

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION FEB 14 10:59Before 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)Suffolk County Objections to Memorandum
and Order Ruling on Intervenors' Proposed
Modified Emergency Planning Contentions

On February 3, 1984, the Board issued a Memorandum and Order Ruling on Intervenors' Proposed Emergency Planning Contentions Modified to Reflect Revision 3 of the LILCO Plan (hereinafter, "Order"). Pursuant to 10 CFR § 2.51a(d), Suffolk County hereby objects to several of the rulings contained in the Order. Specifically, the County objects to the Board's denial of admission of certain proposed modifications to Contentions 15.E, 24.P, 61.C.2, 71.A and 71.C (see Order at 7-8, 8-9, 10, and 11).

I. General DiscussionA. The Board's Desire for a New Pleading Addressing New
Rather than Modified Contentions.

The Board denied admission to certain proposed modifications to the above-referenced contentions based on its finding that they fail to exhibit a clear nexus to the previously admitted contentions which they purport to modify. The Board concluded, based on that finding, that the proposed modifications

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constituted "new" contentions rather than "modifications" to existing contentions. Apparently construing Suffolk County's Memorandum Accompanying Proposed Modified Emergency Planning Contentions dated January 12, 1983 (hereinafter, "Memorandum"), as requesting admission only of "modified" as opposed to "new" contentions, the Board thus denied admission as "modified" contentions of those it deemed to be "new." However, the Board invited Intervenor to petition the Board to admit them as "late-filed" contentions pursuant to 10 CFR § 2.714(a)(1).

Suffolk County submits that the Board erred in determining that the referenced modifications, denied admission, lacked a nexus to the previously admitted contentions. The relationship of each of the modifications denied admission to admitted contentions is discussed in Part II below. Nonetheless, even if the proposed modifications are denoted as "new" rather than "modified" contentions, the County submits that the label has no effect on their admissibility because the 10 CFR Section 2.714(a)(1) standards for admission of the proposed modifications have been satisfied. If, in order to permit litigation of the proposed modifications this Board needs before it a document entitled Petition for Admission of Late Filed Contentions, this pleading should be so considered.^{1/}

^{1/}The County believes that the filing of such an additional pleading is an unnecessary and duplicative exercise which elevates form over substance. The Memorandum contained a clear and particularized explanation of the justification for the filing of each proposed modification; the LILCO Objections raised the "late filed" contention issue and argued that the relevant standards had not been met; and, the Suffolk County Response to
(footnote continued)

B. The Proposed Modifications Satisfy 10 CFR
§ 2.714(a)(1).

Rather than discuss the matter separately with respect to each of the Board's rulings to which the County objects herein, we will discuss satisfaction of the 10 CFR § 2.714(a)(1) standards only once. Each proposed modification denied admission by the Board satisfies those standards.

The first requirement, good cause for failure to file on time, is met because in every case, the proposed modifications were necessitated by, or relate to, revisions made to the LILCO Plan subsequent to Revision 0 upon which the original contentions were based. We do not repeat here the specific and detailed explanations that apply to each of the modifications at issue, since we have already provided that information to the Board twice before. See Memorandum at 9 and County Response at 16-29 (Contention 15.E); Memorandum at 10 and County Response at 32-33 (Contention 24.P); Memorandum at 13-14 (Contention 61.C.2); Memorandum at 13 and County Response at 58-61 (Contention 71.A); and Memorandum at 13 and County Response at 58-62 (Contention 71.C). In denying LILCO's "untimeliness" objections to the

(footnote continued from previous page)

LILCO and NRC Staff Objections to Intervenor's Proposed Emergency Planning Contentions Modified to Reflect Revision 3 of the LILCO Plan (hereinafter "County Response") addressed, in substantial detail, the specific reasons justifying the admission of each objected to modification. Accordingly, other than the labels now ascribed to the proposed modifications as a result of the Board's Order, and the characterization of this pleading as a "Petition" dealing with "new" contentions rather than a "Memorandum" accompanying "modified" contentions, this document in many respects merely repeats information already in the Board's possession.

proposed modifications, the Board clearly recognized the timeliness of the proposed modifications. See Order at 6. Furthermore, beyond some bald unsupported assertions in its Objections to the Proposed Modified Contentions, LILCO has made no showing nor provided the Board with any basis upon which to determine, that the County's two submissions concerning the relationship of the proposed modifications to Revision 3 of the Plan are in any way incorrect. Thus, it is clear that the proposed modifications are not contentions of a type that reasonably could have been raised concerning Revision 0; rather, they concern new information which became available for the first time after the initial contentions were prepared. The County submits, therefore, that it has satisfied the good cause requirement as interpreted by the Appeal Board in Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982), and adopted by the Commission in Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

The second and fourth requirements of § 2.714(a)(1) -- the availability of other means whereby Intervenor's interest will be protected and the extent to which Intervenor's interest will be represented by existing parties -- are also satisfied here. The only contentions to be litigated in this proceeding are those submitted by Intervenor. No other parties have submitted contentions or given any indication that they otherwise intend to bring the matters addressed in the proposed modifications to the

attention of this Board. In addition, this proceeding is the only forum in which Intervenorors presently can pursue their position that the LILCO Plan is inadequate in the respects set forth in the proposed modifications. Thus, there is no basis for believing that any other parties or the use of any means other than through litigation of contentions in this proceeding, will adequately protect Intervenorors' interests.

The third requirement -- the extent to which Intervenorors' participation may reasonably be expected to assist in developing a sound record -- is plainly satisfied given the past history of the County's involvement in this proceeding. Since the operating license hearings began in 1982, Suffolk County has consistently filed detailed direct testimony on admitted contentions, and conducted cross-examination of LILCO and Staff witnesses, all for the purpose of developing a useful, complete and accurate record. The County submits that its involvement to date in this proceeding has in fact resulted in a substantially more sound record than would otherwise have been produced. And, to bar the County's proposed participation with respect to the issues raised in the proposed modifications would, contrary to the intent of the NRC regulations, result in an incomplete record which would be totally silent with respect to certain crucial issues. If this proceeding is designed to find the truth and reach an informed decision on the adequacy and implementability of the proposed LILCO Plan, the proposed modifications must be admitted.

To deny their admission would constitute an improper refusal to deal with important issues which are plainly raised by the proposed LILCO Plan.

Finally, admission of the proposed modifications would not broaden the issues or delay the proceeding in any material way, and thus the fifth requirement of 10 CFR § 2.714(a)(1) is satisfied. The issue raised in each of the proposed modifications is directly related to the issues in already admitted contentions; thus, the so-called "new" issues can and should be addressed by witnesses in the testimony to be submitted on the admitted Group II contentions. Including discussion of the proposed modifications in such testimony will only "broaden the issues" by making the witnesses' discussion in testimony complete on the given issue and fully reflective of the Plan being proposed by LILCO. The amount of "delay," if any, that would result from the admission of the proposed modifications is probably, literally, unmeasurable, given the number of contentions (over 50) and predicted hearing length involved in the Group II issues.

For the reasons set forth above, as well as all those set forth in the Memorandum and the County Response, the County submits that the proposed modifications satisfy the requirements of 10 CFR § 2.714 and should be admitted.

II. Discussion of Specific Rulings

A. Modifications to Contention 15.E

The Board's ruling denying admission to proposed modifications to Contention 15.E apparently applies only to the proposed modifications beginning with "The EBS messages also lack credibility for the following reasons" followed by new Subparts 15.E.1 through 5. See Order at 7 ("[t]he proffered modification adds five sub-contentions...."). The Board denied admission of these proposed modifications because, according to the Board, "[t]hey have no direct relationship to the believability of LILCO as an entity nor to the alleged unbelievability of the EBS messages because of their avowed LILCO authorship." Order at 8. The Board concluded that the proposed modifications "attempt[] to include a new issue within Contention 15." Id.

The County disagrees with the Board's narrow and literal interpretation of Contention 15 as dealing only with the believability of "LILCO as an entity" rather than with the slightly broader but, in this context, more realistic, issue of the believability of LILCO's actions under its proposed plan. A reading of Contention 15 as a whole and its preamble, make clear that the issue of concern is not just LILCO's credibility considered in a vacuum; rather, the contention examines several different LILCO actions under the Plan (i.e., giving orders to workers, making protective action recommendations to school authorities, implementing a traffic control plan, performing security and law enforcement functions, and broadcasting EBS

messages containing instructions, information, advice, and protective action recommendations). The contention alleges that the recommendations, orders, or instructions LILCO may intend to communicate to the public or others will not be followed because the messages will not be believed. As alleged in the contention admitted by the Board, the messages will not be believed for many reasons, including the following: they come from the entity LILCO, they come from untrained LILCO employees without authority to give orders, and their contents will not be believed to be objective or in the best interests of the public (as opposed to the financial interests of LILCO). The proposed modifications simply state some additional reasons that the content of LILCO's proposed emergency information -- specifically its EBS messages containing information, instructions, and protective action recommendations -- will not be believed. Contrary to the Board's assertion, the proposed modifications do not add a new issue to Contention 15.^{2/}

However, assuming for the sake of argument that the proposed Subparts 1-5 of Contention 15.E do involve a so-called "new issue," the requirements of 10 CFR § 2.714(a)(1) have been met for the reasons stated in Part I.B above, and the proposed modifications should be admitted.

^{2/} Moreover, the suggestion that the relationship between the contents of LILCO's EBS messages and the credibility of those messages is a new issue, the raising of which could somehow prejudice LILCO, is absurd, in light of the extensive discussion of this very issue in LILCO's own testimony on Contention 23 already submitted in this proceeding. See discussion at pages 18-19 and 27 of the County's Response.

B. Proposed Modification to Contention 24.P

With all due respect, in the County's view the Board's ruling denying admission to a portion of the proposed modification to Contention 24.P makes no sense. Contention 24.P as originally admitted read:

Contention 24.P. LILCO relies upon the ARC, the Salvation Army, groups such as churches, industries, and select volunteers to provide services, including medical and counselling services, at relocation centers. (Plan 2.2.1, 2.2.-2, 3.6-7 and at 4.2-1). However, LILCO has no agreement with the ARC, the Salvation Army, any other volunteer groups, or individuals, to provide such services. Indeed, many "groups" are not even specifically identified by LILCO. In the absence of such agreements, LILCO's proposed protective action of evacuation cannot and will not be implemented.

The proposed modification is:

Contention 24.P. LILCO relies upon the ~~ARC, the Salvation Army, groups such as churches, industries, and select~~ volunteers to provide services, including medical and counselling services, at relocation centers, (Plan 2.2.1, 2.2-2, 3.6-7 and at 4.2-1). Fowever, LILCO has no agreement with the ~~ARC, the Salvation Army, any other volunteer groups, or individuals,~~ to provide such services in the manner or volume, or according to the procedures, assumed in the LILCO Plan. ~~Indeed, many "groups" are not even specifically identified by LILCO.~~ In the absence of such agreements, LILCO's proposed protective action of evacuation cannot and will not be implemented.

The Board allowed the deletions, but denied admission to the words "in the manner or volume, or according to the procedures, assumed in the LILCO Plan." Order at 8. The Board's

denial was based on its opinion that adding the proposed new words would broaden the scope of the original contention and therefore is not a true "modification." The Board's reasoning was that the original scope was "whether LILCO had agreements which provide assurance that certain emergency support organizations will provide help during a radiological emergency," while the modified scope would "include the issue of the nature and extent of the help that one emerging organization, the American Red Cross, would provide." Order at 8-9.

As noted in Part I.A above, the semantic label applied to a group of words -- i.e., whether the phrases at issue are called "modifications" as opposed to "revisions," a "limitation of scope" or simply "new words" is immaterial. The only question is whether or not the new words can be a part of this litigation. More importantly, the new words in Subpart 24.P do not, in any way, change the substantive scope of the issue addressed in that subpart. Thus, the County disagrees with the Board's assertion that the issue of whether there exists an agreement with the Red Cross to provide the services relied upon and described by LILCO on specifically cited pages of its Plan (as stated in the original, admitted contention) is different from, or more narrow than, the issue of whether there exists an agreement with the Red Cross to provide those services "in the manner or volume or according to the procedures" described in the same referenced portions of the

Plan (as stated in the proposed modification). The issue presented in the original contention and in the modified contention is identical, with the modification being made to put parties on notice even more clearly than before regarding what was at issue. ^{3/}

Moreover, as noted in the County's Response, the proposed modification was necessitated by LILCO's own Plan revisions -- specifically, the new inclusion in the Plan of a purported "agreement" with the ARC. See County Response at 32-33. That purported "agreement" however, suffers from the same defect that was alleged in the original Contention 24.P -- that is, it does not state that the ARC will provide the many services, including medical and counselling services, as specified at pages 2.2-1, 2.2-2, 3.6-7 and 4.2-1 of the LILCO Plan. The new words which constitute the proposed modification merely state, with clarity, the specific deficiencies in LILCO's purported "agreement" which result in the conclusion, as stated in the original contention, that in the absence of an agreement which addresses the requirements which LILCO assumes will be met by the ARC, the proposed protective action of evacuation cannot and will not be implemented. Again, the

^{3/}Of course, the fact that the proposed modification is limited to the American Red Cross rather than also applying to the Salvation Army and volunteer groups, is a limitation of the scope the contention necessitated by LILCO's Plan revisions and reflected in the deletions in the modified contentions which were accepted by the Board.

only change of scope involved in the proposed modification to this subcontention is its now clearer statement of the specific deficiencies in the Revised LILCO Plan.

Even if the proposed new words were considered, for the sake of argument, to raise a "new" issue, the requirements of 10 CFR § 2.714(a)(1) have been met for the reasons stated in Part I.B above.

C. Proposed Modification to Contention 61.C.2

The Board acted sua sponte in denying admission to the proposed new subcontention 61.C.2. Order at 10. The Board explicitly declined to sustain any of the objections asserted by LILCO to that subpart, and the Staff did not object at all to the proposed new subcontention. The Board provided little explanation for its sua sponte action. It stated only that the proposed subcontention "constitutes a new issue which is neither sufficiently related to the subcontention it modifies nor properly raised now for the first time." Order at 10.

First, the Board is incorrect in suggesting that subpart 61.C.2 does not relate to Contention 61. That contention, as previously admitted by the Board, begins with the following:

Intervenors contend that a protective action recommendation of sheltering would not or could not be implemented. Specifically, a substantial number of the people who might be advised to shelter as a practical matter, will be unable to do so because . . .

The subparts A through E which follow that statement each discuss a group of individuals who will be unable to shelter (i.e., persons in wood buildings without basements, persons in cars, school children, transients, and persons in boats). The new subpart merely lists an additional group -- patients in hospitals and other special facilities -- who will not be able to shelter. Clearly, the subpart relates directly to the issue raised in Contention 61^{4/}.

Second, the County does not understand what the Board meant by its assertion that the issue in the new subpart is not "properly raised" at this time. If the Board intended by this statement to suggest that the County is untimely in proposing the new subpart, the County submits that there is no basis for such a suggestion, particularly given the statements concerning LILCO's untimeliness objections made by the Board in the Order. Order at 6. As the County stated in the Memorandum (at 13-14),

^{4/} The Board is correct insofar as it may have intended to state that the new subpart 61.C.2 does not directly relate to the school children issues discussed in the immediately preceding subpart, 61.C.1. The new subpart, more properly, should have been a new lettered subpart under the main contention 61, rather than a numbered subpart to the lettered subpart relating to schools. However, the existing subdivision scheme of the contention did not make such a designation very practical. Specifically, although the logical place to put the new subpart would have been between subparts C and D, there is no letter between C and D to apply to the new subpart. In addition, since following subpart E there is additional text of the "main" contention followed by subparts F-I, the new subpart couldn't become a subpart F. Finally, it would not make sense to put the new subpart after subpart I, since subparts F-I relate to the text following subpart E rather than to the initial text to which the new subpart pertains. Thus, labelling the new subpart as "C.2" was purely a matter of mechanical convenience. If the Board prefers a different designation, the County will adopt whatever designation the Board suggests.

LILCO's plan revisions include new provisions that, unlike those in Revision 0, emphasize sheltering, rather than evacuation as a protective action for special facilities. See Memorandum at 13-14. As the proposed new subpart itself plainly states, citing specific provisions in Revision 3 of the Plan:

the LILCO Plan now characterizes sheltering as "the primary protective action recommendation" for hospitals (OPIP 3.6.5 at 1), and states that sheltering "may be the preferred protective action" for nursing homes (Appendix A at II-29).

The referenced Plan provisions were not contained in Revision 0. No party made a timeliness objection to the proposed new subpart because such an objection would be without basis.

Similarly, if the Board intended by its statement to suggest that the proposed new subpart is not "properly raised" because it fails to meet the basis or specificity requirements, there is no foundation for such a suggestion either. Indeed, the Board recognized that the contention satisfies the basis requirement by refusing to sustain LILCO's objections, which included two separate lack of basis arguments. And, the subpart certainly puts the parties on notice of the issue to be litigated. It states clearly and in some detail the specific reasons that the new LILCO proposal, that sheltering be the "primary" and "preferred" protective action for special facilities, could not and would not be implemented. Clearly, the contention meets the specificity requirement.

Finally, if by the statement that the subpart is not "properly raised" the Board was merely referring to the characterization of the subpart as a "modification" rather than a "new" contention, the views stated in Part I above apply. Even if the proposed subpart were considered a "new" subcontention rather than a "modification" to the admitted Contention 61, it is clear from the discussion here and in Part I.B that the requirements of 10 CFR § 2.714(a)(1) have been satisfied.

D. Proposed Modifications to Subpart 71.A

Again, with all due respect, the County fails to see any logic behind the Board's ruling on the proposed modifications to Subpart 71.A, and believes the Board has misread or misunderstood the original contention.^{5/}

First, the proposed modification, contrary to the Board's assertion, does not broaden the contention by adding nursery school evacuation plans to the issues to be considered by the Board. See Order at 11. In fact, with respect to the Shoreham-Wading River School District, the proposed modification limits the issues covered under Contention 71.A. As explained in the

^{5/} Perhaps the Board was confused or misunderstood the modification to Contention 71.A because the unmodified and general term "schools" is used in Contentions 68-71. The general term was chosen because it covers public, parochial, private and nursery schools, and its use eliminated the necessity of listing each specific type several times in each contention. Where LILCO provided in its Plan different treatment for different types of schools, the distinction was reflected in the contentions. See, e.g., original Contention 70 (Shoreham-Wading River vs. other districts), original and modified Contention 24.E, original Contention 24.F. The County believes the parties understood the usage of the word in the contentions, since it mirrors LILCO's usage in its Plan.

County's Response, the original Contention 71.A dealt with all schools in the Shoreham-Wading River District (i.e., both nursery and non-nursery schools). Under Revision 0 as well as Revisions 1 and 2, LILCO proposed to provide evacuation assistance only to the schools in that District. See County Response at 59-60. In Revision 3, however, LILCO deleted its provision of evacuation assistance to the non-nursery schools in the Shoreham-Wading River District. Therefore, with respect to that district, the proposed modification narrows the scope of the admitted contention by limiting it to nursery schools only.

Revision 3 also added a new provision for LILCO bus drivers to evacuate the nursery schools in districts other than Shoreham-Wading River. See Appendix A at II-20, II-21; and OPIP 3.6.5 (both cited in the proposed modification to Contention 71.A). Thus, given the changes made by LILCO in Revision 3, the concerns relating to LILCO-assisted evacuations stated in the original Contention 71.A now apply only to nursery schools, rather than (as they did under Revision 0), to all schools in the Shoreham-Wading River District.

Second, contrary to the Board's apparent belief, the addition of the word "nursery" to modify "schools" and "school children" in Contention 71.A does not constitute the addition of a "new issue." (See Order at 11). The original contentions, which reflected Revision 0 of the LILCO Plan, dealt with the evacuation of nursery schools in the same way as did that version of the Plan. Thus, in Revision 0, LILCO relied upon early

dismissals, and had no provisions at all for LILCO-assisted evacuation of nursery schools outside the Shoreham-Wading River District; thus, original Contentions 68, 69 and 70 all include nursery schools as well as the other private, parochial and public schools in or near the EPZ that are covered by the LILCO Plan. Similarly, since as noted above, in Revision 0 LILCO proposed to assist in the evacuation of nursery school as well as other school children in the Shoreham-Wading River District, the only nursery school evacuation proposals which were included in Revision 0 of the Plan were covered by original Contention 71. Clearly, the proposed modifications to Contention 71.A are proper and admissible, whether called "modifications" or "new issues." They were necessitated only by LILCO's Plan changes reflected in Revision 3, and the 10 CFR § 2.714(a)(1) standards are satisfied.

E. Proposed Modification to Contention 71.C

In denying admission of proposed modified Subpart 71.C, the Board once again explicitly did not sustain LILCO's objection to the proposed modification. The Staff did not assert any objection to the proposed modification. Thus, the Board apparently denied its admission sua sponte because, in its view, the issue discussed in the proposed subpart "is a new one." Order at 11. The Board's only other explanation for its sua sponte ruling is the following statement:

It is a late-filed contention; it is not a modification and will not be admitted.

Id. The County submits that the proposed subpart should be admitted.

The Board is correct in observing that Subpart 71.C is a "new subcontention." See Order at 11. In the County's view it does constitute a proper "modification" to Contention 71, since it deals with a particular new provision of the LILCO Plan concerning evacuation of children who live in the EPZ but attend schools outside the EPZ, and therefore is an appropriate new subpart to the contention dealing with school evacuations. However, if the Board prefers to label the proposed subpart as a "new contention" rather than a "modification" to an existing admitted contention, it makes no difference since the standards for admission of late-filed contentions have plainly been met. See Part I above.

Although the basis for this new subpart to Contention 71 has been set forth by the County in the Memorandum at 13 and the County's Response at 59-60 and 61-62, we will state it again here. Specifically, in Revision 3, LILCO for the first time included in its Plan (at Appendix A, page II-20) the following provision (which is quoted in the proposed subpart 71.C):

[T]hose schools outside the EPZ which have students living in the EPZ will retain those students at the school when the school day ends, if any protective actions are recommended for the general public in any area of the EPZ.

Prior to Revision 3, the LILCO Plan had no provisions for protective actions for children who live in the EPZ but attend schools outside the EPZ, other than its blanket assumption, which applied to all schools except those in the Shoreham-Wading River District, that under all circumstances and regardless of what

protective actions had been recommended to the general public, all schools would institute an early dismissal. Clearly, the concerns stated in proposed Subpart 71.C could not have been raised in the original contentions since the LILCO Plan provision which gives rise to those concerns did not exist prior to Revision 3.

If this is to be considered a new "late-filed" contention, there can be no question that the good cause requirement, as well as the other requirements of 10 CFR § 2.714 have been satisfied. See Part I.B above. The proposed Subpart 71.C should be admitted.

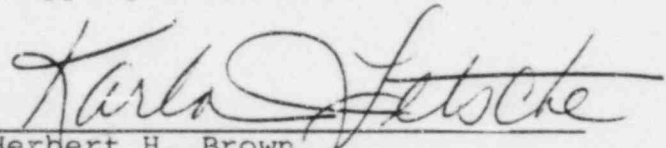
III. Conclusion

For the reasons set forth above, as well as those set forth in the Memorandum and the County's Response, the proposed modifications to Contentions 15.E, 24.P, 61.C.2, 71.A and 71.C which were denied admission in the Order, should be admitted either as modifications or, if the Board prefers, as "new" contentions. To continue to deny their admission would constitute clear error as a matter of law. Moreover, to deny admission in effect would constitute an affirmative decision to ignore substantial identified defects in the LILCO Plan. For this Board to turn its back on plain and specific facts relating to LILCO's inability to protect thousands of patients in hospitals and nursing homes, and thousands of school children, based on some procedural technicality of contention labeling, would be inexcusable and totally without justification,

particularly since the proposed modifications, in every instance were occasioned solely by changes made by LILCO to its Plan. There is no basis for denying admission to the proposed modifications.

Respectfully submitted,

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A handwritten signature in cursive script, reading "Karla J. Letsche". The signature is written in dark ink and is positioned above the typed name.

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Dated: February 9, 1984

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Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of Suffolk County Objections to Memorandum and Order Ruling on Intervenor's Proposed Modified Emergency Planning Contentions, dated February 9, 1984, have been served to the following this 9th day of February, 1984 by U.S. mail, first class, except as otherwise noted.

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