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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
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Before the Atomic Safety and Licensing Board

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In the Matter of )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station, )  
Unit 1) )

Docket No. 50-322-OL-3  
(Emergency Planning)

SUFFOLK COUNTY SUPPLMENTAL RESPONSE IN  
SUPPORT OF MOTION TO COMPEL FEMA TO  
PRODUCE DOCUMENTS

There currently is pending before the Licensing Board Suffolk County's Motion of September 19, 1983 to compel FEMA to produce certain documents. Pursuant to oral order of the Board at the September 26, 1983 discovery conference (Tr. 602-03), FEMA on October 12, 1983 submitted data in support of its position that it is not required to produce these documents for County review. As authorized by the Board (Tr. 603-04), Suffolk County now files this Supplemental Response which demonstrates that the Board should order FEMA to comply with the County's discovery requests.

The detailed bases for the County's position are set forth in Section II hereof. To assist the Board in following the unusual course of this dispute, the County will first present chronological background data.

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I. Background

On September 19, 1983, Suffolk County moved to compel discovery of certain documents from FEMA. See Suffolk County Motion to Compel Discovery from FEMA, Sept. 19, 1983 (the "Motion").

The specific documents sought by the County were the following:<sup>1/</sup>

1. All drafts of Mr. Krimm's June 23, 1983 Memorandum to the NRC Staff which concerns the FEMA review process for the LILCO Transition Plan and FEMA's views on the adequacy/inadequacy of that plan. See Motion at 3-4.
2. A memorandum from Mr. Petrone, FEMA Region II Director, to Messrs. Bragg and Giuffrida, concerning Region II's views on FEMA's response to Mr. Dircks' letter to FEMA, dated July 22, 1983. See Motion at 4-5. (Mr. Dircks' July 22 letter sought clarification of Mr. Krimm's June 23 Memorandum).
3. The written instructions of Mr. Johnson of FEMA to Mr. Sharrocks of FEMA regarding preparation of a draft of FEMA's response to Mr. Dircks' July 22 letter. See Motion at 6.
4. All drafts of the Bragg letter to the NRC, dated August 29, 1983. See Motion at 6.

The County's Motion argued that there was no privilege which protected these documents from disclosure and, at any rate, that FEMA had not properly invoked its privilege claim. See Motion at 6-9, citing United States v. Capitol Serv., Inc., 89 F.R.D. 578, 582-83 (E.D. Wis. 1981).

On September 21, 1983, FEMA filed a response to the County's Motion. See FEMA Response to Suffolk County Motion to Compel Discovery from FEMA, September 21, 1983 (hereafter, sometimes

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<sup>1/</sup> These documents are described in greater detail in the Motion.

referred to as the "First FEMA Response"). Insofar as the First FEMA Response pertains to document discovery,<sup>2/</sup> FEMA generally asserted that the documents requested by the County contained the policy decisions and deliberations of the agency and thus allegedly were protected by executive privilege.

On September 26, 1983, this Board conducted a discovery conference. Concerning the FEMA document dispute, the Board ruled that FEMA had not properly asserted the privilege claim. Tr. 601. The Board specifically cited the three factors enumerated in United States v. Capitol Serv., Inc., supra, which must be addressed for assertion of the privilege:

- o The privilege must be made by the head of the department which has control over the material, after actual personal review and consideration of the materials.
- o The claim must specifically describe and designate the document sought to be withheld.
- o The claim must state the precise and certain reasons for preserving the confidentiality of the communications. Tr. 601-02, quoting United States v. Capitol Serv., Inc.

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<sup>2/</sup> The First FEMA Response also addressed the County's motion to compel depositions of certain FEMA personnel. The Board already has ruled on that deposition dispute. See Memorandum and Order Denying Suffolk County Motion to Compel Discovery from FEMA, September 27, 1983.

FEMA was directed within 15 days to perfect its privilege claim. Within seven days of receipt of the FEMA filing, the County and other parties are permitted to file responses. Tr. 603-04.<sup>3/</sup>

FEMA has now filed its further pleading pursuant to the Licensing Board's September 26, 1983 oral directive. See FEMA Response to Suffolk County Motion to Compel Discovery, October 12, 1983 (the "Second FEMA Response"). Attached to the Second FEMA Response is the unexecuted Affidavit of Louis O. Giuffrida, FEMA's director. FEMA's counsel stated that the affidavit would be executed "sometime after Thursday, October 13, 1983." See letter from FEMA counsel to ASLB, October 12, 1983. The County has received no executed affidavit.

In Director Giuffrida's affidavit, FEMA lists the documents for which it asserts protection of the executive privilege:

- (a) All drafts of a memorandum for Edward L. Jordan of the NRC from Richard W. Krimm, Assistant Associate Director, Office of Natural and Technological Hazards, FEMA, dated June 23, 1983 on the subject of FEMA support for NRC licensing of Shoreham Nuclear Station.
- (b) All drafts of a letter to William J. Dircks of the NRC from Jeffrey S. Bragg, Executive Deputy Director, FEMA, dated August 29, 1983.
- (c) Those sections of a Briefing Paper on Shoreham prepared by the staff of Region II for Frank P. Petrone, Regional Director, detailing his staff's identification of issues and recommendations.

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<sup>3/</sup> The FEMA response was filed on Wednesday, October 12, 1983. Accordingly, the County's filing is timely when filed on October 19, 1983.

- (d) Memorandum for Richard W. Krimm from Gary Johnson, Executive Officer in the Office of Natural and Technological Hazards, dated June 7, 1983 concerning the response of FEMA to the NRC request of June 1, 1983.
- (e) Draft letter, never mailed, prepared for signature of Louis O. Giuffrida by the staff of the office of Natural and Technological Hazards in anticipation of a request by NRC for a FEMA review of the LILCO Transition Plan.
- (f) Portions of Status Report on Shoreham Nuclear Power Plant dealing with opinions of staff.
- (g) Analysis of a hypothetical question concerning LILCO, New York State and Suffolk County response to an accident at the Shoreham Nuclear Power Station.

There are several comparisons to be made between the list of documents set forth immediately above (documents (a) - (g)) and the list set forth in the County's September 19 Motion, documents (1) - (4) listed at page 2 of this filing. First, the documents listed as (a) and (b) above are the same as documents 1 and 4 on page 2 of this filing. Second, document 2 on page 2 of this filing -- the Petrone memorandum -- has now been provided by FEMA. Thus, that dispute is resolved. Third, document 3 on page 2 of this filing -- the Johnson instructions -- is not mentioned in Director Giuffrida's Affidavit or in the Second FEMA Response. No explanation is provided. Finally, documents (c), (d), (d), (f) and (g) from the Giuffrida affidavit are documents within the scope of the County's discovery request which FEMA had not previously identified. FEMA now identifies them and asserts that they are privileged.

## II. Discussion

Suffolk County will not repeat the arguments set forth in its September 19 Motion, but, instead, incorporates the previous arguments by reference. The County submits that FEMA's latest assertion of privilege does not rebut the arguments made by the County on September 19 and, accordingly, the Motion to compel should be granted.

The County does wish to emphasize, however, that FEMA still has not properly asserted the privilege. The Giuffrida Affidavit in paragraph 5 states:

I have personally examined the above documents and have concluded that their production would be contrary to the public interest. These documents are being withheld from discovery at my direction as they consist of intra-departmental memoranda and communications containing opinions, recommendations and deliberations pertaining to decisions that the Federal Emergency Management Agency was required to make in response to requests from the Nuclear Regulatory Commission.

As the executive in charge of the overall operations of the agency, I assert that these documents are subject to the protection of executive privilege. The production of these documents will have a chilling effect on the ability of this agency to receive in written format the comments, concerns and opinions of our staff.

FEMA has met none of the three criteria for assertion of the executive privilege. First, the privilege must be asserted after actual personal review and consideration of the materials by Director Giuffrida. Tr. 601. It is unclear whether such actual personal review and consideration had in fact taken place as of October 12, the date of the FEMA filing. While FEMA has stated



that an executed affidavit will be sent, FEMA's papers do not represent that Director Giuffrida had in fact performed the necessary review.<sup>4/</sup>

Second, the documents sought to be withheld must be specifically described and designated. Tr. 601. This has not been done. Indeed, almost no data are provided regarding the actual factual content of the documents. See Smith v. FTC, 403 F. Supp. 1000, 1017 (D. Del. 1975).

For example, in "describing" documents (a) and (b), the Giuffrida affidavit only repeats the discovery request; it fails to describe at all any specific documents as to which a privilege is asserted. Document (c) is described only as a "Briefing Paper" by Region II Staff for the Region II director "detailing his staff's identification of issues and recommendations." When was this prepared? Issues and recommendations on what topics? Why was it prepared? All such data are essential to any meaningful description of the document. Document (d) allegedly concerns the FEMA response to the NRC request of June 1, 1983. In what way does it "concern" the FEMA response? How does it relate to policy issues at all? Again, the description in the Giuffrida affidavit is so conclusory that it provides essentially

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<sup>4/</sup> The County certainly can understand that Director Giuffrida might be unavailable due to travel commitments at the time the affidavit was actually ready for signature. However, the County believes FEMA was required, in that event, to assert clearly that Director Giuffrida's review had in fact taken place. Otherwise, there could be no possible basis for assertion of the privilege.

no data at all. Document (e) is a draft letter which apparently was never sent. When was it prepared and at whose direction? Such information is essential if the "description" is to have any meaning. Document (f) is "portions" of a status report dealing with "opinions of staff." What status report? And on what subject? Who prepared it and why? Does FEMA really assert that any and all "opinions of staff" are privileged? Document (g) is an analysis of a "hypothetical question." When was this prepared and by whom? For what purpose? How can this possibly be the kind of policy concern designed to be shielded by the privilege? In sum, FEMA has failed completely to provide essential data and thus has not complied with the requirement that documents be specifically described and designated.<sup>5/</sup>

Third, "the claim must state the precise and certain reasons for preserving the confidentiality of communications." Tr. 601-02. FEMA again has completely failed to satisfy this requirement. The Giuffrida affidavit asserts that "production of these documents will have a chilling effect on the ability of this agency to receive in written format the comments, concerns and opinions of our staff." Affidavit, paragraph 5. Such a bald

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<sup>5/</sup> A reason for requiring detailed articulation of the alleged bases for the privilege are not only to avoid the necessity for in camera review but also so that the party seeking production of the documents has sufficient data upon which to file responsive pleadings. FEMA's failure to provide necessary detailed data makes it impossible for the County to prepare detailed arguments on the matter, thus frustrating the County's rights as a party in this proceeding.



assertion clearly does not comply with the Board's direction to provide the precise and certain reasons that the confidentiality must be preserved. Does FEMA really assert that each of these documents must be withheld for exactly the same reason? This constitutes a mere boiler plate assertion of privilege which should be rejected out-of-hand. Indeed, FEMA's latest filing provides essentially no further reasons for assertion of the privilege than the First FEMA Response of September 21 which the Board properly found to be inadequate.

The purpose of the executive privilege is to prevent "against disclosure of intra-agency advisory communications . . . [and thus to encourage] frank discussion within the government as regards the formulation of policy." Smith v. FTC, 403 F. Supp. 1000, 1015 (D. Del. 1975). FEMA repeatedly speaks of fears that the County's discovery will intrude on its "policy-making functions." E.g., Second FEMA Response at 4. However, the FEMA papers never even describe what policy formulation allegedly is being protected by FEMA's assertion of privilege. This is understandable because there is no policy formulation at issue. Rather, this is a purely factual matter wherein FEMA is formulating its factual findings and determinations regarding the adequacy of the LILCO Transition Plan. Those factual findings may have the weight of a rebuttable presumption in NRC proceedings on the question of adequacy of the LILCO plan. See

10 CFR Section 50.47(a)(2).<sup>6/</sup> The fact that different FEMA officials may have differing opinions on these factual matters does not constitute a basis for invoking the executive privilege. FEMA, in short, is not engaged in policy formulation at all but rather is engaged only in rendering its factual findings. There is thus no basis whatsoever for assertion that the executive privilege even applies in this instance.

In sum, despite the Board's order of September 26 and 15 days to prepare a filing, FEMA's Response of October 12, 1983 fails to comply with those definite and clear prerequisites for assertion of the privilege. Since FEMA has thus failed to sustain its burden of proof, the Board should order production of the documents.<sup>7/</sup>

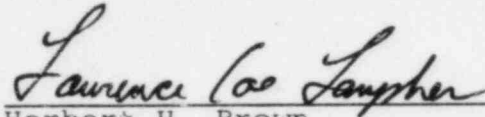
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<sup>6/</sup> A party to NRC proceedings has the right to attempt to rebut or support FEMA's findings. This would be impossible if FEMA were able to shield from disclosure the steps taken in preparation of and thus the detailed bases for those findings. Further, FEMA's suggestion that the requested documents are not relevant (Second FEMA Response at 2-3) is absurd. The FEMA findings, as noted above, may carry heavy evidentiary weight. Any materials which shed light on the bases for FEMA's views are, of course, relevant.

<sup>7/</sup> FEMA states that the County has "argue[d] strenuously" that this Board should conduct an in camera review of the documents. See Second FEMA Response at 6. This is not true. The County believes that no in camera review is appropriate since FEMA has not even established on paper a prima facie case for assertion of the privilege. In these circumstances, the Board should immediately order production of the documents.

Respectfully submitted,

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A handwritten signature in cursive script, reading "Lawrence C. Lanpher", written over a horizontal line.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY SUPPLEMENTAL RESPONSE IN SUPPORT OF MOTION TO COMPEL FEMA TO PRODUCE DOCUMENTS, dated October 19, 1983, have been served to the following this 19th day of October 1983 by U.S. mail, first class, except as otherwise noted.

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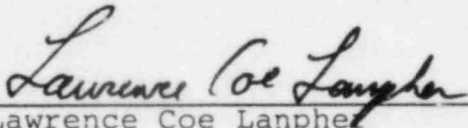
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DATE: October 19, 1983

\*\* By Federal Express  
\* By Hand