UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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| In the Matter of | ) | |
| LONG ISLAND LIGHTING COMPANY | ) | Docket No. 50-322-OL-3 (Emergency Planning) |
| (Shoreham Nuclear Power Station, Unit 1) | ) | |

MEMORANDUM OF GOVERNOR MARIO CUOMO, REPRESENTING THE STATE OF NEW YORK, IN OPPOSITION TO LILCO'S MOTION TO COMPEL EXPEDITED PRODUCTION OF DOCUMENTS BY NEW YORK STATE

This answer has been prepared in opposition to LILCO's motion to compel expedited production of documents by New York State, dated February 6, 1984. For the reasons set forth in detail below, the State of New York respectfully urges that the Board deny LILCO's motion.

I. Background

A preliminary observation is in order concerning the bizarre procedure upon which LILCO's motion is premised. Arguably, it may have been proper, under the NRC's Rules of Practice, for LILCO to file a motion requesting the Board to order New York State to file an expedited response to a LILCO Request for Document Production.[1/] Whether the Board granted such a motion or not, the State would subsequently file its

1/ See, however, discussion below which explains why (a) LILCO is not entitled to file a document request, and (b) the LILCO Request fails to meet the relevancy and particularity requirements of 10 CFR Part 2.



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response to the LILCO Document Request, pursuant to 10 CFR § 2.741(d). If, upon review of the State's response, LILCO determined that it needed to seek additional Board involvement with respect to any of the State's responses (including objections or assertions of privilege), it could file a motion to compel production of withheld documents pursuant to 10 CFR § 2.740(f), which would, in turn, result in the parties' submission to the Board of arguments concerning particular claims made with respect to particular documents. Thus, if the State chose to seek a protective order pursuant to 10 CFR § 2.740(c), it would set forth the basis for its decision to withhold documents, and, in response, LILCO could attempt either to establish that claimed privileges did not apply to particular documents or to demonstrate a compelling need that would overcome a qualified privilege. This is the normal established discovery procedure under the NRC regulations.

In filing the instant motion, however, LILCO has, without explanation or justification, asked this Board to ignore normal NRC procedures. LILCO has asked the Board to order the State actually to produce, on an expedited basis, large numbers of documents before the State has even been given the opportunity to respond to the request, much less file motions for protective orders (assuming LILCO were to seek an order compelling production after reviewing the State's response). Thus, the bizarre procedure proposed by LILCO involves (1) depriving New York State of its right and obligation under 10

CFR § 2.741(d) to file a response to LILCO's document request; (2) eliminating the obligation of LILCO to satisfy the threshold relevancy and particularity requirements for discovery set forth in 10 CFR §§ 2.740(b)(1), 2.741(c), and Part 2, Appendix A, Section IV(a); (3) eliminating the requirement that LILCO meet its burden of proof in establishing its need or entitlement to documents objected to or withheld for reasons set forth in a response as required by 10 CFR §§ 2.730, 2.732, and 2.740(f); and (4) depriving New York State of its right to file a motion for a protective order, if necessary, as provided in 10 CFR § 2.740(c). LILCO has provided no factual or legal basis which could justify this Board's adoption of the procedure proposed by LILCO in its Motion, and the Board should refuse to do so.

In making its document request, LILCO exclusively relied on a portion of a nine-page inventory of certain documents. The New York State Disaster Preparedness Commission ("DPC") prepared the inventory in the summer of 1983 in response to a request for documents under the New York State Freedom of Information Law. The responsive documents generally pertained to two subjects: proposed procedural rules and regulations of the DPC; and materials prepared prior to or in 1982 relating to offsite response to a Shoreham accident to be implemented by the County of Suffolk and the State of New York.

The nine-page inventory lists on pages 1-5 documents that were produced at that time pursuant to the New York State Freedom of Information Law, and on pages 6-9, documents

that were withheld at that time based on exemptions involving, among others, governmental and executive privilege, attorney-client privilege, and the attorney work product doctrine. LILCO only knows the contents of pages 5-9 of the listing, which it attached to its Request. Nonetheless, LILCO requests this Board to order New York State to produce "forthwith"[2/] not just the nine pages which comprise the entire listing, but also a copy of "each and every document referred to in the listing." See Request at 1.

II. DISCUSSION

A. LILCO is Not Entitled to Expedited Document Discovery

LILCO premises its document request and motion for expedited production on the assertion that it "recently became aware" of the existence of the document listing, and that there was "no purpose to pursuing it prior to New York State's entry into this proceeding." Motion at 1 and 3. In fact, the partial listing which constitutes LILCO's document request was sent to LILCO on December 16, 1983 in response to a request made by LILCO's counsel to the DPC for publicly filed comments relating to proposed rules and regulations of the DPC. See February 6, 1984 letter from Irwin to Zahnleuter attached to LILCO's Motion. LILCO knew of the Governor's participation in this proceeding in early January, 1984.

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[2/] In its Request dated February 6, 1984 LILCO asked for production "no later than February 8."

Clearly, LILCO knew of the existence of the listing and possessed its alleged "purpose to pursue" it prior to January 27, 1984, when this Board entertained discussion of what discovery LILCO believed was necessary with respect to New York State. No mention was ever made by LILCO counsel, prior to or on January 27, concerning any desire for document discovery of any kind, much less relating to the subject listing. This is significant because during the discussion on the record on January 27, the Board expressly asked "about the status of the agreement concerning discovery" with respect to New York State (Tr. 3624), and the only discovery requested by LILCO and incorporated into the schedule set by the Board, was depositions of State witnesses. (See Tr. 3626, 3643, 3647). LILCO made no request for, nor did the Board grant LILCO the right to conduct, document discovery.

Moreover, LILCO's alleged need for "expedition" is LILCO's own creation. If it had indicated earlier, at the appropriate time, its desire for document discovery, that additional step in the discovery process could have been factored into the scheduling decision. Clearly, given LILCO's knowledge of the existence of the listing upon which it now relies, its desire for document discovery could and should have been raised much earlier.

B. LILCO's Document Request Fails to Satisfy Particularity and Relevance Requests

Even assuming LILCO were entitled to document discovery, under 10 CFR Section 2.740(b)(1), a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding...." A document request must also "describe each item with reasonable particularity." 10 CFR § 2.741(c). LILCO has failed to satisfy either of these requirements.

First, in its request for documents, LILCO asks for a copy of each and every document referred to in the listing. LILCO requests all these documents, even though it has no knowledge of what documents are identified on pages 1-4 of that listing. Clearly, since LILCO does not know even the identity of approximately one half of the documents it requests, it cannot properly allege, as it has, that such documents are "obviously central" to issues being litigated before this Board. See LILCO Motion at 2 and 3. This portion of LILCO's request is a classic fishing expedition that is expressly barred under the NRC's regulations. Section IV(a) of 10 CFR Part 2, Appendix A states:

> Once the key issues in controversy are identified in the special prehearing conference order . . ., discovery may proceed, and will be limited to those matters. In no event should the parties be permitted to conduct a "fishing expedition . . . ." (Emphasis added)

Second, despite LILCO's assertion that the requested documents are "obviously central to an understanding of New York State's position" on the LILCO Plan (see Motion at 2 and 3), many of the documents identified on the pages of the listing attached to the LILCO request (i.e., pages 5-9) clearly have nothing whatever to do with "New York State's position" on any emergency response plan at all, much less LILCO's Plan. Rather, as is plain from the description in the listing, they have to do with proposed regulations of the New York State Disaster Preparedness Commission (see, e.g., page 9 of attachment to request). The proposed procedural rules and regulations of the DPC cover topics such as voting procedures, quorum requirements and the conduct of meetings. None of the proposed procedural regulations even concern substantive matters, such as standards for the review of offsite emergency plans for nuclear power plants, much less any particular plan or Shoreham. Documents which are related to the DPC's proposed rules and regulations clearly are irrelevant to this proceeding. Thus, none of LILCO's discussion of the alleged "obvious centrality" or even relevance of the requested documents applies to the documents that deal solely with proposed rules and regulations governing the conduct of a New York State agency.

Third, LILCO is incorrect in asserting that any of the requested documents relate to a "position" of New York State concerning any Shoreham-related plan, much less LILCO's. As the listing itself reveals, the vast majority of the documents identified on pages 6-9 are draft, non-final materials containing opinion, conjecture and deliberative information. It is specious

to suggest that such materials indicate a formal "position" by the State, when on their face, they are plainly very preliminary views of staff members of one State commission. Furthermore, as LILCO knows, the DPC never even convened a meeting to review any Shoreham-related materials, much less arrived at a "position" concerning those materials. Indeed, a temporary restraining order was issued enjoining the DPC from taking such action. Subsequently the DPC entered into a stipulation (to which LILCO was also a party) agreeing not to take that action. Thus, LILCO is simply wrong in asserting that the requested documents relate to a New York State "position," given the fact that no "position" was reached during the time frame covered by the documents.

Fourth, LILCO's assertion that the requested documents concern an alleged "review" by New York State of a so-called "Shoreham Offsite Emergency Response Plan" (Motion at 1 and 2) is also a misleading mischaracterization of the facts.

As LILCO well knows but neglected to inform the Board, the so-called "plan" that allegedly was "reviewed" by some staff members of the New York State DPC was, first of all, not a "plan" at all; rather, it consisted of some draft materials prepared prior to 1982 by two Suffolk County employees. Those draft materials were allegedly "completed" by LILCO and packaged by LILCO into binders labeled "Suffolk County Offsite Emergency Response Plan," and then submitted by LILCO to the DPC staff. Thus, the materials allegedly "reviewed" by New York State dealt with a proposed emergency response "plan" to be implemented by County and other authorized governmental officials and employees.

Clearly, the "review" of those materials has no relevance to the plan being litigated before this Board which is one to be implemented by LILCO employees.

Moreover, following the "review" by certain DPC staff members of the materials submitted to them by LILCO, LILCO apparently revised those materials into the form it labeled "the LILCO-County Plan" which it submitted to this Board in May 1983. The Board expressly ruled in June 1983 that this litigation would not deal with that so-called "plan." Order Limiting Scope of Submissions (June 10, 1983). And, that "LILCO-County Plan" was already one generation removed from the draft materials purportedly "reviewed" by New York State. Thus, this Board has already ruled that a "plan" which was one revision closer to the one now before the Board than was the one allegedly "reviewed" by New York State, is not relevant to this proceeding.

LILCO states in footnote 1 of its Motion that the so-called "LILCO-County" Plan is similar in some respects to Revision 0 of the LILCO Transition Plan. However, the Transition Plan which this Board has agreed to consider in this proceeding involves implementation of the entire emergency response by LILCO employees; therefore, it is a completely different proposal from that contained in either the materials allegedly "reviewed" by the State or the "LILCO-County" Plan. And, in addition to that substantial difference which permeates the entire Plan, all aspects of Revision 0 are also one more generation removed from the materials allegedly "reviewed" by the State.

Finally, the Plan that is currently before this Board and the subject of contentions and litigation is Revision 3 of the LILCO Transition Plan -- three more generations removed. Thus, even ignoring the dispositive fact that the Board has already ruled that a proposed emergency response to be implemented by County or State officials is not relevant to this proceeding, the materials to which the requested documents relate, even if they could be said to have constituted a "plan" of some sort, have undergone at least five substantial revisions prior to the creation of the Plan now before this Board. Clearly, LILCO's bald, unsupported assertion that the requested documents, half of which it cannot even identify, relate to a State review of something it calls a "Shoreham offsite emergency response plan" fails to satisfy the threshold relevancy and pleading requirements of 10 CFR §§ 2.740 and 2.741.

Fifth, nowhere in its Request or its Motion does LILCO even purport to relate any of the documents it requests to admitted Group II contentions. Such a showing is an additional threshold requirement of proper discovery under 10 CFR Part 2, Appendix A.[3/] Furthermore, LILCO could not make such a showing, had it acknowledged its obligation to do so, given both the vague, non-particularized identification of those documents it identifies

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3/ LILCO's assertion of a right to discovery as to anything it believes may be vaguely related to offsite emergency planning is particularly inappropriate at this stage of these proceedings. Unless the Board intends to permit full-blown discovery of the type that consumed more than four months prior to the submission of Group I testimony, LILCO should be required to make a particularized showing that requested discovery is necessary and relevant to specific contentions upon which testimony has not yet been filed.

(pages 5-9 of the listing) and the total lack of identification of the rest of the documents it requests (pages 1-4). Because LILCO has failed to meet even the most basic pleading requirements of 10 CFR §§ 2.740, 2.741 and Part 2 Appendix A, its Request and its Motion should be summarily denied.

C. LILCO's Arguments Concerning its Entitlement to Requested Documents are Unfounded.

The State believes that the defects in LILCO's Request and Motion and the fact that the State has not yet had an opportunity to review fully or respond to the LILCO Request, make it unnecessary and inappropriate for the Board to reach the merits of LILCO's Motion at this time. Nonetheless, based on a preliminary review, it is clear that LILCO's arguments concerning the various categories of documents identified in the New York State listing are unfounded and wrong as a matter of law.

First, LILCO asserts:

> There should be no controversy about production of documents preceding paragraph 3 on page 5 of the listing [i.e., the documents LILCO is unable even to identify], since they have already been produced under the NY FOIA.

(Motion at 4). Clearly, what may or may not be subject to production under New York's Freedom of Information Law in response to a particular request (not described by LILCO) filed pursuant to that law, has no bearing upon the propriety of a document request or the production of documents under the NRC regulations in this proceeding. LILCO's conclusory statement fails even to address, much less to establish the relevance to admitted

contentions in this proceeding of the unidentified documents on the missing pages 1-4 of the listing. There is no basis for requiring the State to produce those unidentified materials.

Second, LILCO argues:

> Documents withheld by New York State under either categories "A" or "B" do not fall within any recognizable category of exemption or privilege under the Commission's Rules of Practice, and any documents marked only as withheld subject to those two categories should be ordered to be turned over forthwith.

Motion at 5.[4/] In making this argument, LILCO misstates both the facts and the law.

It is clear from a reading of the explanation on pages 5-6, and the descriptions of the documents themselves on pages 6-9 of the State's listing, that coded exemptions "A" and "B" represent an assertion of executive privilege. Moreover, contrary to LILCO's assertion, both this Board and the Brenner Board have expressly ruled that such a privilege is recognized in NRC proceedings, and that if it is a qualified rather than an absolute privilege, it can be overcome only by a showing of compelling need for disclosure. Specifically, this Board's November 1, 1983 Memorandum and Order Ruling on Suffolk County Motion to Compel FEMA to Produce Documents ("FEMA Order") is controlling -- and dispositive -- here. The Board stated as follows:

> As pertinent here, "executive privilege" has been described by several other names: deliberative process of

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[4/] The documents referred to by LILCO in this statement are 25 of the 38 documents listed on pages 6-9, specifically, the first four listed on page 6, all but the third document listed on page 7, all but the ninth, tenth and last documents on page 8, and the first, fifth and eighth documents on page 9.

> government privilege, governmental functions privilege, and intra-governmental documents privilege. The case law discussing this privilege has also considered exemptions under the Freedom of Information Act. 5 U.S.C. 552(b)(5). This statutory provision exempts from required disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." This provision has been interpreted by the courts in harmony with the doctrine of "executive privilege" so that deliberative materials produced in the administrative decision making process are protected from disclosure while purely factual materials are not protected from disclosure. . . . Agency documents which reflect advisory opinions, recommendations, or deliberations fall within "executive privilege." . . . The reason for protecting the confidentiality of communications between high government officials and those who advise and assist them is to achieve the goal of receiving the most candid advice without regard for appearances or self interest of the adviser.

(Citations omitted). FEMA Order at 6-7.

In the FEMA Order the Board was faced with a claim of executive privilege by FEMA with respect to documents the disclosure of which, FEMA asserted, would reveal "intra-departmental memoranda and communications containing opinions, recommendations, and deliberations pertaining to decisions" of FEMA, and would have a "chilling effect" on the ability of FEMA to receive written comments and opinions in the future. FEMA Order at 8. The Board found that "Executive privilege is not limited to policy formulation but extends to the agency's decision making process," and that "[a]s long as the documents in controversy consist of advisory opinions, recommendations or deliberations in

the agency decision making process, we find that they fall within the doctrine of 'executive privilege.'' FEMA Order at 9. It is clear from a review of the Board's FEMA Order and pages 5-9 of the State's listing, that New York State has asserted executive privilege (i.e., coded exemptions "A" or "B") with respect to very document listed on pages 6-9.[5/]

Assuming arguendo that LILCO's requests were proper and directed to relevant documents, it is well established that LILCO may not obtain any of those documents unless it demonstrates a compelling need for disclosure. See FEMA Order at 5-6, 10-12, and case authority cited therein. LILCO makes no such showing in its Request, and therefore the Request should be denied.

In addition, LILCO's suggestion in footnote 1 on page 2 of its Motion that selected rulings by the Brenner Board on questions of privilege raised by Suffolk County in 1982 have any relevance to the LILCO request for document production by New York State is, on its face, untrue. LILCO has misrepresented to this Board the actions of the Brenner Board by implying that all Suffolk County objections to discovery requests based on assertions of privilege were overruled. This is simply not true. The Brenner Board explicitly recognized, and sustained many of the County's objections based upon executive or governmental

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5/ Of course, since New York State has not been given the opportunity, provided under the rules, to file its response to the LILCO request, the privilege claim has not been made to this Board in the precise form required in the FEMA Order (i.e., by Affidavit by the appropriate agency director). If the Board were to rule that LILCO is entitled to the fishing expedition type of document discovery which it seeks, the State would, in its response, set forth its objections in the appropriate form.

privilege, attorney-client privilege, and the attorney work product doctrine. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1156-1179 (1982). Even more importantly, any Brenner Board rulings were made with respect to privilege claims made by a different party, with different grounds and bases, with respect to different documents, produced by different parties, under different circumstances, for different purposes, and such rulings related to different discovery requests, concerning different contentions, in a different proceeding! To suggest, as LILCO does, that 1982 Brenner Board rulings on Suffolk County assertions of privilege are in any way binding upon the State of New York or this Board, in the context of the LILCO's pending discovery request in this proceeding, is specious and should be rejected.

Third, LILCO asserts:

> Documents withheld on the basis of exemption "C" (material prepared in contemplation for litigation), "D" (attorney work product), and "E" (attorney-client privilege) also should be turned over immediately unless withholding is justified on a document-by-document basis by New York State.

Motion at 5. In making this argument, LILCO once again has placed the cart before the horse and its argument is without basis. The State has already asserted these privileges, in a clear manner, "on a document-by-document basis," in the listing which LILCO has. The burden is on LILCO to demonstrate, on a document-by-document basis, either that the privilege is improperly or incorrectly asserted, or that LILCO has a compelling

need for particular documents that outweighs the State's asserted right to confidentiality. LILCO has made no such showing. Instead, it attempts improperly to shift its own burden of proof under 10 CFR §§ 2.730, 2.732, and 2.740(f)(1), to New York State. This LILCO attempt should be denied.

D. LILCO's Request Imposes Undue Burdens and is Prejudicial to New York State

LILCO's discovery request comes at a time when, pursuant to direction of the Board, the State of New York is preparing for and attending depositions of its Group II witnesses, witnesses and counsel are reviewing the Plan and contentions and preparing Group II testimony, considering rebuttal and supplemental Group I testimony, reviewing depositions of Group I witnesses, reviewing the Group I hearing record, and preparing for hearing on the State's Group I testimony. If the State of New York is ordered to respond to LILCO's request for documents, especially on an expedited basis, the State of New York will have to bear the additional burdens of searching through all of the DPC's files in order to locate the documents, preparing a response, and, presumably filing and responding to motions for protective orders and motions to compel production. This certainly will unfairly prejudice the State of New York because it will impose a substantial burden of expedited discovery response, during a very tight pre-hearing schedule. Such a requirement has generally not been imposed by this Board on other parties in this proceeding and, given the untimeliness of LILCO's request, should not now be imposed on the State.

III. Conclusion

LILCO's Document Request appears to be a transparent effort to subvert the discovery process in this proceeding. While LILCO may well wish to obtain the requested documents for its own political or other purposes, it should not be permitted to distort and abuse the NRC's discovery procedures to obtain them, absent the required particularized pleading, and showings of relevance and compelling need, and without even acknowledging the rights of New York State under the NRC rules. This Board should not countenance this LILCO tactic.

In accordance with the above, the State of New York respectfully urges the Board to deny LILCO's motion.

Respectfully submitted,

MARIO CUOMO,
Governor of the State
of New York

Fabian G. Palomino
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Special Counsel to the Governor
of the State of New York

DATED: February 13, 1984
Albany, New York

UNITED STATES OF AMERICA
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## CERTIFICATE OF SERVICE

I hereby certify that copies of MEMORANDUM OF GOVERNOR MARIO CUOMO, REPRESENTING THE STATE OF NEW YORK, IN OPPOSITION TO LILCO'S MOTION TO COMPEL EXPEDITED PRODUCTION OF DOCUMENTS BY NEW YORK STATE dated February 13, 1984, have been served to the following this 13th day of February 1984 by U.S. mail, first class, except as otherwise noted.

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DATE: February 13, 1984

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* By Hand
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