7115

LILCO, September 16, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

LILCO'S RESPONSE TO NRC STAFF'S MOTION FOR SCHEDULE FOR LITIGATION OF THE JUNE 1988 EXERCISE

This is LILCO's response to the NRC Staff's September 9 Motion for Schedule for Litigation of the June 1988 Exercise. LILCO agrees with the Staff that any proceedings on this exercise should commence apace, and that the Staff's proposals represent a reasonable approach to the matter. LILCO believes that present circumstances, summarized immediately below, support a strong presumption of the adequacy of the Shoreham emergency plan and of its implementability, and does not concede the inevitability of further hearings. A better focus on some aspects of scheduling can be gained, however, only after contentions concerning the 1988 exercise have been filed and ruled upon.

LILCO is filing this Response before the deadline in order to give Intervenors an opportunity in their response, due next Monday, to respond to its thoughts as well as those of the Staff. Set out below are various background considerations that support

DS03

truly expeditious conduct of this proceeding; various general observations on the Staff's proposals; specific observations on those proposals; and a conclusion containing specific proposals for this Board's Order.

I. Background Circumstances Favoring Expedition

The Staff is correct that circumstances now commend action to bring this six-year-long emergency planning proceeding "to a long-awaited end." (Staff Motion at 2). Principal recent events defining those circumstances are, in brief:

1. FEMA's issuance of a deficiency-free report on the June 7-9, 1988 full participation exercise of the Shoreham offsite plan. This report, dated September 2, 1988, was forwarded to the Board and all parties by Staff letter dated September 9.

2. FEMA's issuance of a finding, based on an integration of its exercise evaluation with review of LILCO's offsite radiological emergency response plan through Revision 10, that the LILCO plan is adequate and implementable to provide reasonable protection of the public against the hazards of a radiological emergency at Shoreham. This finding, which represents FEMA's concurrence in full-power operation of the plant, is presumptively valid in NRC licensing proceedings on questions of offsite emergency planning adequacy and implementation capability. 10 CFR § 50.47(a)(2). This finding was forwarded to the Board and all parties by Staff letter dated September 9.

3. The appellate affirmance of the NRC's emergency planning rule amending 10 CFR § 50.47(c) so as to codify the "realism" principle. Commonwealth of Massachusetts v. Nuclear Regulatory Commission, Docket No. 87-2032, ___ F.2d ___ (1st Cir. Sept. 6, 1988). This decision has not been served and is attached to the parallel first-class-mail service copy of this paper.

II. LILCO's General Comments on the Staff's Proposal

1. LILCO supports the staff's intent to define early a set of procedures for avoiding delay in whatever litigation of the 1988 exercise may prove necessary. LILCO's perspective on exercise litigation is shaped by the intolerable experience of the 1986 exercise, in which prehearing proceedings became so distended that, even without summary disposition, hearings themselves did not even start until 13 months after the exercise. The hearings then lasted 42 days spread over 15 weeks, or nearly 4 days of hearing time for every hour of the 11-hour exercise. The Licensing Board then wrote a two-part decision which consumed another several months, and was completed barely less than two years after the exercise. The result was that LILCO was deprived of any effective opportunity to obtain appellate review of adverse aspects of the Board's decision before the presumptive two-year period of validity for the 1986 exercise had expired, see 10 CFR Part 50 App. E ¶ IV.F.1; and LILCO's planning processes were held in thrall for two years.

2. LILCO favors starting out with intervals no longer than those specified in the Rules of Practice, and letting the parties seek to modify them on a good-cause basis. With respect to areas where the Rules do not specify any period, common sense and the facts of the case will have to govern, the dominant concepts being that (1) a reasonable assurance finding has been given by FEMA, (2) many aspects of the implementability of the Shoreham offsite plan performance were found adequate already in the

litigation of the 1986 exercise and should not be re-examined at all, and (3) exercise-review proceedings are supposed to be expedited. Union of Concerned Scientists v. NRC, 735 F.2d 1437,-1448 n.21 (D.C. Cir. 1984), cert. denied 469 U.S.1132 (1985); Long Island Lighting Company (Shoreham Nuclear Power Station), CLI-86-11, 23 NRC 577, 582 (1986).

3. Until contentions have been filed and ruled on, it is difficult to attach specific dates to events beyond those very early in the process. Prehearing conferences, live or by telephone, after and perhaps even before the filing of responses to proposed contentions, may be useful in getting this proceeding on track early.

III. Specific Observations on the Staff's Proposal

1. Service of all documents by parties in this proceeding should be required to be completed by the close of business on the service date and should be considered complete, as to the Board and active parties, only upon receipt by the party being served at its principal place of business. The active parties are LILCO, the NRC Staff, FEMA, Suffolk County and the State of New York.

2. The Staff's proposed October 13 date for submission of contentions -- five weeks from receipt of the FEMA report -- is unnecessarily long. The FEMA report is only 150 pages long and was available to the Intervenors no later than September 9. While NRC regulations do not contemplate discovery before the admission of contentions, 10 CFR § 2.740(b)(1), Intervenors have

already had significant access to information on the 1988 exercise for months, from informal discovery -- their own observation of the exercise, LILCO's voluntary production on July 13 of the exercise objectives and scenario and of virtually all exercise-day player documents, and production of documents to Intervenors by FEMA in response to FOIA requests. They also have knowledge derived from experience with the 1986 exercise. Their contentions can reasonably be expected to by submitted, particularly against this background, by October 3.

3. The Staff's proposed schedule for objection to contentions is probably longer than necessary. Deadlines for filing such objections should be presumptively those in the Rules of Practice: 10 days from service for LILCO, 15 for the Staff. Cf. 10 CFR § 2.714(c). With service of contentions on October 3, replies would be complete, absent an extension for good cause shown, by October 13 for LILCO and October 18 for the Staff. An opportunity should be provided for intervenors to respond in writing to those objections.

4. LILCO agrees with the Staff that teleconferences, and perhaps a prehearing conference, to hear argument on contentions should be held shortly after responses have been filed. Contentions should be ruled on to the extent possible at the hearing, and confirmed in writing or by teleconference as soon thereafter as possible.

5. As noted above, voluntary document discovery has already gotten substantially underway as a means of avoiding

delay in any later proceedings. LILCO voluntarily produced the exercise objectives and scenario, and nearly all of its exercise-day documents (logs, message forms, etc. written by exercise players) over two months ago. Intervenors have also obtained substantial documentation already from FEMA. Against this background, the period for filing compulsory discovery requests, which would begin the day contentions are ruled on, can be short. Parties should be limited to two rounds of interrogatories and one round of document discovery requests, and should be expected to expedite responses and be willing to multiple-track depositions.[1] Discovery should thus be complete by about the end of November, depending on the date of the Board's prehearing conference order.

6. Summary disposition motions can be filed at any time subject to the presiding officer's control. 10 CFR § 2.749(a). The Staff's proposal to establish a deadline 14 days after close of discovery is consistent with the Rules of Practice and is sufficient as a guideline, subject to modification after contentions have been filed and ruled on. Complete substantive responses to any summary disposition motion should be filed, as specified in 10 CFR § 2.749(a), no more than 20 days after receipt of the motion. Any other response, including but not

---

[1] It is too early to anticipate the exact nature or extent of requests for deposition discovery. However, it is clear that its use in the 1986 exercise proceeding was abusive in the aggregate: 52 persons, many of whom were not even proposed or called as witnesses in the proceeding, were deposed in a process which chewed up a period of almost three months.

limited to assertion of inability to answer without further information (10 CFR § 2.749(c)), should be filed on an expedited basis, as the Presiding Officer is permitted to order, within 10 days after receipt of the motion.

7. LILCO agrees with the Staff that any necessary prefiled direct testimony should be filed very soon (the Staff proposes 12 days) after the deadline for of responses to summary disposition motions. LILCO suspects that it is too early yet to fix as definite date for filing, though expecting that the Staff's proposed date of February 7, 1989 can be beaten be several weeks. If necessary, rolling testimony filing deadlines could be used to accelerate the availability of issues for trial.

8. This Board's still-outstanding commitments -- completion of decisions on hospital ETE and school-bus driver role conflict issues, on realism and integrity-of-the-proceeding issues, and on EBS summary disposition motions -- must temper its near-term involvement in this matter. While LILCO has no knowledge of the amount of work remaining to the Board or the amount of time it is likely to take, completion of that work should logically take precedence in the immediate term over commitments to the 1988 exercise litigation. However, because of this Board's knowledge of emergency planning matters generally at Shoreham and the advantages of not fragmenting responsibility for resolution of planning and exercise issues, LILCO believes it

highly desirable that this Board retain jurisdiction over this exercise if its other work commitments permit.[2]

IV. Proposals for Board Order

For the reasons stated above, LILCO requests that the Board enter an order promptly which contains the following requirements and guidance for any proceeding on the 1988 exercise:

1. Intervenors' contentions concerning the 1988 exercise are to be filed not later than October 3.

2. LILCO's objections to the Contentions are to be filed by October 13, and the Staff's by October 18. Intervenors' responses to the objections are to be filed by October 20 for LILCO and October 25 for the Staff.

3. A prehearing conference will be held promptly after receipt of Intervenors' responses to objections to contentions.

4. Voluntary discovery is encouraged but not required before any contentions are admitted. Thereafter, discovery will be conducted on an expedited basis with the following requirements:

a. Parties will be limited, subject to exception for good cause shown, to 2 rounds of interrogatories and one round of document production requests each. The second round of interrogatories will be restricted to follow-up questions on the first round.

b. Response periods for interrogatories and requests for production will be as set forth in the Rules of Practice, except that:

1. any response to an interrogatory or document production request, whether by objection, assertion of privilege or other means of avoidance, which is not intended as a full and complete substantive answer, shall be filed within 5 working days of service of the interrogatory or docu-

---

[2] Intervenors have filed a motion with the Appeal Board to oust this Board of jurisdiction and reinstate the OL-5 Board. As indicated in LILCO's letter of September 14, LILCO believes that Intervenors' motion is incorrectly based and should be summarily dismissed. A copy of LILCO's response is being served on this Board today.

ment production request. Any party wishing to contest such objection, assertion of privilege or other means of avoidance must bring such objection to the Board within 5 working days.

2. The number of depositions which the Board will allow will not be limited to any specific number at the outset. However, the period for deposition discovery will be sharply limited, and will be fixed at the prehearing conference following submission of contentions. Parties will be expected to ration the number of depositions they desire and to we willing to conduct simultaneous depositions.

5. Summary disposition motions will be permitted at any time, subject to subsequent limitation by the Board. Subject to later alteration, responses on the merits will be due within 20 days as presumed by the Rules of Practice. Any response other than a substantive response, including but not limited to an assertion of inability to answer fully without more information (see 10 CFR § 2.749(c)), shall be filed within 10 days.

6. Testimony on any issues remaining after summary disposition will be filed on an expedited basis, with the exact dates to be determined in light of existing circumstances.

7. Service of all documents in this proceeding will be considered effective, as to the Board and active parties (LILCO, NRC Staff, FEMA, Suffolk County, New York State) only when the document has been delivered in fact to the recipient at its normal place of business. Service deadlines, unless otherwise specified, refer to the normal close of business on the date in question.

CONCLUSION

LILCO requests that the Board promptly grant the Staff's motion, as modified to take into account the proposals in item IV. above.

Respectfully submitted,

Donald P. Irwin
James N. Christman
Kathy E. B. McCleskey
Counsel for Long Island Lighting Company

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

DATED: September 16, 1988

United States Court of Appeals
For the First Circuit

No. 87-2032

THE COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

UNITED STATES OF AMERICA,
and UNITED STATES NUCLEAR REGULATORY COMMISSION,

Respondents.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC.,
LONG ISLAND LIGHTING COMPANY,
NUCLEAR MANAGEMENT AND RESOURCES COUNCIL, INC.,
and EDISON ELECTRIC INSTITUTE,

Intervenors.

No. 87-2033

UNION OF CONCERNED SCIENTISTS, ET AL.,

Petitioners,

v.

UNITED STATES REGULATORY COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
NUCLEAR MANAGEMENT AND RESOURCES COUNCIL, INC.,
EDISON ELECTRIC INSTITUTE,
LONG ISLAND LIGHTING COMPANY,
CITIZENS WITHIN THE 10-MILE RADIUS, INC.,
and SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC.

Intervenors.

No. 88-1121

STATE OF NEW YORK, MARIO CUOMO, GOVERNOR,
and COUNTY OF SUFFOLK,

Petitioners,

v.

UNITED STATES OF AMERICA
and UNITED STATES NUCLEAR REGULATORY COMMISSION,

Respondents.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
NUCLEAR MANAGEMENT AND RESOURCES COUNCIL, INC.,
EDISON ELECTRIC INSTITUTE,
LONG ISLAND LIGHTING COMPANY,
and SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC.,

Intervenors.

ON PETITION FOR REVIEW OF AN ORDER OF

THE NUCLEAR REGULATORY COMMISSION

Before

Campbell, Chief Judge,

Breyer, Circuit Judge,

and Acosta,* District Judge.

---

*Of the District of Puerto Rico, sitting by designation.

James M. Shannon, Attorney General, with whom Stephen A. Jonas, Frank W. Ostrander and John Traficonte, Assistant Attorneys General, were on brief for petitioner Commonwealth of Massachusetts.

Karla J. Letsche with whom Herbert H. Brown, Jonathan N. Eisenberg, Frederick W. Yette, Kirkpatrick & Lockhart, Robert Abrams, Attorney General, Alfred L. Nardelli, Assistant Attorney General, Fabian G. Palomino, Special Counsel to the Governor, and E. Thomas Boyle, Suffolk County Attorney, were on brief for petitioners of New York State, Governor Mario M. Cuomo, and Suffolk County.

Ellyn R. Weiss with whom Diane Curran, Andrea C. Ferster, Anne Spielberg, Dean R. Tousley and Harmon & Weiss were on brief for petitioners Union of Concerned Scientists, et al.

Robert A. Backus and Backus, Meyer & Solomon on brief for intervenor Citizens Within The 10-Mile Radius, Inc.

William H. Briggs, Jr., Solicitor, with whom William C. Parler, General Counsel, E. Leo Slaggie, Deputy Solicitor, Peter G. Crane, Counsel for Special Projects, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Roger J. Marzulla, Assistant Attorney General, Anne S. Almy, Assistant Chief, Appellate Section, and John T. Stahr, Appellate Section, Land and Natural Resources Division, Department of Justice, were on brief for respondents.

Thomas G. Dignan, Jr., George H. Lewald, Deborah S. Steenland and Ropes & Gray on brief for intervenor Public Service Company of New Hampshire.

James P. McGranery, Jr., on brief for intervenor Scientists and Engineers for Secure Energy, Inc.

Donald P. Irwin, Lee B. Zeugin, Jessine A. Monaghan, Charles L. Ingebretson and Hunton & Williams on brief for intervenor Long Island Lighting Company.

Jay E. Silberg, Robert E. Zahler, Delissa A. Ridgway, Shaw, Pittman, Potts & Trowbridge, Robert W. Bishop, General Counsel, Nuclear Management and Resources Council, Inc., Robert L. Baum, Senior Vice President and General Counsel, Edison Electric Institute on brief for intervenors Nuclear Management and Resources Council, Inc., and Edison Electric Institute.

SEPTEMBER 6, 1988

CAMPBELL, Chief Judge. These consolidated petitions[1] are for review of a regulation promulgated by the Nuclear Regulatory Commission ("NRC"). The regulation provides standards by which the NRC, in deciding whether to license a utility to operate a nuclear power plant, evaluates a radiological emergency plan that is prepared by the utility alone because local governments have refused to participate in emergency planning. Petitioners specifically contest the rule's incorporation of what is known in NRC parlance as the "realism doctrine," a doctrine that allows the NRC, in evaluating a utility emergency plan, to make the following pair of presumptions: 1) in the event of an actual radiological emergency state local officials will do their best to protect the affected public, and 2) in such an emergency these

---

1. Petitioners are the Commonwealth of Massachusetts (No. 87-2032), the State of New York (No. 88-1121), and the Union of Concerned Scientists ("UCS"), the New England Coalition on Nuclear Pollution, the Seacoast Anti-Pollution League, the town of Hampton, New Hampshire, the towns of Amesbury and Kensington, Massachusetts, and United States Representative Edward J. Markey (No. 87-2033). An organization called Citizens Within the 10-Mile Radius has intervened on behalf of petitioners. Five parties have intervened on behalf of respondent, the Nuclear Regulatory Commission: Public Service Company of New Hampshire, Long Island Lighting Company, Scientists and Engineers for Secure Energy, Inc., Nuclear Management and Resources Council, Inc., and Edison Electric Institute.

The arguments advanced by the various petitioners and intervenor-petitioners are substantially similar, as are those of the respondent and intervenor-respondents. For brevity's sake, we refer to the opponents in this case only as "petitioners" and "NRC."

officials will look to the utility plan for guidance and will generally follow that plan. Petitioners contend the rule is arbitrary and capricious, was promulgated under deficient "notice and comment" procedures, and is beyond the scope of the NRC's statutory authority.

I.

Under the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 et seq. (1982), the Nuclear Regulatory Commission is empowered to

> prescribe such regulations or orders as it may deem necessary . . . to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property . . . .

Id. § 2201(i)(3). Prior to the 1979 accident at the Three Mile Island nuclear power plant near Harrisburg, Pennsylvania, both Congress and the NRC had directed their regulatory efforts primarily at plant design. However, in response to the perceived inadequacy of prior planning and coordination between the utility and local governments during the Three Mile Island accident, Congress included in the NRC's 1980 authorization legislation new provisions aimed to ensure that "offsite" emergency planning was taken into consideration as well. The relevant part of the 1980 authorization legislation provided as follows:

> (a) Funds authorized to be appropriated pursuant to this Act may be used by the Nuclear Regulatory Commission to conduct proceedings, and take other actions, with respect to the issuance of an operating license for a utilization facility only if the Commission determines that--
>
> (1) there exists a State or local emergency plan which--
>
> (A) provides for responding to accidents at the facility concerned, and
>
> (B) as it applies to the facility concerned only, complies with the Commission's guidelines for such plans, or
>
> (2) in the absence of a plan which satisfies the requirements of paragraph (1), there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned.

Pub. L. No. 96-295, § 109(a)(1), 94 Stat. 780 (1980). The disjunctive language in subsection (2) -- "State, local or utility plan" -- indicates that this legislation did not condition the issuance of a license exclusively upon the existence of a state or local emergency plan. Rather, the statute's emergency planning requirements may be satisfied by either 1) a state or local plan complying with NRC guidelines or 2) a state, local, or utility plan that provides "reasonable assurance that public health and safety is not endangered."

After the accident at Three Mile Island, but prior to the 1980 authorization legislation, the NRC began revising its own emergency planning requirements. Its final emergency planning rule was promulgated in August 1980, just a few weeks after Congress had passed the authorization legislation. The NRC rule provided generally, in its initial paragraph, that "no operating license for a nuclear power reactor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." 10 C.F.R. § 50.47(a)(1) (1980). Paragraph (b) of the regulation, along with Appendix E, provided specific substantive standards for emergency response plans. Under subsection (c), however, a licensing applicant's failure to meet paragraph (b)'s standards was not necessarily fatal: an applicant could still demonstrate to the Commission that certain deficiencies were not significant for the plant in question, that interim compensating actions had already been taken or were imminent, or that there were other "compelling reasons" to permit plant operation. The rule did not specifically discuss or refer to emergency plans that were prepared by a utility without input from state or local governments.

The 1980 rule remained unchanged until the 1987 amendment here in issue. Two developments occurred in the

meantime, however, that are worthy of note. First, in two authorization acts subsequent to the 1980 authorization act discussed above, Congress reaffirmed that a plant could be licensed by the NRC on the basis of a "State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned." Pub. L. No. 97-415, 96 Stat. 2067, § 5 (1982-83 Authorization Act); Pub. L. No. 98-553, 98 Stat. 2825, § 108 (1984-85 Authorization Act). These are the only post-1980 authorization acts. Second, in a 1986 adjudicatory ruling, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986), the NRC explained how its 1980 rule would apply in evaluating the adequacy of a utility emergency plan. The question then before the NRC was whether the Long Island Lighting Company's emergency plan for its Shoreham Nuclear Power Plant was inadequate as a matter of law because of the refusal of Suffolk County and New York State to participate in the planning. Noting that it was legally obligated to consider whether a utility plan prepared without government cooperation could pass muster, the Commission stated that such a plan might be adequate under 10 C.F.R. § 50.47(c), see supra, notwithstanding its inability to comply with the specific standards of paragraph (b), which are premised upon a high level of utility-government cooperation. Id. at 29. The

Commission stated that the "root question" under paragraph (c) was identical to the question posed by the "fundamental licensing standard of § 50.47(a)," namely, whether "there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." In its decision, the Commission also put forth what has become known as the "realism doctrine":

> [I]f Shoreham were to go into operation and there were to be a serious accident requiring consideration of protective actions for the public, the State and County officials would be obligated to assist, both as a matter of law and as a matter of discharging their public trust. Thus, in evaluating the LILCO plan we believe that we can reasonably assume some "best effort" State and County response in the event of an accident. We also believe that their "best effort" would utilize the LILCO plan as the best source for emergency planning information and options. After all, when faced with a serious accident, the State and County must recognize that the LILCO plan is clearly superior to no plan at all.

Id. at 31 (citations omitted).

Against this backdrop, the NRC promulgated the regulation in dispute here, amending paragraph (c) of the 1980 rule. See supra. The current rule reads in relevant part as follows:

> In making its determination on the adequacy of a utility plan, the NRC will recognize the reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public. The NRC will determine the

> adequacy of that expected response, in combination with the utility's compensating measures, on a case-by-case basis, subject to the following guidance. In addressing the circumstance where applicant's inability to comply with the requirements of paragraph (b) of this section is wholly or substantially the result of non-participation of state and/or local governments, it may be presumed that in the event of an actual radiological emergency state and local officials would generally follow the utility plan. However, this presumption may be rebutted by, for example, a good faith and timely proffer of an adequate and feasible state and/or local radiological emergency plan that would in fact be relied upon in a radiological emergency.

10 C.F.R. § 50.47(c)(iii)(B) (1988). In short, the amendment reflects the "realism doctrine" the NRC announced in the Long Island Lighting Co. adjudication, modified by an express provision that the doctrine's second presumption is rebuttable.

II.

Petitioners contend as a threshold matter that the disputed rule is not entitled to the judicial deference normally owed agency action. See 5 U.S.C. § 706(2)(A) (1982) (courts can set aside agency action only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). They argue that, for example, offsite emergency planning -- as opposed to technical matters relating to plant construction and design -- is outside the NRC's area

of expertise. We do not agree. The substantive area in which an agency is deemed to be expert is determined by statute; here, under the relevant congressional enactments, see supra, the NRC is specifically authorized and directed to determine whether emergency plans adequately protect the public. See Duke Power Co. v. United States Nuclear Regulatory Commission, 770 F.2d 386, 390 (4th Cir. 1985). We also reject petitioners' argument that the NRC is owed no deference because the issue in this case is a "pure question of statutory construction." The issue is not a pure question of statutory construction. Petitioners do not ask us "purely" to construe a statute; they ask us to hold that, given the statutes, the agency has acted unreasonably. Even if we were to assume, for the sake of argument, that the issue were purely one of statutory construction, petitioners still have not directed us to any enactment in which Congress has clearly indicated a view of emergency planning that is at variance with the NRC rule or that forecloses the NRC's adoption of the approach here adopted. Without such an indication of contrary congressional intent, we should normally defer to the agency's reasonable construction of the statute it administers. Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984); Mayburg v. Secretary of Health and Human Services, 740 F.2d 100 (1st Cir. 1984). As it is, our standard of review here is dictated by section 706(2)(A)

of the Administrative Procedure Act, and we must uphold the agency's action so long as it is "reasonable and defensible." Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 97 & n.7 (1983).

Petitioners advance a host of arguments why the NRC rule -- specifically, its incorporation of the second presumption contained in the "realism doctrine" -- is unreasonable. Petitioners' primary contention is that it is unreasonable for the NRC to presume that, in the event of an actual radiological emergency, states and localities that have previously refused to participate in emergency planning will follow an emergency plan adopted by the utility.[2] We cannot say that this presumption is unreasonable. That state and local governments have refused to participate in emergency planning, or have indicated a belief that such planning is inherently impossible in a particular plant location, does not indicate how these governments would respond in an actual emergency. It is hardly unreasonable for the NRC to predict

---

2. None of the petitioners seriously contests the first presumption of the realism doctrine, the presumption that state and local governments will try to protect the public in an emergency. Petitioner UCS argues that the rule contains an implicit third assumption that states and localities have the resources necessary to comply with the utility plan in the event of an emergency. We do not consider this third presumption to be implicit in the realism doctrine, and to the extent that this part of UCS's argument is a challenge to "interim criteria" adopted by the NRC subsequent to the promulgation of the disputed rule, the issue is not properly before us.

that state and local governments, notwithstanding their misgivings about the adequacy of a utility plan or their opposition to a particular plant location, would, in the event of an actual emergency at a plant they were lawfully obligated to coexist with, follow the only existing emergency plan. This prediction is supported by common sense, and also by the uncontested fact -- part of the administrative record of this rule -- that state and local governments prefer a planned emergency response to an ad hoc response. See 52 Fed. Reg. 42,082 (1987).

Nor is the NRC rule objectionable because it is a "presumption." Agencies are permitted to adopt and apply presumptions if the proven facts and the inferred facts are rationally connected. NLRB v. Baptist Hospital, Inc., 442 U.S. 773, 787 (1979). As we indicated above, the inferred fact of state and local adherence to a utility plan is rationally related to the proven (in this case, hypothesized) fact of an actual radiological emergency. Moreover, the presumption here is expressly made rebuttable:

> It may be presumed that in the event of an actual radiological emergency state and local officials would generally follow the utility plan. However, this presumption may be rebutted by, for example, a good faith and timely proffer of an adequate and feasible state and/or local radiological emergency plan that would in fact be relied upon in an emergency.

10 C.F.R. § 50.47(c)(iii)(B). The proffer of an adequate state or local plan -- an option that some states and localities may have expressly rejected -- is only one possible method of rebutting the presumption. Nothing in the rule's language precludes other means of rebuttal.

Petitioners also contend that the amended rule reflects an impermissible deviation from the NRC's regulatory position in 1980. Assuming, without deciding, that the NRC has in fact changed its position with respect to the role of states and localities in emergency planning, we conclude that such a change was not irrational. The NRC might reasonably have believed that, in light of the proven nonparticipation of states in emergency planning subsequent to 1980, the new rule was necessary to serve Congress's policy that the NRC consider plans prepared by utilities without governmental participation. See Atchison, Topeka & Santa Fe Ry. v. Wichita Board of Trade, 412 U.S. 800, 808 (1973) (agency may alter policy in light of changed circumstances in order to serve congressional policy). There is adequate on-the-record justification for the NRC's adoption of the new rule. See NAACP v. FCC, 682 F.2d 993, 998 (D.C. Cir. 1982) (deference is owed to an agency's determination that circumstances have changed and to the agency's response thereto).

Another of petitioners' contentions is that the NRC failed to comply with the notice and comment procedures

required under section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1982). They contend the NRC's notice of proposed rulemaking failed to address the realism doctrine. Petitioners ignore, inter alia, the following statement, which appeared in information accompanying the notice:

> the Commission believes that State and local governments which have not cooperated in planning will carry out their traditional public health and safety roles and would therefore respond to an accident. It is reasonable to expect that this response would follow a comprehensive utility plan.

52 Fed. Reg. 6983 (col. 2). See also id. at 6980 (col. 1), 6986 (col. 1). This notice was satisfactory, see Natural Resources Defense Council v. EPA, 824 F.2d 1258, 1282-86 (1st Cir. 1987); petitioners' argument is without merit.

Petitioners also contend on a miscellany of grounds that the NRC rule violates the Atomic Energy Act. For example, they claim the new rule permits the NRC to consider a utility's economic costs in determining whether a plan provides "adequate protection" to the public, a result arguably in conflict with the D.C. Circuit's decision in Union of Concerned Scientists v. NRC, 824 F.2d 108 (D.C. Cir. 1987). But even if we were to think that that case controlled here, we do not believe the regulation necessarily opens the door to such economic considerations. Nothing on the rule's face suggests this, and such a motivation is specifically

disclaimed by the NRC. 52 Fed. Reg. 42,083 (1987). Nor can we accept petitioners' claim that such an inference is warranted by the rule's provision that, in evaluating a utility plan, the NRC shall make due allowance for the possibility that state and/or local nonparticipation will make the utility plan's compliance with enumerated safety standards "infeasible." 10 C.F.R. § 50.47(c)(iii)(A). Petitioners claim the word "infeasible" necessarily invites cost-benefit analysis. We reject this argument. A fair reading of this provision of the rule in context suggests that compliance would be "infeasible" simply because some of the specific safety standards clearly contemplate utility-government cooperation.

We have considered and rejected petitioners' other arguments about the rule's statutory invalidity. These arguments are unpersuasive either because they fail to acknowledge the discretion the Act itself vests in the Nuclear Regulatory Commission, see Public Service Co. of New Hampshire v. NRC, 582 F.2d 77, 82 (1st Cir.), cert. denied, 439 U.S. 1046 (1978), or because they attack an imagined unlawful application of the rule. The latter arguments are inappropriate here, where the rule is being challenged on its face. Our holding is, of course, limited to the question of whether the rule is involved on its face; petitioners remain

free to challenge the NRC's application of the rule in an individual case.

The petitions for review are denied.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

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 RESPONSE TO NRC STAFF'S MOTION FOR SCHEDULE FOR LITIGATION OF THE JUNE 1988 EXERCISE were served this date upon the following by Telecopy as indicated by one asterisk, by Federal Express as indicated by two asterisks or by first-class mail, postage prepaid.

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

Dr. Jerry R. Kline *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
East-West Towers, Rm. 427
4350 East-West Hwy.
Bethesda, MD 20814

Mr. Frederick J. Shon *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
East-West Towers, Rm. 430
4350 East-West Hwy.
Bethesda, MD 20814

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

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

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

Christine N. Kohl, Chairman *
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Fifth Floor (North Tower)
East-West Towers
4350 East-West Highway
Bethesda, MD 20814

Alan S. Rosenthal *
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Fifth Floor (North Tower)
East-West Towers
4350 East-West Highway
Bethesda, MD 20814

Dr. W. Reed Johnson *,**
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
115 Falcon Drive, Colthurst

Edwin J. Reis, Esq. *
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

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

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

Alfred L. Nardelli, Esq.
Assistant Attorney General
120 Broadway
Room 3-118
New York, New York 10271

George W. Watson, Esq. *
William R. Cumming, Esq.
Federal Emergency Management Agency
500 C Street, S.W., Room 840
Washington, D.C. 20472

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

Stephen B. Latham, Esq. **
Twomey, Latham & Shea
33 West Second Street
P.O. Box 298
Riverhead, New York 11901

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

Jonathan D. Feinberg, Esq.
New York State Department of Public Service, Staff Counsel
Three Rockefeller Plaza
Albany, New York 12223

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

Evan A. Davis, Esq.
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

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

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

COURTESY SERVICE:

John H. Frye, III, Chairman **
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
East-West Tower
4350 East-West Highway
Bethesda, MD 20814

Dr. Oscar H. Paris **
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
East-West Tower
4350 East-West Highway
Bethesda, MD 20814

Donald P. Irwin

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

DATED: September 16, 1988