

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

DOCKETED
USNRC

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

Docket No. 50-322-OLP
(Low Power)

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

SUFFOLK COUNTY MOTION FOR POSTPONEMENT OF NRC JUNE 11 MEETING

The Commission has scheduled a meeting for 4:00 p.m., June 11, to discuss and possibly vote on a Phase III/IV low power license for Shoreham. Suffolk County hereby moves that the meeting be postponed for the following reasons:

1. The Suffolk County Attorney on June 4 represented to the Commission, inter alia, that the County's position on emergency planning had changed, that because of this changed position there is nothing left of the pending NEPA issue, and that the County Attorney, not Kirkpatrick & Lockhart, would hereafter represent the County before the Commission.

The Commission should not rely upon the foregoing representations of the County Attorney. Rather, based upon the June 3 letter from the County Legislature previously submitted to the Commission as an attachment to the County's June 3 Motion for Postponement of Oral Argument, and further based upon the legal

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opinion of counsel retained by Kirkpatrick & Lockhart for advice on this matter, (the opinion of Arnold & Porter is enclosed as Attachment 1 hereto), it is submitted that:

a) The County Executive's May 30 Executive Order is unlawful and, accordingly, the County position on emergency planning has not changed;

b) There is no basis to believe that there ever will be an implementable offsite emergency plan for Shoreham and, thus, the NEPA issue has not been diminished in any way, let alone eliminated, from the County's case; and

c) Kirkpatrick & Lockhart was not lawfully terminated and, thus, pursuant to pertinent ethical obligations, will continue to represent Suffolk County, at least pending a resolution of the conflict between the present County Executive's Order and the Resolutions of Suffolk County.

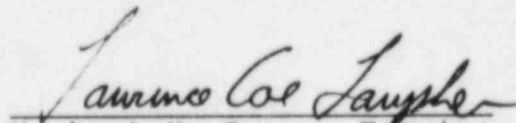
2. The NRC should refrain from any licensing action pertaining to Shoreham until the present conflict within the Suffolk County government has been ruled upon by the New York State Supreme Court. Suits have already been filed and a preliminary injunction hearing is scheduled to be held today. See Letter from Stephen B. Latham to NRC Commissioners, June 9, 1985, which describes the status of these actions. There is every reason to believe that a ruling will be rendered soon, particularly since only legal issues are presented.

The County was severely prejudiced by its inability on June 4 to have legal counsel present its position on the Phase III/IV license issue. Indeed, not only was the County position not

represented, but the County Attorney attempted to disavow critical positions that the County has consistently advocated for more than two years.

LILCO will not be prejudiced by the postponement requested herein. Indeed, LILCO itself stated at the Commission's June 4 oral argument that it will take at least 3 weeks for LILCO to implement promised security changes.* (This also assumes, arguendo, that the County Executive was authorized to enter into the security settlement with LILCO.) Further, even assuming that the County Executive's new emergency planning position were deemed legal, FEMA has been reported making the estimate that an exercise of the LILCO plan, could not occur before late 1985 or early 1986. Therefore, there is no justifiable reason for the Commission to rush the vote on a Shoreham Phase III/IV license in advance of State Court resolution of the present conflict within Suffolk County government.

Respectfully submitted,



Herbert H. Brown, Esquire
Lawrence Coe Lanpher, Esquire
Karla J. Letsche, Esquire

KIRKPATRICK & LOCKHART
8th Floor, 1900 M Street, N.W.
Washington, D.C. 20036

Attorneys for Suffolk County

* Even if the NRC were to authorize a Phase III/IV license, the 3 weeks required for security changes would make it reasonable for the NRC to stay the effectiveness of the license for at least 3 weeks to give time for Court of Appeals review.

ARNOLD & PORTER

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June 9, 1985

Kirkpatrick & Lockhart
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Attn: Herbert H. Brown, Esquire
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Gentlemen:

In connection with your representation of Suffolk County, a municipal corporation of the State of New York, in proceedings pending before the Nuclear Regulatory Commission (the "NRC") relating to the licensing of the Shoreham Nuclear Power Station, Shoreham, New York ("Shoreham"), you have asked us for our opinion with respect to the applicable standards governing certain aspects of your future professional conduct and with respect to the legality of certain actions taken by Suffolk County's current County Executive, Peter F. Cohalan ("Cohalan").

Background

The Suffolk County Legislature (the "Legislature") has duly enacted four resolutions (together, the "Resolutions") setting forth the policies of Suffolk County with respect to Shoreham. Copies of these Resolutions are attached hereto as Appendix A.

In Resolution No. 43-1982, the Legislature authorized the Suffolk County Executive (the "County Executive") to retain legal counsel to assist the Suffolk County Attorney in representing Suffolk County in the Shoreham proceedings. Pursuant to that resolution, Cohalan, on behalf of Suffolk County, retained Kirkpatrick & Lockhart (then Kirkpatrick, Lockhart, Hill, Christopher & Phillips). The parties to the retainer agreement (the "Agreement") were the County of Suffolk and Kirkpatrick & Lockhart. A copy of the Agreement is attached hereto as Appendix B.

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In Resolution 262-1982, the Legislature resolved that the Suffolk County Planning Department should prepare a County Radiological Emergency Response Plan; that such plan (the "Plan") would not be operable or capable of being implemented until approved by the Legislature; and that the Plan was not to be submitted to the NRC or the Federal Emergency Management Agency until so approved.

In Resolution 456-1982, the Legislature resolved, inter alia, that Suffolk County "shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been approved, after public hearings, by the Suffolk County Legislature and the County Executive."

In Resolution 111-1983, the Legislature resolved, inter alia, that the plan, as amended, submitted on October 6, 1982, by Long Island Lighting Company ("LILCO") to the New York State Disaster Preparedness Commission ("DPC") "will not be approved and will not be implemented"; that "no local radiological emergency plan for a serious nuclear accident at Shoreham will protect the health, welfare, and safety of Suffolk County residents"; that therefore "no local radiological emergency plan for response to an accident at the Shoreham plant shall be adopted or implemented"; and that "the County Executive is hereby directed to take all actions necessary to assure that actions taken by any other governmental agency, be it State or Federal, are consistent with the decisions mandated by this Resolution."

You have informed us that each of the Resolutions was adopted by a majority of the Legislature, was approved by the County Executive, and has never been repealed.

Until recently, the County Executive was in full accord with the position set forth in the Resolutions.

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On May 30, 1985, Cohalan announced that he was reversing his position on the Shoreham plant and that he now favors its operation, provided there is a successful test of LILCO's emergency plan. On May 30, 1985, Cohalan issued Executive Order 1-1985 directing County personnel to review, evaluate and test LILCO's proposed emergency response plan. A copy of Executive Order 1-1985 is attached hereto as Appendix C.

On May 31, Cohalan orally requested Kirkpatrick & Lockhart to remain as counsel for the County to represent the County in accordance with his new views. Kirkpatrick & Lockhart replied that it could not represent his new views but could continue to represent the County if the prior County position (as reflected in the County resolutions) were to constitute the County policy. On June 3, 1985, Mr. Cohalan sent a letter (the "Termination Letter") to Kirkpatrick & Lockhart purportedly terminating its representation of the County because the firm refused to represent the County Executive's new position. A copy of that letter is attached hereto as Appendix D.

Issues Requested to be Addressed

You have requested our opinion with respect to the following issues:

1. Under applicable rules governing the professional conduct of Kirkpatrick & Lockhart:

(a) whether Kirkpatrick & Lockhart may properly refuse to turn over the files in Kirkpatrick & Lockhart's possession pertaining to its representation of Suffolk County as has been requested in the Termination Letter. (This issue is sometimes hereinafter referred to as "Issue 1(a)").

(b) if the NRC grants a low power license for operation of the Shoreham Nuclear Power Plant and the County Attorney refuses to or otherwise does not take action on behalf of Suffolk County to seek a stay of that grant or the implementation of the license, whether

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Kirkpatrick & Lockhart may, and under what circumstances it may, properly take action seeking such a stay on behalf of Suffolk County. Specifically, you have asked us to consider whether Kirkpatrick & Lockhart may file an application and a brief on behalf of Suffolk County seeking a stay of an NRC grant or implementation of the license (i) on the merits of issues underlying the grant of the license or (ii) until the internal conflicts within the Suffolk County government are resolved. (This issue is sometimes hereinafter referred to as "Issue 1(b)".)

2. Whether, under New York law, the actions of the County Executive in issuing Executive Order 1-1985 were lawful. (This issue is sometimes hereinafter referred to as "Issue 2".)

Qualifications and Assumptions

We have made such investigation of law, public records and other matters as we have deemed necessary to enable us to render the opinions set forth herein. We have, with respect to all documents which we have examined and upon which we have relied, assumed the genuineness of all signatures, the authenticity of all documents submitted to us as originals, and the conformity to original documents of all documents submitted to us as certified or photostatic copies and the authenticity of the originals of such latter documents. We have further assumed the compliance of the adoption of the Resolutions with applicable procedural requirements.

The opinions expressed herein are further qualified by the fact that we are not, and the attorneys who assisted in the preparation of this opinion are not authorized to practice law in the State of New York and are therefore not specialists in the interpretation of the laws of the State of New York.

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Please note that we are opining only as to matters expressly set forth herein, and no opinion should be inferred as to any other matters. The opinions expressed herein are specifically limited to and by the facts as set forth above. Any change of facts or the applicability of additional facts and circumstances would have a material bearing on the opinions set forth herein, and we therefore express no opinion on matters resulting from any such change or additional facts and circumstances.

You should be aware that a number of questions raised by the matters discussed herein have not been definitively answered by statute, regulation, rulings or court decisions. Moreover, with respect to some of such matters, existing precedents provide little guidance. While our opinions and views expressed herein are based upon our best interpretations of existing sources of law and express what we believe applicable authorities would conclude if presented with these issues, no assurance can be given that such interpretations would be followed if they became the subject of judicial or administrative proceedings.

Applicable Ethical Principles and Laws

We offer no opinion whether the disciplinary authorities with jurisdiction over Kirkpatrick & Lockhart's professional conduct will be those of New York or Washington, District of Columbia. Kirkpatrick & Lockhart is clearly subject to the jurisdiction of the District of Columbia Bar Association. In addition, New York bar authorities will have jurisdiction to the extent that Kirkpatrick & Lockhart lawyers are admitted to practice in New York State or have entered appearances before New York courts or otherwise have submitted themselves to regulation by the New York State bar disciplinary authorities.

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In addition, we offer no opinion concerning which jurisdiction's disciplinary and ethical rules would be applied by authorities exercising jurisdiction over the professional conduct of Kirkpatrick & Lockhart. For example, we understand that the District of Columbia bar disciplinary authorities look to the ethical rules of the jurisdiction to which the actions at issue bear a "substantial relation." In the instant case, such a test would appear to point to the applicability of New York disciplinary rules by the District of Columbia disciplinary authorities, but we can offer no conclusive opinion on that issue.

Similar, but not identical versions of the American Bar Association Code of Professional Responsibility (the "Code") have been adopted by the appropriate authorities with jurisdiction over the bar of the State of New York and Washington, D.C. You have been provided with copies of both versions of the Code. In all respects pertinent to this opinion, the Code adopted by the two jurisdictions is the same.

The Code will govern the professional standards applicable to the conduct of Kirkpatrick & Lockhart. The Code is comprised of "Canons", "Ethical Considerations" and "Disciplinary Rules."

The functions of the Canons, the Ethical Considerations and the Disciplinary Rules are discussed in the Preliminary Statement of the Code which states that:

"The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

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"The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

"The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action An enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations."

We have not relied upon the authority, whether persuasive or mandatory, of the American Bar Association's Model Rules of Professional Conduct (the "Model Rules") adopted by the House of Delegates of the American Bar Association on August 6, 1983. To date, the Model Rules have been adopted by only a few jurisdictions, but have not been adopted in New York or Washington, D.C. To the extent the Model Rules are relevant in evaluating the conduct of Kirkpatrick & Lockhart, Rule 1.13 and the comments thereto appear pertinent, and they are attached hereto as Appendix E.

Issue 1(a) and Issue 1(b)

Discussion

We believe that a determination with respect to Issue 1(a) and Issue 1(b) requires determination of the following additional questions:

1. Who is the client represented by Kirkpatrick & Lockhart?
2. Did the purported termination of Kirkpatrick & Lockhart's employment by the Termination Letter lawfully terminate that employment?

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Who Is Kirkpatrick & Lockhart's Client?

With respect to whom Kirkpatrick & Lockhart represents, it is our opinion that under New York law, Suffolk County is Kirkpatrick & Lockhart's client, not the County Executive or the County Attorney. Under New York law, the identity of a client in situations where the attorney deals with both an organizational entity such as a governmental body or a corporation and its constituents (e.g., its officers) is a question of fact. See Evans v. Artek Systems Corporation, 715 F.2d 788, 794 (2d Cir. 1983) (corporation). Although New York law recognizes that an attorney may simultaneously represent both an entity and the constituents of that entity, see Opinion 80-45 of the Committee of Professional Ethics of the Association of the Bar of the City of New York ("The test [of whether the corporation or the individual officer is the client] is whether this former officer reasonably understood that he was also a client of the law firm and whether his relationship was one in which confidences imparted by the officer would be protected."), on the facts set forth above, it seems clear that Kirkpatrick & Lockhart's client was Suffolk County. The Agreement was authorized by the Suffolk County legislature, the governing body of Suffolk County. The Agreement clearly identifies Suffolk County as the entity to which the duties of Kirkpatrick & Lockhart run. The Agreement states that the Agreement is being entered into to carry out the provisions and intent of Resolution 43-1982, i.e., to assist the County Attorney with the presentation of the County's intervention in the Shoreham licensing proceedings. Finally, the County Executive clearly signed on behalf of the County.

By his actions throughout the period of Kirkpatrick & Lockhart's employment, the County Executive, as well as all other parties, believed Suffolk County was the sole client of Kirkpatrick & Lockhart. The Termination Letter clearly recognizes that Cohalan understood that the client was the County.

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Therefore, we conclude that Suffolk County, and only Suffolk County, was Kirkpatrick & Lockhart's client.

Was The Termination of Employment Proper?

Whether the Termination Letter's purported termination of Kirkpatrick & Lockhart was lawful depends on whether the County Executive had either inherent authority to fire Kirkpatrick & Lockhart or had been granted that authority by the County Legislature.

We have seen no pertinent precedent on the inherent authority of a County Executive to fire counsel, the retention of which was authorized by the County Legislature. However, we note that the scope of a county officer's duties and authority are defined by legislative grant, see e.g., Village of Ft. Edward v. Fish, 156 N.Y. 363, 50 N.E. 973, 975 (1898), and that the relevant granting document, Suffolk County Charter, provides no such right to fire.*/ We also note with respect to the retention of counsel that the prevailing rule is that the power to employ counsel by a municipal officer is not incidental to the powers of the officer, (see Weinstock v. Long, 29 Misc.2d 795, 214 N.Y.S.2d 593, 597 (1961) (town officials), and that express authority, by resolution of the governing body, is necessary to justify the retention of an attorney by a municipal officer. Id.; See Cohn v. Town of Huntington, 29 N.Y.2d 451, 328 N.Y.S.2d 672 (1972).

In the somewhat analogous situation of creation of offices by the County Legislature, the applicable general principle is that repeal or modification of a statute requires a legislative act of equal dignity and

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But note Section 303(d), granting the right of "general supervision over all administrative units of the county, except as otherwise provided in this charter."

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import and not solely action of the executive. See Gallagher v. Regan, 42 N.Y.2d 230, 397 N.Y.S.2d 714, 716, 366 N.E.2d 804 (1977), and see Henry v. Noto, 424 N.Y.S.2d 506, 508, 74 A.D.2d 604 (1980).

Based upon existing New York precedent, we believe that the Suffolk County Executive had no inherent authority to fire Kirkpatrick & Lockhart.

We also believe the County Legislature did not grant to the County Executive the authority to fire Kirkpatrick & Lockhart. The question of the scope of the authority granted to the County Executive appears to be one of fact. See Lindlots Realty Corporation v. Suffolk County, 278 N.Y. 45, 15 N.E.2d 393, 395 (1938). In terms of retaining and discharging Kirkpatrick & Lockhart, the County Executive was the agent of the County Legislature. Although there appears to be no pertinent New York precedent, the general principle applicable in agency situations is that an agent specifically authorized to employ attorneys to act in specific matters does not have power to discharge those whom he has engaged, unless the language authorizing the engagement permits the agent to undertake other acts essential to the enforcement of the claim of the principal or some other language exists which is sufficiently extensive to permit the discharge. 2A C.J.S. § 180 at p. 894. It is our opinion that Resolution 43-1982 authorizing the County Legislature to retain Kirkpatrick & Lockhart contains no such language.

Although a county executive is entitled to reasonable discretion in implementing legislative commands, Henry v. Noto, 424 N.Y.S.2d 506, 508, 74 A.D.2d 604 (1980) and is granted supervisory rights and duties under Section 303(d) of the Suffolk County Charter, any decision by Suffolk County to fire counsel, originally employed by reason of a legislative resolution, properly belongs to the policy making, appropriating, governmental body, the County Legislature. See N.Y. County Law § 153(1) ("A power of a county shall, except as otherwise expressly provided, be exercised through a local law or resolution duly adopted by the board"); Weinstock v. Long, 214 N.Y.S.2d 593, 597 (1961).

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(town board, not town officials, has right to employ counsel) and cases cited therein. The right to discharge counsel properly rested with the County and was properly exercisable by the County Legislature, not the County Executive. South Buffalo Terminals, Inc. v. Grobe, 148 Misc. 646, 266 N.Y.S. 119 (1932), aff'd 239 A.D. 881, 266 N.Y.S. 127.

Finally, even if the County Executive generally had the right to fire counsel, which we have concluded he does not have, it is not clear that the right was properly exercised here. If, as we conclude below, the County Executive's actions in promulgating Executive Order 1-1985 were unlawful and if the dismissal was intertwined with and an essential part of those unlawful actions, the dismissal of Kirkpatrick & Lockhart was also unlawful for that additional reason.

Conclusions

Issue 1(a)

We have concluded that Suffolk County, not the County Executive or the County Legislature, is Kirkpatrick & Lockhart's client and that the County Executive has acted beyond the scope of his authority in authorizing the testing and implementation of the Plan and in purporting to terminate Kirkpatrick & Lockhart's employment. Based upon these conclusions, and because the unauthorized act of a municipal official is not binding on a municipal corporation, see e.g., Lindlotts Realty Corporation v. Suffolk County, 278 N.Y. 45, 15 N.E.2d 393, 395 (1938) we are of the opinion that neither DR 2-110(B)(4) of the D.C. Code nor DR 2-110(B)(4) of the New York Code require the withdrawal of Kirkpatrick & Lockhart as counsel for Suffolk County. Further, neither DR 2-110(A)(2) of the D.C. Code, DR. 2-110(A)(2) of the New York Code nor any other provision of the D.C. Code or the New York Code require return of client papers pursuant to the request of the County Executive and the County Attorney, nor would the failure to so return subject Kirkpatrick & Lockhart to discipline.

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It should be further noted that EC 5-18 is instructive as to how Kirkpatrick & Lockhart should function in the present situation. EC 5-18 states:

"A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a . . . officer . . . or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization."

Therefore, Kirkpatrick & Lockhart is obligated, in the exercise of its independent professional judgment, on behalf of Suffolk County, and in the best interests of Suffolk County to itself determine whether return of its client's files to the County Attorney is appropriate.

To the extent the ABA Model Rules of Professional Conduct (the "Model Rules") are relevant, Model Rule 1.13(a) and comments thereto clearly indicate that Suffolk County, as a governmental organization, is Kirkpatrick & Lockhart's client and that only the activities of its duly authorized constituents are actions of the client which should be obeyed. Assuming that, based upon the conclusions set forth above, Kirkpatrick & Lockhart "knows"*/ that the County Executive has acted in a manner which is a violation of a legal obligation to Suffolk County, and further assuming that Kirkpatrick & Lockhart "knows" that the County Executive's action is likely to result in substantial injury to Suffolk County, then Rule 1.13(b) requires Kirkpatrick & Lockhart to proceed as is reasonably necessary "in the best interests of the organization." Rule 1.13(b) also sets

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"Knows", as defined in the Preamble to the Model Rules, "denotes actual knowledge of the fact in question. A person's knowledge may be derived from circumstances."

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forth the relevant standards and considerations which would govern Kirkpatrick & Lockhart's conduct. Provided that due consideration was given to those factors, we believe, under Rule 1.13, that Kirkpatrick & Lockhart could properly refuse to give the files to the County Executive.

Issue 1(b)

Assuming that the County Attorney's failure or refusal to seek a stay of an NRC grant of a license to operate the Shoreham Nuclear Power Plan is based upon instructions of the County Executive, which in turn are illegal because they derive from Executive Order 1-1985 and the failure to follow faithfully resolutions passed by the County Legislature, we are of the opinion that nothing in the D.C. Code or the New York Code would prevent Kirkpatrick & Lockhart from, or subject Kirkpatrick & Lockhart to discipline for, seeking a stay on behalf of the County based upon the merits of the action of the NRC or seeking a stay pending clarification of the dispute between the County Legislature and County Executive. In such event, Suffolk County, and not the County Attorney or the County Executive, remains Kirkpatrick & Lockhart's client, and as noted above, EC 5-18 provides that Kirkpatrick & Lockhart should keep paramount the County's interests and not the personal desires of any other person or organization. We note that Kirkpatrick & Lockhart would be obligated to conform to DR 7-101A(1), which provides:

"A. A lawyer shall not intentionally:

1. Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules. . . "

To the extent the Model Rules are relevant, assuming that Kirkpatrick & Lockhart "knows" that the County Attorney's action in failing to file a brief was

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a violation of a legal obligation to Suffolk County, and further assuming that Kirkpatrick & Lockhart "knows" that the County Attorney's action is likely to result in substantial injury to Suffolk County, Rule 1.13(b) again counsels Kirkpatrick & Lockhart to proceed as is "reasonably necessary" in the best interests of Suffolk County. Provided that due consideration was given to those factors, we believe, under Rule 1.13, that Kirkpatrick & Lockhart could properly seek a stay and file a supporting brief on behalf of the County. Under Rule 1.13, it would also be appropriate, and perhaps desirable, for Kirkpatrick & Lockhart in the future to take the steps specifically set forth in Rule 1.13(b):

- (1) ask the County Attorney and County Executive for reconsideration of the matter;
- (2) advise Suffolk County that a separate legal opinion on the matter be sought for presentation to the County Legislature and perhaps the County Attorney and County Executive;
- (3) refer the matter to higher authority, probably the County Legislature.

Issue 2

Discussion

Executive Order 1-1985 states that Executive Law, Article 2B and Suffolk County Charter § 302 give the County Executive the authority to order on behalf of Suffolk County the actions set forth therein, i.e., that Suffolk County police and planning personnel to "carry out and cause to be conducted a test and exercise" of LILCO's emergency evacuation plan.

It should be noted at the outset that Executive Order 1-1985 directly conflicts with Resolution 456-1982 which provides that Suffolk County "shall not assign funds or personnel to test or implement any radiological emergency response plan" for Shoreham unless the plan has been approved by the Suffolk County Legislature and the County Executive. Resolution 111-1983 provides that the LILCO plan "will not be approved and will not be implemented. . ."

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The Suffolk County Charter (the "Charter") establishes the duties and functions of the County Executive. In pertinent part, the Charter provides:

"Section 303. Function of county executive.

In addition to the functions assigned to the county executive in other provisions of this charter, the county executive shall:

(d) take care that all laws applicable to the county and that all laws and resolutions of the County are faithfully executed." (emphasis added)

See also N.Y. Const.

Art. IV, § 3 (same duty applied to state executive branch).

Under relevant New York precedent, it is unlawful for the executive branch of the government to override policy declarations of the legislative branch. Where the executive takes unauthorized action inconsistent with duly authorized legislative enactments, the actions of the executive are unlawful because they exceed the executive powers and are an improper exercise of the legislative function. County of Oneida v. Berle, 49 N.Y.2d 515, 427 N.Y.S.2d 407, 411-412, 404 N.E.2d 133 (1980) (Executive Order of Governor impounding funds appropriated by the State Legislature was unlawful); Subcontractors Trade Association v. Koch, 62 N.Y.2d 422, 477 N.Y.S.2d 120, 124, 465 N.E.2d 840 (1984) (Mayor's executive order mandating share of construction contracts awarded by city be given to local enterprises was beyond mayor's executive function and was unlawful usurpation of legislative function); Matter of Fullilove v. Beame, 48 N.Y.2d 376, 423 N.Y.S.2d 144, 145, 398 N.E.2d 765 (1979) (Mayor's affirmative action regulation was unlawful in absence of legislative authorization); Broidrick v. Lindsay, 39 N.Y.2d 641, 385 N.Y.S.2d 265, 268, 350 N.E.2d 595 (1976) (Mayor's affirmative action regulations were invalid because, inter alia, there was no legislative authorization and because they were inconsistent with applicable state statute).

Although Section 304 of the County Charter permits the County Legislature to delegate to the County Executive the powers and duties of the County Legislature, we are aware of no legislative authorization (state or local) for Executive Order 1-1985.

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The language of the Resolutions is unambiguous and does not confer the discretion on the County Executive to issue Executive Order 1-1985 or the actions authorized therein. See County of Oneida v. Berle, 49 N.Y.2d 515, 427 N.Y.S.2d 407 at 412, 404 N.E.2d 133 (1980). Nor is the County Executive compelled by Article 2B or otherwise to test or implement the LILCO plan; therefore, there can be no corresponding power to perform the non-existent duty. See County of Oneida v. Berle, 49 N.Y.2d 515, 427 N.Y.S.2d 407 at 410-411, 404 N.E.2d 133 (1980).

Section 20(1)(b) of Article 2B of the Emergency Preparedness Law (Executive Law § 20 et seq.) does state:

- (1) It shall be the policy of the state that
 - (b) local chief executives take an active and personal role in the development and implementation of disaster preparedness programs and be vested with the authority and responsibility to insure the success of such programs;"

However, in Section 23 of Article 2B the authority to develop disaster preparedness plans is granted to the "County", not the chief executive of the county. Article 2B nowhere gives the chief executive of a county the authority to test and implement plans not approved by the legislature. Furthermore, Article 2B nowhere explicitly takes the extraordinary action of altering existing governmental relations. Rather, its structure seems to provide for the development and implementation of emergency preparedness plans within existing frameworks, and recognizes and distinguishes between the County, the County Legislature and the chief executive of a county. The policy of active involvement and authority to insure the success of such programs seems a restatement of the general authority of the executive branch to implement laws properly passed by the legislative branch. Only in specific, narrow carefully set forth circumstances (e.g., Section 24, the right to declare a state of emergency) is the normal governmental structure altered. The extraordinary power to unilaterally test and implement plans directly contrary to duly enacted law is nowhere granted.

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While there appears to be no pertinent precedent interpreting the provision, Article 2B as a whole contemplates that the responsibility for preparation and implementation of emergency disaster plans and programs should be shared by the state and local governments within the usual governmental channels. We conclude that Article 2B does not validate Executive Order 1-1985. See County of Oneida v. Berle, 49 N.Y.2d 515, 427 N.Y.S.2d 407, 411 n.5, 404 N.E.2d 133 (1980).

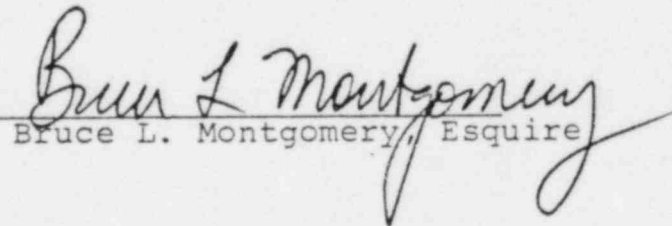
Conclusion

Based upon our conclusion that the issuance of Executive Order 1-1985 was not authorized by either state law (Article 2B), the Suffolk County Charter or the Suffolk County Legislature and was an improper exercise of legislative authority in direct conflict with existing Suffolk County policy, we are of the opinion that such issuance was unlawful under New York law.

Very truly yours,

ARNOLD & PORTER

By:


Bruce L. Montgomery, Esquire

Enclosures

Pro Res. No. 1132-82
Introduced by the Presiding Officer of the Request of the County Executive

RESOLUTION NO. 43-1982, AUTHORIZING THE COUNTY EXECUTIVE TO ENTER INTO AGREEMENTS FOR THE INTERVENTION BY SUFFOLK COUNTY IN THE SHOREHAM NUCLEAR REGULATORY COMMISSION LICENSING PROCEEDINGS, DOCKET NO. 50-322, AND TRANSFERRING FUNDS FOR SUCH AGREEMENTS.

Whereas, the Suffolk County Legislature voted to intervene in the Nuclear Regulatory Commission (NRC) Operating License (O.L.). Proceedings before the Atomic Safety and Licensing Board (ASLB) as a neutral intervenor in 1978; and

Whereas, as an intervenor in the County has been participating in the licensing process of the Shoreham Nuclear Power Plant in order to assure the residents of Suffolk County that the plant is safe; and

Whereas, the Suffolk County Legislature defeated Introductory Resolution No. 2040-1981, by a vote of 12-5-1, proposing a Settlement Agreement between Suffolk County and the Long Island Lighting Company (LILCO) of the County's intervention in the O.L. proceedings; and

Whereas, by voting to defeat Introductory Resolution No. 2040-1981, the Suffolk County Legislature proclaimed its intention to pursue a full physical inspection of the Shoreham Nuclear Power Plant, and committed itself to a full scale intervention in the Shoreham O.L. proceedings; and

Whereas, in response to the Legislative Mandate contained in the legislative vote regarding the County's future intervention in the Shoreham O.L. proceedings, the Suffolk County Attorney is committed to engaging in extensive effort to assure an effective intervention in the Shoreham O.L. proceedings on behalf of the taxpayers and ratepayers of Suffolk County; and

Whereas, to present full-scale intervention in the Shoreham O.L. proceedings, the Suffolk County Executive will hire nationally known technical engineering consultants and legal counsel to assist the County Attorney in the litigation proceedings; and

Whereas, the transfer of funds to the Self Insurance Fund will be less than previously anticipated due to a reduction in the layoff of County personnel; now, therefore, be it

RESOLVED, that the County Executive is hereby authorized to enter into contracts with the appropriate technical engineers and legal counsel for said individuals or firms to assist the County Attorney in the presentation of the County's intervention in the Shoreham O.L. proceedings; and be it further

RESOLVED, that the Suffolk County Comptroller and the Suffolk County Treasurer be and they hereby are authorized to transfer funds as follows:

<u>From</u>	<u>To</u>
Interfund Transfer	Department of Law
Transfer to Self Insurance Fund	General Administration
No. 01-9568-960	01-1420-456
<u>Amount</u>	
\$500,000	

Dated: February 9, 1982

Approved By: /s/Peter F. Cohalan, County Executive of Suffolk County

Introduced by the Presiding at the request of the County Executive

RESOLUTION NO. 161-1982, DIRECTING THE
COMPTROLLER AND COUNTY TREASURER TO REFUND
\$150,000 RECEIVED FROM LILCO AND TRANSFERRING
FUNDS IN CONNECTION WITH RADIOLOGICAL RESPONSE PLAN.

WHEREAS, Resolution No. 694-1981 authorized an agreement between LILCO and the Suffolk County Department of Planning for the preparation of a County radiological emergency response plan; and

WHEREAS, under the terms of the agreement, LILCO has paid the County of Suffolk \$150,000 with an additional \$95,000 due upon completion of the contract; and

WHEREAS, special counsel for the County in the Shoreham operating licensing proceedings has advised the County that it is in the best interest of the County to avoid any appearance of a conflict of interest by returning the \$150,000 received from LILCO for the radiological response plan; and

WHEREAS, it is the intention of the County to complete the radiological response plan at its own expense; now, therefore, be it

RESOLVED, that the County Comptroller and County Treasurer are directed to return \$150,000 to LILCO; and be it further: /

RESOLVED, that the County Comptroller and County Treasurer are directed to cancel the unexpended balance in the following encumbrances:

01-8026-992
01-8026-993
01-8026-994

and be it further

RESOLVED, that the County Comptroller and County Treasurer be, and they hereby are authorized to transfer the following funds and authorization:

FROM

Employee Benefits Health Insurance
01-9060-336

\$175,000

TO

Planning
Radiological Response Plan (Office Supplies)
01-8026-101

10,000

Planning
Radiological Response Plan (Printing)
01-8026-104

19,000

Planning
Radiological Response Plan (Misc.)
01-8026-150

40,000

Planning Radiological Response Plan (Adv.) 01-8026-177	1,000
Planning Radiological Response Plan (Mileage) 01-8026-431	5,000
Planning Radiological Response Plan (Fees for services for non-employees 01-8026-436	200,000

and be it further

RESOLVED, that the County Planning Department shall prepare a County Radiological Emergency Response Plan to serve the interest of safety, health and welfare of the residents of Suffolk County; and be it further

RESOLVED, that said plan shall not be operable and shall not be deemed adequate and capable of being implemented until such time as it is approved by the Suffolk County Legislature; and

RESOLVED, that only after said plan is approved by the Suffolk County Legislature, shall it be submitted to the Federal Emergency Management Agency and the Nuclear Regulatory Commission for purposes of any findings, determinations, rulings, reviews, or hearings by such federal agencies.

DATED: March 23, 1982

APPROVED BY:

[Signature]
County Executive of Suffolk County

Date of Approval: 3/25/82

SUFFOLK COUNTY
County Legislature
RIVERHEAD, N. Y.

This is to certify that J. William H. Rogers, Clerk of the County Legislature of the County of Suffolk, have compared the foregoing copy of resolution with the original resolution now on file in this office, and which was duly adopted by the County Legislature of said County on *March 23, 1982* and that the same is a true and correct transcript of said resolution and of the whole thereof.

I, *[Signature]*, have hereunto set my hand and the seal of the County Legislature of the County of Suffolk

[Signature]
Clerk of the County Legislature

Introduced by Legislators Bloss, Rosso, Foley, Caraciopa, Glese, Allgrove, Richards, Waneenberg, Rizzo, Nolan, Hamilton, Noco, Howard, Prospect, Libus, Divine, Krizan

RESOLUTION NO. 456 - 1982, ESTABLISHING THE
RADIOLOGICAL EMERGENCY RESPONSE PLANNING
POLICY OF THE COUNTY OF SUFFOLK

WHEREAS, County of Suffolk has the primary responsibility for the protection of its residents in the event of a radiological emergency at the Long Island Lighting Company's Shoreham Nuclear Power Station; and

WHEREAS, Suffolk County takes this responsibility seriously and intends, through good faith and sound planning efforts, to assure that the best possible emergency plan and preparedness are developed to protect the citizens of Suffolk County; and

WHEREAS, Suffolk County's Emergency Planning Task Force, composed of nationally recognized experts drawn from a range of pertinent disciplines, is now conducting a detailed planning effort in order to attempt to develop a viable radiological emergency plan for Suffolk County; and

WHEREAS, The Long Island Lighting Company, in an unwarranted and arrogant act, has gone beyond its powers as a private corporation in an attempt to usurp the rightful powers of Suffolk County by submitting county planning resource material to the New York State Disaster Preparedness Commission for its approval as the official radiological emergency response plan for Suffolk County; and

WHEREAS, said planning resource material developed in part by county personnel, is preliminary data which in no way constitutes the Suffolk County-approved RADIOLOGICAL EMERGENCY RESPONSE PLAN and will not in the future constitute such County plan; and

WHEREAS, Suffolk County will submit its RADIOLOGICAL EMERGENCY RESPONSE PLAN to the New York State Disaster Preparedness Commission only when that plan has been fully prepared and approved by Suffolk County and is thereby integrated with the planning efforts of both LILCO and New York State; therefore, be it

RESOLVED, that Suffolk County hereby established the following Radiological Emergency Response Planning Policy:

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been fully developed to the best of the County's ability.

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been the subject of at least two public hearings, one to be held in Riverhead, and one to be held in Hauppauge.

Suffolk County shall not assign nor or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been approved, after public hearings, by the Suffolk County Legislature and the County Executive

and, be it further

RESOLVED, that copies of this resolution be sent to the Governor, the Speaker of the Assembly, the Majority Leader of the Senate and the Legislature of the State of New York.

DATED: May 13, 1982

APPROVED BY:

L. A. Holman
County Executive of Suffolk County

Date of Approval: 5/19/82

SUFFOLK COUNTY
County Legislature
RIVERHEAD, N. Y.

I, County Clerk J. William H. Rogers, Clerk of the County Legislature of the County of Suffolk, have compared the foregoing copy of resolution with the original resolution now on file in this office, and which was duly adopted by the County Legislature of said County on May 18, 1982 and that the same is a true and correct transcript of said resolution and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and the official seal of the County Legislature of the County of Suffolk

William H. Rogers
Clerk of the County Legislature

(11)

Resolution No. 111-1983,
Constituting the Findings and
Determinations of Suffolk County
on Whether A Level of Emergency
Preparedness To Respond to a
Radiological Accident At the
Shoreham Nuclear Power Station
Can Protect the Health, Welfare
and Safety of the Residents of
Suffolk County

WHEREAS, Suffolk County has a duty under the Constitution of the State of New York, the New York State Municipal Home Rule Law, and the Suffolk County Charter to protect the health, safety, and welfare of the residents of Suffolk County; and

WHEREAS, the Long Island Lighting Company ("LILCO") is constructing and desires to operate the Shoreham Nuclear Power Station ("Shoreham"), located on the north shore of Long Island near the town of Wading River, a location which is within the boundaries of Suffolk County; and

WHEREAS, a serious nuclear accident at Shoreham could result in the release of significant quantities of radioactive fission products; and

WHEREAS, the release of such radiation would pose a severe hazard to the health, safety, and welfare of Suffolk County residents; and

WHEREAS, in recognition of the effects of such potential hazard posed by Shoreham on the duty of Suffolk County to protect the health, safety, and welfare of its citizens, this Legislature on March 23, 1982, adopted Resolution No. 262-1982, which directed that Suffolk County prepare a "County Radiological Emergency Response Plan to serve the interest of the safety, health, and welfare of the citizens of Suffolk County"; and

WHEREAS in Resolution 262-1982, the Legislature determined that the plan developed by the County "shall not be operable and shall not be deemed adequate and capable of being implemented until such time as it is approved by the Suffolk County Legislature"; and

WHEREAS, in adopting Resolution 262-1982, the Legislature found that earlier planning efforts by LILCO and County planners (the "original planning data") were inadequate because they failed to address the particular problems posed by conditions on Long Island and further failed to account for human behavior during a radiological emergency and the lessons of the accident at Three Mile Island; and

WHEREAS, on March 29, 1982, Peter F. Cohalan, Suffolk County Executive, acting to implement Resolution 262-1982, by Executive Order established the Suffolk County Radiological Emergency Response Plan Steering Committee ("Steering Committee") and directed it to prepare a County plan for submittal to the County Executive and County Legislature; and

WHEREAS, the Steering Committee assembled a group of highly qualified and nationally recognized experts from diverse disciplines to prepare such County plan; and

WHEREAS, such highly qualified experts worked in a diligent and conscientious effort at a cost in excess of \$500,000 to prepare the best possible plan for Suffolk County, and particularly to ensure that such plan took into account all particular physical and behavioral conditions on Long Island that affect the adequacy of the emergency response plan; and

WHEREAS, the analyses, studies, and surveys of such experts included:

- (a) Detailed analyses of the possible releases of radiation from Shoreham;
- (b) Detailed analyses of the radiological health consequences of such radiation release on the population of Suffolk County, given the meteorological, demographic, topographical, and other specific local conditions on Long Island;
- (c) A detailed social survey of Long Island residents to determine and assess their intended behavior in the event of a serious accident at Shoreham;
- (d) A detailed survey of school bus drivers, volunteer firemen, and certain other emergency response personnel to determine whether emergency personnel intend to report promptly for emergency duties, or instead to unite with their own families, in the event of a serious accident at Shoreham;

- (e) Detailed estimates of the number of persons who would be ordered to evacuate in the event of a serious accident at Shoreham, as well as the number of persons who intend to evacuate voluntarily even if not ordered to do so;
- (f) Detailed analyses of the road network in Long Island and the time required to evacuate persons from areas affected by radiation releases;
- (g) Detailed analyses of the protective actions available to Suffolk County residents to evacuate or take shelter from such radiation releases; and
- (h) Analysis of the lessons learned from the accident at Three Mile Island on local government responsibilities to prepare for a radiological emergency; and

WHEREAS, on May 10, 1982, LILCO, without the approval or authorization of the Suffolk County Government, submitted to the New York State Disaster Preparedness Commission ("DPC") two volumes entitled "Suffolk County Radiological Emergency Response Plan" and containing the original planning data, as further revised and supplemented by LILCO, and requested the DPC to review and approve such LILCO submittal as the local radiological emergency response plan for Suffolk County; and

WHEREAS, in Resolutions 456-1982 and 457-1982, the County further addressed the matter of preparing for a radiological emergency at Shoreham and emphasized that:

- (a) The LILCO-submitted document was not and will not be the County's Radiological Emergency Response Plan; and
- (b) The County's Radiological Emergency Response Planning Policy, as enunciated in Resolution 456-1982, is as follows:

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been fully developed to the best of the County's ability.

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been subject of at least two public hearings, one to be held in Riverhead, and one to be held in Hauppauge.

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been approved, after public hearings, by the Suffolk County Legislature and the County Executive; and

WHEREAS, on June 9, 1982, the DPC rejected the LILCO-submitted document for the reason that it was deficient; and

WHEREAS, on October 6, 1982, LILCO, again without the approval or authorization of the Suffolk County Government, submitted to the DPC an amended version of the previously submitted LILCO document which had been rejected by the DPC; and

WHEREAS, on December 2, 1982, the Draft County Radiological Emergency Response Plan authorized by Resolution 262-1982 was submitted to the County Legislature for review and public hearings as specified in Resolutions 262-1982, 456-1982, and 457-1982; and

WHEREAS, in January 1983, the Legislature held hearings on the Draft County plan, which hearings included:

- (a) More than 1,590 pages of transcripts;
- (b) Detailed written statements and oral testimony of County expert consultants who prepared the Draft County plan;
- (c) Detailed written statements and oral testimony of LILCO officials and expert consultants retained by LILCO;
- (d) Detailed written statements and oral testimony of the Suffolk County Police Department, the County Health Department, the County Social Services Department, and the County Public Works Department, all of which would have indispensable roles in responding to a radiological emergency at Shoreham;
- (e) Detailed written statements and oral testimony of organizations in Suffolk County concerned with radiological emergency preparedness; and
- (f) Extensive presentations by hundreds of members of the general public; and

WHEREAS, members of the Legislature also travelled to and held public hearings in the vicinity of the Three Mile Island Nuclear Power Plant to gain information on the lessons to be learned by local governments from the accident at Three Mile Island; and

WHEREAS, the Draft County plan identifies evacuation and protective sheltering as the two primary protective actions which would need to be implemented in the event of a serious accident at Shoreham; and

WHEREAS, evacuation of Suffolk County residents in the event of a radiological emergency could take as much time as 14-30 hours because of various factors, including: the limited number of appropriate evacuation routes in Suffolk County; difficulties in mobilizing police and other emergency personnel; difficulties ensuing from spontaneous evacuation of large numbers of County residents, thus creating severe traffic congestion; and unavailability of alternate evacuation routes for persons residing east of Shoreham and thus the necessity for such persons during an evacuation to pass by the plant and possibly through the radioactive plume; and

WHEREAS, evacuation times in excess of 10 hours -- and certainly evacuation times in the range of 14-30 hours -- will result in virtual immobilization of evacuation and high exposure of evacuees to radiation such that evacuees' health, safety, and welfare would not be protected; and

WHEREAS, protective sheltering is designed to protect persons from excessive radiation exposure by such persons staying indoors until radiation with the greatest danger to health has passed; and

WHEREAS, if protective sheltering were ordered for Suffolk County residents, unacceptable radiation exposure would still be experienced by substantial portions of the Suffolk County population, thus making it impossible to provide for the health, welfare, and safety of these residents;

WHEREAS, the document submitted by LILCO to the DPC without County approval or authorization is deficient because it does not deal with the actual local conditions, physical and behavioral, on Long Island that would be encountered during a serious nuclear accident at Shoreham; and

WHEREAS, the document submitted by LILCO to the DPC without County approval or authorization does not ensure that effective protective action by persons subject to radiation exposure, in the form of evacuation or sheltering, would be taken in event of a serious nuclear accident at Shoreham, and thus such document, even if implemented, would not protect the health, safety, and welfare of Suffolk County residents; and

WHEREAS, the extensive data which the Legislature has considered make clear that the site-specific circumstances and actual local conditions existing on Long Island, particularly its elongated east/west configuration which requires all evacuation routes from locations east of the plant to pass within a zone of predicted high radiation, the ineffectiveness of protective sheltering, the severe traffic congestion likely to be experienced if a partial or complete evacuation were ordered, and the difficulties in ensuring that emergency personnel will promptly report for emergency duties, preclude any emergency response plan, if implemented, from providing adequate preparedness to protect the health, welfare, and safety of Suffolk County residents; therefore be it

RESOLVED, that the Draft County plan submitted to the County Legislature on December 2, 1982, if implemented, would not protect the health, welfare, and safety of Suffolk County residents and thus is not approved and will not be implemented; and

RESOLVED, that the document submitted by LILCO to the DPC without the County approval or authorization, if implemented, would not protect the health, welfare, and safety of Suffolk County residents and thus will not be approved and will not be implemented; and

RESOLVED, that since no local radiological emergency response plan for a serious nuclear accident at Shoreham will protect the health, welfare, and safety of Suffolk County residents, and since the preparation and implementation of any such plan would be misleading to the public by indicating to County residents that their health, welfare, and safety are being protected when, in fact, such is not the case, the County's radiological emergency planning process is hereby terminated, and no local radiological emergency plan for response to an accident at the Shoreham plant shall be adopted or implemented; and

RESOLVED, that since no radiological emergency plan can protect the health, welfare, safety of Suffolk County residents and, since no radiological emergency plan shall be adopted or implemented by Suffolk County, the County Executive is hereby directed to take all actions necessary to assure that actions taken by any other governmental agency, be it State or Federal, are consistent with the decisions mandated by this Resolution.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of)

LONG ISLAND LIGHTING COMPANY)

(Shoreham Nuclear Power Station,
Unit 1))

Docket No. 50-322-OL
85 JUN 10 P3:43

DOCKETED
USNRC

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY MOTION FOR POSTPONEMENT OF NRC JUNE 11 MEETING have been served on the following this 10th day of June 1985, by U.S. mail, first class, except as otherwise noted.

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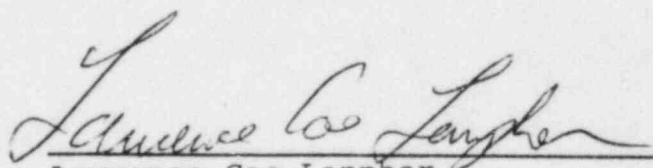
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DATE: June 10, 1985

* By Hand
** By Telecopy
*** By Federal Express