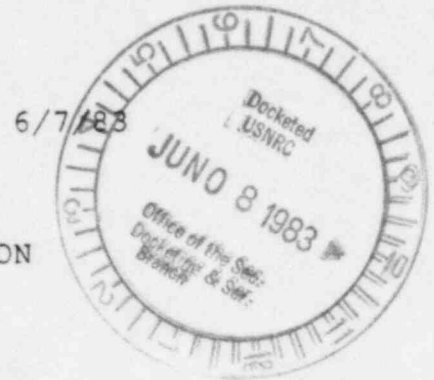


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission



In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station,
Unit 1)

Docket No. 50-322 O.L.
(Emergency Planning)

MOTION FOR COMMISSION RULING ON LILCO'S
"UTILITY PLAN" FOR EMERGENCY PREPAREDNESS

On May 12, 1983, the Commission denied Suffolk County's motion to terminate the Shoreham operating license proceeding. See CLI-83-13, 17 NRC ____ (1983). The Commission ruled that LILCO must have an opportunity to show that adequate preparedness under a "utility plan" exists, despite Suffolk County's decision not to adopt or implement any local emergency response plan.

The Commission's May 12 decision was issued prior to LILCO's submission of an offsite "utility plan" designed to compensate for lack of a County plan. Indeed, the Commission stated that it expressed no opinion whether LILCO could submit a plan which meets "all applicable regulatory standards" because "there is no evidentiary record before us upon which to

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provide any such opinion." CLI-83-13, 17 NRC ____, Slip op. at 4 (1983). Now, however, there is evidence before the NRC, and it compels the Commission to summarily reject LILCO's filing of a so-called "utility plan." In fact, what LILCO has filed does not amount to the requisite "utility plan" contemplated by the Commission in its May 12 Order.

DISCUSSION

On May 26, 1983, LILCO filed its "utility plan" for Shoreham offsite preparedness. See LILCO's Memorandum of Service of Supplemental Emergency Planning Information, May 26, 1983. This "utility plan" (in fact, as described below, there are five plans) is now scheduled first for review by FEMA, then by the NRC Staff, and then ultimately for adjudication before the Licensing Board, all sequentially in accordance with the Commission's May 12 Order. See CLI-83-13, 17 NRC ____, Slip op. at 4 (1983).

LILCO's May 26 submission compels rejection of LILCO's "utility plan" and thus termination of the Shoreham operating license proceeding. While the Commission could not on May 12 have foreseen what LILCO would file as its "utility plan," the Commission now must squarely face the fact that LILCO's May 26 submission provides no possibility of meeting "all applicable

regulatory standards" and cannot be the kind of "utility plan" contemplated by the Commission in its May 12 Order. There is no need for a fact-finding ASLB proceeding to reach this straightforward judgment; rather, any examination of the "plans" submitted by LILCO leads to this inescapable conclusion. The Commission, therefore, should promptly examine the LILCO submission and take action to avoid the unnecessary litigation of these "plans" before the Licensing Board. The Commission should rule that LILCO has had its opportunity to present a "utility plan" but that, as a matter of law, LILCO's submission inherently does not constitute the requisite plan.

LILCO's May 26 submission consists, in fact, of five plans, none of which meets regulatory requirements. Each is described below.^{1/}

LILCO "Plan 1."

Plan 1 is a so-called "LILCO-County plan," which assigns the responsibility for implementation to Suffolk County. This precise plan already has been rejected by the County Legislature in County Resolution No. 111-1983 and, thus, never will be implemented by Suffolk County. A so-called "plan" which

^{1/} Plans 1-4 are discussed in a pleading dated June 7, 1983 and filed with the Licensing Board. A copy of this pleading is attached as Exhibit 1.

categorically will not be implemented certainly is not the subject for an ASLB proceeding. Indeed, despite the title which LILCO has given the document, it simply is no plan at all. Further, the Commission has made clear that a utility is not permitted to submit a plan on behalf of a local government where, as here, the local government specifically objects to that plan. See Chairman Palladino's May 9, 1983 Letter to Congressman Richard L. Ottinger. LILCO has violated this Commission guidance by submission of a local government plan despite the objection of the local government. Such a plan which never will be implemented can never provide the necessary preparedness required by the NRC's rules. Accordingly, LILCO's "Plan 1" must be rejected.

LILCO "Plan 2."

Plan 2 is a so-called "LILCO/State plan," which assigns to the State of New York the responsibilities for command and control of offsite emergency response, with LILCO personnel implementing State command and control decisions. The State, however, has not agreed to perform the duties unilaterally assigned to it by LILCO and, indeed, to the County's knowledge, was not even previously consulted by LILCO as to whether the State would accept those duties. Clearly, lacking State

agreement to do what LILCO calls upon the State to do, the "LILCO/State plan" is no plan at all and must be rejected.

LILCO "Plan 3."

Plan 3 is a so-called "LILCO/FEMA plan," which unilaterally assigns to FEMA the responsibilities for command and control of offsite response, with LILCO personnel implementing FEMA command and control decisions. Quite aside from the question whether FEMA has authority to assume such responsibilities, FEMA has not agreed to perform the duties assigned by LILCO. Further, as with the "LILCO/State plan," FEMA does not even appear to have been consulted in advance by LILCO as to whether FEMA would accept these duties. Lacking FEMA's agreement to do what LILCO calls upon FEMA to do, the "LILCO/FEMA plan" is no plan at all and must be rejected.

LILCO "Plan 4."

Plan 4 is a so-called "LILCO/NRC plan," which assigns to the NRC responsibilities for command and control of offsite response, with LILCO personnel implementing NRC command and control decisions. The NRC has not, however, agreed to perform these duties which LILCO has unilaterally assigned to it. Indeed, from prior Commission statements, it appears that the NRC could not agree to LILCO's proposal, even were it so inclined,

since the NRC relies on FEMA for offsite emergency planning assistance and has stated that the NRC "does not have the resources necessary to handle offsite emergency planning and preparedness matters." See May 9, 1983 letter from Chairman Palladino to Congressman Richard L. Ottinger, Answer to Question 7.C. Clearly, the so-called "LILCO/NRC plan" is no plan at all and must be rejected.

LILCO "Plan 5."

Plan 5 is a so-called "LILCO transition plan," which calls for LILCO personnel to perform essentially all offsite emergency preparedness functions. The LILCO transition plan relies on no local or state governmental entities for implementation. Thus, this plan ripens for immediate Commission consideration of the issue raised by Commissioner Gilinsky in his Separate Views on CLI-83-13. Responding to the question of whether there can be adequate emergency preparedness where no governmental entities participate, Commissioner Gilinsky stated:

I have abstained, not because I disagree with the Licensing Board's legal conclusion -- that the Commission can consider the utility's plan even in the absence of any state or local government participation -- but because the Commission has failed to deal with the actual issue in this case. That is: Can there be adequate emergency preparedness (as distinct from planning) if neither the State nor the County Governments will participate?

The answer is clearly, No. There cannot be adequate emergency preparedness for the surrounding population without the participation of a responsible government entity. And, however, they may qualify their views now, I do not believe that a single Commissioner would actually approve the operation of the plant without such participation. Unfortunately, the Commissioners appear to think that holding out the possibility that they will approve the utility's plan will encourage the parties to this case to settle their disputes. The opposite is true. Whatever the chances of settlement might be, they would be enhanced, rather than diminished, if the parties knew where the Commission actually stands on this ultimate question. CLI-83-13, Separate Views of Commissioner Gilinsky (emphasis supplied).

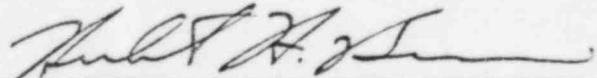
On May 12, one could only speculate what kind of "plan" LILCO might file. At that time, the County, and perhaps the Commission as well, believed that -- as LILCO had publicly stated -- other governmental entities were being substituted for the County. Now, however, we have LILCO's so-called "transition plan," and its essential ingredient is for LILCO to do everything with no participation of a responsible governmental entity. Thus, the issue raised by Commissioner Gilinsky can no longer be avoided. The County agrees strongly with Commissioner Gilinsky and submits that one of the undisputed lessons of the TMI accident is that there can be no possibility of adequate preparedness without the full support and

participation of the responsible governments. Since LILCO's "transition plan" has neither the support nor participation of any government, the Commission should reject that "plan" as well.

In conclusion, none of LILCO's five "plans" forms the basis for a "utility plan" within the meaning of Section 5 of the current NRC Authorization Act or the "compensating measures" contemplated by Section 50.47(c)(1) of the NRC's regulations. Clearly, none of those "plans" could provide adequate preparedness to respond to a Shoreham accident. Accordingly, the Commission should reject the five LILCO "plans" and bring this operating license proceeding to an immediate conclusion.

Respectfully submitted,

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June 7, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

EXHIBIT 1

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 O.L.
(Emergency Planning)

SUFFOLK COUNTY RESPONSE TO "LILCO'S MEMORANDUM
OF SERVICE OF SUPPLEMENTAL EMERGENCY PLANNING
INFORMATION" AND REQUEST FOR SUMMARY LICENSING
BOARD REJECTION OF LILCO EMERGENCY PLANS

On May 26, 1983, Suffolk County received "LILCO's Memorandum of Service of Supplemental Emergency Planning Information" (the "LILCO Memorandum"). In accordance with LBP-83-22, as amended by the Board's May 5, 1983 Order Confirming Adjustment in Schedule to File Contentions, LILCO's submission of the emergency planning information commences a four week period for preparation and filing of contentions. Further, the parties have been directed to consult and report to the Board "their agreement or disagreement on whether the four week period should be adjusted slightly, in either direction, due to the unexpectedly concise or extensive content of LILCO's revision to its emergency plan." May 5 Order, pp. 1-2.^{1/}

1/ The County will advise the Board by separate submission on or before June 9 regarding its views on the adequacy of the four week contention preparation period.

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Suffolk County hereby responds to those portions of the LILCO Memorandum which seek to require parties to submit contentions on five alternative emergency response "plans" for Shoreham.^{2/} The County requests the Board to rule that four of such five so-called "plans" -- all except the LILCO transition plan -- must be summarily rejected.^{3/}

Summary

LILCO has submitted five "plans" to the Licensing Board: the so-called LILCO-County Plan, which relies on Suffolk County employees for implementation; and four so-called interim plans,

^{2/} The County is not responding to LILCO's discussion of what it intends to attempt to prove in this proceeding or its views on the so-called "core issues." See, e.g., LILCO Memorandum at 7-9, 13-18. Much of this discussion is merely LILCO's speculation about what issues the County and other intervenors may raise. No response at all is required to such speculation. However, the excessive LILCO speculation does highlight the need to determine first what, in fact, is properly before the Board for litigation. By ruling on the County's request for summary rejection of four of LILCO's "plans," the Board will provide necessary guidance and thus permit parties to proceed to identify the issues actually in controversy.

^{3/} The County believes that the LILCO transition plan also should be rejected because adequate emergency preparedness cannot exist where no governmental entities participate, as is the case in the LILCO transition plan. The County believes, however, that the rejection of the LILCO transition plan is a matter for Commission decision, given that this issue was specifically addressed by Commissioner Gilinsky's statements regarding his view of the full Commission's position. See CLI-83-13, Separate Views of Commissioner Gilinsky. Accordingly, while the County will file a motion with the Commission to reject the LILCO transition plan, the County has no objection to this Board certifying the instant pleading to the Commission should the Board deem that appropriate.

which vary depending upon whether the State of New York ("State"), FEMA, the NRC, or LILCO is assumed to carry-out the important command and control and public information functions. The term "assumed" is underscored because to date neither the State, FEMA, nor the NRC has declared its willingness or intent to carry-out those functions. And, until any of such entities makes such a declaration, there cannot, by definition, be a plan which includes and depends on those entities. Nevertheless, LILCO asks that parties be required to submit contentions on all five such "plans." LILCO Memorandum at 2.

This Board should summarily reject four of LILCO's five plans. The LILCO-County plan must be rejected because its submission squarely violates Commission guidance which prohibits LILCO from submitting a local governmental plan where, as here, the responsible local government objects. The LILCO-County "plan" must be rejected also because the County categorically decided that it will not adopt or implement that plan. LILCO's speculation of what might happen (i.e., the County may change its mind sometime in the future, or Board findings on the LILCO-County plan may help to persuade some government to rescue LILCO) is no basis for litigation. The LILCO-County "plan" is not scheduled for implementation by anyone, and simply put, it is no plan at all. This Board is not in the business of granting advisory opinions or, as LILCO would have it, acting as some kind of LILCO tool to persuade the County to change its mind. Rather, this Board is convened to determine whether preparedness actually exists in Suffolk County. LILCO's

suggested litigation of the LILCO-County plan is meaningless, since without the County's agreement to implement the so-called "plan" and thus establish preparedness, the "plan" can never provide the basis for preparedness.

The Board also should summarily reject the LILCO/State, LILCO/FEMA, and LILCO/NRC "plans." Again, these are not plans at all, because the crucial intent and agreement of, respectively, the State, FEMA, and the NRC to undertake the actions specified in those "plans" does not exist. Indeed, there is not even a suggestion that these entities had been consulted prior to LILCO's May 26 filing as to whether they would assume offsite command and control responsibilities for Shoreham. If the State, FEMA, or the NRC were to indicate that it will provide the resources and take the actions described in LILCO's "plans," then searching litigation of the feasibility and adequacy of those plans may be appropriate.^{4/} Until then, however, there is nothing that can be litigated, because it is now but the grandest of speculation whether the State, FEMA, and/or the NRC would in fact agree to the LILCO proposal. Indeed, without those entities being a part of the plans, the force of logic alone proves that there are no such plans at all. There are only words without effect or consequence.

^{4/} There are serious issues concerning the legal authority of entities like the NRC or FEMA to assume overall command and control of offsite emergency response. Such issues need not be addressed at all, however, if these entities decline to accept LILCO's proposal.

Discussion

A. The LILCO-County Plan

The LILCO-County plan is written to be implemented by Suffolk County. The County Legislature rejected this plan in Legislative Resolution 111-1983. Nevertheless, LILCO asks the Board to make finding that this "plan" is a feasible means to accomplish emergency planning for Long Island, "but for Suffolk County's unwillingness to implement the plan." LILCO Memorandum at 2. For several reasons, the Board must reject this plan.

First, Commission guidance makes clear that LILCO is not permitted to submit this "plan" for NRC review. This guidance is contained in letters between the Commission and members of Congress. In an April 11, 1983 letter to NRC Commissioners, Congressmen Thomas J. Downey and Richard L. Ottinger made the following statement:

It would be against the law if the NRC were to consider a local government plan which was developed by a utility and not "officially submitted" by the local government. The law is clear, and our colloquy further emphasizes, that a utility, devoid of any manner of enforcing compliance with plans pertaining to actions of non-utility personnel, cannot submit a plan on behalf of a local government against the wishes of that local government. (emphasis supplied).

See Attachment A for complete text of letter as well as the referenced colloquy. In a May 9, 1983 response to this letter, Chairman Palladino stated:

[W]hile the Commission agrees with your statement that a utility "cannot submit a plan on behalf of a local government against the wishes of that local government," it also believes that, in appropriate circumstances, the utility may submit its own plan, labelled as such, for consideration under 10 CFR § 50.47(c)(1).

See Attachment B for full text of Palladino letter. Thus, the NRC has made clear that LILCO cannot submit a plan on behalf of Suffolk County against the County's wishes. However, that is precisely what LILCO has done since the LILCO-County plan purports to be a plan on behalf of and to be implemented by Suffolk County. This is not a "utility plan" at all, since it relies on County resources for implementation. Therefore, since LILCO cannot submit a plan for Suffolk County over the County's objections (and the Board is keenly aware that the County does object again now as well as through County Resolution 111-1983 to the LILCO-County plan), that plan must be summarily rejected.

Second, this Board is convened to consider and adjudicate facts -- namely, whether there is adequate offsite preparedness in the event of a Shoreham emergency. The Board is not a forum for speculation regarding what might happen in the future (i.e., might the County change its mind about the feasibility of emergency planning on Long Island?) or a forum for attempting to persuade the County to change its mind (would the County be persuaded to change its mind if the Board found the plan "qua plan" to be adequate?). Thus, notwithstanding LILCO's remarkable, even fantasy-like, speculation about what may happen in the

future,^{5/} the Board and parties to this proceeding must deal with the here and now. And the undisputed fact is that Suffolk County has decided that it will neither approve, adopt, nor implement the LILCO-County plan. Without County agreement to implement the LILCO-County plan, that "plan" is only a parcel of empty words. To expend time and resources to find whether a "plan" might be acceptable if in the future circumstances change -- when there is no basis for change now known to anyone and not a scintilla of evidence that a change of County position is even possible, let alone likely -- is to engage in a meaningless exercise.^{6/} It would be like holding a hearing

^{5/} LILCO speculates that while the County now opposes this plan, it "may not oppose it in the future (LILCO Memorandum at 3, emphasis supplied); a Board decision in favor of the plan "as a plan (questions of who will implement it aside) might very well help to solve the problem of who will implement the plan (id. at 4, second emphasis supplied); "if LILCO is able to show adequate emergency planning without the County's cooperation and as a result Shoreham goes into operation, it may well be that Suffolk County will then decide to resume its participation in planning . . . [which] will be faster and easier if there is an accepted plan for the County already in existence (id. at 4, first and second emphasis supplied); "a finding that the LILCO offsite plan is an adequate plan qua plan may very well be enough to support a low-power license (id. at 4, emphasis supplied); "LILCO may argue at some point that the existence of an adequate offsite plan, coupled with a showing that the County's refusal to implement it is beyond the applicant's control, constitutes other compelling circumstances to allow operation under 10 C.F.R. § 50.47(c)(1) (id. at 5, emphasis supplied).

^{6/} It is difficult, if not humorous, to imagine what contentions might be filed on the LILCO-County plan. For instance, in response to the LILCO speculation that "the County government may change its mind" about implementing that plan (LILCO Memorandum at 3), a contention would be that "the County government may not change its mind." It is instructive to ponder the absurdity of testimony, evidence, and a hearing on such a contention. The ASLB, and the Commission in affirming LBP-83-22, cannot have intended such a meaningless exercise.

to determine whether the moon is made of cheddar or swiss cheese without first determining it is in fact cheese of which the moon is made.

Finally, LILCO's request that the parties litigate the LILCO-County plan is contrary to the scope of this proceeding, as enunciated by the ASLB in LBP-83-22.

Lest this decision be misinterpreted, we emphasize at the outset that our ruling is limited to the narrow legal issue of whether a county's refusal to prepare or implement a radiological emergency response plan operates as a veto, precluding as a matter of law the issuance of a full power operating license for a nuclear power plant. In holding that it does not, we do not reach the factual question of whether the Long Island Lighting Company (LILCO) is capable of providing that degree of offsite emergency preparedness necessary to entitle it to a full power license without the cooperation of Suffolk County (the County). That factual question will now be litigated before this Board. We decide at this time only that LILCO is entitled to the opportunity to attempt to make such a factual showing.

LBP-83-22 at 1-2 (emphasis supplied). Thus, the Board has made clear that the issue to be litigated is whether adequate preparedness can be demonstrated assuming the lack of participation of Suffolk County. Since the LILCO-County plan assumes that the County does participate with LILCO (and we reiterate the County's position that it will not adopt or implement the LILCO-County plan and hence will not participate with LILCO), it is outside the scope of this proceeding.

In sum, the LILCO-County "plan" is no plan at all. It is at best merely LILCO's speculation of what it wishes existed

in Suffolk County. However, the facts are that the LILCO-County plan has been rejected by the County; that the Commission has clearly indicated that LILCO may not submit such a rejected plan for ASLB consideration; and that this Board itself has ruled that the litigation is to focus on whether there can and will be preparedness in Suffolk County given the fact that the County will neither approve, adopt, nor implement any plan. Accordingly, the Board should summarily reject the LILCO-County plan and rule that it is not to be litigated in this proceeding.

B. The LILCO/State, LILCO/FEMA, and LILCO/NRC Plans Should be Rejected

Three of LILCO's alternative interim "plans" call for the State, FEMA, or the NRC to perform certain functions in the event of a serious Shoreham emergency. The most important function to be assumed by these entities is that of overall command and control of the offsite emergency response. In addition, the State, FEMA, or the NRC would have important public information duties. See LILCO Memorandum, Attachment 3. LILCO requests that contentions be submitted on each of these so-called "plans." Id. at 2.

The ASLB should summarily reject these so-called LILCO "plans" as entirely speculative and unresponsive to legal requirements.

In fact, these are not plans at all, because there is no intent or agreement of the State, FEMA, or the NRC to carry-out the functions assigned to these entities in LILCO's "plans." Rather, given the actual status of events which today exists, these "plans" are at best the mere product of LILCO's imagination and perhaps wishful thinking. Absent a statement from the State, FEMA, or the NRC that they agree to carry-out the functions assigned by LILCO and will in fact achieve the preparedness level and training required, these "plans" cannot be considered the proper subject of litigation.

The LILCO Memorandum does not indicate that the State, FEMA or the NRC has agreed to perform the responsibilities unilaterally assigned to them by LILCO. Indeed, the Memorandum does not even suggest that these entities were consulted in advance regarding the responsibilities which LILCO was dreaming up for them. The County's informal understanding is that FEMA, in fact, was not consulted prior to the LILCO May 26 filing. [The County has no knowledge regarding whether the State or NRC had any prior knowledge of the LILCO proposal, although on June 2 Staff Counsel stated that the NRC has not agreed to LILCO's ideas.^{7/}] The County has sought data from LILCO counsel concerning the status of agreement or lack thereof

^{7/} The County does not believe the NRC could agree to assume the responsibilities LILCO proposes since the NRC has already stated that the agency "does not have the resources necessary to handle offsite emergency planning and preparedness matters." See ASLB Memorandum Serving Exerpts From Commission Testimony Before Congress, April 26, 1983, Answer to Question 7.C.

on the part of these other entities to accept LILCO's proposal. LILCO counsel stated on June 2 only that LILCO presently is talking with "lots" of people.


Thus, no one knows at this time whether the State, FEMA or the NRC will agree to perform the functions which LILCO has unilaterally assigned to these entities. Similarly, even if one or more of these entities is inclined to agree, or in fact does agree, no one knows whether the entity would want to make changes in the nature of the responsibilities or how they are to be implemented by those governmental entities. Similarly, no one knows whether these entities would insist on changes in other portions of these plans, portions designed to be carried out by LILCO but which would be subject to overall direction of the State, FEMA, or the NRC. In sum, no one knows whether these speculative "plans" ever will ripen into concrete implementation programs for offsite governmental protective action and, if so, in what format, or whether instead they will forever be LILCO's abortive trial balloons. However, there is one fact that everyone knows: those "interim plans" are not plans at all at this time. None can be considered a genuine plan until an entity in fact agrees to perform the functions unilaterally assigned to it by LILCO.

Accordingly, the Board should summarily reject the LILCO/State, LILCO/FEMA and LILCO/NRC "plans" and direct LILCO not to submit any such plan until it has agreement from an

entity or entities to perform the duties which LILCO assigns
in its "plan."

Respectfully submitted,

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Attorneys for Suffolk County

June 7, 1983

Congress of the United States

House of Representatives

Washington, D.C. 20515

April 11, 1983

(ATTACHMENT A)

Mr. Thomas M. Roberts
Commissioner
Nuclear Regulatory Commission
Matomic Building
1717 H Street, N.W.
Washington, D.C. 20555

COPY SENT TO ALL
S NRC COMMISSIONERS

Dear Mr. Commissioner:

We are aware of the pending controversy in the Shoreham nuclear power plant proceeding concerning offsite emergency preparedness. Following an exhaustive nine-month emergency planning study, Suffolk County on February 17 determined that it would not adopt or implement a local radiological emergency response plan. The county, acting under its constitutional mandate to assure the well-being of its citizens, resolved that the public health, safety and welfare could not be protected if there were a serious nuclear accident at Shoreham.

We are writing to emphasize that the NRC not take undue liberties with the authority granted by Congress in Section 5 of the NRC's 1982 Authorization Act. In particular, we refer you to our colloquy during the final consideration of Section 5. The colloquy provides:

The reference to a State or local plan is clearly intended to apply only to a plan which has been officially submitted by a State or local government. A utility, therefore, cannot submit a local government plan. NRC consideration of a utility plan is a last resort and is not intended to preempt a State or local plan. This legislation does not in any way affect the authority of the Federal Emergency Management Administration with respect to authority and requirements regarding emergency management plans. (Congressional Record, Page H 8823, December 2, 1982, enclosed.)

In light of this, we wish to bring your attention to the following:

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1. It would be against the law if the NRC were to consider a local government plan which was developed by a utility and not "officially submitted" by the local government. The law is clear, and our colloquy further emphasizes, that a utility, devoid of any manner of enforcing compliance with plans pertaining to actions of non-utility personnel, cannot submit a plan on behalf of a local government against the wishes of that local government.

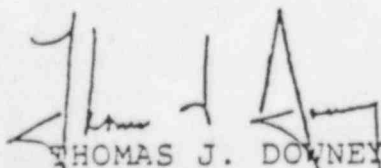
2. Section 5 specifically was "not intended to preempt" a local plan. Therefore, where a local government has made determination that the public well-being cannot be protected through a local emergency plan, a utility plan cannot be considered under Section 5. Otherwise, the utility plan would "preempt" the local plan, which is contrary to the legislative intent of Section 5.

3. We wish to stress the importance of the NRC's adhering to its own regulations. The NRC's regulation in section 50.47, which in subsection (a) requires both State and local government emergency plans, was promulgated after a thorough NRC rulemaking proceeding in which the public, states, local governments, and utilities participated. That rulemaking process established the regulations to which the NRC is bound in all cases, including Shoreham, and the NRC now has no discretion to ignore those regulations. If the Commission wishes to reconsider section 50.47, it may do so through another rulemaking proceeding where the public and others affected are given fair opportunity to assert their views. Short of that, however, we can perceive no basis on which the NRC could depart from the clear force of its own properly promulgated regulation in section 50.47.

4. Section 5 "does not in any way" affect the authority and responsibility of FEMA with respect to offsite emergency preparedness. The NRC therefore may not ignore or shortcut FEMA's involvement in the Shoreham case.

Finally, we request your assurances that Congress's intent in Section 5, quoted above, is not being treated casually by the NRC, particularly in the Shoreham case where a first-of-its-kind issue is pending. If the NRC views any of the four points addressed above differently from how we presented them, we would appreciate your providing us with a most expeditious explanation.

Very truly yours,


THOMAS J. DOWNEY
Member of Congress

original signed by Congressman Ellinger
RICHARD L. OTTINGER
Member of Congress



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

(ATTACHMENT B)

May 9, 1983

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The Honorable Richard L. Ottinger
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Ottinger:

Thank you for your letter of April 11, 1983 giving your views on section 5 of the NRC's Fiscal Year 1982-83 Authorization Act, Public Law 97-415, 96 Stat. 2067, with respect to the current offsite emergency planning controversy regarding the Shoreham Nuclear Power Station.

I am enclosing a copy of the Commission's answer to Question 7 of a list of questions submitted to NRC by the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works. These answers were provided for the record at a Subcommittee hearing in Washington on April 15, 1983.

The answers to Question 7 address generally the issues raised in your letter. It should be added that while the Commission agrees with your statement that a utility "cannot submit a plan on behalf of a local government against the wishes of that local government," it also believes that, in appropriate circumstances, the utility may submit its own plan, labelled as such, for consideration under 10 CFR § 50.47(c)(1). Further, the Commission does not believe that the submission of such a utility plan would result in any illegal "preemption" of a local government plan.

Because the Shoreham case is the subject of adjudication before an Atomic Safety and Licensing Board, it would be inappropriate for the Commission to comment upon the specifics of that proceeding in relation to the matters discussed in your letter. Be assured, however, that the issues you have raised will be given serious consideration.

Sincerely,



Nunzio J. Palladino

Enclosure:
NRC responses to Senate
Subcommittee Question 7

QUESTION 7.

In the absence of a FEMA-approved state or local emergency preparedness plan, section five of Public Law 97-415 authorizes the Commission to issue an operating license for a nuclear power reactor if the Commission determines that there exists, as one option, a utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility.

- (a) What additional implementing procedures, if any, must first be adopted by the Commission as a prerequisite to the Commission's exercise of this authority in a given case, or do the Commission's existing regulations provide sufficient flexibility for the Commission to avail itself of this authority?

ANSWER.

Use of Section 5 authority does not require implementing procedures as a prerequisite. Our emergency planning rule (10 CFR 50.47(c)(1), includes provisions which are consistent with the authority of Section 5. Of course, as the subsequent answers indicate, the availability of the authority of Section 5 may not be adequate for all foreseeable circumstances.

QUESTION 7.

- b. In the event that a utility should submit a plan to the Commission under section five, what steps does the Commission intend to take in its consideration of such a plan?

ANSWER.

First we would send the plan to FEMA for review under the general procedures which NRC and FEMA have agreed to in a memorandum of understanding between the two agencies. We would request FEMA to provide its findings in as timely a fashion as the circumstances premitted.

After receiving FEMA's findings, the staff would review them and decide whether it would make the reasonable assurance determination called for by Section 5. In this regard, FEMA is the lead agency at the federal level which has the responsibility and the expertise to assess the adequacy of offsite emergency planning and preparedness. Although the NRC has the authority and the responsibility to make the ultimate reasonable assurance finding on the overall adequacy of emergency planning and preparedness, we rely heavily on FEMA's input for the offsite component of that finding.

QUESTION 7.

- c. In those cases where FEMA findings on the adequacy of State and local emergency plans for a reactor under construction are not available on a schedule that is compatible with the NRC licensing schedule, does the authority to approve a utility plan under section five constitute a workable, effective solution to such problems?

ANSWER.

We believe that the cooperative working arrangements between NRC and FEMA under the memorandum of understanding between the two agencies will assure that the situation which the question presumes is unlikely to occur. If, however, for whatever reason, there are no FEMA findings, our task becomes a very difficult one because of our heavy reliance on FEMA's responsibility and expertise in assessing the adequacy of offsite emergency planning and preparedness. (See the answer to Question 7b). Although Section 5 gives the NRC the authority to act under such circumstances, for operations beyond 5% of rated power it must first determine "that 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." This agency simply does not have the resources necessary to handle offsite emergency planning and preparedness matters. For the reasons stated, a rational basis for making this finding in the absence of any input from FEMA is fraught with very practical, if not insurmountable, difficulties.

Commissioner Ahearne adds that the Commission is answering a different question. This question asks -- if FEMA findings on state & local plans are not available, We answered: if no FEMA findings are available, The answer should have been cast to discuss our reliance on FEMA findings on utility plan to the extent it deals with offsite preparedness.

QUESTION 7.

- d. In those cases where inadequate State and local plans for a reactor under construction threaten to delay the issuance of an operating license for the facility, does the authority to approve a utility plan under section five constitute a workable, effective solution to such problems.

ANSWER.

Section 5 could be of assistance assuming that there are FEMA findings which indicate that there are measures, such as from a utility's plan, which will compensate for inadequacies in State and local plans. On the other hand if FEMA is unable to find adequate compensating measures, we would rely heavily on that input in determining whether or not a reasonable assurance finding required by Section 5 could be made.

QUESTION 7.

- e. In those cases where a State or local government or both, simply refuse to implement an emergency preparedness plan, does the authority to approve a utility plan under section five constitute a workable, effective solution to such problems.

ANSWER.

In the event that no State and local emergency preparedness plans are available, the issue in making the overall reasonable assurance assessment will ultimately turn on the adequacy of compensating measures in the utility's plan. Although an assessment of adequacy will depend on the circumstances in a particular case, the refusal of both the State and local government to cooperate on emergency preparedness matters greatly complicates the task of assessing the overall adequacy of emergency planning and preparedness.

Commissioners Asselstine and Gilinsky believe that if both the State and local government refuse to cooperate on emergency preparedness matters, a utility plan does not provide a workable and effective alternative to provide adequate emergency planning and preparedness capability.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station,
Unit 1)

Docket No. 50-322 O.L.

(Emergency Planning)

CERTIFICATE OF SERVICE

I hereby certify that copies of MOTION FOR COMMISSION RULING ON LILCO'S "UTILITY PLAN" FOR EMERGENCY PREPAREDNESS," dated June 7, 1983, have been served to the following this 8th day of June 1983 by U.S. Mail, postage prepaid, except as otherwise noted.

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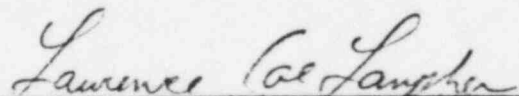
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