June 9, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

GOVERNMENTS' NOTICE THAT THE BOARD HAS PRECLUDED CONTINUATION OF THE CLI-86-13 REMAND

The Governments (Suffolk County, New York State, and the Town of Southampton) hereby provide notice that the Board has precluded continuation of the CLI-86-13 remand. The Board has framed the litigation so as to compel the Governments to act contrary to their lawful sovereign decisions and has directed wasteful discovery into irrelevant matters. The proceeding cannot continue in these circumstances.

The Board's rulings applying the new rule (10 CFR § 50.47(c)(1)(i)-(iii)) have made the focus of this proceeding the false premise that the Governments would generally follow LILCO's plan in the event of a Shoreham emergency and would cooperate, work, and interface with LILCO in responding to such

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an emergency. The Governments have demonstrated that they would do neither by every means known and available to them: pleadings, affidavits, discovery responses, and even testimony. The Board's rulings, however, have ignored these repeated representations.

This proceeding is a remand pursuant to CLI-86-13, 24 NRC 22 (1986). Its purpose is two-fold: (1) to determine whether the LILCO plan and the "best efforts" of the Governments would enable the Board to find reasonable assurance that adequate protective measures can and will be taken in the event of a Shoreham emergency; and (2) to determine whether certain emergency response functions in LILCO's plan can and will be implemented in compliance with NRC regulations. The adequacy of LILCO's plan is thus an appropriate subject for litigation, as is the nature of the Governments' "best efforts" response to a Shoreham emergency. Pursuant to CLI-86-13, the Board may properly review the "best efforts" response as described in this testimony and determine whether such a response, together with LILCO's plan (to the extent LILCO lawfully may implement its plan), provides a basis for the necessary reasonable assurance finding. The Board exceeded these bounds however, and structured the proceeding according to a premise that is contrary to the Governments' lawful determinations, as set forth in their testimony.

The Governments have made clear how they would respond to a Shoreham emergency. That is, they would never use LILCO's plan; they would never work cooperatively or "interface" with LILCO; they would never give LILCO permission or otherwise authorize LILCO to act on their behalf; they would not adopt or implement any plan for Shoreham; they have no plans which they would follow in a Shoreham emergency; they would respond to a Shoreham accident on the basis of what they judge to be best for their citizens at the time of the emergency; and, as they have explained countless times, would do so without reference to LILCO or LILCO's plan. The testimony of Suffolk County Executive Halpin and New York State Commissioner of Health Axelrod sets forth these decisions and their bases in detail.[1/] In essence, the Governments have lawfully declared that they will not use or implement LILCO's plan (thus rebutting the presumption of the new emergency planning rule), and that LILCO's so-called "interface procedure" cannot ever be realized in any way, shape, or form.[2/]

1/ It is without dispute that New York State and Suffolk County have the exclusive and sovereign authority to decide how they will act in response to nuclear power plant emergencies. The NRC has no authority to mandate how such governments will act. The State of New York and Suffolk County have made their decision for Shoreham. The Federal and State courts have upheld the County's decision in this regard. Citizens for an Orderly Energy Policy Inc. v. County of Suffolk, 604 F. Supp. 1084 (E.D.N.Y. 1985), aff'd, 813 F.2d 570 (2d Cir. 1987); Prospect v. Cohalan, 65 N.Y. 2d 867, 493 N.Y.S. 2d 293 (1985).

2/ The "interface" procedure is referenced at page 2 of the May 24, 1988 "Board Ruling" and is entitled "Suffolk County Interface Procedure" (OPIP 3.1.1, Attachment 10). This Board Ruling indicates that the interface procedure is to be a chief focus of discovery. The LILCO procedure calls for continuous interaction between LERO and the County, including County approval of LERO

(footnote continued)

The Governments' decision as to what their best efforts would be is not subject to dispute, second guesses, or rejection by this Board. Neither the Board nor LILCO can speak for or bind the Governments as to their response to a nuclear emergency or any other conduct within their sovereign powers.

This Board is authorized by NRC regulations to decide if the Governments' "best efforts" would be adequate to satisfy the reasonable assurance licensing standard. But, this Board has no authority to proclaim or otherwise decide that the Governments' response would be anything other than what the Governments and their duly elected Chief Executives say. Nevertheless, this is precisely the premise on which the Board is acting.3/

Thus, it would be senseless and contrary to the police power decisions reached by the Governments to proceed with 16-18 depositions, as LILCO proposes, related to the "interface" issue,

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(footnote continued from previous page)
protective actions, LERO sending personnel to the County Police headquarters, the County giving permission for LERO road crews to remove road impediments, and other response actions. The Halpin and Axelrod testimony make clear that none of these actions would be authorized by either Government.

3/ This notice does not address the impact of the Governments' decisions, i.e., whether these decisions mean that the Shoreham operating license must be denied (although it clearly is the fact that LILCO acting alone lacks legal authority to implement its plan, as this Board, the Appeal Board, and the Commission have acknowledged). However, it is clear that the Governments' decisions define a critical element of the licensing issue which must be decided: whether the NRC can license Shoreham to operate above 5 percent power solely on the basis of a utility plan which will never have the support or involvement of the State and local governments and will not be implemented by them.

because the Chief Executives of the Governments have made clear that they will not interface with LILCO. Under these circumstances, no rationale can justify any inquiry whatsoever -- let alone LILCO's depositional expedition -- into a point of fact that has been categorically ruled out of the realm of possibility. Such an inquiry would not only constitute an extreme waste of resources, it also would be a challenge to the Governments' police power decisions -- something the NRC is not authorized to do.4/

The Governments are compelled to underscore how this impasse was created. The Board, through its application of the new rule, has made the rule's presumption unrebuttable and has sanctioned the fiction that the Governments would "interface" with LILCO in responding to a Shoreham emergency. It is pursuant to this fiction that the Board has directed further discovery on the non-existent "interface" issue. The Governments have every desire to proceed with the legal authority contentions, but are precluded from doing so when the basic premise of the litigation is contrary to the lawful decisions reached by the Governments. The Board must understand that the Governments will never use

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4/ For the same reason, it is pointless to proceed with "inquiry" into the County's Operation Plan. LILCO appears to believe that plan is important because it provides LILCO a means of interfacing with the County. But the interface issue is a fiction -- there will be no such interface for the reasons spelled out in detail in Mr. Halpin's testimony.

LILCO's plan or interface with LILCO. The Board must decide the legal authority contentions in the context of this reality.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the GOVERNMENTS' NOTICE THAT THE BOARD HAS PRECLUDED CONTINUATION OF THE CLI-86-13 REMAND have been served on the following by U.S. mail, first class, the 10th day of June 1988, except as otherwise noted.

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