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February 1, 1988 '88 FEB -2 P3:44

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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-3 (Emergency Planning)

SUFFOLK COUNTY, STATE OF NEW YORK, AND TOWN OF SOUTHHAMPTON REPLY TO "NRC STAFF RESPONSE TO LILCO MOTION FOR SUMMARY DISPOSITION WITH RESPECT TO COMPLIANCE WITH SECTION 50.47(c)(1)(i) & (ii)"

Suffolk County, the State of New York, and the Town of Southhampton (the "Governments") hereby reply to the NRC Staff's January 15, 1988 Response[1] in support of LILCO's December 18, 1987 Motion for Summary Disposition with respect to Section 50.47(c)(1)(i) & (ii).[2] The Staff's Response is uninformed and irrelevant in context. The Staff, for example echoes LILCO's unfounded prayer for summary disposition, but offers no bases other than dittoing the self-serving claims put forward by LILCO

1/ NRC Staff Response to LILCO Motion for Summary Disposition With Respect to Compliance With Section 50.47(c)(1)(i) & (ii), Jan. 15, 1988 (hereafter, the "Staff Response").

2/ LILCO's Motion for Summary Disposition of Contentions 1-10 With Respect to 10 CFR § 50.47(c)(1)(i) and (ii), December 18, 1987, (hereafter, the "Motion").

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in its Motion. The Staff also fictionalizes a "law of the case" to prop-up LILCO's claims, but the actual holdings in the Shoreham proceedings belie the Staff's fiction. Finally, the Staff reveals either by design or naivete that it has no meaningful knowledge of the course of LILCO's conduct toward the County and State since 1982 -- the lack of good faith and the periodic flourishes of bad faith.

The Governments' January 19 Response in opposition to LILCO's Motion[3/] demonstrates clearly that the Motion is defective as a matter of law; that there are multiple material facts in dispute; and that the Motion must be denied. None of these conclusions is altered by the Staff's Response.

The following is the Governments' reply to particular misstatements in the Staff's Response:

1. The Staff states that it is "appropriate" for the Board to consider LILCO's Motion for summary disposition. Staff Response at 2. The Staff's statement misleads the Board and flies in the face of established federal caselaw. As elucidated in the Governments' Response, the federal courts have held that summary disposition is "notoriously inappropriate" where, as here, "good faith" is the underlying issue. Governments'

3/ Suffolk County, State of New York, and Town of Southampton Response in Opposition to LILCO's Motion for Summary Disposition of Contentions 1-10 With Repsect to 10 CFR § 50.47(c)(1)(i) and (ii), Jan. 19, 1988 (hereafter, the "Governments' Response").

Response at 4, 12-15. Neither the Staff nor LILCO has even acknowledged the existence of this controlling caselaw, let alone confronted it squarely.

2. The Staff states that LILCO has "persuasively demonstrated" that there is no genuine issue of material fact in dispute, and that LILCO is "entitled to favorable findings on these issues as a matter of law." Staff Response at 2. The Staff's statements are baseless. In fact, not only did LILCO fail to demonstrate -- pervasively or otherwise -- that it is "entitled" to summary disposition, but LILCO did not submit -- even for pro forma purposes -- a single affidavit to support its conclusory claims. LILCO's purported "evidence" consists merely of a few self-serving characterizations that it has selectively carved from years of ill-suited conduct. By contrast, the Governments' evidence is meaningful in both scope and context. The Governments submitted detailed affidavits of persons with personal knowledge. These affidavits demonstrate that LILCO has manifested sustained conduct lacking good faith, sometimes even showing actual bad faith. LILCO clearly does not satisfy Section 50.47(c)(1)(i)-(ii), and nothing in the Staff's conclusory Response alters the reality that material facts are in dispute. See Governments' Response, Attachment 2.

3. The Staff states that the effect of the Licensing Board's decisions in the Shoreham proceeding "is to establish that the inability of LILCO to satisfy the emergency planning requirements for licensing . . . is derived in substantial part from the refusal of the County and State to participate in planning for an emergency at Shoreham." Staff Response at 3. The Staff concludes that it is the "law of the case" that LILCO's failure to comply with emergency planning requirements is "wholly or substantially because of State and local government non-participation in planning." Id. at 4.

The Staff's statements are incorrect. First, it is factually unsupportable that Suffolk County "refused to participate" in emergency planning for Shoreham. The County expended $600,000 on a plan prepared by a team of nationally recognized experts. Attached hereto is a letter written by the Suffolk County Executive and the Presiding Officer of the County Legislature to the Executive Director of the Staff on March 10, 1987, demanding that the Staff stop misrepresenting that the County has "refused to participate" in emergency planning. The Staff's continuation of such misstatements is inexcusable.

Second, the "law of the case" is not that LILCO's failure to comply with the NRC's emergency planning requirements "derived" from the County and State's determination not to adopt or implement an emergency plan. Never in the Shoreham proceedings has

the cause -- i.e., "derivation" -- of LILCO's failure to comply with the requirements of Section 50.47(b) been at issue. Rather, the issue has been whether LILCO has complied with the regulations. Indeed, it is only now, with the promulgation of the new rule, that cause is an issue.

Third, the "law of the case" in actuality is the controlling effect of the Constitution of New York State and the New York courts' decisions in Cuomo v. LILCO, as recognized by the Licensing Board in the April 1985 PID (21 NRC at 911) and the September 17, 1987 Memorandum and Order (LBP-87-26, at 25). This law provides that LILCO cannot be delegated the State's legal authority or given permission to implement its emergency plan because a private corporation cannot exercise the State's police powers. LILCO's non-compliance with NRC requirements is thus the result of LILCO's own status as a private corporation -- its inherent lack of capacity; not anything the County or State has done. See Governments' Response at 11.

Finally, LILCO is not in compliance with a substantial number of NRC requirements which are unrelated to its lack of legal authority to implement its emergency plan. The Governments have listed these at pages 11-12 of their January 19 Response to LILCO's Motion.

4. The Staff states that "LILCO sets out in great detail its efforts to obtain the cooperation of the County and State . . . ."; and that LILCO's efforts "support the finding . . . of a sustained good faith effort to secure and retain governmental participation." Staff Response at 4. The Staff's statement is incorrect. As demonstrated by the affidavits of Frank R. Jones, Gregory J. Blass, Fabian G. Palomino, and Frank P. Petrone, LILCO has chosen to disregard important material facts. There is no "great detail" in LILCO's Motion. The Motion is seriously incomplete and misleading. Moreover, the Staff's statement evidences either ignorance of LILCO's actual conduct toward the County and State since 1982, or carelessness in dealing with the facts. LILCO's Motion is replete with distortions; it is selective and exclusionary, and the Staff's endorsement of it is telling evidence of the Staff's lack of independence from LILCO. The Governments' Response (see pp. 18-25) summarizes the lack of a sustained good faith effort of LILCO. See also Governments' Response, Attachments 3-6. The Staff Response does nothing to establish that there are no material facts in dispute.

5. The Staff states that even "far less effort [by LILCO] would have been sufficient to demonstrate good faith efforts . . . ." Staff Response at 4. These words ridicule the Staff. First, assuming arguendo that the Staff's words should be taken seriously, there is no NRC or judicial guideline against

which something "far less" than "good faith" can be measured. "Good faith" is a subjective issue for the Board to decide in light of such factors as actions, intentions, and state of mind. Surely, the Staff does not claim to have a meter-stick by which to measure degrees of "good faith," or the prescience to sense by feel what no one else can.

Second, taken at face value, the Staff's statement is absurd. As the Jones, Blass, and Palomino affidavits demonstrate, it is difficult to imagine LILCO's efforts being any more lacking in good faith than they in fact have been since 1982. Indeed, the affidavits show acts of actual bad faith by LILCO. See Governments' Response at 18-25 and Attachments 3-5. The Staff's conception of "good faith" conduct existing at a level of "far less" LILCO effort, therefore, is without basis.

6. The Staff states that "it should be sufficient [to demonstrate good faith efforts] that LILCO submitted a series of plans, rejected by the Licensing Board, providing for participation of State and local governments in emergency response." Staff Response at 4. Again, the Staff reveals its ignorance of the facts and its blind loyalty to LILCO. The "series of plans" submitted by LILCO constituted misrepresentations, the genesis of which was LILCO's 1982 submittal to the State Disaster Preparedness Commission of a document which LILCO falsely labeled and claimed to be Suffolk County's emergency plan. LILCO's misrepre-

sentations are highlighted in the Jones affidavit as having elements of actual bad faith. See Governments' Response, Attachment 3, ¶s 18-28.

7. The Staff refers to "facts which must be deemed to be established by virtue of their adoption by various adjudicatory bodies sitting in this proceeding." Staff Response at 4-5. This statement is valueless. Which "various" adjudicatory bodies? Which facts? What does "by virtue of their adoption" mean? The fact is that this proceeding under the NRC's new emergency planning rule raises issues of first impression that no NRC board -- let alone "various boards" -- has confronted. Since, this proceeding deals with facts that heretofore were not addressed, by definition the facts could not have been previously "adopted". See Governments' Response at 15-16 and Attachment 1. The Staff's conclusory support for LILCO cannot change the reality: materials facts are in dispute. See Governments' Response, Attachment 2.

For the foregoing reasons, the Staff's Response should be disregarded. LILCO's Motion is defective for the reasons stated herein and in the Governments' January 19 Response. The Motion must be denied.

Respectfully submitted,

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COUNTY OF SUFFOLK

March 10, 1987

Mr. Victor Stello
Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Stello:

On behalf of the government of Suffolk County, we are writing in reply to your letter of February 20, 1987, which responds to the January 16 letter of the Suffolk County Executive. The County Executive's letter had corrected certain of your statements quoted in the press that mischaracterized the actions of Suffolk County concerning the Shoreham nuclear power plant. Your February 20 letter rejects the County Executive's corrections and reiterates even more emphatically the mischaracterizations you made earlier.

The message of your February 20 letter is clear: the Staff of the NRC has decided that public safety does not matter at Shoreham; that what matters only is putting the plant into operation. You have converted the Staff's role in the Shoreham licensing proceedings from participant in the case to champion of the cause -- LILCO's cause. In short, you have betrayed the Staff's responsibility to the public in these proceedings. It is time for you to take remedial actions.

Accordingly, first, the government of Suffolk County requests that you immediately disqualify yourself and the rest of the Staff from participating further as a party in the Shoreham proceedings. The Staff has subordinated its own identity to that of LILCO, and permitting the Staff to continue to participate as a purportedly impartial party would be nothing but a ruse. Section 0.735-3(a)(6) of the NRC's Regulations requires that the Staff "not give or appear to give favored treatment or competitive advantage to any member of the public." The Staff

cannot satisfy this standard: your February 20 letter is a manifesto of the Staff's favor and partisanship toward LILCO; a declaration of hostility toward Suffolk County.

Second, Suffolk County requests that you appear before a Special Session of the County Legislature. Your February 20 letter parades a bias that stems either from ignorance of the facts or from design. We want to know the sources upon which you rely for information concerning emergency planning at Shoreham. With whom from LILCO and other entities outside the NRC have you met, and what have they said? What private conversations have you held with NRC Commissioners? What is your true purpose in putting LILCO's interests above those of Suffolk County's citizens? The citizens of Suffolk County have the right to know the full story behind your actions concerning emergency planning issues at Shoreham.

Finally, we request that you digest the facts presented in this letter. To begin, the County Executive's January 16 letter corrected your mistatement that in a "real emergency" Suffolk County would cooperate with LILCO and "follow LILCO's plan." The Executive informed you that your statement was unfounded and incorrect, and transmitted documents, including Suffolk County Resolution No. 111-1983, to explain in detail the reasons for his statement that, "I would not use the authority of this government to implement LILCO's emergency plan or to work in concert with LILCO to effect an emergency response to an accident at Shoreham."

Your February 20 letter demeans the County Executive's statement. In scarcely veiled terms, you accuse the County Executive and the County Legislature of being liars, and even boast that you "continue to stand behind" your earlier misstatements. This presumptuousness does not suit an appointed NRC employee addressing the elected government of 1.3 million people.

The fact is that the government of Suffolk County would never use LILCO's emergency plan, or work in concert with LILCO, or rely upon LILCO's advice or judgment in a nuclear emergency. Whatever our actions, they would not include LILCO or LILCO's plan. This is the result of the County government having absolutely no confidence in the judgment or competence of LILCO. The June 23, 1986 statement of the Suffolk County Executive, which I sent you on January 16, explains the reasons in detail.

Your February 20 letter persists in mischaracterizing the emergency planning actions of Suffolk County. You write of the "refusal" of the County to participate in emergency planning and charge the County with "intransigence." The facts belie your words.

In fact, Suffolk County has participated thoroughly in emergency planning. In March 1982, we retained a team of nationally recognized experts at a cost of $600,000, directed them to prepare the "best possible" plan, and gave them free rein to do that. Eight months later, when the experts completed their draft plan and the extensive studies, analyses, and surveys that accompanied it, the County Legislature held eight days of open hearings at which specialists from around the country, including LILCO's consultants and officials, and members of the public testified. Sixteen hundred pages of testimony were compiled. Thereafter, the County Legislature travelled to Three Mile Island to meet with local government officials and the public in order to learn first-hand the lessons of the 1979 nuclear accident.

In February 1983, the County Legislature analyzed the emergency planning materials and testimony before it and concluded that in the event of a serious nuclear accident at Shoreham, it would not be possible to evacuate or otherwise protect the public. The bases for this determination are stated in Resolution No. 111-1983: among them are the limited roadway network, population densities, and other physiographic conditions which would cause people who were attempting to evacuate, instead to become stuck in gridlock. These people, therefore, would be exposed to the very radiation from which they were directed to flee.

The government of Suffolk County had two choices: to adopt an emergency plan, or to resolve not to adopt one. To have done the former would have misled the public into believing they were being protected when in fact they were not. To do the latter would be to tell the truth: that the adoption of an emergency plan would merely put an ineffective paper plan on the shelf and lull the public into a sense of false security. This government was elected to tell the public the truth and to protect their welfare. That is what we did resolving in County Resolution No. 111-1983 not to adopt or implement an emergency plan.

Suffolk County's Resolution No. 111-1983 and the County's actions were challenged by LILCO in Federal court. The County won the case: the Court ruled that the Resolution is lawful and rationally based. LILCO also challenged the Resolution in State court. The New York Court of Appeals upheld the County's decision not to adopt a plan. In short, the County lawfully exercised its police powers.

It is clear to us that you accuse Suffolk County of "refusing" to participate in emergency planning only because you do not like the result of the County's emergency planning process -- that is, the decision not to adopt or implement an emergency plan. The reason for your view presumably is that the County's actions do not enable the NRC to license Shoreham. If Suffolk County had followed the identical emergency planning process it used, but instead decided to adopt an emergency plan, we believe you would now be praising the County for its "participation" in emergency planning. You cannot have it both ways: The County in fact participated thoroughly in emergency planning and, as part of that participation, acted lawfully to protect the welfare of its citizens. For the same reasons that you would praise a County decision to adopt a plan, fair-mindedness requires that you accept the County decision not to adopt one.

Your February 20 letter states, "The record of this protracted proceeding also shows various state and local permits for environmental monitoring, building and zoning were also sought by LILCO and approved." This is a contrived and misleading statement, apparently intended by you to convey the impression that the County promoted the construction of Shoreham, and only as a last minute device to prevent operation of the plant raised the emergency planning issue. The impression you seek to convey is false. The fact is that in issuing whatever permits for Shoreham that you have in mind, the County did not address, and was not required to address, the feasibility of evacuating Long Island's residents in a nuclear emergency. The permits you have in mind presumably dealt with whether LILCO satisfied local building and other codes. The permits did not deal with whether safe evacuation was possible. Indeed, the agencies with the opportunity to address radiological emergency preparedness issues were the AEC and NRC, when LILCO applied for a permit to construct Shoreham and thereafter. However, they refused to address the issues. It is thus the AEC and NRC, along with LILCO, who are responsible for building Shoreham without taking into account whether safe evacuation is possible.

Moreover, in 1977, when LILCO applied for an operating license and the County intervened in the NRC's proceeding, the County raised the issue of whether evacuation was feasible at Shoreham. This was three years before the NRC even had a rule requiring an effective local emergency plan. The County's action followed the persistent efforts, begun in 1970, of a Long Island citizens group that had intervened in the Shoreham construction permit proceeding to raise and litigate the emergency planning issue before the AEC. In 1973, at the strong urging of LILCO and the AEC Staff, the AEC ruled that the citizens group could not raise or litigate the emergency planning issue at that time. The issue was postponed by the AEC until the "operating license

stage." Therefore, it is clear that the only reasons that emergency planning issues were not considered before construction of Shoreham was well underway were (1) because LILCO insisted on this and the AEC agreed; and (2) because the NRC did not require the issue to be thoroughly examined until the adoption of its post-Three Mile Island regulations in 1980.

You know well that the turning point for all concerned with radiological emergency planning was the Three Mile Island accident, when the Kemeny Commission, Congress, and the NRC itself heralded the need for workable local emergency preparedness. Indeed, all of the major investigations into the emergency preparedness aspects of Three Mile Island concluded that workable local emergency preparedness is a key to effective response to a nuclear accident. The investigators implored local governments to approach this responsibility seriously. NRC officials who travelled across the country holding workshops echoed the need for effective local involvement in emergency planning. No one had the temerity to suggest that a County which had extensively examined emergency preparedness for a nuclear plant within its jurisdiction, drafted the best possible emergency plan, and lawfully determined that the public could not be protected would be confronted with NRC Staff efforts to license the operation of the plant on the basis of a utility's illegal emergency plan. This is precisely the action of the NRC Staff in the Shoreham case.

The fact is that Shoreham was sited by LILCO and construction of the plant was approved by the AEC when emergency planning was given little attention. As late as 1979, before the Three Mile Island accident, the NRC's regulations did not require a local emergency plan as a condition of licensing a plant. The NRC required only that the utility submit "procedures for notifying, and agreements reached" with local governments that were of a general nature. Your letter of February 20 evidences the Staff's willingness to license Shoreham under circumstances which do not comply even with the NRC's discredited pre-Three Mile Island regulations.

Your February 20 letter discloses the refusal of the Staff to confront reality. Indeed, reality is that (1) Suffolk County has participated extensively in emergency planning and has rationally determined safe evacuation and other protection of the public to be impossible; (2) the County's determination has been upheld in Federal and State courts; and (3) LILCO's substitute emergency plan has been held by New York State courts to be illegal and not implementable. By choosing to rationalize LILCO's licensing objective in the Shoreham proceedings, rather than advocating reality, you have become stuck with promoting the following fantasy: that in the absence of County, State, or

implementable LILCO emergency plans, the public still would be protected by a not implementable emergency plan which has been lawfully opposed by County government in order to protect the public's welfare.

We look forward to your early reply.

Sincerely,

Gregory J. Blass
Presiding Officer
Suffolk County Legislature

Michael A. LoGrande
Suffolk County Executive

cc: NRC Service List