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USNRCUNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Appeal BoardOFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCHIn the Matter of )  
)LONG ISLAND LIGHTING COMPANY )  
)(Shoreham Nuclear Power Station, )  
Unit 1) )  
)  
)Docket No. 50-322-OL-3  
(Emergency Planning)SUFFOLK COUNTY MEMORANDUM IN OPPOSITION TO  
FEMA'S APPEAL AND REQUEST FOR STAY OF  
MAY 18 BOARD ORDER COMPELLING PRODUCTION  
OF DOCUMENTS BY FEMA

Suffolk County submits this Memorandum pursuant to the Appeal Board's Order dated May 22, 1984. That Order was issued following the Appeal Board's ex parte entry of an emergency temporary stay of the effectiveness of the Licensing Board's May 18, 1984 Memorandum and Order Ruling on Suffolk County Motion to Compel Production of Documents by FEMA (hereinafter "ASLB Order"). The Appeal Board's May 22 Order indicated that the question of whether the temporary stay should be continued pending full consideration and disposition of FEMA's appeal from the ASLB Order will be heard on May 23. This Memorandum sets forth the bases for Suffolk County's opposition to: 1) a continuation of the stay; and 2) the Appeal Board's consideration of the FEMA appeal. We discuss each of these matters below.

I. Background

On April 19, 1984, FEMA filed with the ASLB testimony of Thomas E. Baldwin, Joseph H. Keller, Roger B. Kowieski, and Philip B. McIntire concerning offsite emergency planning contentions. The FEMA testimony consisted of 99 pages of text, and several attachments including what is referred to as the "RAC Report," that is a report of the FEMA Regional Assistance Committee ("RAC") following its review (the "RAC review") of the LILCO Transition Plan, which was undertaken by FEMA at the request of the NRC. Apparently all of the FEMA witnesses participated in the so-called "RAC review." All the witnesses have authored some of the documents at issue in this discovery dispute. The witnesses have attached the RAC Report to and as part of their prefiled testimony and intend that it will be offered into evidence. In addition, in their testimony they expressly rely upon the findings of the RAC as the basis for the opinions and conclusions they express concerning the adequacy of the LILCO Plan and the accuracy of Intervenor's contentions concerning the Plan.

Upon receipt of the FEMA testimony, Suffolk County filed and served a Request for Production of Documents by FEMA, dated April 20, 1984. A copy is Attachment 1 hereto. Having

received no response to that discovery request, and in light of the need to schedule depositions prior to the scheduled cross-examination of the FEMA witnesses beginning on May 29, the County filed a Motion to Compel Response to Request for Production of Documents by FEMA on May 8. See Attachment 2 hereto. The Board and parties discussed the County's Motion and on May 9 agreed upon a schedule for the filing of FEMA's Response, a Motion by the County to Compel Production of Withheld Documents, and a Board ruling on that motion by May 18. The schedule was designed so that the documents could be turned over to the County (if so ordered by the Board) in time for them to be reviewed by County counsel prior to the depositions of the FEMA witnesses which were scheduled for May 23 and 24. See Tr. 8751-54, which is Attachment 3 hereto.

Despite the requirement that "on Monday, May 14th, FEMA will file a list of all the documents which meet the [County's document] requests and a list of its objections to the request for documents" (Tr. 8752 (Laurenson)), the County received the FEMA Response to Suffolk County Request for Production of Documents (hereinafter, "FEMA Response") on May 15. The FEMA Response is Attachment C to the ASLB Order.<sup>1/</sup> In addition, at

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<sup>1/</sup> As noted below, the ASLB Order is Attachment 6 hereto.

approximately 4:00 p.m. on May 15, the County received a letter from FEMA counsel (Attachment 4 hereto) which purportedly "supplemented" the FEMA Response. The letter stated that documents responsive to the County's document request -- apparently in addition to those identified in the FEMA Response -- have been "requested" from RAC members, but apparently not yet received by FEMA counsel or included in the listing contained in the FEMA Response. The May 15 letter also stated that "two or three additional items that may be responsive" to the request "have been forwarded" to FEMA counsel but have not yet been received. Thus, as of May 17, 1984, the County had still not received a complete response to its April 20 document request.

Nonetheless, pursuant to the agreed upon schedule, on May 17 Suffolk County filed a Motion to Compel Production of Documents Identified by FEMA on May 14 and 15 (hereinafter the "County Motion"). The Motion is Attachment 5 hereto. In the Motion, the County requested the Board to issue an order compelling FEMA to produce the 37 documents identified (but withheld from production) on pages 5-8 of the FEMA Response, as well as all remaining responsive documents subsequently located by FEMA counsel. The County's Motion expressly addressed only the 37 documents identified in the FEMA Response, however, since the remaining documents had not yet been identified by FEMA counsel.



During a conference call on May 18, the ASLB issued its ruling on the County Motion. It ordered FEMA to turn over to Suffolk County 30 of the 37 identified documents. See ASLB Order, which is Attachment 6 hereto. Pursuant to FEMA counsel's oral request for a temporary stay of the ASLB Order, the Board also issued on May 18, 1984 an Order Granting Temporary Stay, Attachment 7 hereto, (hereinafter, "ASLB Stay Order"), giving FEMA "until 5:00 p.m. EDT on Monday, May 21 to either have the documents in the hands of Suffolk County or to obtain an additional stay from the Appeal Board." ASLB Stay Order at 2.

At approximately 11:00 a.m. on May 21, County counsel received FEMA's two sentence Notice of Appeal and Request for a Stay of an Order of the Atomic Safety and Licensing Board. Shortly thereafter, the County filed with the Appeal Board its Preliminary Suffolk County Response to FEMA's Notice of Appeal and Request for a Stay of Order of the Atomic Safety and Licensing Board, which stated the County's "intention to respond to whatever additional pleadings may be filed by FEMA in support of its Appeal and Request for a Stay should this Board be inclined to consider at all FEMA's interlocutory appeal and request for a stay . . . ."

Despite telephone conversations among counsel, during which counsel for FEMA promised (1) to notify County counsel when additional papers were filed with the Appeal Board, and (2) to provide copies of such papers to the County upon their completion, the County first learned that FEMA had filed additional pleadings with the Appeal Board when the Appeal Board's secretary telephoned to inform us of the Appeal Board's Temporary Stay Order. The County never did receive FEMA's Memorandum or Affidavits on May 21. We were able to obtain a copy from the NRC Staff on May 22.

II. There is No Basis for Granting an Additional Stay of the ASLB Order.

10 C.F.R. § 2.788 sets forth four factors which must be considered in determining whether to grant or deny an application for a stay. Those factors are:

- 1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- 2) Whether the party will be irreparably injured unless a stay is granted;
- 3) Whether the granting of a stay would harm other parties; and
- 4) Where the public interest lies.

In the ASLB Stay Order, the Licensing Board stated:

This Board finds that only one factor, the possibility of irreparable injury should a stay not be granted, weighs in favor of granting FEMA's request. We do not find that FEMA has made a strong showing that it is likely to prevail on the merits, nor that the public interest lies on the side of non-disclosure of the subject documents. Furthermore, the grant of a stay would cause inconvenience to Suffolk County.

ASLB Stay Order at 2. The FEMA Memorandum filed in support of its stay application does not overcome FEMA's failure to meet the Section 2.788 standards. Accordingly, the request for an additional stay should be denied.

A. FEMA Cannot Demonstrate A Strong Probability  
of Prevailing on the Merits of its Privilege  
Claim

The FEMA Memorandum does not even address the merits of FEMA's privilege claim, much less make the requisite "strong showing" that FEMA is likely to prevail on the merits. Although some arguments made in papers filed with the ASLB are repeated in the FEMA Memorandum, none of the arguments on the merits which were made in the County's Motion are addressed, and the grounds for the ASLB's Order are also ignored. Thus, in the face of the ASLB's ruling against FEMA on the merits of its privilege claim, FEMA has submitted nothing but a rehash of its original arguments which were rejected by the ASLB.

Clearly, FEMA has made no showing of likelihood to prevail in the merits.

For the reasons stated in sections 1-4 belcw, the County believes that FEMA could not prevail on the merits, if a stay were granted.

1. The Executive Privilege Does Not Apply to the Documents at Issue

Although it is difficult to discuss in any detail the documents being withheld because the descriptions provided by FEMA are so uninformative, it nonetheless seems clear that given their subject matter, most if not all of them, are not subject to the executive privilege. It is well established that the privilege "does not attach to purely factual communications, or to severable factual portions of communications, the disclosure of which would not compromise military or state secrets." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1114, 1164 (1982), citing EPA v. Mink, 410 U.S. 73 at 87-88. See also Brand v. Phillips Petroleum Co., 628 F.2d 873 (5th Cir. 1981).

The documents at issue all relate to the RAC Review or the RAC Report which is attached to the testimony of the FEMA witnesses. That review, and the resulting report, consists of

purely factual material -- that is, whether or not the LILCO Plan contains or does not contain various elements identified in NUREG 0654. Indeed, many of the documents being withheld appear to be nothing more than the particular findings of fact by RAC members -- labeled "comments" in the FEMA document listing -- that eventually became the RAC Report that is relied upon by the FEMA witnesses in their testimony. Such purely factual material is not subject to executive privilege.

Furthermore, the executive privilege is designed to protect the internal policy formulation or decision-making process in a governmental agency. Despite the incantation of the words "pre-decisional," "thought processes," and "deliberations" in the FEMA Response and the FEMA Memorandum, there is no indication either in those documents, or in the description of the withheld documents, that the findings or notes of RAC members, drafts of the RAC Report, or the identified memoranda have anything to do with FEMA policy or decisions or deliberations about FEMA policies.

As stated in the FEMA Response, the RAC members engaged in "a technical review" of the LILCO Plan. FEMA Response at 9. Their purpose was to make findings of fact, not to set FEMA policy or to make decisions for that agency. Indeed, with the



exception of the RAC Chairman (FEMA witness Roger Kowieski), the RAC members are not even FEMA employees. The "comments" of the RAC members are technical factual findings concerning the contents of the LILCO Plan. They have nothing to do with any internal FEMA policy formulation or decisionmaking. FEMA has failed to, and, in the County's view could not, demonstrate that any of the documents at issue deal with the type of nonfactual, policy, or decision-making matters that the executive privilege is designed to protect.

The County thus disagrees with the ASLB's ruling that the FEMA findings "involve the decision making process of government which is protected by executive privilege." ASLB Order at 6. The RAC "findings" are just that -- factual observations and conclusions about whether the LILCO Plan does or does not contain the specific elements identified in NUREG 0654. There is no "policy" or "decision" making process involved in identifying or "finding" facts. The executive privilege does not apply to the RAC findings, or individual RAC member findings.

2. Even if a Privilege at One Time Attached  
to the Documents, the Privilege Has Been  
Waived

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Even assuming for the sake of argument that the executive privilege could have attached at one time to some of the documents at issue, it is clear that by its own subsequent actions FEMA has waived such privilege. FEMA intends to introduce the RAC Report into evidence in this proceeding. The FEMA witnesses have attached the report to their prefiled testimony. In addition, those witnesses state throughout their testimony that their opinions and conclusions concerning the LILCO Plan are based upon the RAC findings. In addition, at least three of the FEMA witnesses (Messrs. Keller, Baldwin, and Kowieski) participated in the RAC review, and authored several of the documents being withheld.

Clearly, the County, the Board, and the other parties are entitled to probe the bases for the opinions and conclusions stated by the FEMA witnesses in their testimony, both for impeachment purposes and otherwise to develop a full and complete record. See the March 6, 1984 Order which is Attachment B to ASLB Order, at 7-8. Since the FEMA witnesses rely in their testimony upon the findings of the RAC, inquiry into the bases of the RAC findings is clearly not only proper, but essential.

The FEMA position -- that no one is permitted to see or inquire into anything other than the bare conclusions stated in the final RAC Report -- flies in the face of logic as well as the rules of procedure.

FEMA, in effect, attempts to use the executive privilege to bar any inquiry into the bases for the opinions of its witnesses. Clearly, once FEMA submits testimony, and relies upon factual findings in that testimony, it has waived any pre-existing rights to keep confidential the processes or means by which those findings and the conclusions of its witnesses were developed. See e.g., Houston Light and Power Co. (South Texas Project, Units 1 and 2), LBP-79-30, 10 NRC 594, 595 (1979). See also, March Order (Attachment B to ASLB Order) at 8. Given the circumstances of this case, to permit FEMA to abuse the executive privilege as it attempts to do, would be improper.

Sustaining FEMA's executive privilege claim with respect to the documents now at issue would accord a special "untouchable" status to the FEMA witnesses. Such status has not been accorded any other parties' witnesses in this proceeding -- the parties and the Board have had or will have the opportunity to probe the bases for the opinions of every other witness.

Thus, there is no basis for FEMA's unilateral view that its witnesses are entitled to shield from scrutiny any inquiry into the bases for their views. Such a shield, indeed, would be particularly improper in an NRC proceeding where FEMA's views allegedly are entitled to some sort of rebuttable presumption of correctness. See 10 C.F.R. § 50.47(a)(2). How can a party rebut the views of FEMA witnesses if the party cannot even probe the bases for those views? Finally, sustaining FEMA's privilege claim would also improperly deprive all parties of their right under 10 C.F.R § 2.743(a) to conduct "such cross-examination as may be required for full and true disclosure of the facts."

The ASLB agreed with the County on this matter. It stated:

[T]he FEMA findings of the RAC Committee are directly relevant to the issue in controversy in this licensing hearing. In general, the parties should be permitted to inquire into those findings and the procedures which were followed to arrive at the FEMA consensus. Only by probing those findings and determinations will the parties and the Board be able to assess the weight to be given to those findings and determinations in our review under 10 C.F.R. § 50.47(a)(2).

ASLB Order at 7.

Thus, even if a privilege at one time may have attached to some of the documents at issue, FEMA's subsequent reliance upon the RAC review in the testimony submitted in this proceeding, constitutes a waiver of the privilege.

3. In Any Event, the Alleged "Chilling Effect" of Releasing the Documents is Outweighed by the County's Need to Obtain the Documents

As noted above, in applying a balancing test to determine whether the qualified executive privilege is overcome, the ASLB recognized that the County's need for the documents at issue is substantial and compelling. The documents are the factual findings which underlie and form the basis for the RAC findings upon which the FEMA witnesses rely for the opinions and conclusions stated in their testimony. Without access to these documents, the County would be unable to cross-examine the FEMA witnesses, to probe, challenge, or impeach their conclusions, or otherwise to present on the record of this proceeding all the relevant facts pertaining to the opinions of the FEMA witnesses. To deny the County access to these documents would constitute a violation of the County's rights under 10 C.F.R. §§2.743(a) and 50.47(a)(2) and would, in effect, accord special preferential treatment to one party's witnesses by shielding those witnesses from any meaningful inquiry or challenge.



The ASLB held that:

[T]he County should be able to discover the underlying documents that went into the formulation of the publicly disclosed RAC Report because the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence. . . .

ASLB Order at 8. The Board went on to state:

[W]e find that the documents which underlie the RAC Report are centrally important to the County's case in asserting that the LILCO Plan does not comply with NUREG-0654. We do not find that cross-examination alone, without access to these documents, will be equivalent.

ASLB Order at 9.

Indeed, the County's need for these FEMA documents is even more substantial than that of LILCO with respect to the State of New York documents which were the subject of the March ASLB Order. There, the Board held that LILCO's need for documents concerning a so-called "review" by certain New York employees (who were not witnesses in this proceeding), of a draft plan different from the LILCO Plan at issue in this proceeding, outweighed the State's interest in confidentiality. The Board stated:

At the present time, New York has become an active participant in opposition to LILCO. New York expects to present witnesses who will testify concerning deficiencies or inadequacies in LILCO's current plan. We, therefore, conclude that fairness dictates that LILCO should be given access to prior assessments of LILCO's earlier evacuation plan in order to determine whether it can impeach New York's witnesses with prior inconsistent statements about the same or similar provisions of the plan. Obviously this information is not available to LILCO through any other means. We find that LILCO has a compelling need to see these documents. On the other hand, New York's fear of a "chilling effect on the ability of the DPC to receive written comments, concerns, and opinions of its staff" is less compelling. . . . Frankly, New York is not entitled to have its cake and to eat it too. As an active participant in the proceeding, its interests in preserving secrecy are outweighed by LILCO's need to have these documents to effectively cross-examine New York's witnesses.

Attachment B to ASLB Order at 7-8 (emphasis added).

The documents at issue here involve: (1) the very witnesses chosen by FEMA to submit testimony, (2) the very Plan at issue in this proceeding, (3) the actual RAC review and findings which are attached to and are a part of the testimony to be submitted into evidence by FEMA, (4) the findings upon which the FEMA witnesses expressly rely for the opinions and conclusions contained in their testimony, and (5) the "FEMA findings and determinations" which are perhaps a rebuttable

presumption in this proceeding. Thus, the nexus between the FEMA documents and the matters at issue, as well as the County's need for those documents, are substantially greater than that presented by LILCO in March.

4. The Arguments on the Merits in  
FEMA's Memorandum Are Without  
Basis

The FEMA Memorandum contains three assertions, which arguably relate to its position on the merits, which require correction and response.

First, the FEMA Memorandum states at page 9: "The County's documents make no showing of any circumstances requiring overriding the policy considerations of executive privilege." As the above discussion and a review of the County Motion makes clear, this FEMA assertion simply ignores the contents of the County's Motion as well as of the ASLB Order which in substantial part granted that Motion. This FEMA assertion is simply without basis.

Second, FEMA asserts on pages 5 and 10 of its Memorandum and in the Kowieski Affidavit, that the individual opinions of RAC members "are irrelevant." The apparent basis for this assertion is the argument that: "The RAC submitted its final

report which reflects the collegial judgment of the RAC. . . . The RAC review is a collective document. If the individual RAC members and consultants hold a spectrum of views on any given issue, that fact would not vitiate the validity of the consensus expressed in the report." FEMA Memorandum at 10, 11.

This FEMA argument should also be rejected. It ignores the applicable relevancy standard for discovery, which is whether "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 10 CFR § 2.740(b)(1). The opinion of FEMA Counsel and Mr. Kowieski that the findings of individual RAC members, which form the basis for the "collegial" RAC findings "are irrelevant" also ignores reality. The RAC findings are included in FEMA's testimony on the contentions in this proceeding. See FEMA Response at 5. The FEMA witnesses also expressly rely on the RAC findings in their testimony. FEMA counsel's suggestion that documents relating to the findings which constitute the bases for his own witnesses' testimony are irrelevant, is inexplicable and should be rejected out of hand. As the ASLB recognized, the requested discovery clearly is reasonably calculated to lead to the discovery of admissible evidence.

Third, FEMA asserts that a Commission memorandum in Consolidated Edison Company of New York (Indian Point, Units 2 and 3), Docket No. 50-247-SP, slip op. (August 20, 1982) supports its position that the documents relating to the RAC Report relied upon in the FEMA testimony are entitled to be kept secret. The referenced Commission memorandum is inapposite. The issue ruled upon in that case was whether representatives of intervenors could observe activities inside the Indian Point control room during a FEMA exercise. The Commission's decision had nothing to do with discovery requests relating to testimony filed by FEMA witnesses, or to documents relied upon by witnesses in forming expert opinions expressed in testimony. In addition, one of the stated reasons for the Commission's ruling that intervenors could not personally observe the FEMA exercise was the Commission's expectation that intervenors would have "access to extensive documentation generated by the NRC and FEMA staffs during the exercise. . . ." Id. at 3. Clearly, that situation is in no way analogous to this case, where FEMA is attempting to limit the documents relating to the RAC findings available to Suffolk County to only the final RAC Report. FEMA's reference to Indian Point is simply irrelevant.



For the reasons set forth in sections 1-4 of this section, the County submits that FEMA could not succeed on the merits of its privilege claim even if a stay were granted and the Appeal Board were to consider its appeal. Accordingly, FEMA's stay application should be denied.

B. FEMA Has Failed to Satisfy the Other Requirements of Section 2.788

FEMA's Memorandum has substantial discussion of the so-called "irreparable injury" which would result if it were forced to comply with the ASLB Order. However, the discussion in the FEMA Memorandum of irreparable harm is substantially identical to the "chilling effect" argument made by FEMA in support of its withholding of documents in its original filing with the ASLB. FEMA asserts that releasing the documents at issue would have a chilling effect on RAC efforts at other plants. The ASLB expressly rejected that argument and found against FEMA as follows:

On balancing the competing interests, we find that, as to most documents, the County's need to have these documents is greater than the harm or 'chilling effect' which such release will have in decision making in the future. . . . We are most impressed with the fact that the FEMA RAC Report now constitutes FEMA's findings for purposes of 10 C.F.R. § 50.47. . . . Moreover, three members of the RAC will testify for FEMA. The FEMA testimony incorporates

numerous references to the RAC Report. Under these circumstances, it would be unfair to deny the County access to the underlying documents and processes by which the RAC Report achieved its final form. . . . FEMA intends to present testimony of three RAC members on May 29, in support of its findings in the RAC Report. Thus, we find that the documents which underlie the RAC Report are centrally important to the County's case in asserting that the LILCO Transition Plan does not comply with NUREG-0654. We do not find that cross-examination alone, without access to these documents, will be equivalent.

ASLB Order at 8-9. Thus, the irreparable injury argument made by FEMA is a rehash of its argument on the merits, and it has already been expressly rejected.

In its Memorandum, FEMA further clarifies its "chilling effect" argument, however, by making explicit its belief that it is entitled to conduct the business of the RAC Review in secrecy, with the findings of the RAC members never seeing the light of day. The Affidavits of Messrs. McIntire and Kowieski clearly reveal that FEMA wishes to cover up the factual data, which by law belongs to the public and in the public domain, and which FEMA itself has placed into controversy in this proceeding through its own submitted testimony. FEMA is a government agency, which purportedly acts on behalf of and in the public's interest. Indeed, in the FEMA Memorandum, FEMA

asserts that "The public interest requires a full, detailed, sometimes critical review of emergency plans, exercises and preparedness around nuclear plants." FEMA Memorandum at 9. FEMA's extreme protests against disclosure of the factual observations of RAC members, which purportedly are made for the public benefit, are inexplicable. Indeed, as the ASLB noted:

Presumably, [the RAC members] submit their independent opinions concerning an evaluation of an emergency preparedness plan. We cannot see why those opinions would be different even if it were known that such opinions would become public.

ASLB Order at 8.

It further is clear that if the factual observations and evaluations of RAC members would be affected or influenced by the knowledge that such observations would be subject to public disclosure, then such disclosure is even more essential. The public is certainly entitled to know if a public body that is supposedly serving its interests and protecting its safety says one thing in secret meetings behind its own closed doors, but says something else in a formal report submitted to the NRC in support of the licensing of a nuclear power plant. FEMA's cover-up attempt aside, it is clear that the public interest, and the interest of Suffolk County as a litigant in this

proceeding, can only be harmed by honoring FEMA's self-serving demands for secrecy. Clearly, FEMA has failed to meet the standards set forth in 10 C.F.R. § 2.788(e)(3) and (4).

Furthermore, FEMA's arguments about the need to change its internal procedures "to ensure that individual RAC member views will never be discoverable again" (McIntire Affidavit at 1), and the supposed delays in RAC reviews relating to Shoreham and other plants in New York and New Jersey (McIntire Affidavit at 2), are irrelevant, unsupported, pure speculation, and self-serving. They are clearly nothing more than an attempt to bolster the not very veiled threat, stated on page 11 of the FEMA Response, that "If the NRC expects to receive full cooperation of FEMA and the RAC," it should be willing to ignore the law and rules of procedure and allow FEMA to conduct its public business in secret. This FEMA argument should be rejected; the County assumes that this Appeal Board is not susceptible to such blackmail threats, in the face of the compelling legal and factual reasons that require the very disclosure FEMA seeks to avoid. FEMA must be held to the same legal standards as are other litigants; there is no basis for permitting the FEMA witnesses -- as opposed to all others -- to find facts or arrive at opinions or conclusions by means of secret shielded activities, behind closed doors, barred from public disclosure.

Both the public interest and the interest of Suffolk County require that there be no further stay and that the ASLB's Order be enforced.

For the reasons previously stated, the County believes there is no basis for the issuance of an additional stay of the ASLB Order, primarily because FEMA has made no strong showing of a probability of succeeding on the merits, and has failed to meet the other requirements of 10 C.F.R. § 2.788. If, however, the Appeal Board believes there is a need to consider the merits of the FEMA appeal, then because producing the documents at issue would moot FEMA's confidentiality claim, a stay may be appropriate. Should the Board so determine, the County wishes the Board to understand the implications of that determination so appropriate guidance can be provided to the ASLB.

Although FEMA asserts that the issuance of a stay "will not result in substantial hardship to any party" because deposition schedules and hearing schedules can be adjusted "with a minimum of disruption" (FEMA Memorandum at 8), FEMA is incorrect. The FEMA witnesses are presently scheduled to be cross-examined on their prefiled direct testimony next week -- May 29-June 1. The County's discovery requests and attempts to take the depositions of the FEMA witnesses were all structured



so documents could be obtained and reviewed prior to depositions, depositions could be taken during breaks in the hearing (so counsel would be available to take and defend the depositions), and the discovery could be concluded before cross-examination. As a result of delays by FEMA in responding to the County's document requests, and the FEMA appeal of the ASLB Order, the FEMA depositions have not yet occurred. If an additional stay is granted, they will not occur this week or early next week. Clearly, as the ASLB and even FEMA have recognized, discovery must precede the appearance of FEMA's witnesses for cross-examination at the hearing. Thus, the issuance of an additional stay would make it impossible to go forward with the hearing as scheduled for the week of May 29-June 1.

Contrary to FEMA's assertion, an "adjustment," i.e., moving other testimony and witnesses into the May 29-June 1 slot now set for cross-examination of FEMA, would result in substantial prejudice to Suffolk County, even if LILCO were able to "arrange for other witnesses" to appear in place of the FEMA witnesses. The County has been preparing for the cross-examination of FEMA's testimony, not other matters; if the hearing were to go forward according to a new schedule, the County would be forced to proceed without adequate preparation,

and would clearly be prejudiced. Thus, if an additional stay is to be granted, the Appeal Board should advise the ASLB to adjust the hearing schedule accordingly, by cancelling the hearing now set for FEMA's witnesses next week and not scheduling new testimony for which the County has not been able to prepare.

III. This Interlocutory Appeal Should Not Be Considered at All

It is well established that as a general rule, the Appeal Board will not exercise its discretion to entertain interlocutory appeals of discovery matters. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-609, 12 NRC 172, 173 n.2 (1980); Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-608, 12 NRC 168, 170 (1980); Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449, 450 (1979). Indeed, the Appeal Board has stated that it is "particularly reluctant to intrude into the conduct of a licensing board hearing in progress where the dispute is only over such preliminary questions as the manner of receipt of evidence or the conduct of discovery." Pennsylvania Power and Light Company and Allegheny Electric Corporation, Inc. (Susquehanna

Steam Electric Station, Units 1 and 2), ALAB-593, 11 NRC 761, 763 (1980). See also Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693, 696 (1979).

The issue here is one that is clearly encompassed within this general principle. The ASLB, fully familiar with the facts, issues, and testimony involved in this proceeding, has reviewed 35 separate documents in camera and made individual rulings on privilege claims in the context of this proceeding as a whole. The Appeal Board is not in a position to overrule the essentially factual findings of the ASLB concerning the balancing of interests that requires the release of documents by FEMA. Indeed, in a case in which petitioners challenged a special master's grant of a claim of privilege, the Appeal Board ruled:

[T]he contention that the denial of a claim of privilege (much less its grant) enjoys a special status deserving of interlocutory review has been expressly rejected by the Supreme Court [citing Will v. United States, 389 U.S. 90 (1967)]. We think it wisest to continue our own adherence to that same practice.

Toledo Edison Company (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 768-69 (1975). The Appeal Board stated

that relaxation of the general rule against granting interlocutory appeals was not justified when the effect would be "to grant interlocutory review simply to reexamine sui generis rulings on individual privilege claims." Id. The Board so held both because such review would slow the proceeding, and because the licensing board was in a better position to evaluate claims of privilege than was the Appeal Board. Id.

In light of FEMA's failure to make any showing of likelihood to prevail on the merits, and the fact that non-disclosure of the documents at issue would be contrary to the public interest, the interests of Suffolk County, and the well-established principles governing discovery, qualified privilege, and litigants' rights to probe the bases for opinions of opponents' witnesses, the Appeal Board should not entertain FEMA's interlocutory appeal of the ASLB's discovery order.

IV. Conclusion

For the foregoing reasons, FEMA's Notice of Appeal and Request for a Stay should be denied.

Respectfully submitted,

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Dated: May 23, 1984

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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In the Matter of )  
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LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station,  
Unit 1) )  
\_\_\_\_\_ )

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

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY MEMORANDUM IN  
OPPOSITION TO FEMA'S APPEAL AND REQUEST FOR STAY OF MAY 18 BOARD  
ORDER COMPELLING PRODUCTION OF DOCUMENTS BY FEMA dated May 23, 1984,  
have been served to the following this 23rd day of May, 1984 by  
U.S. mail, first class, except as otherwise noted.

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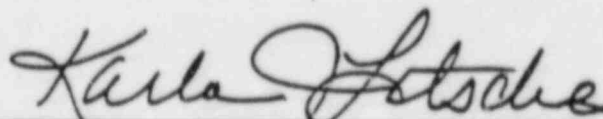
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DATED: May 23, 1984

\*By Hand  
\*By Telecopier

ATTACHMENT 1

Before the Atomic Safety and Licensing Board

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

~~844423444~~

### Documents Requested

All documents that were produced in connection with, or in any way relate to the FEMA Regional Assistance Committee ("RAC") review of the LILCO Transition Plan for the Shoreham Nuclear Power Station, including, but not limited to, the following (but not including the LILCO Transition Plan itself or NUREG 0654):

1. All memoranda, correspondence, questions, comments, reports, evaluations, ratings, summaries, notes, including drafts, relating to the RAC review of the LILCO Transition Plan.
2. All drafts or revisions of reports, comments, evaluations, or other documents including drafts of and comments relating to, the document entitled "Consolidated RAC Review Dated February 10, 1984," which is attached to the Direct Testimony of Thomas E. Baldwin et al. Concerning Phase II Emergency Planning dated April 17, 1984 and filed in this proceeding.
3. All transcripts, minutes, summaries or notes of meetings, discussions or conferences, including telephone conferences, among RAC members or others relating to the RAC review of the LILCO Transition Plan.

Respectfully submitted,.....

Martin Bradley Ashare  
Suffolk County Department of Law  
Veterans Memorial Highway  
Hauppauge, New York 11788



Herbert H. Brown  
Lawrence Coe Lanpher  
Karla J. Letsche  
John E. Birkenheier

KIRKPATRICK, LOCKHART, HILL,  
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1900 M Street, N.W.  
Washington, D.C. 20036

Attorneys for Suffolk County

Dated: April 20, 1984



ATTACHMENT 2

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

\_\_\_\_\_  
In the Matter of )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station,  
Unit 1) )  
\_\_\_\_\_

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

SUFFOLK COUNTY MOTION TO COMPEL  
RESPONSE TO REQUEST FOR PRODUCTION  
OF DOCUMENTS BY FEMA

For the reasons set forth below, Suffolk County, pursuant to 10 CFR Section 2.740(f), hereby requests that the Board order FEMA to respond to the Suffolk County Request for Production of Documents by FEMA, dated April 20, 1984.

On Friday, April 20, Suffolk County filed a Request for Production of Documents by FEMA. Counsel for FEMA was served with this document on Monday, April 23.<sup>1/</sup> During the hearing

1/ The document was delivered to FEMA Counsel's New York office by Federal Express on Monday, April 23. The County also hand delivered a second copy to FEMA Counsel in Washington, D.C. on Wednesday, April 25.

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on Thursday, April 26, the County made clear its need for a response to its document request prior to its conducting depositions of FEMA's witnesses, then scheduled for May 8 and 9, and FEMA counsel stated that the response would be provided to the County by May 1 or 2. During numerous conversations with counsel, FEMA counsel has made clear that he does not intend to produce several documents that are responsive to the County's document request; nonetheless, neither a response to that request nor a motion for a protective order has yet been filed by FEMA. In addition, the County has also made clear that it needs the documents requested, or at least a Board ruling upholding FEMA's decision to withhold those documents, in order to be able adequately and effectively to conduct depositions of FEMA witnesses. Without having received either a response to its document request that identifies the documents being withheld and the basis for such non-production, or a motion for a protective order that could be opposed and a Board ruling obtained, the County cannot seek production of any specific documents, and, indeed, also cannot proceed with properly focused depositions of the FEMA witnesses.<sup>2/</sup> Under prior Board

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<sup>2/</sup> As FEMA counsel has mentioned, Suffolk County did file with FEMA a Freedom of Information Act request, and some documents were produced in response to that request on

(Footnote cont'd next page)

rulings in this case, the County is entitled to conduct such discovery prior to having to cross examine the FEMA witnesses during the hearings.

As the Board was made aware on Friday, May 4, 1984, the May 8 and 9 depositions have been cancelled because of FEMA's failure to respond to the County's document request. Suffolk County is attempting to reschedule them during the two week break in the hearing (on May 22 and 23) so that the cross examination of FEMA witnesses can proceed as planned when the hearing reconvenes on May 29, 1984. However, in order to take the depositions at that time, it will be necessary to receive the FEMA response and obtain whatever Board rulings may be necessary prior to that time. Accordingly, the County requests that FEMA be ordered to respond to the County's document request, and file its motion for a protective order to cover the documents it does not intend to produce by May 10, 1984.

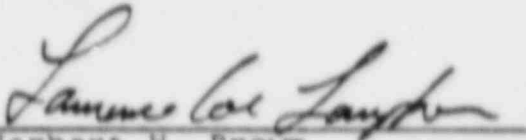
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(Footnote cont'd from previous page)

May 1. A seven page list of documents not produced was also provided on that date. While the County has stated it does not seek to receive two copies of documents that may be responsive to both its FOIA request and its Request for Production of Documents, it is well established that it nonetheless is entitled to receive a response to its Request for Production of Documents, separate and apart from a response to its FOIA request.

Respectfully submitted,

Martin Bradley Ashare  
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Washington, D.C. 20036

Attorneys for Suffolk County

Dated: May 8, 1984

ATTACHMENT 3



#14-1-Sue

JUDGE LAURENSEN: We are back on the record now. We have an off-the-record conference concerning the discovery dispute between FEMA and Suffolk County concerning the April 20th, 1984 Suffolk County request for production of documents by FEMA, and the Suffolk County motion to compel response to request for production of documents by FEMA, which was filed yesterday, May 8th.

After an extensive discussion with all the parties, I am going to summarize my understanding of what has been said and what has been agreed to, and then I will give all the parties an opportunity to add anything or correct anything that I have said.

The initial Suffolk County request for production of documents by FEMA, dated April 20, 1984 listed three categories of documents requested, on Page 2 of that request, but did not indicate any particular date for the production of those documents other than what would be encompassed within the NRC regulations concerning production of documents.

The Suffolk County motion to compel, which was filed yesterday, requested that FEMA be ordered to respond to the County's document request and to file its motion for a protective order to cover the documents it does not intend to produce by May 10, 1984.

The discussion that we have had with Mr. Glass

#14-2-Sue

for FEMA indicates that at the present time, he does not believe that there are any documents that meet the requirements of Request Number 3 on Page 2 but that he has agreed to meet with the individual RAC Committee members on Friday of this week to determine that there are no such documents.

As to Request Number 1 and 2 on that page, it is the present position of FEMA that those -- there are documents that meet those requests but that they are all privileged because they are essentially pre-decisional documents, the same type of executive privilege which FEMA has previously asserted in this proceeding, that FEMA does not intend to produce any documents in response to that request.

After extensive discussions concerning scheduling, it was agreed that on Monday, May 14th, FEMA will file a list of all of the documents which meet the requests and a list of its objections to the request for documents. On Thursday, May 17th, FEMA will file copies of all of the documents in question In Camera with the Board with a duplicate set of those documents being sent to the FEMA Washington D. C. office. On that same date, Thursday, May 17th, all parties, including Suffolk County, of course, will file their responses to the FEMA objections to the production of the documents.

The Board will endeavor to rule on all of these

#14-3-Sue

objections and requests for protective order and motions to compel on Friday, May the 18th, in order that the depositions of FEMA witnesses may go forward as scheduled during the next week.

This completes my recollection and notes of what was said during our conference. If anyone else cares to add to this or correct anything I've said, we will entertain such statements now.

MR. GLASS: Just one point of clarification. On the items listed in Number 1, I am asserting the privilege only for those documents that we have not already provided to the Kirkpatrick law firm. Some of the documents in Number 1 had already been provided to them.

And on a point of information. Would Ms. Letsche need additional copies of those if they were already provided in the FOIA request? It means a great deal of duplication.

MS. LETSCHE: No. I stated that I don't need extra copies, but I assume they will be identified in your response to my document request so that I know which of the documents you produced in response to the FOIA request or the ones that are responsive to my document request.

MR. GLASS: Okay.

JUDGE LAURENSEN: FEMA agrees to do that?

MR. GLASS: Yes.

JUDGE LAURENSEN: All right. Anything else to

14-4-Sue supplement or correct what I have said on the record.

2 MS. LETSCHE: Just to supplement one item, Judge  
3 Laurenson, and that is that, although you are absolutely  
4 correct in stating that the County's original request for  
5 production of documents by FEMA did not include a date upon  
6 which those documents were requested to be produced, that  
7 during discussions among counsel, both off and on the  
8 record, it had been made clear by the County to Mr. Glass  
9 that those documents were necessary prior to the conduct  
10 of the depositions, and that a response to that document  
11 request would be forthcoming prior to that time.

12 MR. GLASS: The County had the opportunity to  
13 serve the document request when they wanted. I am not going  
14 to make any further comment.

15 JUDGE LAURENSEN: All right. At this point then,  
16 that concludes our discussion concerning the discovery dis-  
17 pute concerning documents between the County and FEMA.

18 We will take a ten minute recess at this point,  
19 and we will reconvene with the LILCO panel concerning  
20 Cluster 11.

21 (Whereupon, a recess is taken at 3:25 p.m.,  
22 to reconvene at 3:45 p.m., this same day.)

end #14

Doc flws

ATTACHMENT 4



# Federal Emergency Management Agency

Region II

26 Federal Plaza

New York, New York 10278

May 15, 1984

Karla Letsche, Esq.  
Kirkpatrick, Lockhart, Hill  
Christopher & Phillips  
1900 M Street, N.W.  
8th Floor  
Washington, D.C. 20036

Dear Ms. Letsche:

This letter supplements our response to Suffolk County's Discovery Request. FEMA has identified all items within the Regional and Headquarters office that is responsive to your request. In addition we have requested information that may be in the offices of the Regional Assistance Committee members.

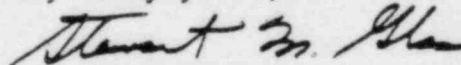
Attached please find a Briefing Sheet supplied by the Environmental Protection Agency which is responsive to the third item in your request.

We understand that two or three additional items that may be responsive to your request have been forwarded to our office from the Department of Transportation RAC member but we have not yet received this information.

I am also enclosing copies of a FEMA employee's Anticipated Workload Forms as they relate to Shoreham activities.

If you have any further questions please do not hesitate to contact this office.

Very truly yours,

  
Stewart M. Glass  
Regional Counsel



ATTACHMENT 5

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

\_\_\_\_\_  
In the Matter of )  
 )  
 )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station, )  
Unit 1) )  
 )  
 )  
 )  
\_\_\_\_\_ )

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

SUFFOLK COUNTY MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS IDENTIFIED  
BY FEMA ON MAY 14 AND 15

Pursuant to the agreed upon schedule discussed by the Board and parties on May 9, 1984, and pursuant to 10 C.F.R. § 2.740(f), Suffolk County hereby moves the Board to issue an order compelling FEMA to produce the thirty seven documents identified, but withheld from production, on pages 5-8 of FEMA's Response to Suffolk County Request for Production of Documents (hereinafter "FEMA Response"). The bases for this Motion are set forth in parts B-F below.

A. FEMA's Response is Still Not Complete

As a preliminary matter, the County notes that it is filing this Motion on May 17, in order to obtain a Board ruling on FEMA's withholding of documents. The County's filing, however,

84-5210569

is of necessity incomplete as a result of FEMA's inability or unwillingness to provide the information upon which the County's Motion is necessarily premised on a timely basis as contemplated by the May 9 agreement among the parties which was adopted by the Board. Thus, despite the requirement that "on Monday, May 14th, FEMA will file a list of all the documents which meet the [County's document] requests and a list of its objections to the request for documents," (Tr. 8752 (Laurenson)), on May 14 the County received only pages 1-7 of the FEMA Response. Those pages did not contain a complete listing of the responsive documents, and they contained no objections or bases for withholding any documents. The County did not receive the full eleven page document entitled "FEMA Response to Suffolk County Request for Production of Documents" until shortly before noon on May 15.

In addition, at approximately 4:00 p.m. on May 15, the County received a letter from FEMA Counsel (Attachment A hereto) which purportedly "supplements" the FEMA Response. The letter states that documents responsive to the County's document request -- apparently in addition to those identified in the FEMA Response -- have been "requested" from RAC members, but apparently not yet received by FEMA counsel or included in the listing contained in the FEMA Response. The May 15 letter

also states that "two or three additional items that may be responsive" to the request "have been forwarded" to FEMA counsel but have not yet been received. As of May 17, 1984, the County has still not received a complete response to its April 20 document request.<sup>1/</sup>

Thus, although the entire schedule leading to a Board ruling by May 18 was premised on the representation of FEMA counsel that he could file a complete response by May 14 and provide by May 17 all the withheld documents to the Board (with duplicates available for production to the County pending the Board's ruling), it is clear that a complete response has yet to be provided by FEMA: FEMA counsel has not even located, much less received or reviewed all the responsive documents. The County submits that in light of FEMA's continuing non-compliance with the timetables set in this proceeding, and the scheduled depositions of the FEMA witnesses during the week of May 21, the Board should order FEMA to turn over all

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<sup>1/</sup> Furthermore, despite the representation at page 4 of the FEMA Response, as of May 15, 1984, the 8 documents listed on pages 4-5 of the FEMA Response had not yet been provided to the County. They were received after noon on May 16. Similarly, despite the representations in the May 15, 1984 letter from Mr. Glass, the FEMA employees' Anticipated Workload Forms relating to Shoreham, were also not provided to the County until May 16, 1984.

remaining responsive documents to the County, regardless of whether FEMA objects to their production, no later than Monday, May 20.

The County's Motion addresses only the 37 documents identified in the FEMA Response, since the remaining documents have not yet been identified by FEMA counsel.

B. FEMA has Failed to Satisfy the Threshold Standards for a Proper Assertion of the Executive Privilege

In its November 1, 1983 Memorandum and Order Ruling on Suffolk County Motion to Compel FEMA to Produce Documents (hereinafter, "November Order") which is relied upon by FEMA at page 8 of its Response, this Board identified four requirements for properly invoking the executive privilege. See November Order at 2. FEMA has not satisfied at least two of those requirements.

The County received late on May 14 an unexecuted Affidavit drafted for the signature of Louis O. Guiffrida, Director of FEMA. The County assumes that the Board will have in hand an executed copy of that Affidavit before it makes any ruling upholding any of the FEMA privilege claims. The County also assumes that copies of the documents which have been identified

and withheld will be provided for the Board's in camera inspection by May 17. Thus, the County does not at this time contest FEMA's satisfaction of the first and fourth requirements set forth on page 2 of the Board's November Order. The documents submitted by FEMA, however, do not satisfy either the second or third requirements identified by the Board, and this failure alone requires the granting of the County's motion to compel.

The two requirements in question are:

(2) the claim must specifically describe and designate the documents sought to be withheld;

(3) the claim must state the precise reasons for preserving the confidentiality of the documents

November Order at 2.

Neither the FEMA Response nor the Guiffrida Affidavit specifically describes all the documents sought to be withheld, even limiting those documents to the 37 listed in the FEMA Response. First, at least four of those documents (items 20, 21, 22 and 23) have not even been seen by either FEMA Counsel (see FEMA Response at 8-9) or by Mr. Guiffrida (see Affidavit at paragraph 6.) Although these documents are described as "individual personal notes," clearly, neither FEMA Counsel nor



Mr. Guiffrida have any basis for assuming such description is accurate. More importantly, the description "personal notes" does not constitute a meaningful or useful description of the documents at issue that could enable either the Board, or Suffolk County, to evaluate the applicability of the asserted privilege. "Personal notes" clearly could comprise purely factual statements to which the asserted privilege does not apply. The County cannot file an informed response to the FEMA privilege claim, nor can this Board rule, based on the limited so-called "description" of these documents that has been provided by FEMA.

This deficiency also applies to most of the other documents identified and withheld by FEMA. The FEMA designations of the following items fail to "specifically describe" them:

- Items 1-19 (each described only as "comments")
- Item 27 ("Transmittal Memorandum")
- Item 28 ("Memorandum," "Subject: Shoreham Plan and Review")
- Items 29 and 30 ("Discussion Points" and "Q's and A's" "on the FEMA finding of 3/15/84 for Shoreham")
- Item 31 ("annotated notes")
- Item 32 ("Notes and Option Paper on Strategies for Handling Shoreham Offsite Emergency Preparedness Problem")



- Item 33 ("Memorandum" "Subject: Federal Emergency Management Agency Support for Nuclear Regulatory Commission Licensing of Shoreham Nuclear Station")
- Item 34 ("Memorandum" "Subject: Legal Issues Identified During the RAC Review of LILCO Transition Plan for Shoreham")
- Item 37 ("pages of a flip chart" of RAC "comments")

The FEMA Response and Guiffrida Affidavit also fail to state "precise reasons for preserving the confidentiality of the documents" being withheld. The only "reasons" contained in the FEMA Response are the following unexplained or conclusory assertions:

It is the position of [FEMA] that the above thirty-seven (37) documents are privileged, that they are subject to the protection of the executive privilege (sic). (At 8.)

\* \* \*

FEMA objects to the discovery of any advisory memoranda, predecisional deliberations related to the RAC review, or the input of the individual RAC members to the final FEMA RAC report. (At 9.)

\* \* \*

It is obvious . . . that [Suffolk County is] seeking to ascertain the predecisional thoughts and opinions of the individual RAC members. Executive privilege is meant to protect these very thought processes, advisory opinion recommendations and deliberations. (At 9.)

\* \* \*

These documents fall squarely within the scope of executive privilege . . . . (At 10.)

These assertions are insufficient to support a claim of privilege. First, they are not related in any way to the actual documents at issue (e.g., why are memoranda concerning "FEMA Support for NRC Licensing of Shoreham," or "legal issues identified in the RAC Review," or RAC comments on Revision 1 (Items 33, 34 and 37) subject to executive privilege?) Second, there is no "reason" given to support the asserted conclusion that individuals' thoughts and opinions -- which are supposedly in the notes and comments of RAC members -- are covered by executive privilege. Clearly, every document containing written words also reflects some individual's thoughts. That alone does not make a document privileged, particularly when the individual is a witness or when that individual's thoughts and opinions have been submitted into evidence, which is the case here. Third, even if some of the documents at one point may have been subject to a privilege of some sort, the FEMA Response is totally silent concerning any need to preserve the confidentiality of any of the documents, given the fact that FEMA is a party to this proceeding, has submitted testimony by several of the authors of documents being withheld, and has

submitted into evidence, and its witnesses rely upon the very report which is the subject of the documents being withheld. As we explain further in part D below, FEMA has not stated any basis for a continuing privilege -- if one ever applied -- with respect to the documents at issue.

The Guiffrida Affidavit is similarly deficient. Although it does assert that production of the documents "would be contrary to public interest," "will have a chilling effect on this agency to receive in written format the comments, concerns and opinions of our staff," (sic) and "will also adversely affect the ability of our RAC Chairman to receive in written format the comments, concerns and opinions of" the RAC members, there is again no stated relationship between these conclusions and the particular documents at issue. There is also no recognition, much less discussion, of the fact that many of these documents have been authored by individuals designated as witnesses by FEMA, and that they all involve a document -- the RAC Report -- that FEMA will be submitting into evidence in this proceeding.

Finally, the October 12, 1983 FEMA Response to Suffolk County Motion to Compel Discovery which is referenced in the FEMA Response (at 8), is as incomprehensible and inapposite now

as it was in October. In addition, it of course fails to address any of the documents now at issue. (The matters at issue in October primarily involved FEMA's internal policy and proposed response to the NRC's requests for a review of the LILCO Plan.) It provides no additional information which could support a claim of privilege.

In short, FEMA has failed to make even the threshold showings necessary to support a claim of privilege and need for confidentiality with respect to the 37 documents it has identified and withheld.

C. The Executive Privilege Does Not Apply to the Documents at Issue

Although for the reasons noted above it is difficult to discuss in any detail the documents being withheld because the descriptions provided by FEMA are so uninformative, it nonetheless seems clear that given their subject matter, most if not all of them, are not subject to the executive privilege. It is well established that the privilege "does not attach to purely factual communications, or to severable factual portions of communications, the disclosure of which would not compromise military or state secrets." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC

1114, 1164 (1982), citing EPA v. Mink, 410 U.S. 73 at 87-88. See also Brand v. Phillips Petroleum Co., 628 F.2d 873 (5th Cir. 1981), cited in the November Order, at 7, and this Board's Memorandum and Order Ruling Upon LILCO's Motion to Compel Production of Documents and Objections of Governor Mario Cuomo, dated March 6, 1984 (hereinafter "March Order") at 7. The documents at issue all relate to the RAC Review or the RAC Report which is attached to the testimony of the FEMA witnesses. That review, and the resulting report, consists of purely factual material -- that is, whether or not the LILCO Plan contains or does not contain various elements identified in NUREG 0654. Indeed, many of the documents being withheld appear to be nothing more than the particular findings of fact by RAC members -- labeled "comments" in the FEMA document listing -- that eventually became the RAC Report that is relied upon by the FEMA witnesses in their testimony. Such factual material is not subject to executive privilege.

Furthermore, the executive privilege is designed to protect the internal policy formulation or decision-making process in a governmental agency. Despite the incantation of the words "pre-decisional," "thought processes," and "deliberations" in the FEMA Response and the Guiffrida Affidavit, there is no indication either in those documents, or in the

description of the withheld documents, that the findings or notes of RAC members, drafts of the RAC Report, or the identified memoranda have anything to do with FEMA policy or decisions or deliberations about FEMA policies.

As stated in the FEMA Response, the RAC members engaged in "a technical review" of the LILCO Plan. FEMA Response at 9. Their purpose was to make findings of fact, not set FEMA policy or make decisions for that agency. Indeed, the RAC members except the Chairman, are not even FEMA employees. The "comments" of the RAC members are technical factual findings, having nothing to do with any internal FEMA policy formulation or decisionmaking. They are not protected by the executive privilege. Unlike the documents involved in the Fall 1983 discovery dispute, which at least arguably dealt with internal FEMA policy and decision making deliberations (see November Order at 9),<sup>2/</sup> the documents at issue here appear to deal with nothing but the technical findings of the RAC concerning the contents of the LILCO Plan. FEMA has failed to demonstrate that any of the documents deal with the type of nonfactual, policy, or decision-making matters that the executive privilege is designed to protect.

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<sup>2/</sup> At issue in November were items such as draft memoranda and correspondence apparently setting forth the agency's policy, position, or intended response to the request from NRC that certain actions be undertaken.



D. Even if a Privilege at One Time Attached  
to the Documents, the Privilege Has Been  
Waived

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Even assuming for the sake of argument that the executive privilege could have attached at one time to some of the documents at issue, it is clear that by its own subsequent actions FEMA has waived such privilege. FEMA intends to introduce the RAC Report into evidence in this proceeding. The FEMA witnesses have attached the report to their prefiled testimony. In addition, those witnesses state throughout their testimony that their opinions and conclusions concerning the LILCO Plan are based upon the RAC findings. In addition, at least three of the FEMA witnesses (Messrs. Keller, Baldwin, and Kowieski) participated in the RAC review, and authored several of the documents being withheld.

Clearly, the County, the Board, and the other parties are entitled to probe the bases for the opinions and conclusions stated by the FEMA witnesses in their testimony, both for impeachment purposes and otherwise to develop a full and complete record. See the March Order at 7-8. Since the FEMA witnesses rely on the findings of the RAC, inquiry into the bases of the RAC findings is clearly not only proper, but essential. The FEMA position -- that no one is permitted to see or inquire



into anything other than the bare conclusions stated in the final RAC Report -- flies in the face of logic as well as the rules of procedure.

FEMA, in effect, attempts to use the executive privilege to bar any inquiry into the bases for the opinions of its witnesses. Clearly, once FEMA submits testimony, and relies upon factual findings in that testimony, it has waived any pre-existing rights to keep confidential the processes or means by which those findings and the conclusions of its witnesses were developed. See e.g., Houston Light and Power Co. (South Texas Project, Units 1 and 2), LBP-79-30, 10 NRC 594, 595 (1979). See also, March Order at 8. Given the circumstances of this case, to permit FEMA to abuse the executive privilege as it attempts to do, would be improper.

Sustaining FEMA's executive privilege claim with respect to the documents now at issue would accord a special "untouchable" status to the FEMA witnesses; such status has not been accorded any other parties' witnesses in this proceeding -- the parties and the Board have had or will have the opportunity to probe the bases for the opinions of every other witness. It would also improperly deprive all parties of their right under 10 C.F.R § 2.743(a) to conduct "such cross-examination as may

be required for full and true disclosure of the facts." Finally, it would violate 10 CFR § 50.47(a)(2) because the parties would be unable to rebut the FEMA findings, having been barred from even determining the bases for those findings.

Thus, even if a privilege at one time may have attached to some of the documents at issue, FEMA's subsequent reliance upon the RAC review in the testimony submitted in this proceeding, constitutes a waiver of the privilege.

E. In Any Event, the Alleged "Chilling Effect" of Releasing the Documents is Outweighed Here by the County's Need to Obtain the Documents

This Board has stated in both its November and March Orders that a balancing test must be applied to determine whether the qualified executive privilege is overcome by the need of a litigant for the particular documents at issue. See November Order at 10, and March Order at 3-5. In this case, as demonstrated in parts B and C above, FEMA has failed to document or even explain the basis for its "chilling effect" assertion with respect to the documents at issue. Those documents appear to contain only factual, technical, non-policy material having nothing to do with any internal FEMA decision-making. On the other hand, the County's need for these documents is substantial and compelling.

As noted in part D above, the documents at issue are the factual findings which underlie and form the basis for the RAC findings upon which the FEMA witnesses rely for the opinions and conclusions stated in their testimony. Without access to these documents, the County would be unable to cross-examine the FEMA witnesses, to probe, challenge, or impeach their conclusions, or otherwise to present on the record of this proceeding all the relevant facts pertaining to the opinions of the FEMA witnesses. As noted in part D above, to deny the County access to these documents would constitute a violation of the County's rights under 10 C.F.R. §§2.743(a) and 50.47(a)(2) and would, in effect, accord special preferential treatment to one party's witnesses by shielding those witnesses from any meaningful inquiry or challenge.

Indeed, the County's need for these FEMA documents is even more substantial than that of LILCO with respect to the State of New York documents which were the subject of the Board's March Order. There, the Board held that LILCO's need for documents concerning a so-called "review" by certain New York employees (who were not witnesses in this proceeding), of a draft plan different from the LILCO Plan at issue in this proceeding, outweighed the State's interest in confidentiality. The Board stated:

At the present time, New York has become an active participant in opposition to LILCO. New York expects to present witnesses who will testify concerning deficiencies or inadequacies in LILCO's current plan. We, therefore, conclude that fairness dictates that LILCO should be given access to prior assessments of LILCO's earlier evacuation plan in order to determine whether it can impeach New York's witnesses with prior inconsistent statements about the same or similar provisions of the plan. Obviously this information is not available to LILCO through any other means. We find that LILCO has a compelling need to see these documents. On the other hand, New York's fear of a "chilling effect on the ability of the DPC to receive written comments, concerns, and opinions of its staff" is less compelling. . . . Frankly, New York is not entitled to have its cake and to eat it too. As an active participant in the proceeding, its interests in preserving secrecy are outweighed by LILCO's need to have these documents to effectively cross-examine New York's witnesses.

March Order at 7-8 (emphasis added).

The documents at issue here involve: (1) the very witnesses chosen by FEMA to submit testimony, (2) the very Plan at issue in this proceeding, (3) the actual RAC review and findings which are attached to and are a part of the testimony to be submitted into evidence by FEMA, (4) the findings upon which the FEMA witnesses expressly rely for the opinions and conclusions contained in their testimony, and (5) the "FEMA findings and determinations" which are a rebuttable presumption in this proceeding. Thus, the nexus between the FEMA documents

and the matters at issue, as well as the County's need for those documents, are substantially greater than that presented by LILCO in March. The County submits that, assuming any of the FEMA documents are properly subject to a claim of privilege, the Board's March Order, which required New York to turn over privileged documents to LILCO, is controlling here. Accordingly, the County's Motion to Compel should be granted.

F. FEMA's Other Arguments are Without Basis

The FEMA Response contains two assertions which require a response and correction.

First, the FEMA Response states at page 9 "The County's document request to FEMA makes absolutely no showing of any circumstances requiring disclosure of the requested documents." Clearly, no such "showing" is required in a Request for Production of Documents. See 10 CFR § 2.741. This motion sets forth in as much detail as possible, given the limited information provided by FEMA, the circumstances which require disclosure of the documents.

Second, FEMA asserts on page 10 of its Response that the requested documents "are irrelevant and will not lead to the production of admissible relevant evidence." The apparent

basis for this assertion is the argument that: "the FEMA RAC review is not being litigated in this proceeding and the inputs of the various members of the RAC Committee have absolutely no probative value. The RAC submitted its final report which reflects the collegial judgment of the RAC." FEMA Response at 10.

This FEMA argument ignores the applicable relevancy standard for discovery, which is whether "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 10 CFR § 2.740(b)(1). FEMA Counsel's opinion that the findings of individual RAC members, which form the basis for the "collegial" RAC findings "have absolutely no probative value" also ignores reality. As the very next sentence of the FEMA Response acknowledges, the RAC findings are included in FEMA's testimony on the contentions in this proceeding. The FEMA witnesses also expressly rely on the RAC findings in their testimony. FEMA counsel's suggestion that documents relating to the findings which constitute the bases for his own witnesses' testimony are irrelevant, is inexplicable and should be rejected out of hand. The requested discovery clearly is reasonably calculated to lead to the discovery of admissible evidence.



Conclusion

For the foregoing reasons, the County's Motion to Compel should be granted.

Respectfully submitted,

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Attorneys for Suffolk County

Dated: May 17, 1984





# Federal Emergency Management Agency

Region II

26 Federal Plaza

New York, New York 10278

May 15, 1984

Karla Letsche, Esq.  
Kirkpatrick, Lockhart, Hill  
Christopher & Phillips  
1900 M Street, N.W.  
8th Floor  
Washington, D.C. 20036

Dear Ms. Letsche:

This letter supplements our response to Suffolk County's Discovery Request. FEMA has identified all items within the Regional and Headquarters office that is responsive to your request. In addition we have requested information that may be in the offices of the Regional Assistance Committee members.

Attached please find a Briefing Sheet supplied by the Environmental Protection Agency which is responsive to the third item in your request.

We understand that two or three additional items that may be responsive to your request have been forwarded to our office from the Department of Transportation RAC member but we have not yet received this information.

I am also enclosing copies of a FEMA employee's Anticipated Workload Forms as they relate to Shoreham activities.

If you have any further questions please do not hesitate to contact this office.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Stewart M. Glass", is written over the typed name.

Stewart M. Glass  
Regional Counsel

ATTACHMENT 6

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges  
James A. Laurenson, Chairman  
Dr. Jerry R. Kline  
Mr. Frederick J. Shon

In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station,  
Unit 1)

Docket No. 50-322-OL-3

(Emergency Planning Proceeding)

May 18, 1984  
3:00 p.m., E.D.T.

MEMORANDUM AND ORDER RULING ON SUFFOLK COUNTY  
MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY FEMA

We have before us today a discovery dispute between Suffolk County and FEMA. While we have entertained frequent discussions concerning various such disputes between the County and FEMA in the past, the current dispute commenced on May 8 when Suffolk County filed a Motion to Compel Response to Request for Production of Documents by FEMA. The County's request recited the facts that the County served on FEMA a Request for Production of Documents on April 23 and that a prompt response was necessary in order to prepare for depositions next week and cross-examination of FEMA witnesses at the hearing beginning on May 29. The County asked us to require FEMA to respond to the request for documents by May 10.

We held a discussion with all parties on May 9 during the hearing in Hauppauge, NY. At that time, FEMA indicated that it intended to

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assert executive privilege and to withhold numerous documents. The Board established a schedule for the filing of the list of documents in question on May 14 and subsequent filing of briefs, and in camera submission of the documents. At that time we notified all parties that we would announce our ruling at a telephone conference at 3:00 p.m. on May 18, 1984. The FEMA list was served upon the Board on May 15 and the County asserts that it did not receive the entire list until then. The FEMA list identified 37 documents as responsive to the Suffolk County request for documents but FEMA claimed "executive privilege" for all 37 listed documents. FEMA characterizes these documents as "advisory memoranda, predecisional deliberations related to the RAC Review, or the input of the individual RAC members to the Final FEMA Report." (FEMA's Response to Suffolk County Request for Production of Documents at 9.) FEMA goes on to object to the request to provide what it says are "the predecisional thoughts and opinions of the individual RAC members." FEMA's brief goes on to state that "the FEMA RAC Review is not being litigated in this proceeding." (Pg. 10.)

Yesterday, FEMA filed in camera copies of 35 of 37 documents in question. At the same time, FEMA submitted an Affidavit of Gen. Louis Giuffrida, Director of FEMA, listing and describing the 37 documents in question and stating that he had examined the documents (except 4 which were delivered to us still sealed) and that he concluded that the production of these documents would be contrary to the public interest. He further asserted that "the production of these documents will have a chilling effect on this agency's ability to receive in written format

the comments, concerns and opinions of our staff." He also stated that it will adversely affect the ability of the RAC Chairman to receive written advice from representatives of the RAC.

Yesterday, Suffolk County filed its Motion and Brief to Compel Production of Documents. The County first complains about FEMA's response not being complete because additional documents may be identified. The County's arguments in support of the disclosure of all documents in question are as follows: (1) FEMA failed to satisfy the threshold standards for a proper assertion of executive privilege because the documents are not specifically described and there is no precise reason given by FEMA for preserving the confidentiality of the documents; (2) the executive privilege does not apply to these documents at all because they all consist of purely factual material concerning the RAC Review and do not concern FEMA policy; (3) even if they were privileged at one time, the privilege has been waived because FEMA intends to offer the RAC Report in evidence; and (4) the County claims that any chilling effect of releasing the documents is outweighed by the County's need to obtain the documents.

NRC Staff and LILCO both support FEMA's response and assertion of executive privilege. The LILCO brief in support of FEMA makes the argument that the FEMA RAC is analogous to the NRC ACRS and that the deliberations and advisory opinions of ACRS are protected by executive privilege.

No party has challenged the ruling principles of law which we have applied to assertions of executive privilege in our November 1, 1983

(Attachment A hereto) and March 6, 1984 (Attachment B hereto) Orders ruling on motions to compel production of documents. Therefore, we shall continue to assume that our legal analysis of the doctrine of executive privilege is correct. To recap those orders, we set forth specific procedural requirements for the assertion of the privilege. Furthermore, we have characterized the privilege, once it is established, as a qualified one. Upon a prima facie showing of executive privilege, the Board must employ a balancing test to determine whether to pierce the qualified privilege. (See pages 5-7, Attachment A, and pages 3-5, Attachment B.) Factors to be weighed and considered in favor of piercing the privilege and releasing the documents are the following: (1) importance of the documents to the Suffolk County case; (2) the unavailability elsewhere of this information; (3) the philosophy of broad discovery under NRC rules of procedure; (4) our prior decision in the dispute between LILCO and New York State where we found that LILCO's need for the documents outweighed New York's claim of harm resulting from disclosure; and (5) the fact that in most cases here, the authors of the documents in question are not subordinates of the persons to whom the documents are addressed and therefore the possibility of any "chilling effect" of disclosure is lessened.

On the other side of this scale are the following factors which weigh against disclosure: (1) future RAC participants may alter their advice or input if they know that their comments may become public; (2) disclosure will curtail free expression, integrity and independence of those responsible; (3) the relevant information concerning the bases for



the FEMA RAC findings can be adequately tested through cross-examination of the four FEMA witnesses at the hearing and the disclosure of the drafts and early discussions leading to the final report are not needed by Suffolk County; (4) the documents requested are not relevant to the issues in this proceeding, i.e., the admitted contentions rather than the RAC Review of the LILCO Plan; (5) what one member of the RAC may have thought about the Plan under review is not relevant or probative of anything; and (6) our November 1, 1983 Order essentially upheld the executive privilege and denied most Suffolk County requests to produce drafts of similar documents.

#### ANALYSIS

Part 351 of the Federal regulations pursuant to Title 44 provides for the establishment of RACs and describes their duties. 44 C.F.R. § 351.10(b) provides for the establishment of Regional Assistance Committees in each of the 10 standard Federal regions. That section goes on to list the makeup of the RACs and concludes by stating: "The FEMA Chairperson of the RACs will provide guidance and orientation to other agency members to assist them in carrying out their functions." The function of the RAC is described in 44 C.F.R. § 351.11(b) to include the review of state and local radiological emergency plans and to observe exercises to evaluate the adequacy of such plans. The Federal agency members are charged with the responsibility of becoming knowledgeable about Federal planning and guidance in this area and where their agency can assist in improving the preparedness.



Turning first to the procedural objections of the County, we find that FEMA's submissions consisting of its Response and Affidavit of Louis O. Giuffrida adequately describe and designate the documents sought to be withheld. Likewise, these submissions by FEMA contain the precise reasons for preserving the confidentiality, i.e., the chilling effect on the agency's ability to receive written comments, concerns, and opinions from its staff and the chilling effect on the RAC Chairman's ability to receive such material from members of the RAC. Therefore, we reject this argument of Suffolk County.

Suffolk County next asserts that these documents are not privileged because they all relate to the RAC Review or the RAC Report which is attached to the FEMA testimony. Suffolk County asserts that this material consists of purely factual material. We disagree. While there are obviously facts contained in the documents, the thrust of these documents is that they contain evaluations, advisory opinions, recommendations and deliberations which fall within "executive privilege." We also find that the FEMA findings herein, as adopted from the RAC Report, involve the decision making process of government which is protected by executive privilege. Therefore, we find that FEMA has made a prima facie showing of executive privilege.

10 C.F.R. § 50.47(a)(1) states that no license may be issued without an NRC finding that offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

10 C.F.R. § 50.47(a)(2) states that the NRC will base its finding under 10 C.F.R. § 50.47(a)(1) on a review of the FEMA findings and determinations as to whether state and local emergency plans (in this case the LILCO Transition Plan) are adequate and capable of being implemented.

The FEMA RAC Review submitted to NRC on March 15, 1984, constitutes the FEMA findings and determinations as specified in 10 C.F.R. § 50.47(a)(2). The RAC Review was an evaluation of Revision 3 of the LILCO Transition Plan against each planning element specified in NUREG-0654. Almost all of the Intervenor's contentions refer to specific sections of NUREG-0654 and allege deficiencies in the Plan.

Hence, the FEMA findings of the RAC Committee are directly relevant to the issues in controversy in this licensing hearing. In general, the parties should be permitted to inquire into those findings and the procedures which were followed to arrive at the FEMA consensus. Only by probing those findings and determinations will the parties and Board be able to assess the weight to be given to those findings and determinations in our review under 10 C.F.R. § 50.47(a)(2). Thereafter, we will consider and assess all relevant and probative evidence in ruling on the question of the reasonable assurance finding to be made by the NRC pursuant to 10 C.F.R. § 50.47(a)(1).

This brings us to the balancing test to determine whether the qualified privilege should be pierced in this instance. On balancing the competing interests, we find that, as to most documents, the County's need to have these documents is greater than the harm or

"chilling effect" which such release will have on decision making in the future. We are most impressed with the fact that the FEMA RAC Report now constitutes FEMA's findings for purposes of 10 C.F.R. § 50.47. In this regard, the RAC is clearly distinguishable from ACRS. Moreover, three members of the RAC will testify for FEMA. The FEMA testimony incorporates numerous references to the RAC Report. Under these circumstances, it would be unfair to deny the County access to the underlying documents and processes by which the RAC Report achieved its final form. By this holding, we do not mean to imply that the comments of any individual RAC member may be relevant or admissible. What we are saying is that the County should be able to discover the underlying documents that went into the formulation of the publicly disclosed RAC Report because the information sought appears reasonably calculated to lead to the discovery of admissible evidence. We are aware that there might be some "chilling effect" as a result of this decision, but we think it will be less than those cases where we have previously withheld discovery. As to the RAC members, most of them are not employees or subordinates of FEMA. Presumably, they submit their independent opinions concerning an evaluation of an emergency preparedness plan. We cannot see why those opinions would be different even if it were known that such opinions would become public. As to the opinions and advice of FEMA staff employees, we are only authorizing release of the draft documents concerning the RAC Review and RAC Report. We find that the other internal advice giving documents of FEMA staff should not be disclosed consistent with our November 1, 1983 and March 6, 1984 Orders.

This litigation concerns the contentions of Suffolk County. Almost all of the contentions are founded upon the County's claim that the LILCO Transition Plan fails to comply with the regulations and NUREG-0654. The RAC Report evaluates the LILCO Transition Plan against the criteria in NUREG-0654. FEMA intends to present testimony of three RAC members on May 29, in support of its findings in the RAC Report. Thus, we find that the documents which underlie the RAC Report are centrally important to the County's case in asserting that the LILCO Transition Plan does not comply with NUREG-0654. We do not find that cross-examination alone, without access to these documents, will be equivalent.

We have reviewed each of the 35 documents submitted to us in camera by FEMA. We incorporate FEMA's Response to Suffolk County's Request for Production of Documents, dated May 14, 1984, consisting of 11 pages and attached hereto as Attachment C. We order as follows: On page 5 through page 7 of Attachment C, the documents numbered 1-23 shall be released as underlying documents, authored by members of the RAC, which went into the process of formulating the final RAC Report. The request to produce Document Nos. 1-23 is GRANTED. (Items 2 and 23 were not submitted to us.)

As to Document Nos. 24, 27, and 28 on page 7 of Attachment C, FEMA asserts that the final drafts of the letter and memos have been released to Suffolk County. That appears to be true as to Nos. 24 and 28, but we do not see No. 27 on the list of documents released to Suffolk County. In any event, the Board finds that the final drafts of each of these 3 should be released but that there is no showing of need by the County

for the release of earlier drafts. The request to produce Document Nos. 24, 27, and 28 is DENIED.

Document Nos. 25, 26, 31, 34-37 on pages 7 and 8 of Attachment C are drafts of various documents, documents with handwritten notes, and a compilation of RAC members' comments. For the reasons stated in connection with Document Nos. 1-23, we find that these documents should be released. As to Document Nos. 25, 26, 31, 34-37, the request to produce is GRANTED. (Item 35 consists of three drafts not two drafts as stated.)

Document Nos. 29 and 30 on page 7 of Attachment C are internal working papers concerning preparation for a press conference which was never held. We find that the County has established no need for these documents and the request to produce Document Nos. 29 and 30 is DENIED.

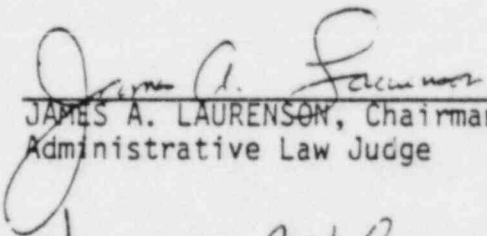
Document No. 32 on page 8 of Attachment C is an internal FEMA option paper concerning strategies for dealing with the Shoreham offsite emergency preparedness problem. We have reviewed this document and it is not relevant to the RAC Review or Report. We find that the "chilling effect" of releasing this document would outweigh any potential need of the County to see it. Therefore, the request to produce Document No. 32 is DENIED.

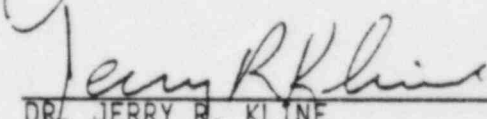
Document No. 33 on page 8 of Attachment C is a draft of a memorandum, the final draft of which FEMA indicates has been released to Suffolk County. This draft shall not be released for the same reasons stated in connection with Document Nos. 24, 27 and 28. The request to produce number Document No. 33 is DENIED.

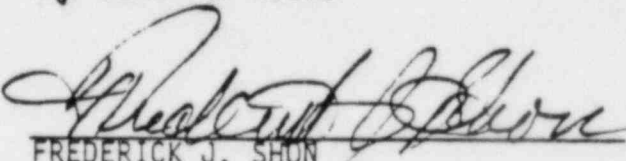
Based upon this Order, we believe that FEMA and Suffolk County should be able to resolve their differences about additional RAC related documents which may be subsequently obtained by FEMA.

IT IS SO ORDERED.

ATOMIC SAFETY AND  
LICENSING BOARD

  
JAMES A. LAURENSEN, Chairman  
Administrative Law Judge

  
DR. JERRY R. KLINE

  
FREDERICK J. SHON

Bethesda, Maryland



DOCKETED  
USNRCUNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

83 NOV -2 P4:01

Before Administrative Judges  
James A. Laurenson, Chairman  
Dr. Jerry R. Kline  
Mr. Frederick J. Shon

SERVED NOV 3 1983

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

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

November 1, 1983

MEMORANDUM AND ORDER RULING ON SUFFOLK COUNTY  
MOTION TO COMPEL FEMA TO PRODUCE DOCUMENTSI. Procedural History

On September 19, 1983, Suffolk County (the County) filed a "Motion to Compel Discovery from FEMA (Federal Emergency Management Agency)." Some matters raised in that motion have been settled by the parties. However, as relevant here, the County requested discovery of the following: (1) all drafts of the Memorandum dated June 23, 1983 from Richard W. Krimm, Assistant Associate Director of FEMA to Edward L. Jordan of the NRC; (2) all drafts of a letter dated August 29, 1983 from Jeffrey S. Bragg, Executive Deputy Director of FEMA to William J. Dircks, Executive Director of Operations of NRC; and (3) written instructions from Gary D. Johnson, Executive Officer of FEMA to Fred Sharrocks, Senior Program Manager at FEMA regarding preparation of a

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draft FEMA response to the July 22, 1983 letter from William J. Dircks of the NRC.

On September 21, 1983, FEMA filed a response to the County's motion wherein FEMA asserted that the above listed documents were not subject to discovery because of "executive privilege." FEMA cited no authority in support of its position.

On September 26, 1983, we held a Discovery Conference in Washington, D. C. Efforts to settle this discovery dispute between the County and FEMA were unavailing. The Board notified FEMA that it had not properly invoked the claim of "executive privilege." However, FEMA was given a period of 15 days to perfect the claim of privilege by completing the following: (1) the claim must be asserted by the head of the agency, i.e., Louis O. Giuffrida, Director; (2) the claim must specifically describe and designate the documents sought to be withheld; (3) the claim must state the precise reasons for preserving the confidentiality of the documents; and (4) the documents for which executive privilege was claimed must be submitted under seal for the Board's in camera review if that became necessary. The Board invited the parties' attention to U.S. v. Capitol Service, Inc., 89 F.R.D. 578 (E.D. Wis. 1981). The Board also informed NRC Staff that its terse concurrence with FEMA's position was "wholly insufficient." (T. 590). All parties were given a period of one week to respond to FEMA's claim of privilege. (T. 602).

On October 12, 1983, FEMA submitted another response to the County's motion to compel discovery. Of the three disputed items listed

in the County's September 19, 1983 motion, FEMA asserted the claim of executive privilege as to items 1 and 2. FEMA did not address item 3. In addition to items 1 and 2, FEMA also asserted a claim of executive privilege for the following documents:

- A. Those sections of a Briefing Paper on Shoreham prepared by the staff of Region II for Frank P. Petrone, Regional Director detailing his staffs identification of issues and recommendations.
- B. 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.
- C. 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.
- D. Portions of Status Report on Shoreham Nuclear Power Plant dealing with opinions of staff.
- E. Analysis of a hypothetical question concerning LILCO, New York State and Suffolk County response to an accident at the Shoreham Nuclear Power Station.

The FEMA claim of privilege was made by its Director, Louis O. Giuffrida. His affidavit states that he personally examined the documents in controversy and concluded that their production would be contrary to the public interest. He asserted that the seven categories of documents "consist of intra-departmental memoranda and communications containing opinions, recommendations and deliberations pertaining to decisions" subsequently made by FEMA. He went on to say that the disclosure 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 of Louis O. Giuffrida, at 3.

On October 19, 1983, Suffolk County filed a Supplemental Response in support of its motion to compel production of the documents. The County first claims that the Affidavit of Director Giuffrida is defective because it is unsigned. The County also asserts that FEMA failed to comply with the criteria listed by the Board at the Discovery Conference. Finally, the County asserts that the doctrine of "executive privilege" is not available to FEMA because that agency is not engaged in policy formation. The County claims that FEMA "is engaged only in rendering its factual findings." Suffolk County Supplemental Response at 10. Thus, the County's argument goes, "executive privilege" may only be asserted in connection with policy formulation and since FEMA formulates no policy in connection with the documents in controversy here, it is not entitled to claim privilege.

In spite of the Board's prior characterization of the NRC Staff position on this issue as "wholly inadequate," NRC Staff elected not to respond to FEMA's claim of executive privilege.

## II. ISSUES

Whether discovery of the documents in question is precluded by the doctrine of "executive privilege" and whether FEMA properly invoked "executive privilege" in this matter.

### III. APPLICABLE LAW

The scope of discovery in NRC proceedings is quite broad. The pertinent rule is as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding . . . . It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

10 CFR § 2.740(b)(1). (Emphasis supplied.)

Although not cited by any party to this dispute, the prior Licensing Board in the instant matter was called upon to decide whether the County could prevent disclosure of some of its documents because of "executive privilege." In Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144 (1982), the County opposed LILCO's discovery requests for emergency planning documents because of, inter alia, executive privilege of the County. The Licensing Board summarized the applicable law concerning "executive privilege" as follows:

The executive privilege is a qualified privilege, and does not attach to purely factual communications, or to severable factual portions of communications, the disclosure of which would not compromise military or state secrets. EPA v. Mink, 410 U.S., at 87-88; Smith, supra, 403 F. Supp., at 1015. Furthermore, even communications which fall within the protection of the privilege may be disclosed upon an appropriate showing of need. United States v. Leggett & Platt, Inc., 542 F. 2d 655, 658-659 (6th Cir. 1976) cert.



denied, 430 U.S. 945 (1977). See also Smith, 403 F. Supp., at 1015-1016. In determining the need of a litigant seeking the production of documents covered by the executive privilege, an objective balancing test is employed, weighing the importance of the documents to the party seeking their production and the availability elsewhere of the information contained in the documents against the government interest in secrecy. Legget & Platt, supra, 542 F. 2d, at 658-659.

Id. at 1164-5. It is clear that executive privilege in connection with state secrets or military secrets, the disclosure of which would threaten national security, is a matter of absolute privilege. See Kinoy v. Mitchell, 67 FRD 1 (S.D.N.Y. 1975). However, since the only claim of executive privilege asserted by FEMA here is that disclosure of the documents would be harmful to the decision making process of the agency, we agree with the statement of the prior licensing board in Shoreham that this is a "qualified privilege."

As pertinent here, "executive privilege" has been described by several other names: deliberative process of 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. See Branch v. Phillips Petroleum Co., 628 F. 2d 873 (5th Cir. 1981). Agency documents which reflect advisory opinions, recommendations, or deliberations fall within "executive privilege." U.S. v. Capitol Service Inc., supra, at 582. 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. U.S. v. Nixon, 418 U.S. 683, 705 (1974).

The U.S. Supreme Court in EPA v. Mink, 410 U.S. 73 (1973), set forth rules for separating factual material from "deliberative information" through in camera inspection, in cases brought pursuant to the Freedom of Information Act. The same procedure has been followed in "executive privilege" cases. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966) aff'd on opinion below, 384 F. 2d 979 (D.C. Cir.) cert. den. 389 U.S. 952 (1967).

[C]ourts should not hesitate to make a private examination of disputed materials upon a reasonable showing that it can serve a purpose truly useful to a party actually or potentially entitled to some discovery . . . . In camera inspection in executive privilege cases is appropriate where it appears with reasonable clarity that the party seeking production is entitled to access to some of the materials demanded. Examination in this type of situation enables the separation of what should be disclosed from what should not be revealed . . . ."

Id. at 331.

#### IV. OPINION

We begin our analysis and review of this controversy by assessing the affidavit of FEMA's Director, Louis O. Giuffrida, in the light of our announced prerequisites and the County's objections. First, we note that our copy of the affidavit is signed by Director Giuffrida and his signature is notarized. There is no reason to doubt the validity of the signature. Accordingly, the County's objection that the affidavit is defective because it is unsigned will be overruled.

Second, the County claims that the FEMA affidavit should be rejected because it fails to comply with the criteria established for that affidavit by the Board during the Discovery Conference. We find that FEMA Director Louis O. Giuffrida is the head of his agency. The Giuffrida affidavit describes the seven documents sought to be withheld. The affidavit asserts that FEMA Director Giuffrida personally examined the documents in controversy and invoked "executive privilege" to prevent disclosure of "intra-departmental memoranda and communications containing opinions, recommendations, and deliberations pertaining to decisions" of FEMA. He further stated that disclosure of the documents would have a "chilling effect" on the ability of FEMA to receive written comments and opinions in the future. We find that, for the purpose of asserting "executive privilege," the seven FEMA documents are described and the reason for preserving confidentiality is articulated. Hence, we find that FEMA has complied with our order concerning the prerequisites

of the claim of executive privilege. The objections of Suffolk County to the FEMA affidavit are overruled.

This leads us to the County's claim that the doctrine of "executive privilege" is not available to FEMA because the privilege is only available to protect against disclosure of communications regarding policy formulation and FEMA does not engage in policy formulation in this matter. We find that the County is mistaken. Executive privilege is not limited to policy formulation but extends to the agency's decision making process. In Kaiser Aluminum & Chemical Corp. v. U.S., 157 F. Supp. 939 (Ct. of Claims 1958), Justice Reed (Retired), sitting by designation held,

The document sought here was a part of the administrative reasoning process that reached the conclusion embodied in the contracts with Kaiser and Reynolds. The objective facts, such as the cost, condition, efficiency, terms and suitability are otherwise available. So far as the disclosure of confidential intra-agency advisory opinions is concerned, we conclude that they belong to that class of governmental documents that are privileged . . . .

Id. at 946.

While we agree with the County that purely factual material is not privileged, it is unproductive to attempt to distinguish "policy formulation" from "decision making" or "administrative reasoning." As 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." Thus, the County's argument that we should not consider FEMA's assertion

of privilege, for failure to specify the type of policy formulation involved, is rejected.

Although we find in favor of FEMA concerning its claim of the existence of "executive privilege" here, that does not end the matter. We have previously stated that the privilege is a qualified one. This requires us to balance the need for the privilege against the need of the County to have the documents. With this standard in mind, we begin our review of Director Giuffrida's affidavit asserting "executive privilege" for seven documents. We shall discuss them in the order listed therein.

"(a.) All drafts of a memorandum . . . ."

At the outset we note that the final version of this memorandum, from FEMA to NRC on June 23, 1983, is public information which has been served on all parties. We find that the drafts which led up to the final product are privileged and the County has failed to establish compelling reasons for disclosure. We see no reason to examine the drafts. The County's motion to compel production of these drafts is DENIED.

"(b.) All drafts of a letter . . . ."

Again we note that the final version of the letter drafted August 29, 1983 from FEMA to NRC is publicly available. We see no reason to examine these drafts. For the same reasons listed concerning drafts of the memorandum above, we DENY the County's motion to compel production of these documents.

"(c.) Those sections of a Briefing Paper on Shoreham prepared by the Staff . . . for . . . Regional Director . . . detailing his staff's identification of issues and recommendations."

We find this to be the type of opinion and recommendation squarely protected by the privilege. The County again failed to establish any compelling need for the document which would suffice to overcome the privilege. We found no reason to examine this document. FEMA's claim of "executive privilege" is SUSTAINED.

"(d.) Memorandum . . . dated June 7, 1983 concerning the response of FEMA to the NRC request of June 1, 1983."

Although we previously found that FEMA had properly identified this document for a claim of privilege, FEMA's description of the memorandum led us to believe that part of it may be discoverable. Accordingly, we unsealed the documents and examined this memorandum. We find that the memorandum contains factual material which can be separated from the privileged material. Prior to the last paragraph on page 1, the memorandum contains only factual, non-privileged matter. Beginning with the last paragraph on the first page, the remainder of the memorandum is privileged. The County has not established a compelling reason for disclosure of the privileged material. To clarify this matter, FEMA shall produce a copy of the June 7, 1983 memorandum from Gary D. Johnson to Richard W. Krimm through the paragraph ending with the phrase, "in preparation of FEMA's response to NRC." As to the remainder of that memorandum, FEMA's claim of privilege is SUSTAINED.



"(e.) Draft letter, never mailed . . . ."

For the reasons stated in connection with draft memorandums and draft letters in parts (a.) and (b.) supra, we uphold FEMA's claim of executive privilege and find no reason to review this document.

"(f.) Portions of Status Report . . . ."

"(g.) Analysis of a hypothetical question . . . ."

In connection with these two documents, we concluded that the documents in question should be reviewed in order to balance the competing interests. Accordingly, the Board examined the portions of the status report and analysis of a hypothetical question and concluded that neither document contained discoverable factual material and that both documents contained opinions, deliberations and recommendations which should be withheld. FEMA's claim of "executive privilege" as to these items is SUSTAINED.

In addition to the documents described above, Suffolk County, in its Motion to Compel Discovery from FEMA, requested production of written instructions from Gary D. Johnson of FEMA to Fred Sharrocks of FEMA concerning preparation of a draft response to a letter from NRC. FEMA has not asserted "executive privilege" or otherwise objected to the production of this material. Accordingly, Suffolk County's motion to compel production of these written instructions is GRANTED.

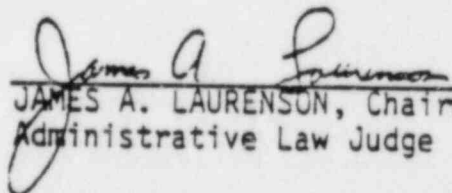


V. ORDER

WHEREFORE IT IS ORDERED that FEMA shall submit to Suffolk County the following documents: (1) Page 1 of a memorandum dated June 7, 1983 from Gary D. Johnson to Richard W. Krimm through the paragraph ending with the phrase, "in preparation of FEMA's response to NRC;" and (2) written instructions from Gary D. Johnson to Fred Sharrocks concerning preparation of a FEMA response to a July 22, 1983 letter from William J. Dircks of NRC.

IT IS FURTHER ORDERED that as to all other documents for which "executive privilege" was claimed, as identified in the Suffolk County Motion to Compel Discovery from FEMA and the October 12, 1983 FEMA response, the FEMA claim of "executive privilege" is SUSTAINED and the Motion to Compel Discovery is DENIED.

ATOMIC SAFETY AND  
LICENSING BOARD

  
JAMES A. LAURENSEN, Chairman  
Administrative Law Judge

Bethesda, Maryland

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges  
James A. Laurenson, Chairman  
Dr. Jerry R. Kline  
Mr. Frederick J. Shon

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

Docket No. 50-322-OL-3

(Emergency Planning Proceeding)

March 6, 1984

MEMORANDUM AND ORDER RULING UPON LILCO'S  
MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND  
OBJECTIONS OF GOVERNOR MARIO CUOMO

A. Procedural History

On February 6, 1984, LILCO filed a "Motion to Compel Expedited Production of Documents by New York State." On February 8, we issued an "Order Establishing Expedited Response Schedule." On February 13, Governor Cuomo filed a Memorandum in Opposition to the Motion to Compel Production. On February 13, Suffolk County also filed a "Response" to LILCO's motion. On February 15, we held a conference telephone call and advised the parties that New York State was ordered to produce a list of all documents requested and to provide copies of the documents to which New York had no objection. On February 23, 1984, New York produced copies of certain documents, an explanation concerning other documents which could not be identified or located, and objections to the

production of the remaining documents for the following reasons: relevancy, executive privilege, attorney-client privilege and attorney work product. LILCO presented an oral argument concerning New York's objections on February 24, 1984. (Tr. 3883-3889.) On February 27, New York submitted an Affidavit of David Axelrod, M.D., Chairman of the New York State Disaster Preparedness Commission. Dr. Axelrod certified that he personally reviewed each of the withheld documents and was claiming "executive privilege" for certain documents. His affidavit further asserts that the release of these documents "would have a chilling effect on the ability of the DPC to receive written comments, concerns and opinions of its staff." On February 28, LILCO filed a "Motion for Leave to Make and Supplement Replies, etc." On February 29, counsel for New York and LILCO sent us letters concerning this dispute. On March 1, the Board conducted a conference call with counsel for New York and LILCO at which time we advised them of our ruling on each document in question. New York and LILCO were informed that this Order would be put in writing. On March 2, counsel for Suffolk County sent us a letter protesting the fact that the County had not been included in the conference telephone call of March 1. The County also suggested a procedure for future conference calls.

B. Issue

Whether the documents in question are privileged and, if so, whether such privilege is outweighed by LILCO's need for the documents.

C. Applicable Law

On November 1, 1982, we issued a "Memorandum and Order Ruling on Suffolk County Motion to Compel FEMA to Produce Documents," In the Matter of Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1) LBP-83-72, 18 NRC \_\_\_\_ (1983). Therein, we discussed at length the law applicable to "executive privilege." We set forth procedural requirements for asserting the privilege as well as the fact that it is, insofar as relevant here, a qualified privilege which requires a balancing test. Thereafter, we conducted an in camera inspection of certain FEMA documents. We held that some were privileged and others were not. Insofar as New York asserts "executive privilege" here, we reaffirm our prior analysis. Indeed, none of the parties to the instant dispute challenge our prior conclusions of law or their application.

To recap our prior conclusions on the doctrine of "executive privilege," we first held that the claim of "executive privilege" must (1) be asserted by the head of the agency; (2) specifically describe the documents sought to be withheld; (3) state precise reasons for preserving confidentiality of the specific documents; and (4) be accompanied by the documents themselves, under seal, for possible in camera inspection by the Board. If the governmental agency makes a prima facie showing of the above criteria, the Board will then find that the privilege is a qualified one and will balance the litigant's need for the documents against the government's assertion of the "chilling effect" on its decision making process.

In connection with the instant dispute, we re-examined the guidance of the federal courts in the application of the balancing test. In U.S. v. Leggett & Platt, Inc., 542 F.2d 655 (6th Cir. 1976), the court stated,

The district court properly applied a balancing test in determining whether LP could pierce the qualified governmental official information privilege to obtain the investigatory files . . . . To override the government interest in secrecy, the court must find that LP's objective, rather than its subjective need for the documents overrides the governmental interest in secrecy.

Id. at 658. The court went on to identify the factors to be considered including the following: the importance of the documents to the party's case and the availability elsewhere of the information contained in the documents. Id. at 659.

In A. O. Smith v. FTC, 403 F. Supp. 1000, 1015-6 (D. Del. 1975), Judge Schwartz states as follows:

While the exact showing necessary to surmount a governmental claim of privilege is unclear, what is basically involved in each case is an ad hoc balancing of individual need for the materials against the harm resulting from any such disclosure. In fact, it is this assessment of individual need that most completely distinguishes adjudications of executive privilege under the Freedom of Information Act, where an individual's need for materials is deemed irrelevant. [Citations Omitted.]

In Kinoy v. Mitchell, 67 F.R.D. 1, 11 (S.D.N.Y. 1975) the test was stated as follows:

This type of information is protected by a qualified, not an absolute privilege, so

that the claim of privilege made by the Government may be overcome by a litigant's showing of need for the material great enough to outweigh the policies favoring nondisclosure. Or the Court may reconcile the competing interests, after in camera inspection of the documents, by ordering partial disclosure, or disclosure subject to a protective order.

The Court went on to state:

The factors which the Court considers are many and complex. The deliberative and decision-making process of Government officials are held confidential to preserve the free expression, integrity and independence of those responsible for making the determinations that enable government to operate.

Ibid.

And finally,

Against these considerations favoring nondisclosure, the courts weigh the needs of the litigant seeking disclosure, keeping in mind the philosophy of broad discovery which the Federal Rules of Civil Procedure embrace. Discovery is most likely when the material is centrally important and the litigant has no other means of obtaining equivalent proof of his allegations or defenses.

Id. at 12.

The "Attorney-Client Privilege" and "Work Product Doctrine" were discussed in detail in an earlier Memorandum and Order Ruling on LILCO's Motion to Compel Discovery of Suffolk County Emergency Planning Documents of the other licensing board at 16 NRC 1144, 1157 et. seq. (1982). We adopt and apply the tests discussed therein. Without belaboring the point, it should be noted that we have sustained each and



every objection of New York which was founded upon "attorney-client" or "work product" privilege.

D. Application of the Law to the Documents in Controversy.

In connection with several documents, New York objected to the motion to compel production for the reason that the document was believed to be "irrelevant" because it concerns a plan prepared by LILCO in the spring of 1982, which plan relied on the County and the State for implementation." (emphasis in original.) Objections of Governor Mario Cuomo, etc. at 3. Other relevancy objections were lodged against production of documents dealing with DPC rules and regulations. Id. at 5. Suffice it to say that the liberal provisions of Rule 26 of the Federal Rules of Civil Procedure have been incorporated in the NRC Rules of Practice. The applicable NRC discovery rule provides that "it is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 10 C.F.R. § 2.740(b)(1). In each instance where New York asserts a relevancy objection, we find that the discovery of the New York State review of the earlier LILCO plan and the DPC procedures are reasonably calculated to lead to the discovery of admissible evidence. All of New York's relevancy objections are overruled.

In the majority of instances we sustained New York's claim of "executive privilege." The principal area in which we overruled New York's assertion of "executive privilege" is the review and assessment

of LILCO's earlier emergency evacuation plan by New York's employees. For purposes of identification, these documents are designated and listed below as Nos. 1, 2, 12, 15-23, and 30. At the outset we note that many of these documents are primarily factual and, hence, no "executive privilege" attaches to purely factual material. For example, the New York review of LILCO's earlier emergency evacuation plan found many elements required by NUREG-0654 to be "missing." However, intertwined with this factual material are other assessments of "adequate" or "inadequate." Such subjective determinations constitute advisory opinions or recommendations which are included within "executive privilege." Hence, we found that most of the above documents fall within "executive privilege."

Pursuant to our prior discussion of the qualified nature of "executive privilege," we next proceed to the balancing test of weighing LILCO's need for the documents against New York's need for secrecy. At the present time, New York has become an active participant in opposition to LILCO. New York expects to present witnesses who will testify concerning deficiencies or inadequacies in LILCO's current plan. We, therefore, conclude that fairness dictates that LILCO should be given access to prior assessments of LILCO's earlier evacuation plan in order to determine whether it can impeach New York's witnesses with prior inconsistent statements about the same or similar provisions of the plan. Obviously, this information is not available to LILCO through any other means. We find that LILCO has a compelling need to see these documents. On the other hand, New York's fear of a "chilling effect on

the ability of the DPC to receive written comments, concerns, and opinions of its staff" is less compelling. The documents in question concern advice that was given more than a year ago about a plan that is no longer viable. While this does not mean that discovery of such information will not lead to admissible evidence, it does mean that the "chilling effect" is less than it would be for a viable plan. Moreover, the nature of the "comments, concerns, and opinions" contained in the document is such that we find that disclosure of these documents will have little, if any, "chilling effect." Frankly, New York is not entitled to have its cake and to eat it too. As an active participant in this proceeding, its interests in preserving secrecy are outweighed by LILCO's need to have these documents to effectively cross-examine New York's witnesses.

As we explained to New York and LILCO in our telephone conference call of March 1, 1984, we have numbered each of the documents (or groups of documents) in question. We will proceed through this list of 36 documents in the order in which they are listed beginning at the bottom of page 3 of Governor Cuomo's Objections. The description of each document by New York was inadequate for us to rule upon the assertion of the privilege without conducting an in camera inspection. Therefore, we have read each of the 36 documents and applied the tests enumerated above. Where we agree with New York, we have SUSTAINED its objection and DENY the motion to compel production of the document. Where we find for LILCO, we OVERRULE New York's objection and GRANT the motion to

compel production of the document. In a few instances, we have SUSTAINED the objection in part and OVERRULED the objection in part.

<u>Document Date</u>	<u>Objection</u>	<u>Ruling</u>
1. 6-1-82	Irrelevant; Executive Privilege	OVERRULED; We find that this document is subject to Executive Privilege, but that LILCO's need to have this document outweighs New York's need for secrecy for the following reasons: (1) LILCO may be able to show that New York witnesses who will testify against the current plan made prior assessments which are contrary to their present testimony; and (2) the form in which the assessment is made is such that disclosure of the document is not likely to have a "chilling effect."
2. Undated	Irrelevant; Executive Privilege	SUSTAINED as to page 1 because of Executive Privilege containing opinions of the author, but OVERRULED as to the "comments." The comments are primarily factual and LILCO's need for these "comments," which are not available elsewhere, outweighs New York's need for secrecy.
3. 5-17-82	Executive Privilege	OVERRULED. We find this to be a factual account of a meeting, and it does not qualify as executive privilege.
4. 5-14-82	Executive Privilege	SUSTAINED. These appear to be handwritten notes containing personal

observations of the author. LILCO's need for this document does not overcome New York's need for secrecy.

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| 5.  | 4-26-83                                  | Executive Privilege   | SUSTAINED. LILCO's need to know does not outweigh New York's need for secrecy.   |
| 6.  | 3-4-83                                   | Executive Privilege   | SUSTAINED. Same as No. 5.  |
| 7.  | 3-7-83                                   | Executive Privilege, Attorney-Client and Work Product   | SUSTAINED. Attorney-client and work product privilege.   |
| 8.  | 2-23-83                                  | Executive Privilege, Attorney-Client and Work Product   | SUSTAINED. Same as No. 7.  |
| 9.  | 1-19-83                                  | Executive Privilege   | SUSTAINED. Same as No. 5.  |
| 10. | 2-16-83                                  | Executive Privilege, Attorney-Client and Work Product   | SUSTAINED. Same as No. 7.  |
| 11. | 2-11-83                                  | Executive Privilege   | SUSTAINED. Same as No. 5.  |
| 12. | 1-30-82,<br>error--should<br>be 11/30/82 | Executive Privilege--<br>merely a staff advisory<br>rating which was never<br>acted upon by DPC | SUSTAINED only as to the<br>2-page cover memo;<br>OVERRULED as to the 13<br>pages of review for the<br>reasons in No. 1 and 2. |
| 13. | 12-6-82                                  | Executive Privilege   | SUSTAINED. Same as No. 5.  |
| 14. | Various<br>Dates                         | Executive Privilege   | SUSTAINED. Same as No. 5.  |
| 15. | 11-24-82                                 | Executive Privilege   | OVERRULED. LILCO's need to see this otherwise unavailable information outweighs New York's need for secrecy.                   |
| 16. | 11-23-82                                 | Executive Privilege   | OVERRULED. Same as No. 15.   |
| 17. | 11-19-82                                 | Executive Privilege   | OVERRULED. Same as No. 15.   |



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| 18. | 11-15-82 | Executive Privilege                                   | OVERRULED. Same as No. 15.  |
| 19. | 10-25-82 | Executive Privilege                                   | OVERRULED. Same as No. 15.  |
| 20. | 9-16-82  | Executive Privilege                                   | OVERRULED. Same as No. 15.  |
| 21. | 9-13-82  | Executive Privilege                                   | OVERRULED. Same as No. 15.  |
| 22. | 9-8-82   | Executive Privilege                                   | OVERRULED. Same as No. 15.  |
| 23. | 5-17-82  | Executive Privilege                                   | OVERRULED. This is a purely factual document to which executive privilege does not attach.  |
| 24. | 11-9-82  | Executive Privilege                                   | SUSTAINED. Same as No. 5.   |
| 25. | 7-23-83  | Executive Privilege and Attorney-Client Privilege     | SUSTAINED. For the reasons set forth in document No. 5 with the exception that a clean copy of the letter dated June 23, 1982 from Howard E. Pachman to Chairman Hennessey shall be released since this letter is not privileged. |
| 26. | 5-18-82  | Executive Privilege, Work Product and Attorney-Client | SUSTAINED. Same as No. 7.   |
| 27. | 7-18-83  | Executive Privilege, Attorney-Client and Work Product | SUSTAINED. Same as No. 7.   |
| 28. | 7-1-83   | Executive Privilege; Irrelevant                       | OVERRULED. The page 1 memorandum is purely factual and executive privilege does not attach. The attachment is not privileged and we have previously denied New York's relevancy objection to this.                                |
| 29. | 6-27-83  | Executive Privilege, Attorney-Client and Work Product | SUSTAINED. Same as No. 7.   |



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| 30. | 6-20-83 | Executive Privilege,<br>Attorney-Client and<br>Work Privilege | SUSTAINED as to the<br>first six pages of legal<br>memoranda for the<br>reasons set forth in No. 7.<br>However, the attachments<br>appear to be the same<br>attachments previously<br>ordered to be released in<br>our ruling concerning docu-<br>ment No. 1. To the<br>extent that New York<br>objects to release of the<br>review and rating, that<br>objection is OVERRULED and<br>those two attachments to<br>the memoranda are ordered<br>to be released. |
| 31. | 5-17-83 | Executive Privilege,<br>Attorney-Client and<br>Work Privilege | SUSTAINED. Same as No. 7.  |
| 32. | 5-11-83 | Executive Privilege,<br>Attorney-Client and<br>Work Privilege | SUSTAINED. Same as No. 7.  |
| 33. | 4-29-83 | Executive Privilege,<br>Attorney-Client and<br>Work Privilege | SUSTAINED. Same as No. 7.  |
| 34. | 4-29-83 | Executive Privilege,<br>Attorney-Client and<br>Work Product   | SUSTAINED. Same as No. 7.  |
| 35. | 5-18-83 | Executive Privilege,<br>Attorney-Client and<br>Work Product   | SUSTAINED. Same as No. 7.  |
| 36. | Undated | Executive Privilege,<br>Attorney-Client and<br>Work Product   | SUSTAINED. Same as No. 7.  |

E. Suffolk County's Objections to Conference Call Advising LILCO and New York of the Board's Rulings in This Discovery Dispute.

On March 2, 1984, one of the attorneys for Suffolk County sent the Board a letter stating that "the County strenuously objects to this Board's conduct." The County was upset that it had not been included in the conference call of March 1, to hear the Board's ruling on this discovery dispute between LILCO and New York. The County notes that it had previously taken a position on this matter on February 13. The County's February 13 "Response" consisted of two sentences supporting the argument of New York and opposing LILCO's motion.

In light of all the circumstances, we believed that the instant dispute was between LILCO and New York concerning whether New York would be compelled to produce documents which it claimed to be privileged. We convened the conference call to notify LILCO and New York of our rulings so that they could take steps to implement the ruling when it was written. The Board confesses that it not only neglected to include Suffolk County in the conference call but also omitted NRC Staff, FEMA, Shoreham Opponents Coalition, North Shore Committee Against Thermal and Nuclear Pollution, and the Town of Southampton. Unless the County presents facts to support its assertion that we "have often made statements of pertinence to the parties that are not later memorialized in written orders," we shall disregard such a claim. We have endeavored to minimize telephone conference calls because of the difficulties presented in conducting such calls with eight parties. In the future,

we will consider Suffolk County's request that a transcript be made of each such call.

ORDER

WHEREFORE IT IS ORDERED that LILCO's Motion to Compel Production of New York State Documents is GRANTED as to the documents listed and designated above as follows: 1, 3, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 28.

IT IS FURTHER ORDERED that LILCO's Motion to Compel Production of New York State Documents is DENIED as to the documents listed and designed as follows: 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 24, 26, 27, 29, 31, 32, 33, 34, 35 and 36.

IT IS FURTHER ORDERED that LILCO's Motion to Compel Production of New York State Documents is GRANTED IN PART and DENIED IN PART as more fully sent forth above as to the documents listed and designated as follows: 2, 12, 25 and 30.

ATOMIC SAFETY AND  
LICENSING BOARD

James A. Laurenson  
JAMES A. LAURENSEN, Chairman  
Administrative Law Judge

Bethesda, Maryland

UNITED STATES OF AMERICAN  
NUCLEAR REGULATORY COMMISSION

ATTACHMENT C

Before the Atomic Safety and Licensing Board

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

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

FEMA'S RESPONSE TO  
SUFFOLK COUNTY REQUEST FOR  
PRODUCTION OF DOCUMENTS

FEMA was served with a Discovery Request by Suffolk County on April 23, 1984. Included in that request was a three part Document Request related to the Regional Assistance Committee's (RAC) review of the LILCO Transition Plan. Pursuant to the provisions of 10 CFR 2.740(f), 2.741(d) and the Board's instructions of May 9, 1984 FEMA respectfully submits the following reply.

FEMA has produced as part of a Freedom of Information Request numerous documents to the law firm of Kirkpatrick-Lockhart. Counsel for Suffolk County has agreed that FEMA need only identify those documents previously provided which are responsive to the present Discovery Request.

The following documents relevant to this Request were provided to Suffolk County's counsel pursuant to the FOIA inquiry:

1. September 23, 1983 memorandum from Jeffrey S. Bragg, Executive Deputy Director to Frank P. Petrone, Regional Director, Region II requesting Mr. Petrone's office arrange for the performance of a full RAC review of Revision 1 of the LILCO Transition Plan.
2. September 23, 1983 memorandum from Richard W. Krimm, Chairman, FRPCC to the Federal Radiological Preparedness Coordinating Committee (FRPCC) members informing them that a request will be made for RAC support.

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3. October 4, 1983 memorandum from Frank P. Petrone, Regional Director to all Region II RAC members outlining the schedule for review of the LILCO Plan for Shoreham.
4. October 7, 1983 memorandum from Philip McIntire for Frank P. Petrone, Regional Director to Richard Krimm, Assistant Associate Director, NTH - Subject: Status Report #1 Shoreham Plan review.
5. October 24, 1983 memorandum from Frank P. Petrone, Regional Director to Richard W. Krimm, Subject: Shoreham Plan Review Status Report #2.
6. October 27, 1983 memorandum from Richard W. Krimm to Edward L. Jordan, Director Division of EP&ER, USNRC. Subject: FEMA'S need for an extension to complete the review of the LILCO Transition Plan, Revision 1.
7. November 4, 1983 letter from Louis O. Giuffrida, Director FEMA and Nunzio J. Palladino, Chairman NRC to Honorable Alan K. Simpson conveying quarterly report on emergency preparedness for nuclear power plants.
8. November 8, 1983 memorandum from Frank P. Petrone to Richard Krimm, Subject: Shoreham Plan Review Status Report #3.
9. November 16, 1983 memorandum from Frank P. Petrone to Richard W. Krimm, Subject: Shoreham Plan Review Revision 2.
10. November 18, 1983 memorandum from Roger B. Kowieski, Chairman RAC to Philip McIntire, Chief NTH, Region II, Subject: LILCO's Emergency Response Plan Revision II.
11. November 23, 1983 memorandum from Roger B. Kowieski to Frank P. Petrone and Philip McIntire - Subject: Review of the LILCO Plan for the Shoreham Nuclear Power Station (Assumptions used in review of Plan).
12. December 8, 1983 memorandum from Samuel W. Speck, Associate Director State & Local Programs and Support to Frank P. Petrone, Subject: Extension of time for the Review of the LILCO Transition Plan. Revision 2.
13. December 12, 1983 memorandum from Roger B. Kowieski to Philip H. McIntire, Subject: RAC review of the LILCO Transition Plan.
14. December 14, 1983 letter from Donald P. Irwin to Bernard M. Bordenick dealing with timeliness of submittal of Revision 3 to FEMA.
15. December 14, 1983 letter from Donald P. Irwin to Stewart M. Glass including a general description of changes to occur in Revision 3.



16. December 14, 1983 letter from Donald P. Irwin to Stewart M. Glass relating to Revision 3 of the LILCO Transition Plan.
17. December 15, 1983 Telefax from Frank P. Petrone to Richard W. Krimm, Subject: Shoreham Activities Report #5.
18. December 16, 1983 from Roger B. Kowieski to all Region II RAC members outlining schedule for work on Revision 2.
19. December 20, 1983 memorandum from Frank P. Petrone to Samuel W. Speck, Subject: Extension of time for RAC review of LILCO Transition Plan for Shoreham.
20. December 21, 1983 letter from Stewart M. Glass to Donald P. Irwin, confirming Transmittal of collated LILCO Transition Plan, Revisions 3 and matrix of changes.
21. December 29, 1983 letter from John Wesmante (LILCO) to Stewart M. Glass, confirming that copies of the LILCO Transition Plan were sent to all RAC members. Attached is cross - reference to the plan.
22. January 9, 1984 memorandum from Frank P. Petrone to Samuel W. Speck, Subject: RAC Review of LILCO Transition Plan - Revision 1, 2, & 3.
23. January 10, 1984 - Attendance list and staff notes of LILCO Briefing on Revision #3. (In attendance representatives from Kirkpatrick-Lockhart, NRC, ANL, FEMA, LILCO, Hutton-Williams, KLD Assoc., LERIO).
24. January 13, 1984 - memorandum from Richard W. Krimm to Edward L. Jordan, Subject: RAC review of LILCO Transition Plan for Shoreham.
25. January 20, 1984 attendance list from RAC meeting.
26. January 24, 1984 memorandum from Frank P. Petrone to Samuel W. Speck, Relating to Shoreham Plan Review, Governor's position, legal authority and assumptions made in order to allow RAC members to proceed with a technical review.
27. January 25, 1984 letter from Samuel W. Speck to William J. Dircks as to whether FEMA should continue, modify or terminate the NRC requested reviews of the LILCO Plan.
28. February 3, 1984 memorandum from Samuel W. Speck to Frank P. Petrone, Subject: Whether NRC wishes FEMA to proceed with Plan review.



29. February 9, 1984 letter to H. Taylor Reveley III, Esq. from George W. Jett, General Counsel. Subject: Emergency preparedness issues for Shoreham.
30. March 1, 1984 Fax of changes to page 6 of portion of RAC review.
31. Copies of pages that were changed in RAC review after initial submittal to FEMA Headquarters.
32. March 14, 1984 memorandum from Roger B. Kowieski to Stewart M. Glass conveying letter from Joseph H. Keller.
33. March 14, 1984 memorandum from Roger B. Kowieski to Stewart M. Glass. Subject: Submission of Revisions/Additions to LILCO Transition Plan.
34. March 15, 1984 letters to Dr. Catacosinos, Chairman LILCO, King Mallory, Honorable Alan Simpson from Louis O. Giuffrida, Director FEMA conveying copy of letter to NRC.
35. March 15, 1984 memorandum from Roger B. Kowieski to Marianne Jackson conveying Regional Director briefing paper and chronology of events relevant to the review of the LILCO Transition Plan, Revisions 1, 2 & 3 (with those attachments).
36. March 15, 1984 draft of letter from Ronald G. Eberhardt, Director of Congressional Relations conveying copy of RAC review. Attached is list of Congressional recipients of that letter.
37. March 15, 1984 letter from Samuel W. Speck to William J. Dircks conveying the RAC review. Also provided summary sheet prepared by Richard W. Krim comparing Argonne review and RAC review.
38. March 19, 1984 letter from Congressman Markey to Louis O. Giuffrida, Director FEMA requesting additional information.
39. March 30, 1984 memorandum from Stewart M. Glass to George Jett Subject: Status Report on Shoreham ASLB Proceedings.
40. April 13, 1984 letter from Donald P. Irwin to Stewart M. Glass and Spence Perry requesting a meeting with the RAC.

In addition, the following documents have been provided to Suffolk County with this Response:

1. September 15, 1983 memorandum from Edward L. Jordan to Richard W. Krim, Subject: Federal Emergency Management Agency (FEMA) Support for the Nuclear Regulatory Commission (NRC) Licensing of Shoreham Nuclear Station.

2. November 10, 1983 memorandum from Edward L. Jordan to Richard W. Krimm. Subject: Federal Emergency Management Agency (FEMA) Support for the Nuclear Regulatory Commission (NRC) Licensing of Shoreham Nuclear Station.
3. November 15, 1983 memorandum from Edward L. Jordan to Richard W. Krimm. Subject: Shoreham Long Island Lighting Company Transition Plan.
4. December 22, 1983 memorandum from Edward L. Jordan to Richard W. Krimm. Subject: The Federal Emergency Management Agency (FEMA) Support for the Nuclear Regulatory Commission (NRC) Licensing of Shoreham Nuclear Station.
4. December 28, 1983 memorandum from Edward L. Jordan to Richard W. Krimm. Subject: The Federal Emergency Management Agency (FEMA) Support for the Nuclear Regulatory Commission (NRC) Licensing of Shoreham Nuclear Power Station.
5. January 11, 1984 memorandum from Edward L. Jordan to Richard W. Krimm. Subject: Federal Emergency Management Agency (FEMA) Review of Long Island Lighting Company (LILCO) Transition Plan for the Shoreham Nuclear Power Plant.
6. January 26, 1984 letter from William J. Dircks, to Samuel W. Speck regarding response to January 25, 1984, letter asking whether FEMA should continue, modify, or terminate its review of LILCO offsite emergency plans for the Shoreham facility.
7. February 24, 1984 Draft memorandum from Sheldon A. Schwartz to E. Christenbury. Subject: FEMA review of offsite emergency plan for Shoreham.
8. April 2, 1984 letter from A. Schwencer, to M.S. Pollock regarding - Federal Emergency Management Agency (FEMA) Findings on Long Island Lighting Company (LILCO) Transition Plan for Shoreham.

Pursuant to the terms of 10 CFR 2.740 (f) and 2.741 (d), Rule 26(b) of the Federal Rules of Civil Procedure and the terms of the Boards instructions of May 9, 1984 the Federal Emergency Management Agency respectfully objects to the release and discovery of the following documents.

1. Letter dated November 3, 1983 conveying NRC RAC member, Craig Z. Gordon's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.
2. Memorandum dated November 2, 1983 conveying DOE RAC member, Herb G. Fish's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.
3. Letter dated October 21, 1983 conveying FDA (HHS) RAC member, Ronald E. Bernacki's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.

4. Memorandum dated November 3, 1983 conveying DOT RAC member, Paul Lutz's, comments on the LILCO Transition Plan Revision 1 for Shoreham.
5. Letter dated October 14, 1983 conveying USDA RAC member, Cheryl Malina's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.
6. Submission dated November 1, 1983 conveying FEMA employee, Robert L. Acerno's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.
7. Letter dated November 2, 1983 conveying INEL RAC consultant, Joe H. Keller's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.
8. Memorandum dated November 4, 1983 conveying ANL RAC consultant, Thomas E. Baldwin's, comments on the LILCO Transition Plan Revision 1 for Shoreham.
9. Letter dated December 5, 1983 conveying EPA RAC member, Linda Olmer's, comments on the LILCO Transition Plan Revision 1 for Shoreham.
10. Letter dated January 12, 1984 conveying NRC RAC member, Robert J. Bores's, comments on the LILCO Transition Plan Revision 3 for Shoreham.
11. Memorandum dated January 6, 1984 conveying DOE RAC member, Herbert Fish's, comments on the LILCO Transition Plan, Revision 3 for Shoreham.
12. Letter dated January 6, 1984 conveying FDA RAC member, Ronald E. Bernacki's, comments on the LILCO Transition Plan, Revision 3 for Shoreham.
13. Memorandum dated January 10, 1984 conveying DOT RAC member, Paul Lutz's, comments on the LILCO Transition Plan, Revision 3 for Shoreham.
14. Letter dated January 6, 1984 conveying USDA RAC member, Cheryl Malina's, comments on the LILCO Transition Plan, Revision 3 for Shoreham.
15. Submission dated January 9, 1984 written directly on copy of preliminary draft conveying FEMA staff member, Robert L. Acerno's, comments on the LILCO Transition Plan Revision 3 for Shoreham.
16. FEMA Plan Review Form - dated January 12, 1984 conveying EPA RAC member, Joyce Feldman's, comments on the LILCO Transition Plan Revision 3 for Shoreham.

17. Letter dated January 10, 1984 conveying INEL RAC consultant Joe H. Keller's comments on the LILCO Transition Plan Revision 3 for Shoreham.
18. Memorandum dated January 9, 1984 conveying FEMA member, Marianne C. Jackson's, comments on the LILCO Transition Plan Revision 3 for Shoreham.
19. Submission dated January 9, 1984 written directly on Preliminary Draft conveying ANL RAC consultant, Thomas E. Baldwin's, comments on the review of the LILCO Transition Plan Revision 3 for Shoreham.
20. Preliminary Draft of Consolidated RAC Review dated January 20, 1984 with individual notes of Cheryl Malina of RAC meeting of January 20, 1984.
21. Preliminary Draft of Consolidated RAC Review dated January 20, 1984 with individual notes of Robert Bores of RAC meeting of January 20, 1984.
22. Preliminary Draft of Consolidated RAC Review dated January 20, 1984 with individual notes of Joyce Feldman of RAC meeting of January 20, 1984.
23. Preliminary Draft of Consolidated RAC Review dated January 20, 1984 with individual notes of Paul Lutz of RAC meeting of January 20, 1984.
24. Pre-Decisional Drafts of March 15, 1984, Letter Transmitting FEMA Finding to NRC.
25. Pre-Decisional Draft of Definitions of Categories, etc., for February, 1984, Consolidated RAC Review of the LILCO Transition Plan.
26. Sample of Four Random Draft Pages of February, 1984, Consolidated RAC Review of LILCO Transition Plan.
27. Pre-Decisional Drafts of the 2/21/84 Region II Transmittal Memorandum to Headquarters for the RAC review of the LILCO Transition Plan.
28. Pre-Decisional Drafts of the 2/3/84 Memorandum to Frank P. Perrone, Regional Director, Region II, From Samuel W. Speck, Associate Director, State and Local Programs and Support, Federal Emergency Management Agency, Subject: Shoreham Plan Review.
29. Pre-Decisional Draft of Discussion Points, for Richard W. Krimm and Joseph Winkle for Press Conference (not held) on the FEMA finding of 3/15/84 for Shoreham.
30. Pre-Decisional Sets of Q's and A's for Press Conference (not held) on the FEMA Finding of 3/15/84 on Shoreham.



31. Margaret Lawless' copy of Region II RAC findings with her annotated notes.
32. Pre-Decisional Notes and Option Paper on Strategies for Handling Shoreham Offsite Emergency Preparedness Problem.
33. Draft Telefax Header and Pre-decisional draft of FEMA 10/27/83 Memorandum to: Edward L. Jordan, Director, Division of Emergency Preparedness and Engineering Response, Office of Inspection and Enforcement, Nuclear Regulatory Commission, From: Richard W. Krimm, Assistant Associate Director, Office of Natural and Technological Hazards Programs, Subject: Federal Emergency Management Agency Support for Nuclear Regulatory Commission Licensing of Shoreham Nuclear Station.
34. Memorandum to Regional Assistance Committee members from Roger Kowieski, Subject: Legal Issues Identified During the RAC Review of LILCO Transition Plan for Shoreham (Revision 3).
35. Three (3) Drafts of Consolidated RAC Review of LILCO Transition Plan for Shoreham - Revision 3, (1/20/84)-Annotated with notes of FEMA employees and contractors.
36. Draft LILCO Plan Review (LILCO Transition Plan Revision 1) consolidated RAC review.
37. 26 pages of a flip chart of Regional Assistance Committee members' individual comments on LILCO Transition Plan titled Shoreham Review Compilation of RAC Comments.

It is the position of the Federal Emergency Management Agency that the above thirty-seven (37) documents are privileged, that they are subject to the protection of executive privilege. FEMA rely's on the Board's Memorandum and Order Ruling on Suffolk County Motion to Compel FEMA to Produce Documents dated November 1, 1983, the arguments FEMA submitted in support thereof (attached) and the Board's Memorandum and Order Ruling Upon LILCO's Motion to Compel Production of Documents and Objections of Governor Mario Cuomo dated March 6, 1984.

The above documents fall within a number of subgroups. Items one (1) through nineteen (19) contain the individual review comments of the individual RAC members, consultants and staff as provided to the RAC Chairman. Items twenty (20) through twenty-three (23) contain the

individual personal notes of RAC members of the RAC meeting of January 20, 1984 as annotated on the Preliminary Draft of the Consolidated RAC Review. It should be noted that these personal notes were not originally in the possession of FEMA but were provided by the RAC members to Region II to enable it to fully identify all items contemplated by Suffolk County's Discovery Request. The individual notes have not been reviewed at this time. Items twenty-five (25), twenty-six (26), and thirty-four (34) through thirty-seven (37) contain the various drafts and working papers of the RAC review and the compilation of the individual RAC comments. While item thirty-one (31) contains a headquarters staff employee's comments on the RAC Plan Review.

FEMA objects to the discovery of any advisory memoranda, predecisional deliberations related to the RAC review, or the input of the individual RAC members to the final FEMA RAC report. FEMA has provided to Suffolk County documents outlining the assumptions made in order to allow the RAC members to proceed with a technical review and copies of changes and clarifications to the Review after its submittal to FEMA headquarters. The County's document request to FEMA makes absolutely no showing of any circumstances requiring disclosure of the requested documents. It is obvious from the Memorandum explaining Suffolk County Discovery Requests Relating to FEMA that they are seeking to ascertain the predecisional thoughts and opinions of the individual RAC members. Executive privilege is meant to protect these very thought processes, advisory opinion recommendations and deliberations.



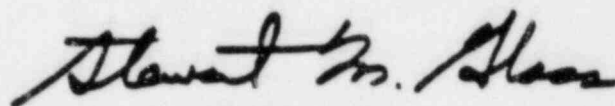
In addition these documents are irrelevant and will not lead to the production of admissible relevant evidence. The FEMA RAC review is not being litigated in this proceeding and the inputs of the various members of the RAC Committee have absolutely no probative value. The RAC submitted its final report which reflects the collegial judgment of the RAC. The RAC review is included as a portion of the testimony which further addresses the specific contentions which are the issues in litigation before this body. The FEMA witnesses have indicated that the purpose of their testimony is to address the contentions relating to offsite preparedness at the Shoreham Nuclear Power Station which are properly the matter before this Board. Further, the panel indicates that their testimony (Q.17 p. 8 FEMA Testimony) represents the current FEMA evaluation of the LILCO Transition Plan, Revision 3.

Items twenty-four (24), twenty-seven (27) through thirty (30), and thirty-two (32) and thirty-three (33) all consist of drafts of documents which contain the thoughts and opinions of individual staff members. In the case of items twenty-four, twenty-seven and twenty-eight the final documents were submitted and are available to the parties. These documents fall squarely within the scope of executive privilege while the matters contained therein are not related to the issues in contention before this Board.

It is understood that pursuant to NRC regulations all that FEMA need undertake in response to the County's Discovery request is identify the items being withheld, state the privilege that is being asserted and the

reason the privilege applies to the documents in question. The burden is on the County to seek an Order to Compel. Under normal circumstances the party from whom discovery is sought would have an opportunity to respond to the County's Motion. Due to the constraints of time that opportunity is not available, therefore FEMA expresses its willingness to engage in oral argument on Friday, May 18th if that would assist the Board.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Stewart M. Glass". The signature is fluid and cursive, with the first name "Stewart" being more prominent.

Stewart M. Glass  
Regional Counsel  
Federal Emergency Management Agency  
26 Federal Plaza  
New York, New York 10278

Dated: May 14, 1984

ATTACHMENT 7

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges  
James A. Laurenson, Chairman  
Dr. Jerry R. Kline  
Mr. Frederick J. Shon

In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station,  
Unit 1)

Docket No. 50-322-OL-3

(Emergency Planning Proceeding)

May 18, 1984

ORDER GRANTING TEMPORARY STAY

During a telephone conference call on the afternoon of May 18, 1984, we announced our ruling on Suffolk County's Motion to Compel Production of Documents from FEMA. (That ruling was issued, in written Memorandum and Order form, on the same date.) In requesting compelled production of documents, Suffolk County had cited its need for the information contained therein prior to scheduled depositions of certain FEMA witnesses during the week of May 21, 1984, in order to ultimately conduct effective cross-examination of FEMA witnesses at our hearing session of May 29. FEMA resisted the request on the assertion that the documents were protected by executive privilege and that their release would result in a "chilling effect" upon FEMA's decision making process. Of the 37 documents at issue, we granted compelled discovery as to 30.

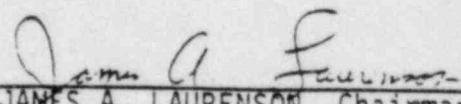
64-522-OL-3

Counsel for FEMA immediately entered an oral application for a stay of the ruling pending appeal, pursuant to 10 C.F.R. § 2.788(g). The Board heard the arguments of all parties to the conference call.

10 C.F.R. § 2.788(e) sets forth four factors for determining whether to grant or deny an application for a stay. This Board finds that only one factor, the possibility of irreparable injury should a stay not be granted, weighs in favor of granting FEMA's request. We do not find that FEMA has made a strong showing that it is likely to prevail on the merits, nor that the public interest lies on the side of non-disclosure of the subject documents. Furthermore, the grant of a stay would cause inconvenience to Suffolk County. Nevertheless, we believe that the irreparable harm that could occur to FEMA should we require production of these documents before FEMA has had time to enter an appeal of our ruling is in itself significant enough to mandate a brief stay in the interests of fairness. Therefore, we hereby grant a temporary stay of the compelled production of documents pursuant to our Memorandum and Order of May 18, 1984. FEMA will have until 5:00 p.m. EDT on Monday, May 21 to either have the documents in the hands of Suffolk County or to obtain an additional stay from the Appeal Board.

IT IS SO ORDERED.

ATOMIC SAFETY AND  
LICENSING BOARD

  
JAMES A. LAURENSEN, Chairman  
Administrative Law Judge