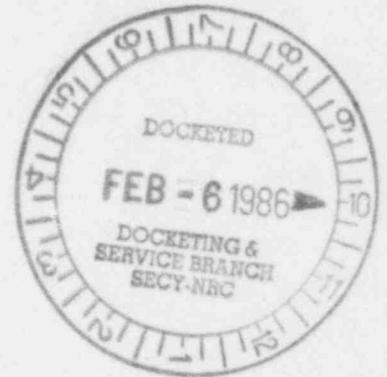


989

LILCO, February 3, 1986

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



Before the Commission

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

LILCO'S REPLY TO SUFFOLK COUNTY, ET AL. "NOTICE AND MOTION  
CONCERNING PROPOSED EMERGENCY PLANNING EXERCISE"

INTRODUCTION

LILCO opposes, and urges the Commission to deny, the relief requested by counsel for Intervenor Suffolk County on its own behalf and, apparently, that of the State of New York and the Town of Southampton, in a January 22 pleading entitled "Notice and Motion Concerning Proposed Emergency Planning Exercise." Citing reams of allegedly unanswered correspondence to other parties in the Shoreham case, but little else, the intervenors ask this Commission not only to assure their ability to observe the February 13 exercise, but to compel pre-exercise disclosure of the exercise scenario and related information, and to compel their admission to pre-exercise preparatory drills, meetings and other activity. The bases for LILCO's opposition, in summary, are as follows:

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1. Suffolk County and its less vocal partners already have access to vast quantities of detailed information about LILCO's Shoreham Local Offsite Radiological Emergency Response Plan and the proposed February 13, 1986 FEMA graded exercise, from litigation before this Commission and from the sidebar efforts of the Suffolk County legislature, as well as from FEMA in direct preparation for the exercise. The intervenors have not been deprived in fact of any legitimate information necessary for them to understand the exercise concept or to prepare to observe it. The remaining information which they desire -- the exercise scenario, information related to it, and information about LILCO's specific plans for preparation for the exercise -- is all either restricted by FEMA policy or protected by the attorney-client and attorney work product privileges.

2. Suffolk County has declared its intention to pursue litigation on the results of the exercise. The exercise itself, and not preparations for it, will be the subject of that litigation. Therefore, efforts to compel discovery of pre-exercise documents, LILCO's drills, and the like are both irrelevant to the exercise itself and protected by the attorney-client and attorney work product privileges, since they are directly in preparation for clearly threatened litigation. Torrents of self-serving correspondence from intervenors do not create discovery rights which do not exist.

3. Intervenors will be allowed to observe the exercise, which is the actual subject of potential litigation. No one has disputed their request to do so, in accordance with terms and conditions that have evolved in connection with other litigated cases.

4. Suffolk County's attempts to compel production of information from LILCO about the exercise and preparations for it, when there is in effect a Suffolk County local law which subjects not only the exercise, but preparatory activity, to potential criminal prosecution, constitute an invitation to this Commission to join the County in compelling disclosure of potentially self-incriminatory information, in plain violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

#### BACKGROUND

In early December 1985, the Federal Emergency Management Agency, responding to this agency's request,<sup>1/</sup> scheduled a graded emergency planning exercise on February 13, 1986 for the Shoreham Nuclear Power Station. In response, on the afternoon

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<sup>1/</sup> The request was originally authorized by a Commission decision forwarded to the Executive Director for Operations, William J. Dircks, by memorandum from the Secretary of the Commission on June 4, 1985. The Staff formally requested FEMA to conduct an exercise on June 20, 1985. FEMA Associate Director Samuel Speck responded to Mr. Dircks on October 29; Mr. Dircks replied to Mr. Speck on November 12.

of December 23, 1985 the Suffolk County Legislature introduced and enacted a criminal statute subjecting any person to penalty of up to a year in prison and a \$1000 fine for "conducting" or "participating in" any emergency planning "test" or "exercise" of which the Suffolk County Legislature had disapproved, and requiring, under threat of the same criminal penalty, written disclosure to the Legislature of the activities proposed to be undertaken in any such "test" or "exercise" at least 25 days in advance.<sup>2/</sup>

The Suffolk County Executive dutifully signed the bill, which became Local Law 2-86, on January 13, 1986. LILCO and the federal government have both subsequently made efforts to comply with its pre-exercise disclosure requirements through submissions to the Suffolk County Legislature.<sup>3/</sup> LILCO has also filed a suit in the United States District Court for the Eastern District of New York seeking to have Local Law 2-86 enjoined and invalidated on a number of bases, including its obstruction of mandatory federal activity (an emergency planning exercise) in a federally preempted area.<sup>4/</sup>

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<sup>2/</sup> None of the basic operative terms in quotation marks is defined in the bill as enacted.

<sup>3/</sup> See Items, 1A-1C, pp. 7-8 below.

<sup>4/</sup> Long Island Lighting Company v. County of Suffolk and Peter F. Cohalan, CV-86-0174 (LDW) (E.D.N.Y.), filed 16 January 1986.

In the meantime, necessary and unavoidable preparatory efforts for the February 13 exercise have been taking place, both by LILCO personnel and persons and organizations collaborating with it in its Local Emergency Response Organization (LERO), and by officials of the federal government charged with organizing, supervising and evaluating the exercise. On the face of Local Law 2-86, even these preparatory efforts are potentially subject to criminal prosecution due to its broad and vague drafting. Counsel for LILCO attempted as early as January 16 to obtain assurances from counsel for Suffolk County that activities occurring less than 25 days from the local law's effective date would not be subject to potential prosecution, since compliance with its advance-notice requirements during that period would be impossible. See Attachments 1 and 2 hereto. No such assurances were given, despite LILCO's request, until a January 27 federal court hearing on LILCO's suit, at which the Suffolk County Attorney, Mr. Ashare, agreed, under pressure from Federal District Judge Wexler's questions, that the local law would not be enforced for the first 25 days of its effectiveness (i.e., until February 7 or 10, depending on one's interpretation of New York State law).<sup>5/</sup>

Even subsequent to January 27, when counsel for Suffolk County requested LILCO to invite the County to attend meetings

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<sup>5/</sup> LILCO v. Suffolk County, 86-CV-0174 (E.D.N.Y.), Tr. 7-10 (Jan. 27, 1986).

and practice drills scheduled for January 29 and 30, they refused, when requested by counsel for LILCO, to give any assurance that information acquired by the County at such meetings and practice sessions, or otherwise during the first 25 days of the effectiveness of Local Law 2-86, would not be applied in potential criminal investigations and prosecutions of events occurring after those first 25 days. See Attachments 3-6. Suffolk County's refusal to give such assurances rendered chimerical its assurances of January 27 before Judge Wexler, at least as to events beyond those about which LILCO has voluntarily provided the County with information.

It is important to bear this somewhat detailed background in mind when evaluating Suffolk County's pending January 22 "Notice and Motion." It constitutes a request, made at the same time that the County was making a continuing threat to invoke criminal process against all activity associated with the February 13 exercise and preparations for it (i.e., before the January 27 hearing before Judge Wexler), that this Commission compel parties to potentially incriminate themselves by disclosure of information about the exercise and preparatory activity. The Fifth and Fourteenth Amendments to the U.S. Constitution apply in Suffolk County, New York as much as elsewhere. The County's "Notice and Motion" amounts to nothing less than a cynical invitation for this Commission to make itself the County's unwitting partner in plainly unconstitutional prosecutorial behavior.

DISCUSSION

1. Intervenors have been furnished with adequate information about the February 13 exercise.

Intervenors have possessed multiple copies of each revision of LILCO's Local Offsite Radiological Emergency Response Plan for Shoreham Nuclear Power Station since the spring of 1983. This five-volume document contains a wealth of information about the Shoreham offsite emergency planning apparatus. This plan has also been litigated in great detail, in over 85 days of live proceedings from December 1983 through July 1985.

In addition, the Intervenors have been on the service list for all routine correspondence between the NRC and FEMA respecting the presently planned exercise.

Intervenors have also received the following special submissions with respect to the February 13 exercise:

- A. Long Island Lighting Company's Description, Pursuant to Suffolk County Local Law 2-86, of Activities in February 13, 1986 Emergency Planning Exercise Sponsored by Federal Emergency Management Agency, with Attachments.

The principal document in this submission is a 34-page description and explanation from LILCO as it understands the proposed exercise. Its principal attachment is a 13-page detailed matrix describing each of the principal jobs in LILCO's Local Emergency Response Organization (LERO). This document was served on Suffolk County on January 16 and filed with the Commission by LILCO counsel on January 17.

- B. Letter of January 22, 1986 from Herzel H. E. Plaine, General Counsel of the NRC, and George W. Watson, Acting General Counsel of FEMA, to Peter F. Cohalan, Suffolk County Executive.

This four-page single-spaced letter sets out in detail the federal government's concepts of operations and conduct of the February 13 exercise. It includes a recitation of facilities which it will expect to be activated and the nature of the "simulation" which it expects federal officers to engage in during the exercise.

- C. Long Island Lighting Company's Response to the Suffolk County Legislature's Request for Additional Information, dated January 28, 1986.

This submission, fifteen pages in length, answers a series of questions on the February 13 exercise which Suffolk County propounded in response to LILCO's January 21 filing. It was forwarded to the Commission, along with the Suffolk County Legislature's questions, by LILCO counsel by letter dated January 30.

- D. Final Exercise Objectives for the 1986 Shoreham Exercise, FEMA, January 28, 1986.

FEMA provided copies of this nine-page single-spaced document to LILCO, and it understands to Suffolk County and the Commission also, on the afternoon of January 29, 1986. This document lays out in detail the specific performance and organizational objectives of the February 13 exercise.

The foregoing documents set out in great detail the nature and organization of LERO, the facilities from which and the procedures and methods by which LERO operates, and the concept of the proposed exercise. LILCO also understands that counsel for FEMA, Mr. Glass, has made periodically available miscellaneous documents to Suffolk County at their counsel's request, though LILCO has not received copies of any of FEMA's transmittal letters. From these documents a sophisticated observer can tell where exercise events are going to take place, what kinds of events they will be, and hence how to plan to observe the exercise.

The only information related to the February 13 exercise which is not revealed by these documents is information relating to the specifics of the exercise scenario. Those specifics are kept secure as a matter of what LILCO understands to be uniform and rigid FEMA policy from any participants in the exercise and those in privity with them. In addition, all persons who have access to such information are required by FEMA to agree not to disclose it to anyone else. This policy is justified by FEMA on the clearly sound proposition that part of any exercise's purpose is to test the readiness of an emergency response organization to deal with unexpected circumstances; and that disclosure of scenario-related information could either give an emergency response organization an unfair advantage or risk "tainting" the results of the exercise.

All persons affiliated with LILCO and its contractors who have access to such information meet the nonparticipation test and have agreed to observe the FEMA nondisclosure policy. Suffolk County has declined to agree to observe the FEMA nondisclosure policy. LILCO has therefore declined to date (see Attachment 2 and LILCO's January 28 Submission to the Suffolk County Legislature at, e.g., 7-9) to disclose any such information to the County, since access to the information is within FEMA's control. LILCO believes that the same considerations should govern the Commission's determination, particularly given the abundance of other information available to the County.

2. Intervenors have no right to discovery on LILCO's preparations for the February 13 exercise.

To the extent that intervenors' motion to the Commission goes to discovery of events that will take place before the February 13 exercise, rather than focusing on the exercise itself, their request is outside the scope of legitimate discovery. The preliminary LILCO drills and other practice sessions -- those that take place before the February 13 exercise and the constellation of events immediately surrounding it -- involve internal preparations by LILCO for participation in the federally required, federally supervised February 13 exercise of its offsite organization's preparedness. It will be the February 13 exercise, and not the preparatory drills, that will

constitute the grist of any post-exercise litigation. LILCO does not expect other parties to accept as proof of the adequacy LERO's performance in the February 13 exercise a demonstration that a practice drill in late January proceeded in any given fashion. Nor should other parties expect to establish anything significant about the February 13 exercise from observation of earlier practice drills. Thus pre-exercise drills and materials are irrelevant to the actual February 13 exercise, and discovery on them should not be permitted.

Even if there were some arguable relevance to activities and documents concerned not with the February 13 exercise but with preparations for it, the fact is that Suffolk County has repeatedly made it clear that it intends to litigate the February 13 exercise as fully and doggedly as it and its lawyers, witnesses and other agents are permitted to. See, e.g., Attachment 1 at 2-3; Attachment 3; Attachment 5. Preparation for the February 13 exercise is thus preparation for what will, barring some happy but remote reversal of trends and events, be a litigated event. Preparation for February 13 is thus preparation for litigation, and protected by the attorney-client and attorney work product privileges.

Federal officials were present at the LILCO practice drill of January 30, 1986 and at a preliminary meeting for it, on January 29. This fact does not change the analysis or conclusion above. The federal officials, in their supervisory

capacity, requested LILCO to enable them to be present in order to permit them to plan for a more efficient and effective observation of the February 13 exercise. No critique of the substantive conduct of the January 30 drill, and no briefing on the February 13 exercise, was asked for by LILCO, and none was given.

LILCO declined to permit Intervenor's representatives onto its property to observe this drill and the preliminary meeting (see Attachments 4-6) on three principal grounds: that they were preparatory to litigation and were privileged; that the litigation, when it occurred, would concern the February 13 exercise, not the practice sessions, and hence the requested discovery was irrelevant to the subject matter of the inevitable litigation; and that in the face of the Suffolk County Local Law 2-86, Intervenor's presence at LILCO activities, without assurances of nonprosecution which Suffolk County's attorneys were unwilling to give, posed a legally unenforceable invitation to LILCO to engage in potential self-incrimination.

3. Suffolk County will be permitted to observe the exercise.

The bedrock assertion in Suffolk County's "Notice and Motion" is that the County intends to observe the February 13 exercise. To the extent that this statement is a request for Commission relief rather than a declaration of intention, it is at the least premature. No one from LILCO and no one, to

LILCO's knowledge from the federal government, has suggested that observers for Suffolk County or other intervenors will not be permitted to observe the exercise. LILCO, in fact, has stated quite the opposite, and has indicated its willingness to attempt to work out a protocol for observation of the exercise with Suffolk County representatives. See Attachment 4. Any such observation must be compatible with the scope of an exercise of an offsite plan, and must not in any way interfere with or cramp its conduct or good order, or chill or intimidate the performance of duties by individual emergency workers, or impede the ability of federal controllers and observers to carry out their functions, or pose any threat to LILCO's property or compliance with the Commission's regulations. Guidelines for exercise observation have been being worked out in a series of recent cases, e.g., Indian Point, Catawba, and Shearon Harris, and LILCO expects either to work out an agreement with Suffolk County or to focus potential areas of disagreement much more sharply within the next few days. Until such time, Suffolk County's broad-gauged declarations, to the extent that they request action by the Commission, are simply premature.

4. Suffolk County's pre-exercise discovery requests, in combination with Local Law 2-86, constitute, and request this Commission to collaborate with it in, an unconstitutional requirement that LILCO produce information that is potentially self-incriminatory under Local Law 2-86 (although no other law).

Local Law 2-86 makes it a substantial crime in Suffolk

County, punishable by up to a year in prison and a \$1,000 fine, to "conduct" or "participate in" any emergency planning "test" or "exercise" of which the County legislature disapproves, or to fail to provide sufficient advance notice of any such "test" or "exercise," and does so without defining significant operative terms. As outlined above, attorneys for Suffolk County refused to give any public assurance of the County's intentions under the statute, even as to its initial, 25-day implementation period, before being forced to do so by a federal judge. They have subsequently refused to give assurances that they will not attempt later, following the expiration of the initial 25-day commitment, to apply any knowledge gained during that first 25 days to prosecution of events occurring thereafter. Thus while events during the first 25 days of the statute's effectiveness (i.e., until February 7 or 10, depending on one's theory) can no longer be prosecuted, subsequent events may be. And Suffolk County attorneys have refused to give assurances that any such prosecutions will not be undertaken on the basis of information gained during the first 25 days.

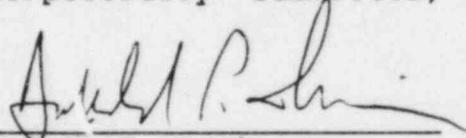
Under these circumstances LILCO has no choice but to regard any disclosure to Suffolk County as potentially contributing to a potential prosecution of its employees and other members of LERO, not to mention federal officials, with respect to events occurring after February 7 or 10.

While Suffolk County's prayer for relief is less than perfectly clear, to the extent that it requests the Commission to require LILCO to disgorge information which may contribute to a future prosecution it is requesting the Commission to require LILCO to potentially incriminate its employees, other LERO members, and federal officials under Local Law 2-86. LILCO believes that it has an absolute right against such compelled self-incrimination under the Fifth and Fourteenth Amendments to the U.S. Constitution.

CONCLUSION

For the foregoing reasons the discovery requests posed by Suffolk County on its own behalf and that of other intervenors in the January 22 "Notice and Motion" are either premature (as to the right to observe the exercise itself) or improper, and should be denied.

Respectfully submitted,



Donald P. Irwin  
James N. Christman  
Lee B. Zeugin  
Kathy E. B. McCleskey

Hunton & Williams  
707 East Main Street  
P. O. Box 1535  
Richmond, Virginia 23212

DATED: February 3, 1986

# KIRKPATRICK & LOCKHART

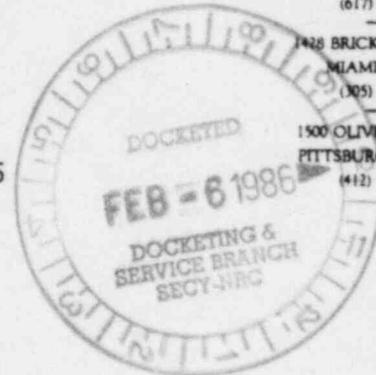
ATTACHMENT 1

1900 M STREET, N.W.  
WASHINGTON, D.C. 20036  
TELEPHONE (202) 452-7000  
TELEX 440209 HPH UI  
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ONE BOSTON PLACE  
BOSTON, MA 02108  
(617) 973-5400  
1428 BRICKELL AVENUE  
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1500 OLIVER BUILDING  
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KARLA J. LETSCHE  
(202) 452-7064

January 17, 1986



Donald P. Irwin, Esq.  
Hunton & Williams  
P.O. Box 1535  
707 E. Main Street  
Richmond, Virginia 23212

Dear Don:

This is to confirm the requests I made in our telephone conversation on January 15, 1986, and my understanding of your responses.

First, I asked when the LILCO tabletop exercise, to be observed by FEMA, was scheduled to take place. (As I told you, I was informed by Stewart Glass that, at one point, the "projected date" for such a tabletop exercise was January 29, 1986.) I told you that Suffolk County, the State of New York, and the Town of Southampton intended to attend that exercise to monitor it in order to protect their rights in any NRC proceeding concerning exercise results. You said that you did not know the date of such an exercise or whether a date had been set. You also said that you did not know what LILCO's position would be concerning the attendance of County, State and Town representatives at such an exercise. You did state, however, that you would see if you could find out about the scheduling of the tabletop exercise and would get back to me on the subject. You were not able to promise that you would give me the scheduling information I requested.

Second, I indicated that despite repeated requests to FEMA and to the NRC on behalf of the County, State and Town, we have been unable to obtain any factual information about the proposed February 13 exercise, including correspondence and other documents relating to proposed or actual objectives for that exercise, despite the fact that we had received as a routine matter copies of LILCO/FEMA/NRC exercise-related correspondence and proposed objectives in the past (*i.e.*, before the decision to schedule a Shoreham exercise). I requested that you have an appropriate or knowledgeable LILCO representative provide copies of LILCO-FEMA

KIRKPATRICK & LOCKHART  
Donald P. Irwin, Esq.  
January 17, 1986  
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correspondence and other documents relating to proposed and actual exercise objectives to me. I also made clear that while we disagree with FEMA's and LILCO's position that documents related to the exercise scenario must be withheld from County, State, and Town representatives unless they sign confidentiality pledges, my present request did not seek such documents; rather, I asked only for documents concerning the facts and objectives relative to the exercise, not the scenario.

You replied that you personally had never seen any documents or correspondence of the type I requested. You stated, further, that you and your client are operating under strict FEMA-imposed absolute secrecy requirements, according to which LILCO cannot reveal any information at all related to the February 13 exercise or FEMA will not participate in the exercise as LILCO has requested. You indicated that you understood the FEMA secrecy requirement, which you described as a "policy" you had discussed with FEMA lawyers, to be based on a concern by FEMA that providing any information to the State, County or Town could result in an argument that the exercise was not "valid," or could result in "contamination" of the exercise. By this letter, I reiterate our request for all exercise-related documents except for the scenario.

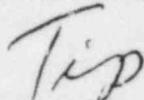
Third, I told you that again despite repeated requests, we have not been informed by FEMA of scheduled FEMA/LILCO/NRC meetings (including drills or tabletop exercises) relating to the proposed exercise. I told you that the County, State and Town had stated several times an intention to attend such meetings, in order to monitor them for purposes of protecting their rights in the ongoing and future Shoreham proceedings, and that we had requested notice of the meetings even if FEMA would not permit the governments' representatives to attend. You indicated an awareness of those requests and intentions. You also indicated that you would check to see if there was a schedule of meetings, and while you would get back to me on that subject, you could not promise to provide me the requested information.

Finally, I told you that the State, County, and Town intended to attend the February 13 exercise should it actually take place, in order to monitor it and be in a position to effectively pursue their rights in any subsequent NRC proceedings. I also stated that the factual information sought was necessary to enable us to prepare adequately and properly for such attendance and to make

KIRKPATRICK & LOCKHART  
Donald P. Irwin, Esq.  
January 17, 1986  
Page 3

our attendance effective for purposes of the subsequent litigation.

Sincerely,



Karla J. Letsche

KJL:so

cc: Fabian G. Palomino, Esq.  
Stephen B. Latham, Esq.  
Bernard M. Bordenick, Esq.  
Stewart M. Glass, Esq.

## HUNTON &amp; WILLIAMS

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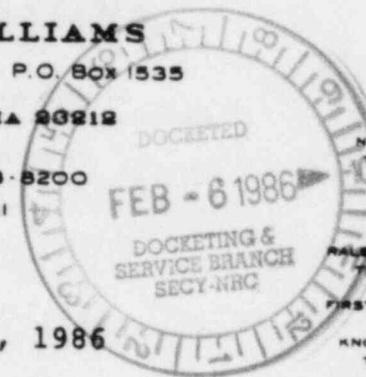
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3080 CHAIN BRIDGE ROAD  
FAIRFAX, VIRGINIA 22030  
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NEW YORK, NEW YORK 10017  
TELEPHONE 212-308-1000  
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RALEIGH, NORTH CAROLINA 27602  
TELEPHONE 919-888-3000

FIRST TENNESSEE BANK BUILDING  
P. O. BOX 951  
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TELEPHONE 615-637-4311

January 27, 1986

FILE NO.

DIRECT DIAL NO. 804 788- 8357

Karla J. Letsche, Esq.  
Kirkpatrick & Lockhart  
1900 M Street, NW  
Washington, DC 20036

Dear Tip:

I have reviewed your "confirmatory" letter to me of January 17, which arrived while I was out of the office last week. I have also seen your letter of the same date to Bernie Bordenick and of the 21st to Stu Glass. Since I was not present on your calls with them I cannot speak directly to the substance of your letters to them. Nor do I see any value getting into a contest over characterizations of our conversation. I do, however, think it important to note a couple of matters dealt with in our conversation but not in your letter.

1. When, in our conversation, you asked me for documents, meeting notices, and the like, I asked for the basis for your apparent assumption that pre-exercise activities should be the subject of discovery, and told you that I was not aware of any. There is not a licensing board with jurisdiction at this point, at least to my knowledge; there are no contentions, which typically form the basis for discovery requests, submitted, much less admitted. Nor have I received any papers which would invoke whatever formal discovery rights you apparently conceive to exist at this point, such as a set of interrogatories or a motion to produce documents. I did not receive any substantive answer from you on this question. However, I note that your letter's suggestion that the County has received no information relating to the exercise is inaccurate: LILCO filed a detailed submission with the County Legislature on January 16, the day before your letter; and the NRC and FEMA jointly sent a letter to the Suffolk County Executive on January 22, describing aspects of the federal government's participation in an exercise.

HUNTON & WILLIAMS

2. You requested various documents related to the specifics of the proposed exercise. The FEMA-imposed strictures on disclosure of exercise-related information are real, and derive from the common-sense policy that detailed information on a confidential exercise scenario should not become available prematurely to persons who will be participating in it, lest the validity of the exercise later be impugned. Neither your firm's client nor the other parties aligned with it have been willing, apparently, to sign a confidentiality agreement regarding scenario-related information. Nor, I gathered from you, would they be willing to refrain from arguing that advance disclosure of scenario-related information to all parties, including LILCO, would not taint the results of the exercise. Under these circumstances, I trust you will understand my reluctance to authorize disclosure of documents which (even assuming I controlled access to them) FEMA has required to be kept segregated from exercise participants and those working with them at LILCO.

3. Most important, with respect to your requests for information about tabletops and other events taking place less than 25 days after the effective date of Local Law 2-86, I indicated to you that Local Law 2-86 provides a means of compliance, i.e., by submission of a written statement of the contents of any "test" or "exercise" in which "roles" or "functions" of Suffolk County officials may be "performed" or "simulated." Since the Local Law requires any such submission to be made at least 25 days in advance of the "test" or "exercise," it is definitionally true that events planned for less than 25 days from the effective date of the Local Law (which I understand to have been January 16, 1986) cannot be covered by such a compliance filing. I therefore asked you whether it was intended that the Local Law be applied to such events, since the kind of pre-FEMA-exercise activities about which you desired information would occur less than 25 days from the Local Law's effective date. I also indicated that in our view its application to activities occurring less than 25 days after its effective date would deprive those potentially affected of due process since compliance with the law would be impossible except by totally refraining from the regulated activity. I stated that unless you could unequivocally state that the Local Law's criminal sanctions were not intended to apply to activities planned to occur less than 25 days after its effective date, when you (or you on behalf of your client) stood in the position of a potential prosecutor, and that under those circumstances normal access to information, either by right or comity, that would be provided in a civil context did not apply. I asked you to clarify the County's position on this transcendent issue. You said you could not, but that you would get back to me on it; I have not heard from you on it, either in your letter or otherwise. However, I understand

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HUNTON & WILLIAMS

that in a hearing this morning before Judge Wexler in the U.S. District Court for the Eastern District of New York, counsel for Suffolk County agreed that no enforcement would be attempted of the Local Law for at least 25 days from its effective date. If this understanding is not correct, please inform me: in such an event, I would have to regard any request for information about activities occurring less than 25 days from the effective date of Local Law 2-86 as a request that LILCO, or others who might be potentially involved in such activities, incriminate themselves. That, of course, is a matter against which there is an absolute constitutional protection.

Sincerely yours,

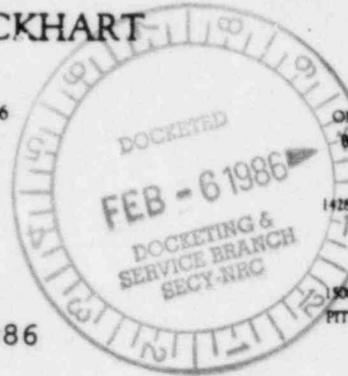


Donald P. Irwin

91/6033

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KARLA J. LETSCHE  
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January 28, 1986

BY TELECOPIER

Donald P. Irwin, Esq.  
 Hunton & Williams  
 P.O. Box 1535  
 707 E. Main Street  
 Richmond, Virginia 23212

Dear Don:

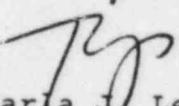
I learned on Friday from Bernard Weiss that there are NRC/FEMA/LILCO meetings or training sessions, concerning proposed Shoreham exercises, scheduled for tomorrow, January 29, and an exercise to be attended by the NRC and FEMA scheduled for January 30. I informed Stewart Glass and, by copy of my letter to Stewart, the other parties to the Shoreham proceeding, that I intend to attend the January 29 meetings and the January 30 exercise, as a representative of Suffolk County, the State of New York and the Town of Southampton, to monitor the meetings and exercise for the purpose of protecting the Governments' rights in the Shoreham proceeding.

Despite repeated requests made to Stewart and to Mr. Weiss (see copies of letters attached hereto), I have not yet been able to find out the times or locations of the January 29 meetings or the January 30 exercise. At about 2:45 this afternoon, Stewart confirmed by letter that FEMA did intend to attend the meetings and the exercise, but he did not provide me with the requested scheduling information. Moreover, he stated that "any requests to attend these sessions should be directed to LILCO." Accordingly, I hereby request that you tell me the times and locations of (a) Shoreham-exercise-related meetings scheduled for January 29, and (b) the Shoreham exercise scheduled for January 30, so the Governments' representatives can attend and monitor

KIRKPATRICK & LOCKHART  
Donald P. Irwin, Esq.  
January 28, 1986  
Page 2

them. Since time is so short, I request that you reply as soon as possible today.

Sincerely,

  
Karla J Letsche

KJL:so

Attachments

cc: Martin B. Ashare, Esq.  
Fabian G. Palomino, Esq.  
Stephen B. Latham, Esq.  
Bernard M. Bordenick, Esq.  
Stewart M. Glass, Esq.

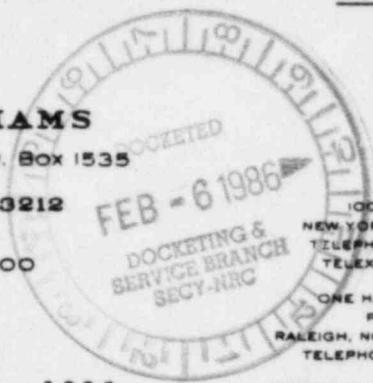
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January 29, 1986

FILE NO.

DIRECT DIAL NO. 804 788-8357

BY TELECOPIER

Karla J. Letsche, Esq.  
Kirkpatrick & Lockhart  
1900 M Street, N.W.  
Washington, D.C. 20036

Dear Tip:

This will follow up on our conversation at about 6:00 yesterday evening, in which you asked me whether you, and potentially other unnamed representatives of "the Governments," as you call them, would be invited by LILCO to attend the internal practice drill which LILCO has scheduled for this Thursday, January 30, and a preliminary meeting scheduled for the afternoon of the 29th.

As you know, the exercise scheduled for February 13 is a prerequisite to LILCO's obtaining a federal full power license. It is being held under the auspices of the NRC and FEMA, in pursuance of their responsibilities under the Atomic Energy Act. That exercise is potentially subject to litigation before the NRC, consistent with the UCS case and follow-on decisions. As I told you, LILCO recognizes the right of Suffolk County to observe that exercise to the extent necessary to protect whatever its litigative rights may be with respect to it, as long as the exercise of those rights does not impede the participants' performance of their duties in the exercise. You have told me that Suffolk County definitely intends to contest the results of the exercise, and that you believe that other intervenors will desire to do so, too. As I also told you, I wish to meet with you within the next few days to reach agreement on the manner and extent of observation by Suffolk County. I will appreciate your coordinating the participation of any other intervenors who wish to observe the exercise and may wish to litigate its results.

The practice drill scheduled for this Thursday, January 30, is an internal LILCO/LERO drill to test LILCO's readiness for the February 13 exercise. It will use a scenario different from that which will be used on February 13. LILCO's performance in the January 30 drill will have no bearing on its performance in the February 13 exercise for licensing purposes. It is merely

## HUNTON & WILLIAMS

Karla J. Letsche, Esq.  
January 29, 1986  
Page 2

and completely in preparation for the February 13 exercise and for the litigation which you have indicated that your client intends to pursue on it. It is thus inherently in preparation for litigation and would be privileged from discovery by opposing parties in that anticipated litigation, even if there were in fact a proceeding<sup>1/</sup> in progress which would give rise to active discovery rights.<sup>2/</sup>

The meeting on the afternoon of January 29, I have learned, is primarily a briefing session for internal LILCO/LECO drill controllers and observers. In short, it is in preparation for the January 30 practice drill, and as such is also privileged from discovery.

As you know, it is expected that representatives from the NRC and FEMA will be present at the meeting on the 29th and the practice session on the 30th. Their primary aim, as I understand it, is to familiarize themselves with the arrangements associated with the February 13 exercise, so as to enable them to control and observe it effectively, in furtherance of their federal-law obligations.<sup>2/</sup> Their presence, which LILCO understands is customary, necessary and useful to pursuance of their statutorily based exercise-supervision duties, does not, in LILCO's view, mean that the sessions are any the less preparatory for litigation on LILCO's part or thus any the less privileged from discovery.

Finally, the continued pendency of Suffolk County Local Law 2-86 causes a particular problem. As you know, it is a

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<sup>1/</sup> As you know, I do not believe that a party's preparations to conduct a graded emergency planning exercise are litigable, or subject to discovery. Certainly, there is no Board convened with jurisdiction over these matters, no contentions filed, no other indicia of an active proceeding (as distinguished from the litigation on the plan itself, which is on appeal). In addition, I am not aware of any other licensing proceeding in which intervenors have been permitted to attend practice sessions for a graded FEMA/NRC exercise. If your knowledge is different from mine, I invite you to share it with me.

<sup>2/</sup> You asked me whether federal officials present at the January 30 drill will perform there any "simulative" functions. Since our conversation I have checked with those familiar with the anticipated drill and am told that federal officials are not expected to perform any such functions on Thursday.

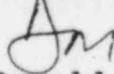
HUNTON & WILLIAMS

Karla J. Letsche, Esq.  
January 29, 1986  
Page 3

criminal statute. I understand that Suffolk County agreed on January 27 before Judge Wexler not to consider any conduct that occurs within the first 25 days following its enactment to give rise to any potential criminal liability under it. Nevertheless, there is cause for concern that knowledge gained in the course of observation during the first 25 days of the statute's life could later be put to use with respect to criminalization of behavior that occurs after that period. When I put to you my concern on this score, you forthrightly told me that information acquired by you in the course of any observation of a LERO practice drill would be made available to the Suffolk County government, including the legislature, and that you could not guarantee or limit the uses to which they would or would not put it. In those circumstances, the pendency of Local Law 2-86 puts any representative of Suffolk County in the potential dual roles of civil litigation opponent and agent of a criminal prosecution. As I have earlier indicated to you, it is our belief, given LILCO's absolute constitutional right to avoid self-incrimination, that unless you can give me the guarantee which you apparently cannot give, LILCO is protected against otherwise normal civil discovery on matters within the potential purview of Local Law 2-86.

For both these reasons LILCO declines to permit Suffolk County representatives to enter onto its property to observe either the meeting tomorrow or the exercise Thursday. I have not raised the question of practicality -- your request comes so late, I doubt that it could be implemented consistent with proper security precautions in any event. I thought it more important to deal with the substantive problems. However, I look forward to working with you in the next few days to attempt to conclude mutually satisfactory arrangements for observation of the February 13 exercise.

Sincerely yours,

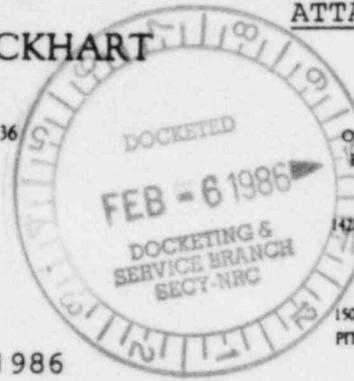


Donald P. Irwin

P.S. I was on the phone when Larry Lanpher called at about 6:33. When I attempted to return his call at 6:55 and again at about 7:05, he was not in his office. Since I presume he was calling on this matter, would you tell him I tried to reach him.

## KIRKPATRICK &amp; LOCKHART

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 1500 OLIVER BUILDING  
 PITTSBURGH, PA 15222  
 (412) 355-6500

LAWRENCE COE LANPHER  
 (202) 452-7011

January 29, 1986

VIA TELECOPY

Donald P. Irwin, Esq.  
 Hunton & Williams  
 P.O. Box 1535  
 707 E. Main Street  
 Richmond, Virginia 23212

Dear Don:

This letter concerns our telephone conversation this morning, which conversation followed up on a conversation between you and Tip Letsche last night. Subsequent to our conversation this morning, we received your letter to Ms. Letsche which concerns last night's conversation.

On behalf of Suffolk County, the State of New York, and the Town of Southampton, we have requested to be present at the meetings and "training sessions" scheduled for today on Long Island concerning the proposed February 13 exercise and at the drill which is scheduled for tomorrow. We understand that LILCO invited FEMA and NRC personnel and contractors to attend today's meetings and "training sessions" and tomorrow's drill. Your letter confirms that NRC and FEMA personnel will be present at today's sessions and the January 30 drill.

You have refused our requests, with your bases set forth in your letter.

1. The alleged attorney/client or work product privilege rationale for refusing our access to these activities is baseless, indeed preposterous here. Whatever "privilege" may have applied (and I do not concede for an instant that there is any such privilege in this instance), clearly is waived by the presence of FEMA and NRC personnel.

2. The alleged self-incrimination basis is similarly unfounded. As you acknowledge, the Suffolk County Attorney, Martin B. Ashare, represented on the record to United States

KIRKPATRICK & LOCKHART

Donald P. Irwin, Esq.  
January 29, 1986  
Page 2

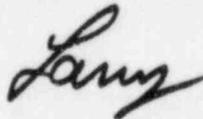
District Judge Wexler on Monday, January 27, 1986, that Local Law 2-1986 would not apply to any activities of LILCO during the first 25 days of the Law's effectiveness. Thus, any activities conducted in the next two days would not be subject to any prohibition.

You also stated that you were concerned that information gained now would provide Suffolk County with knowledge about where activities would take place on February 13 and thus allow the County to be in a position to carry out enforcement of the Law on February 13. That "reason" for barring our access is without basis. You pledged to Tip Letsche last night (and again in your letter) to inform us of where activities would occur on the 13th because you acknowledged that we have a right as litigators and interested parties to be present at those events on the 13th. Thus, you have already promised to provide us with the data which may be generated during the next two days.

In short, the barring of Suffolk County and other governmental representatives from activities pertaining to the February 13 exercise is not proper. It is in fact an obstruction of our legal rights as interested parties and lays the basis for serious denials of our due process rights. The fact that Federal agencies are concurring in your actions only exacerbates the arbitrariness of LILCO's conduct. In short, LILCO is denying Suffolk County and the other governments the right to prepare for effectively monitoring the exercise and depriving us of our due process rights.

I asked in our conversation this morning whether LILCO would reconsider these refusals. You stated that you had thought about it overnight and that LILCO would stand fast in its position.

Sincerely yours,



Lawrence Coe Lanpher

cc: Gregory Blass  
Martin B. Ashare, Esq.  
Fabian G. Palomino, Esq.  
Stephen B. Latham, Esq.  
Bernard M. Bordenick, Esq.  
Stewart M. Glass, Esq.

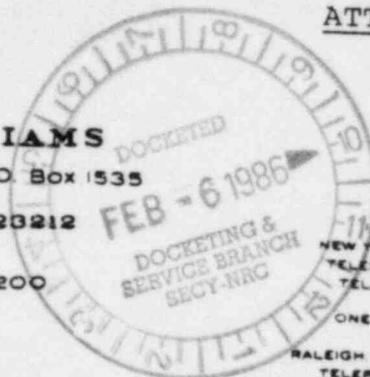
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FILE NO.

DIRECT DIAL NO. 804-788-

January 31, 1986

Lawrence Coe Lanpher, Esq.  
Kirkpatrick & Lockhart  
1900 M Street, N.W.  
Washington, D.C. 20036

Dear Larry:

I have just received a letter from you dated January 29. Although marked "via telecopy", it was not transmitted to us until approximately 3:15 this afternoon.

Your letter is a self-serving misrepresentation of what I told Tip Letsche. My letter to her stands. I did not pledge to provide any material from yesterday's drill or the meeting the day preceding it. You had an opportunity to seek to be present at those meetings in a timely fashion, did not, and did not seek a judicial remedy for them. You will be provided information with respect to the February 13 exercise and, as I told Tip, I expect to meet with her next week in order to see whether we can make mutually satisfactory arrangements for it.

Sincerely yours,

Donald P. Irwin

cc: Gregory Blass  
Martin B. Ashare, Esq.  
Fabian G. Palomino, Esq.  
Stephen B. Latham, Esq.  
Bernard M. Bordenick, Esq.  
Stewart M. Glass, Esq.



CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO's Reply To Suffolk County, Et Al. "Notice and Motion Concerning Proposed Emergency Planning Exercise" were served this date upon the following by first-class mail, postage prepaid.

Nunzio J. Palladino, Chairman  
U.S. Nuclear Regulatory Commission  
1717 H Street, N.W.  
Washington, DC 20555

Commissioner Thomas M. Roberts  
U.S. Nuclear Regulatory Commission  
1717 H Street, N.W.  
Washington, DC 20555

Commissioner James K. Asselstine  
U.S. Nuclear Regulatory Commission  
1717 H Street, N.W.  
Washington, DC 20555

Commissioner Frederick M. Bernthal  
U.S. Nuclear Regulatory Commission  
1717 H Street, N.W.  
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Commissioner Lando W. Zech, Jr.  
U.S. Nuclear Regulatory Commission  
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U.S. Nuclear Regulatory  
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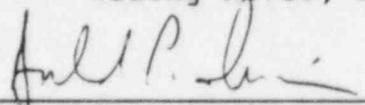
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Dr. Monroe Schneider  
North Shore Committee  
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Wading River, NY 11792

  
Donald P. Irwin

Hunton & Williams  
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DATED: February 3, 1986