UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

APPLICANT'S ANSWER TO "MOTION OF SUFFOLK COUNTY FOR EXPEDITIOUS COMMISSION RULING ON ISSUES TRANSFERRED FROM THE APPEAL PANEL"

In memoranda and orders of April 20, 1983, the Licensing Board in the Shoreham operating license proceeding (1) denied Suffolk County's motion to terminate this proceeding and referred this decision to the Appeal Board for interlocutory review under 10 C.F.R. § 2.730(f) and (2) certified a related issue about the application of the regulations governing low-power licenses to the Commission, through the Appeal Board, for interlocutory consideration.1/ The Appeal Panel Chairman,

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1/ Memorandum and Order Referring Denial of Suffolk County's Motion to Terminate to the Appeal Board and Certifying Low-Power License Question to the Commission (Through the Appeal Board), LBP-83-21, 17 NRC ___ (Apr. 20, 1983); Memorandum and Order Denying Suffolk County's Motion to Terminate the Shoreham Operating License Proceeding, LBP-83-22, 17 NRC ___ (Apr. 20, 1983). The latter will be cited hereinafter simply as "LBP-83-22."

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by Order of April 26, 1983, transferred both the referral and the certified question to the Commission.2/

On May 4, 1983, Suffolk County filed a "Motion of Suffolk County for Expeditious Commission Ruling on Issues Transferred From the Appeal Panel" (hereinafter "SC Motion"). The Motion asks for three things:

1. Expeditious Review of the Licensing Board's decision not to terminate the Shoreham proceeding and the issues referred to the Commission by the Appeal Panel,

2. An accelerated schedule for submission of briefs on these issues to the Commission, and

3. A stay or suspension of further Licensing Board proceedings.

SC Motion 15. This is the answer of the applicant Long Island Lighting Company (LILCO) to the Suffolk County Motion.

Expeditious Review

LILCO does not oppose an expeditious briefing and decision schedule if the Commission decides to take up the County's motion to terminate at all. But in light of the fact that the Commissioners appear to have already "addressed in large measure the very legal issues encompassed by the referred ruling" (Appeal Panel Chairman's Order of April 26, 1983, at

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2/ Order (Apr. 26, 1983) (unpublished).

2), it does not appear necessary for the Commission to address the issue. The Appeal Panel Chairman transferred the referral to the Commission for "whatever further consideration, if any, it might deem justified." Id. 3 (emphasis added).

LILCO does not believe that the Commission needs to consider the Licensing Board's decision not to terminate. Although the Board disagreed with a number of LILCO's legal arguments, on all the important points LILCO believes the Board's decision is not only right, but clearly right. The Board's decision, which is thorough and carefully reasoned, in combination with the recent Indian Point decisions[3/] and the Commissioners' testimony appended to the Licensing Board's "Memorandum Serving Excerpts From Commission Testimony Before Congress" of April 26, 1983, should provide ample guidance for the future without further elaboration by the Commission.

It bears emphasizing that the Licensing Board's decision was on an exceedingly narrow point. See LBP-83-22, slip op. 1-2. The issue is not whether LILCO can demonstrate adequate emergency preparedness without Suffolk County's cooperation,

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3/ Consolidated Edison Co. of New York, Inc. (Indian Point Units 2 and 3), CLI-82-38, 16 NRC ____ (Dec. 22, 1982); Consolidated Edison Co. of New York (Indian Point, Unit Nos. 2 and 3), CLI-83-11, 17 NRC ___ (May 5, 1983).

but whether LILCO will even be allowed to try. All the Board decided was that an applicant with an almost-finished nuclear power plant is entitled to an opportunity to prove that it is safe. This seems to LILCO to be a proposition that is almost undeniable and that should be uncontroversial.

The Need For Briefing

On page 8 of its Motion the County calls for briefing by the parties on the issues referred to the Commission. LILCO believes that, for the same reason that Commission consideration of the motion to terminate is not necessary, neither is briefing. The briefs of the parties before the Board and the Board's decision are ample basis for a Commission decision, if one is needed. Suffolk County, after all, had three opportunities to brief the issues to the Licensing Board, and since it took the occasion of the Motion to the Commission to argue the merits, it has now had four opportunities. All the fourth opportunity added to the debate, so far as LILCO can tell, was the claim that the Licensing Board was wrong, whereas before the County could argue only that LILCO and the NRC Staff were wrong.

In its Motion the County alleges three errors, or types of error, that it believes the Board made. These are (1) the

Board's treatment of the federal preemption issue, (2) the Board's treatment of the 1980 NRC Authorization Act, and (3) the Board's alleged "misleading characterization of certain facts." Since the County undertook to address these issues on the merits in its Motion, LILCO will respond, very briefly, here.

Preemption

Suffolk County's argument on the preemption issue misses the point. The County rests its argument on the proposition that all it has done is to decline to do something itself--not to try to force the federal government to do something. The County argues that it has a perfect right to decline to prepare an emergency plan.

This may or may not be true,[4/] but it is beside the point. Assuming that the County does have a right to decline to do emergency planning, the point is that it does not have the right to use that decision as a bar to the NRC's issuing an operating license. The crucial fact is this: the County is not saying that its inaction prevents the NRC from issuing a

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4/ The parties have not engaged the question of whether Suffolk County has a duty, under either federal or state law, to implement an emergency plan. Nor do we engage it in this pleading.

license as a matter of fact, but that it operates as a matter of law. The County's assertion is that, no matter whether the plant is safe or not, if the County decides not to do an emergency plan, for whatever reason, then the NRC may not lawfully issue an operating license. If this is not a veto, then nothing is.

The County attempts to avoid the preemption issue by suggesting that the NRC's own regulations create this veto power. But this argument has two flaws. First, it requires acceptance of the County's argument that the Commission intended to grant such a veto power, and the rulemaking record[5/] and the recent Indian Point decisions[6/] show decisively the contrary. Second, it ignores the fact that the NRC lacks the power to grant a veto to local governments even if it wanted to, as the Licensing Board recognized. See LBP-83-22, 17 NRC ____, slip op. 52-53, 58 n.31.

Authorization Act

In its Motion the County repeats once again its argument that the Commission's emergency planning regulation contains

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5/ See LBP-83-22, 17 NRC ____, slip op. 18-22, 35-39.

6/ Note 3 above.

language "more restrictive" than the 1980 NRC Authorization Act (SC Motion 12). But there is nothing whatsoever that LILCO knows of or that the County has pointed out that indicates that the language chosen by the Commission is "more restrictive." To the contrary, the rulemaking record shows that the Commission intended to be "consistent" with the statute. See LBP-83-22, 17 NRC ___, slip op. 31-39.

The only datum that the County has on which to base its argument is the fact that industry representatives recommended adopting as a regulation the precise words of the statute, and the Commission declined to do so. See SC Motion 10-13. But there is nothing to suggest that because the words chosen were different from the statute, they were "more restrictive."

In any event, the issue involving the 1980 Authorization Act pressed by the County is not very important. Because the overwhelming evidence in the words of 10 C.F.R. § 50.47(c), the rulemaking record, and the Indian Point decisions, is that under 10 C.F.R. § 50.47(c) the Commission is to look at all the factors to decide if emergency planning is adequate to protect the public health and safety, regardless of who is doing that emergency planning at the moment.

The Board's Characterization of Certain Facts

Finally, the County quarrels with the Licensing Board's characterization of certain factual matters. None of the alleged mischaracterizations is of any great importance to the issue at hand, and so they are a poor reason to ask the Commission to exercise interlocutory review. Moreover, the alleged mischaracterizations do not appear to LILCO to be mischaracterizations at all.

First, the County takes issue with a Board statement to the effect that Suffolk County indicated its willingness to participate in emergency planning while litigating various issues including emergency planning. This statement is perfectly accurate, and the County does not deny it. It merely adds that LILCO was "on notice" that evacuation "might be impossible" because an intervenor in the construction permit hearings had said so (SC Motion 14). But being on notice that an intervenor says something is a far cry from being on notice that it is true.7/ The fact is that emergency planning was

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7/ For that matter, it is hard to see why Suffolk County feels that the Lloyd Harbor Study Group's position in 1970 is more important than the County's own position at that time. As was pointed out in LILCO's brief to the Licensing Board, the then-County Executive made a limited appearance statement that was a paean of praise for the Shoreham project. LILCO's Brief in Opposition to Suffolk County's Motion to Terminate this Proceeding and for Certification 18-19 (Mar. 18, 1983).

litigated at the construction permit stage, in accordance with the then-existing regulations, and the issues were resolved in LILCO's favor. The ASLB rejected the argument that adequate emergency planning is not possible for Shoreham (which is what Suffolk County is arguing now), in part because of the cooperation then-existing between LILCO and local authorities. See Long Island Lighting Company (Shoreham Nuclear Power Station), LBP-73-13, 6 AEC 271, 285 (1972), aff'd, ALAB-156, 6 AEC 831 (1973). The plain fact is that Suffolk County's refusal to cooperate with LILCO on emergency planning started, quite abruptly, as recently as spring 1982, and its decision that emergency planning is impossible dates only from February 1983. See Appendix A to LBP-83-22; LILCO's Brief in Opposition to Suffolk County's Motion to Terminate this Proceeding and for Certification 14-02 (Mar. 18, 1983).

Second, the County argues that the Board misunderstood how the County's consultants came by their 20-mile plume exposure pathway EPZ (SC Motion 14). The County says that "factors other than radiological effects provided substantial bases for the County's 20-mile EPZ" (SC Motion 14). But it is perfectly true that, as the Board said, the County's 20-mile EPZ (rejected by the County government along with the rest of the draft County plan) was based "largely" (at least) on County

consultants' review of a LILCO draft risk assessment. To suggest that other factors may also have influenced the County's consultants is at best a quibble. And even if the Board's characterization were erroneous (which it is not), it is still hard to see why the County thinks it important to correct the error at this stage.

Finally, the County says that the Board was incorrect that the County's draft plan was developed independently of NRC guidelines (SC Motion 14). Again, it is hard to see why this is important, since the County's plan as well as LILCO's plan was rejected by the County government. Also, it appears to LILCO that it is the County rather than the Board that is mischaracterizing. While the County's consultants did address the NRC planning standards of NUREG-0654 in their draft plan, it is perfectly clear that the essential elements of that plan, which have to do with radiological risk, human behavior, and the size of the EPZ, are substantially at odds with NRC law. More important, the County government's basis for rejecting emergency planning is completely at odds with NRC practice, taking issue with the NRC's siting requirements and emergency planning requirements at the same time. See LILCO's Brief in Opposition to Suffolk County's Motion to Terminate this Proceeding and for Certification 92 n.39 (Mar. 18, 1983).

Suspension of the Licensing Proceeding

Finally, the County asks the Commission to suspend the Licensing Board's decision, and the licensing proceeding, pending a decision by the Commission. There is no justification for such a suspension. In the first place, it appears that the ultimate decision on the motion to terminate will be in LILCO's favor and that a suspension will therefore prove to have resulted in needless delay. Once the Licensing Board ruled in LILCO's favor, the equities against giving the losing party a litigation advantage by delaying the proceeding became very strong.

In the second place, the other equities also weigh in favor of LILCO. The costs of delaying the operation of a nuclear plant are well known and need not be recited here. The County bases its request for a suspension on the fact that the uncertainty over how the Commission will finally rule "continues to complicate the County's efforts at the State level to resolve the economic issues related to Shoreham not going on-line" (SC Motion 2). Also, the County cites the construction expenditures that will continue if a suspension is not granted. And finally, the County does not wish to be put to the burden of continuing with litigation in light of the fact that there is some chance, however small, that the proceeding will be terminated upon Commission review.

The answer to these three points is as follows. First, it is unclear what the County means by complication of its efforts to resolve the economic issues, and the County does not explain, elaborate, or give any evidence. All that the County really appears to be saying is that its life would be easier if the Commission would let it win this case. Second, given that the Shoreham Station is almost complete, the additional construction expenditures that the County is concerned about should be of much less concern than the costs of delay if the suspension is granted. It is strange that the County now laments additional construction costs after waiting until several billion dollars had been invested before deciding to oppose the Shoreham Station.

Finally, the County's unwillingness to bear the burden of further litigation is entitled to no support at all, in LILCO's view.8/ In the first place, all that the County is being called upon to do at the present, and for several weeks into the future, is to write contentions once LILCO files its alternate plans for implementing offsite emergency

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8/ The County complains that it has only three weeks to file draft contentions (SC Motion 4 n.1). But on May 4 the Licensing Board gave an additional week to draft contentions and an opportunity to ask for a slight adjustment of even that schedule. Order Confirming Adjustment in Schedule to File Contentions (May 5, 1983).

preparedness. More important, the County showed no reluctance to engage in months of litigation over the "Phase I" (onsite) emergency planning issues, only to default on the eve of hearings on a manufactured legal ground that the County never supported and never appealed. See Memorandum and Order Ruling on Licensing Board Authority to Direct that Initial Examination of the Pre-Filed Testimony Be Conducted by Means of Prehearing Examinations (Nov. 19, 1982). Finally, the County has engaged the Commission and LILCO for years in intense, protracted litigation on multiple issues only to decide at the end of the process that it has all been a waste of time because of the emergency planning issue.

In short, the granting of a suspension is essentially an equitable matter, and there are no discernible equities in Suffolk County's favor. The request for suspension should be denied.

Low-Power License Issue

All of the above has addressed only the issue of whether the licensing proceeding should be terminated. The other issue now before the Commission is whether LILCO would be entitled to a low-power license (absent other obstacles) in light of the present offsite emergency planning situation. Here LILCO's

position is different from its position on the termination issue. LILCO believes the Commission should entertain briefs on the low-power issue, simply because the parties have not yet addressed the issue, and because the Licensing Board has as a practical matter decided it.

Conclusion

For the foregoing reasons, the County's Motion should be denied except insofar as it asks for briefing of the certified question.

Respectfully submitted,

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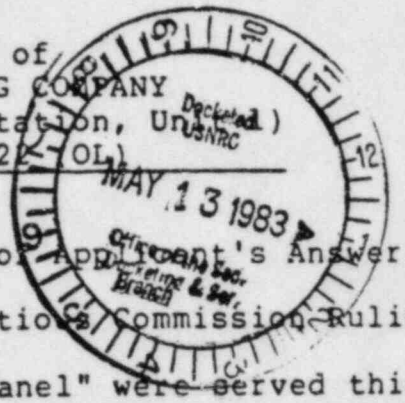
DATED: May 12, 1983

CERTIFICATE OF SERVICE

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



I hereby certify that copies of Applicant's Answer to "Motion of Suffolk County for Expedition of Commission Ruling on Issues Transferred from the Appeal Panel" were served this date upon the following by first-class mail, postage prepaid, or, as indicated by asterisks, by hand:

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