.[4] Many other admitted contentions are also indisputably "relevant" to LILCO's proposed 25% power operation, such as those in the OL-5 proceeding related to alerting and notification and LERO training, and the EBS issues currently before this Board.[5]

4/ See also NRC Staff Response to Board Memorandum Requesting Parties' Views on Questions Raised by LILCO 25% Power Authorization Motion (Nov. 6, 1987) at 4 ("several of the pending emergency planning issues, particularly the legal authority issues relating to activation of the alert and notification system and the decision and recommendation process for protective actions for the public, would seem to require a finding of regulatory compliance at 25% power as well as at full power" and "this would appear to be true, even using the 'realism' assumption" citing CLI-86-13 and rule amendment).

5/ See, e.g., NRC Staff Reply to Other Party Views on Board Questions Concerning LILCO Motion for Authorization to Operate at 25% (Dec. 15, 1987) at 3 ("[T]he issues of whether the LILCO offsite emergency response organization (LERO) is sufficiently trained to implement the LILCO Plan, and whether the realism-postulated best effort government response following the LILCO Plan would be adequate are open issues in the OL-5 and OL-3 hearings, respectively. As conceded by LILCO, these issues are relevant to consideration of the 25% power motion and would necessarily be open to litigation in the OL-6 docket.") (emphasis added).

The foregoing few examples amply demonstrate the fundamental fallacy in the Board's apparent belief that there could ever be a finding by any "new forum" that no contentions are relevant to LILCO's 25% power operation. Clearly, there is no basis for creating a "new forum" to decide a question for which the answer: (a) is already provided by the regulations; (b) is already provided in ASLB decisions; or (c) is a matter of common sense.

Third, the Governments submit that the proposal to appoint a new licensing board is improper and contrary to the intent of Section 50.57(c). As the NRC Staff has stated on several occasions, "10 C.F.R. § 50.57(c) reflects a regulatory policy that <u>the same licensing board which has considered the contentions pending in a proceeding</u> should determine whether those contentions are relevant to the activity sought to be authorized . . . ." NRC Staff View on Prioritizing Matters Before the Licensing Board (Nov. 14, 1987), at 3-4, n.1.[6/] Since that precise determination -- whether existing contentions are relevant to 25% power operation -- is what the Order proposes to be made in this case by a new Board rather than by the presiding

---

6/ <u>See also</u> NRC Staff Response to LILCO Motion for Designation of Licensing Board and Setting Schedule to Rule on LILCO's 25% Power Request, filed with the Commission (July 29, 1987) at 3 (implicit in CLI-87-04 "is the determination that, under 10 C.F.R. § 50.57(c), the Licensing Board which has considered the contentions still pending, should hear from the parties concerning the relevance of such contentions to the activity sought to be authorized"); and 4-5 ("LILCO's argument that the issues raised in its 25% power request are so distinct from pending issues as to obviate the regulatory policy that the licensing board hearing evidence on contentions preside over the § 50.50(c) application is without merit").

Board, the new Board alternative proposal cannot lawfully be implemented. To do so would violate Section 50.57(c) and the Commission's interpretation of the intent of that Section.[7/]

Fourth, even assuming _arguendo_ it were proper under the regulations, it is the Governments' view that there would be no "advantages" to be gained by the appointment of a new Licensing Board, or an Alternate Board Member, or a Technical Interrogator. There are, however, many disadvantages to all three proposals.

As the Governments and the NRC Staff have reiterated several times, given the issues to be decided by the Board's proposed "new forum," it would be inefficient, counterproductive, and prejudicial to the parties to have a new adjudicator brought into this complex case, with its years of procedural and substantive history, particularly for the purpose of ruling on the relevance of matters with which the presiding Board has itself been dealing for years.[8/] This is true whether the "new forum" were to be a

---

7/ Indeed, Section 50.57(c) itself makes clear that it does not contemplate the involvement of new adjudicators unfamiliar with the pending proceeding and its contentions. It provides:

> Action on [a motion for a license short of full power filed in a pending proceeding] _by the presiding officer_ shall be taken with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized. _Prior to taking any action on such a motion, the presiding officer_ shall make findings on the matters specified in paragraph (a) of this section as to which there is a controversy . . . .

8/ For the sake of brevity, we do not repeat here the extensive (footnote continued)

Licensing Board, an Alternate Board Member, or a Technical Interrogator. Any newcomer to this proceeding would simply not have the necessary background knowledge or information to enable him or her to perform productively or fairly as an adjudicator, or interrogator.

This is true particularly in light of the task proposed for the "new forum" -- determining whether any of the contentions are "substantively relevant" to 25% power operation. Order at 10. To make such determinations would necessitate a full understanding of the LILCO Plan, all the contentions in the OL-5 and OL-3 proceedings, the litigation, evidence, and in some cases, rulings concerning them from 1983 to the present, in addition to

---

(footnote continued from previous page)
discussions on this subject which have already been provided to this Board. We provide the pertinent references for convenience, however. We also note that the Board's definition of the task it proposes to assign to the "new forum" does not affect in any way the previous arguments concerning the interrelated nature of the issues presented by LILCO's 25% power request and the emergency planning issues with which this Board has been dealing for the past several years. See Suffolk County, State of New York and Town of Southampton Response in Opposition to LILCO Motion for Designation of Licensing Board and Setting Expedited Schedule to Rule on LILCO's 25% Power Request (July 27, 1987) at 11-13; NRC Staff Response to LILCO Motion for Designation of Licensing Board and Setting Expedited Schedule to Rule on LILCO's 25% Power Request (July 29, 1987) at 4-5; Response of Suffolk County, the State of New York and the Town of Southampton to August 31, 1987, Licensing Board Notice (Sept. 14, 1987) at 8-11; NRC Staff Views on Prioritizing Matters Before the Licensing Board (Sept. 14, 1987) at 4 ("Due to the desirability of having the Licensing Board familiar with the other emergency planning issues deal with the 25% power request, the Staff does not recommend appointment of an additional Licensing Board or designation of a Special Master to hear the LILCO Request for Authority to operate at 25% power."); NRC Staff Reply to Other Party Views on Board Questions Concerning LILCO Motion for Authorization to Operate at 25% Power (Dec. 15, 1987) at 3-4.

the extensive procedural and substantive history of the legal authority contentions. It seems preposterous to suggest it could be "advantageous" to assign such a task to a person or persons with no background, familiarity, or experience with any of those matters, particularly when the relative ignorance of such a newcomer(s) is contrasted with the experience of at least two of the presiding board members.

In addition, resource limitations and logistical considerations would make it grossly prejudicial, if not impossible, to have a "new forum" begin a new 25% power proceeding, to be conducted simultaneously with the many other proceedings already in progress on various other aspects of LILCO's license application.[9/] This Board apparently believes that its "existing burdens" are so great that it must transfer some of its workload to a "new forum." See Order at 10. There is no basis for the Board's apparent assumption that the resources of the parties --

---

9/ It bears mentioning those matters which are presently outstanding as of January 22 (or which are about to be) as an example of why it is clear error to suggest that another full proceeding of the complexity of 25% power could simply be added to the burden. These matters are: responses to and pursuit of discovery and subsequent proceedings on school issues (the Contention 25.C remand); response to the Staff's support of LILCO on summary disposition of hospital issues and potential future proceedings on that issue; further proceedings concerning response to the Governments' EBS contentions and LILCO's new EBS proposal; response to the Staff's support of LILCO on its 10 CFR § 50.47(c)(1)(i)-(ii) summary disposition motion; response to LILCO's six other legal authority summary disposition motions (and further filings if the Staff supports LILCO); response to LILCO's appeal of the Frye Board's December 7, 1987 PID; response to the forthcoming reception center decision; response to a forthcoming second Frye Board exercise decision; review of Rev. 9 of LILCO's Plan which is due to be filed shortly; and response to LILCO's exercise request.

at least those of the Governments and, perhaps, the NRC Staff as well -- would permit them to accept, without extreme prejudice, the additional burden of a separate 25% power proceeding, particularly in light of the repeated statements by the Governments and the Staff which demonstrate clearly that the parties cannot shoulder such a new burden.[10] Notably, the Board cites no basis for its assumption. Furthermore, it must be emphasized that the Governments are involved in NRC and other Shoreham-related proceedings, which demand extensive resources and time commitments, in addition to those which are too burdensome for this Board.[11] In sum, it would be not only disadvantageous, but also prejudicial, to create a "new forum" for the conduct of an additional proceeding in this case.[12]

10/ NRC Staff Response to LILCO Motion for Designation of Licensing Board and Setting Expedited Schedule to Rule on LILCO's 25% Power Request (July 29, 1987) at 5-6; Response of Suffolk County, the State of New York and the Town of Southampton to August 31, 1987 Licensing Board Notice (Sept. 14, 1987) at 9: NRC Staff Views on Prioritizing Matters Before the Licensing Board (Sept. 14, 1987) at 2-3; Suffolk County, State of New York, and Town of Southampton Reply Regarding the Priority of OL-3 Issues (Sept. 21, 1987) at 4-5.

11/ These additional matters include exercise-related proceedings before the Appeal Board, LILCO's new exercise request, U.S. Court of Appeals proceedings contesting amended 10 C.F.R. § 50.47(c)(1), and comments on draft NUREG-0654, Rev. 1, Supp. 1.

12/ One other Board observation requires comment. The Board suggests that "the validity of the technical analysis supporting LILCO's motion is a narrow one . . . ." Order at 9. It may be narrow and it may be only a "small part of the total litigation" (Id. at 9-10), assuming the 25% power litigation proceeds at all. But, it is error -- and serious error at that -- if the Board meant to imply or suggest that this "small part" may be addressed "with due regard to the equities involved" in any relatively short time frame or without imposing serious burdens upon the (footnote continued)

The bottom line is clear: if there is to be consideration of the 25% power motion, then <u>other</u> matters must be put on different schedules. It is impossible -- and a potentially gross deprivation of due process -- to suggest that the Governments should be expected to proceed on these multiple tracks simultaneously. The Board may believe (erroneously in the Governments' view) that LILCO is "entitled to proceed on the course it has chosen." Order at 12. But that "entitlement" clearly does <u>not</u> carry with it any right to proceed in a manner which deprives parties of due process. Thus, contrary to the Board's assertion (Order at 12), the burden on the parties of LILCO's chosen "course" must be considered.[13]

Finally, the alternative "new forum" proposals would bring no "advantages" for an additional reason. Given the issues to be determined by the "new forum," there is no basis for assuming that any new Board, Alternate Board Member, or Technical Interrogator would be any more qualified to deal with those issues than

---

(footnote continued from previous page)
parties. Quite aside from the massive resources that would be required to review such analyses, the Board must recognize that it is, pure and simple, a <u>huge</u> task. LILCO's 25% power Request contains 10 technical appendices, including a PRA, a common-cause initiator analysis, and source term analyses. These types of studies take <u>very</u> substantial time to review. They obviously took LILCO substantial time to prepare, since they involved seven major contractors (Request at 6) and four "independent peer" reviewers. <u>Id</u>.

[13] <u>See</u> <u>Cuomo v. NRC</u>, Docket No. 84-1264 (D.D.C. April 25, 1984) CCH Nuc. Reg. Rptr. ¶ 20,304 (NRC enjoined from proceeding on a schedule that deprived Governments due process). <u>See</u> <u>also</u> <u>Long Island Lighting Co.</u> (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154 (1984).

the members of the existing Board.[14] Judge Shon has the technical expertise to deal with PRA-related matters. Judges Kline and Shon have substantial familiarity and experience in dealing with the LILCO Plan, the admitted contentions in this and the OL-5 proceeding, and the emergency planning regulations. Judge Gleason has a legal background. There is no basis to presume that any other members of the Licensing Board Panel (with the possible exceptions of Judges Frye and Paris who have familiarity with Shoreham issues) would be any more qualified or able to deal with the issues this Board wishes to give to a "new forum." Indeed, as noted above, any other Panel members would be substantially less qualified.

For the foregoing reasons, the Governments submit that there are no advantages to any of the alternative "new forum" proposals contained in the Order. Indeed, each of them would be prejudicial, counterproductive, and disadvantageous.

Under the regulations, this Board must deal with the 25% power issue itself. Logic, common sense, and basic principles of fairness and equity require the same result. Moreover, the regulations, Licensing Board decisions, and ordinary common sense have already answered the question supposedly to be determined with respect to the 25% power request: there are contentions in the OL-5 and OL-3 proceeding which are relevant to the 25% power activity in question. Accordingly, the underlying premise of the

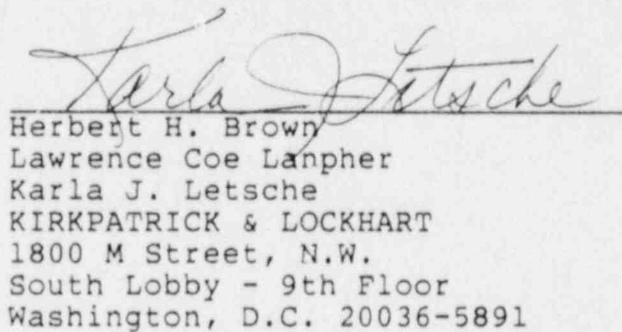
---

14/ According to Section 2.722(a), technical interrogators and alternate board members are to be appointed "from the Atomic Safety and Licensing Board Panel."

"new forum" proposals -- that there conceivably could be a finding that no contentions are relevant to 25% power operation -- is fundamentally incorrect.

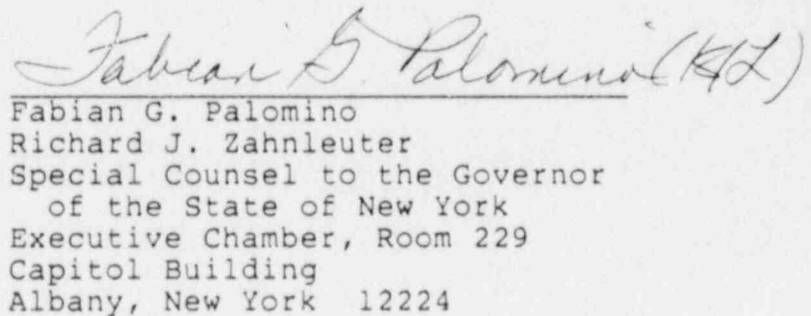
Respectfully submitted,

E. Thomas Boyle
Suffolk County Attorney
Building 158 North County Complex
Veterans Memorial Highway
Hauppauge, New York 11788



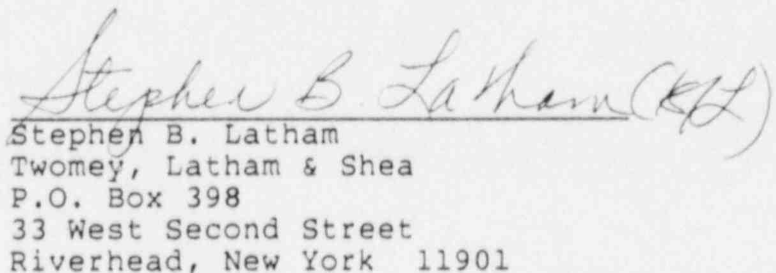
Herbert H. Brown
Lawrence Coe Lanpher
Karla J. Letsche
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
South Lobby - 9th Floor
Washington, D.C. 20036-5891

Attorneys for Suffolk County



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

Attorney for Mario M. Cuomo,
Governor of 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

DOCKETED
USNRC

'88 JAN 26 A11:15

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

January 22, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL-6 (25% Power)

CERTIFICATE OF SERVICE

I hereby certify that copies of GOVERNMENTS' COMMENTS IN RESPONSE TO JANUARY 7, 1988 MEMORANDUM AND ORDER have been served on the following this 22nd day of January, 1988 by U.S. mail, first class, except as otherwise noted.

James P. Gleason, Chairman
Atomic Safety and Licensing Board
513 Gilmoure Drive
Silver Spring, Maryland 20901

James P. Gleason, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Christine N. Kohl, Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal Board
115 Falcon Drive, Colthurst
Charlottesville, Virginia 22901

Mr. Frederick J. Shon
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. 20055

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

William R. Cumming, Esq.
Spence W. Perry, Esq.
Office of General Counsel
Federal Emergency Management Agency
500 C Street, S.W., Room 840
Washington, D.C. 20472

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

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

Joel Blau, Esq.
Director, Utility Intervention
N.Y. Consumer Protection Board
Suite 1020
Albany, New York 12210

Anthony F. Earley, Jr., Esq.
General Counsel
Long Island Lighting Company
175 East Old Country Road
Hicksville, New York 11801

E. Thomas Boyle, Esq.
Suffolk County Attorney
Bldg. 158 North County Complex
Veterans Memorial Highway
Hauppauge, New York 11788

Ms. Elisabeth Taibbi, Clerk
Suffolk County Legislature
Suffolk County Legislature
Office Building
Veterans Memorial Highway
Hauppauge, New York 11788

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

Stephen B. Latham, Esq.
Twomey, Latham & Shea
33 West Second Street
Riverhead, New York 11901

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

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

Alfred L. Nardelli, Esq.
New York State Department of Law
120 Broadway, 3rd Floor
Room 3-118
New York, New York 10271

Hon. Patrick G. Halpin
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

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

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

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

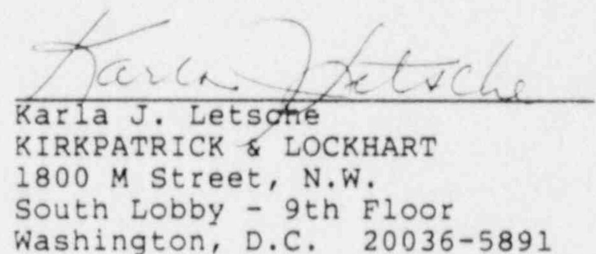
Edwin J. Reis, Esq.
George E. Johnson, Esq.
U.S. Nuclear Regulatory Comm.
Office of General Counsel
Washington, D.C. 20555

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

Douglas J. Hynes, Councilman
Town Board of Oyster Bay
Town Hall
Oyster Bay, New York 11771

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

Mr. Philip McIntire
Federal Emergency Management Agency
26 Federal Plaza
New York, New York 10278



Karla J. Letsche
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
South Lobby - 9th Floor
Washington, D.C. 20036-5891