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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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USNRC

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In the Matter of )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station,  
Unit 1) )

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

SUPPLEMENTAL BRIEF OF SUFFOLK COUNTY  
IN RESPONSE TO MAY 30 APPEAL BOARD ORDER

In an order dated May 30, 1984, the Appeal Board requested that the parties to this appeal address "the permissibility and advisability of one agency of the federal government ordering the disclosure of documents by another agency," both generally, and with reference to the Memorandum of Understanding between the NRC and FEMA, dated December 16, 1980, 45 Fed. Reg. 82,713 (1980). The views of Suffolk County are set forth below.

First, neither the "permissibility" nor the "advisability" of one agency's ordering another to disclose documents, can be addressed or evaluated in a vacuum. The authority of any government agency is limited by that agency's enabling legislation, other relevant statutes, and duly adopted regulations. Thus, whether an agency can "permissibly" order another to turn over documents first depends upon whether the law which sets forth that agency's powers and responsibilities includes the authority to issue such an order.

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Similarly, the "advisability" of one agency's issuing such an order is also dependent upon the powers and responsibilities which under law are possessed by the agency. In some cases, such an order could be required by law or by the agency's rules; in others, such an order could be left to the discretion of the agency; in still other cases, such an order could go beyond the agency's authority, and therefore be improper. The "advisability" of an order would thus depend upon the law and regulations which govern the actions of the agency, including that which governs the exercise of discretion by agency officials.

In this case, the NRC's authority derives from the Atomic Energy Act, 42 U.S.C. §2011 et seq.<sup>1/</sup> The Act authorizes the NRC, among other things, to issue licenses for the operation of nuclear power plants and to promulgate rules and regulations as necessary to carry out the purposes of the Act. Section 161 of the Act also authorizes the Commission "by subpoena to require any person to appear and testify, or to appear and produce documents, or both. . . ." 42 USC § 2201(c). The term "person" is defined in Section 115 as "any individual, corporation, partnership, firm . . . Government agency other than the Commission . . . and . . . any legal successor, representative, agent or agency of the foregoing." 42 USC § 2014. The Act also requires the Commission to hold a hearing upon the request of any person whose interest may be affected by the proceed-

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<sup>1/</sup> Although the NRC was established by the Energy Reorganization Act of 1974, 42 USC § 5801 et seq., the functions, powers, and responsibilities of the NRC are set forth in the Atomic Energy Act of 1954, as amended, 42 USC § 2011 et seq. See 10 CFR § 1.1.

ing. This Section 189 hearing requirement has been held to apply to any material factors relied upon by the Commission in making its licensing decisions. Union of Concerned Scientists v. NRC, No. 82-2053, \_\_\_ F.2d \_\_\_ (May 25, 1984). Section 191 of the Act further authorizes the Commission to establish Atomic Safety and Licensing Boards "to conduct such hearings as the Commission may direct and make such intermediate and final decisions as the Commission authorizes with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, any other provision of law, or any regulation of the Commission issued thereunder."

Pursuant to the Atomic Energy Act, the NRC has adopted rules of practice which include the delegation of authority to Atomic Safety and Licensing Boards. Such authority includes the power to issue subpoenas, rule on offers of proof, receive evidence, order depositions to be taken, rule on motions, issue protective orders, regulate the course of hearings, and issue initial decisions. 10 CFR §§ 2.718, 2.721, 2.730, 2.740, 2.760. The rules adopted by the Commission also include provisions for discovery by interrogatories, document requests, depositions and subpoenas to parties and persons who are not parties. The NRC's rules state that "It is not grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears to reasonably calculated to lead to the discovery of admissible evidence." 10 CFR §2.240(1).

The authority of Licensing boards to issue orders compelling depositions or production of documents, whether pursuant to notices and requests or applications for subpoenas, is not limited by the person who is the subject of such an order.<sup>2/</sup> Licensing boards are not prohibited by the Atomic Energy Act or the NRC's rules from ordering an agency of the government to produce documents, pursuant to the discovery rules, in a particular proceeding. Indeed, by the Commission's own definitions, which are consistent with those in the Act, the power to order production of documents (by subpoena) is expressly extended to government agencies. See 10 CFR § 2.4(o). Thus, according to the law under which the NRC is empowered to act, it is clearly permissible for the NRC to order FEMA to produce documents.

In the County's view, the "advisability" of such an order here -- like the May 18 ASLB Order which is the subject of this appeal -- is also governed by the Commission's own regulations and the fact that FEMA has voluntarily subjected itself to the NRC's jurisdiction in this proceeding. The particular regulatory provisions (Section 189 of the Atomic Energy Act and 10 CFR §§2.740, 2.743(a), and 50.47(a)(2)) and their applicability in the context of this case and the facts involved in the balancing test required to determine

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<sup>2/</sup> Although there are particular procedures governing discovery requests directed to the NRC Staff, those are not relevant here. Moreover, the standards for requiring the production of documents and witnesses, if objected to by the NRC Staff, are not substantively different from those applicable to motions for protective orders and motions to compel discovery from persons other than the NRC Staff.



whether the asserted FEMA privilege has been overcome, are discussed at length in prior pleadings of the County and will not be repeated here. The fact that FEMA has submitted testimony to the ASLB, intends to offer written testimony and the RAC Report into evidence, intends to present witnesses to testify at the hearing, has been accorded the opportunity of cross examining other witnesses, has participated regularly in conferences of counsel held by the ASLB, and has regularly availed itself of all the protections provided by the NRC's rules, makes it fully subject to the NRC's jurisdiction. Accordingly, FEMA is obligated to comply with the requirements of the NRC's rules, including Licensing Board Orders to produce documents.

There is nothing in the Atomic Energy Act or the NRC rules which authorizes the NRC to grant preferential treatment or status to FEMA, or to any other government agency that has subjected itself to the NRC's jurisdiction by participating in an adjudicatory proceeding. Not only would the granting of such a preferred "above-the-law" status to FEMA be unauthorized and unadvisable, it would also constitute a blatant violation of the County's rights under the NRC's rules of discovery and cross examination, and the right guaranteed in Section 50.47, to rebut the FEMA findings, all of which were recognized by the ASLB in its May 18 Order.<sup>3/</sup>

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<sup>3/</sup> The permissibility and advisability of the ASLB's order compelling FEMA to produce documents is unaffected whether FEMA is considered a party to this proceeding, a "consultant" to the NRC, or something else. The ASLB's authority goes to any person, which by definition includes government agencies. Similarly, any person which subjects itself to the jurisdiction of the NRC is obligated to comply with NRC's regulations.

The Memorandum of Understanding between the NRC and FEMA is not relevant to either the "permissibility" or "advisability" of affirming the ASLB order at issue here. That Memorandum is not law; it does not and cannot extend, diminish, or have any effect whatsoever upon the authority of the NRC. As discussed above, such authority is stated in the Atomic Energy Act and the NRC's own regulations. The Memorandum is simply an agreement between two agencies. It does not have the status or authority of law or regulation. It cannot be used to limit the powers or responsibilities assigned by Congress to the NRC.

However, the Memorandum does evidence a clear intent, by both FEMA and the NRC, that FEMA would be subject to the jurisdiction of NRC licensing boards in licensing proceedings. The following language in the Memorandum is illustrative:

FEMA will provide support for NRC reactor, full facility and material licensing reviews, as requested, with regard to the assessment of the adequacy of State and local response plans for accidental radiological releases.

. . . .

FEMA routine support will include providing assessments of State and local plans related to reactor Construction Permit and Operating License reviews . . . . To support its findings and determinations, FEMA will make expert witnesses available before the Commission, the NRC Advisory Committee or Reactor Safeguards, NRC hearing boards and administrative law judges, any court actions, and during any related discovery proceedings.

Memorandum at III.A (emphasis added).

It should be noted that the Memorandum does not say that FEMA will "support its findings and determinations" before NRC hearing boards and in related discovery but will keep secret the underlying documents and information concerning the process by which it arrived at such findings and determinations. Similarly, the Memorandum does not say that "FEMA will make expert witnesses available" before NRC boards and in related discovery, but such witnesses shall not have to testify as to the bases for their opinions or how they were derived.

Thus, although the Memorandum has no legal impact on either the permissibility or the advisability of affirming the May 18 ASLB order, nonetheless it clearly demonstrates that both the NRC and FEMA contemplated the participation of FEMA in NRC adjudicatory proceedings. There is nothing in the Memorandum or in the law under which the NRC is required to act, which makes it either permissible or advisable to exempt FEMA from the jurisdiction of the NRC in this licensing proceeding.

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Docket No. 50-322 (O.L.)  
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CERTIFICATE OF SERVICE

I hereby certify that copies of Supplemental Brief of Suffolk County in Response to May 30 Appeal Board Order have been served on the following this 5th day of June 1984, by U.S. mail, first class, except as otherwise noted.

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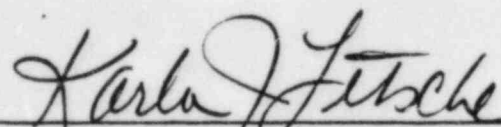
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