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December 22, 1986

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'86 DEC 30 P12:14

Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station,  
Unit 1) )

Docket No. 50-322-OL-5  
(EP Exercise)

OPPOSITION OF SUFFOLK COUNTY, STATE OF NEW YORK AND TOWN OF  
SOUTHAMPTON TO FEMA'S REQUEST FOR STAY

On December 19, 1986, the Federal Emergency Management Agency ("FEMA") filed its "Request for Stay of Issuance of Subpoenas and Modification of Procedure with Respect to Depositions" ("Request for Stay"). FEMA argues that "the Board should stay its Order of the 17th with respect to issuance of subpoenas, so that FEMA can determine whether or not appeal of the Board's approach to discovery against FEMA with respect to both witnesses and document production is appropriate." Request for Stay at 2.

FEMA's Request for Stay is both procedurally defective and premature, and should therefore be denied. The proper procedure for opposing issuance of a subpoena is by motion to quash or modify. 10 CFR § 2.720(f). To the extent that FEMA's Request

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for Stay addresses matters in the Board's December 17 Order<sup>1/</sup> other than the issuance of subpoenas, it is defective for failing to address the criteria set forth in 10 CFR § 2.788(e). That section provides as follows:

(e) In determining whether to grant or deny an application for a stay, the Commission, Atomic Safety and Licensing Appeal Board, or presiding officer will consider.

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

Any party who seeks a stay of a Board order must, inter alia, give "[a] concise statement of the grounds for stay, with reference to the factors specified in paragraph (e) of this Section." See, 10 CFR § 2.788(b)(2). This FEMA has failed to do and, for that reason alone, the Request for Stay should be denied.

If the Board should decide to consider FEMA's Request for Stay on the merits, despite its procedural defects, the Request should be denied. The only grounds FEMA gives for its Request are: 1) that FEMA "assumes" the Governments will wish to

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<sup>1/</sup> Memorandum and Order (Ruling in Part on Intervenor's Motions to Compel FEMA to Produce Witnesses for Deposition, to Permit Witnesses to answer Deposition Questions, and to Produce Documents), December 17, 1986.

question the subpoenaed evaluators on Revisions 7 and 8 and, since the review of Revisions 7 and 8 will not be available until December 31, 1986, any testimony prior to that date will only lead to wrangling and delay; and 2) that the procedure for asserting the deliberative process privilege outlined in the Board's Order of December 17, 1986 will be almost impossible for Counsel for FEMA to implement "[a]ssuming that the Intervenor[sic] questions are both numerous and lengthy. . ." Request for Stay at 2-3.

As to FEMA's first stated ground, given the present realities in this litigation, it is highly unlikely that any of the subpoenaed witnesses will be called to testify prior to December 31. See letter to Board from Michael S. Miller dated December 22, 1986. Furthermore, while the Governments may indeed inquire into Revisions 7 and 8, it is expected that the majority of the Governments' questioning of these witnesses will concern their roles at the February 13 Exercise.

FEMA's second ground for requesting a stay is premature. Again, FEMA is basing its Request on an "assumption" -- that the Governments will engage in lengthy inquiry into privileged areas. FEMA's request that the Board further delay the testimony of four evaluators who were at the Exercise solely because FEMA's counsel may find it burdensome to object to questions he "assumes" will be asked is absurd on its face and makes a mockery of both due process and the law of the deliberative process privilege.



None of the grounds asserted by FEMA for its Request meets the requisite showing under 10 CFR § 2.788(e). FEMA has made no showing that it is likely to prevail on the merits, nor has it shown that a failure to grant the stay will cause any, let alone irreparable, injury to FEMA.

For the foregoing reasons, the Governments respectfully ask that the Board deny FEMA's Request for Stay as both procedurally defective and premature.

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Dated: December 22, 1986

December 22, 1986

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CERTIFICATE OF SERVICE

I hereby certify that copies of OPPOSITION OF SUFFOLK COUNTY, STATE OF NEW YORK AND TOWN OF SOUTHAMPTON TO FEMA'S REQUEST FOR STAY have been served this 19th day of December 1986 by U.S. mail, first class, except as otherwise noted.

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