March 26, 1985

Note to: James M. Taylor, Director
Office of Inspection & Enforcement

Harold R. Denton, Director
Office of Nuclear Reactor Regulation

From: James P. Murray
Acting Executive Legal Director

Subject: UNITED STATES DISTRICT COURT'S DECISION IN CITIZENS OR AN ORDERLY ENERGY POLICY, INC. V. SUFFOLK COUNTY

On March 18, 1985, the United States District Court for the Eastern District of New York issued a decision in the case of Citizens for an Orderly Energy Policy, Inc. v. Suffolk County (a copy of which is attached). The case involved Suffolk County's refusal to participate in off-site emergency planning for the Shoreham Nuclear Power Plant. Plaintiff "Citizens," a public interest group consisting of residents of Long Island, contended that Suffolk County's actions in adopting three resolutions (the last of which concluded that no safe emergency plan could be developed for the Shoreham facility and that therefore no plan should be developed) were preempted by the Atomic Energy Act. Citizens asked the court to find the resolutions invalid and to order the County to participate in emergency planning activities. LILCO joined Citizens in the lawsuit.

The court found that Congress had not intended to compel local or state governments to participate in emergency planning activities. Instead, Congress authorized utilities to develop their own off-site emergency plans. The court stated that the County could not require LILCO to comply with the County's safety or emergency planning requirements and that the ultimate decision on whether LILCO's plan is adequate or whether a license should issue rests not with the County but with the NRC. However, the court found that the County was not regulating nuclear power but was merely refusing to participate in emergency planning. Since such refusal was contemplated and not prohibited by Congress, the court found that the refusal was not

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preempted by federal law. Accordingly, the court dismissed Citizens' lawsuit.

Original signed by
James P. Murray

James P. Murray
Acting Executive Legal Director

Attachment:
Court Decision

cc: W. Dircks
JGuiterrez

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DATE	:3/26/85	:3/26/85	:3/26/85	:3/27/85	:	:	:

SHOREHAM LITIGATION STATUS REPORT (UPDATED AS OF 4/11/85)

There are five distinct proceedings related to the Shoreham operating license. They encompass general safety, site security, qualification of the on-site emergency A/C power sources (the TDI diesels), low-power authorization without TDI diesels, and off-site emergency planning. The general site security matters were settled by stipulation ratified by the Licensing Board on December 3, 1982. The other proceedings are discussed below.

General Safety Litigation

There were approximately 75 contentions originally filed by the Intervenors (Suffolk County, Shoreham Opponents Coalition, and North Shore Committee) in this proceeding related to general safety, plant security, and onsite emergency planning. All of these contentions were either litigated (17), settled (45), or dismissed for default (13 onsite EP contentions) between May, 1982 and April, 1983.

On September 21, 1983 the Licensing Board issued a 1401 page PID favorably resolving all 17 issues litigated and authorized a low power license upon resolution of a late admitted issue concerning emergency diesel generators. Appeals were filed and oral argument was held on March 27, 1984. On April 23, 1984, legal questions were certified to the Commission by the Appeal Board. On June 6, 1984, in CLI-84-9 the Commission in answer to the certified questions ruled that "important to safety" was broader than "safety related" in relation to GDC-1, and ruled that no new NEPA analysis was needed for low power operation because of the open legal issue of whether LILCO could implement an offsite emergency response plan without local government cooperation. Thereafter, in ALAB-788 (October 30, 1984), the Appeal Board affirmed the Licensing Board except as to three minor matters which were resolved by the Licensing Board on December 20, 1984. On March 4, 1985, after a New York court determined that LILCO could not implement its offsite plan (see below), intervenors again asked the Commission to supplement the Shoreham EIS to consider low power operation without ultimate full power operation.

TDI Litigation

By the terms of the PID, the only issues still pending for resolution by the Licensing Board prior to possible issuance of a low-power license concern provision for on-site emergency AC power as required by GDC-17. A major crankshaft failure in Shoreham TDI diesels and subsequent problems caused the start of the hearing on these issues to be delayed from August 1983, to September 1984. The issues involve the adequacy of the diesel crankshafts, blocks and pistons. On November 1, 1984, during hearing, LILCO proposed to amend its application to qualify the diesels to bear loads of 3300 KW instead of 3800 KW. Hearings on the qualification of the TDI diesels at 3300 KW and the loads they would encounter in an emergency concluded on March 15, 1985. Proposed findings of fact on the crankshaft issue have been filed with the Licensing Board. Findings on other issues are to be completed by May 5, 1985.

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Low-Power Authorization Litigation

As an alternative to the qualification of the TDI diesels, LILCO filed a motion on March 20, 1984, under 10 C.F.R. § 50.57(c), for a low-power (5% power) license without having a qualified onsite AC power source that meets GDC-17. A hearing before a separate Licensing Board originally commenced on April 24, 1984, but was delayed to give intervenors further time to prepare for hearing. On May 16, 1984 the Commission ruled (CLI-84-8), as a preliminary matter, that GDC 17 does apply to low power operation and that LILCO must seek an exemption pursuant to 10 C.F.R. § 50.12(a) if it seeks a low power license without meeting GDC-17. LILCO filed that exemption request and the low-power hearing recommenced on July 30, 1984, and concluded on August 8, 1984. On September 5, 1984, the Licensing Board issued an order allowing fuel loading and cold criticality testing (Phases I & II) prior to permitting operation at 5% power. This order was allowed to become effective by the Commission (CLI-84-21, November 21, 1984), and a license to allow Phase I & II operation was issued on December 7, 1984. A petition for review of CLI-84-21 was filed in the Court of Appeals on January 18, 1985.

On October 29, 1984, the Board issued an Initial Decision resolving all power issues in favor of issuing an exemption and a low-power license of up to 5% of rated power (Phases III & IV), and transmitted that decision, too, for Commission immediate effectiveness review. On February 12, 1985, the Commission in CLI-85-01 granted that decision immediate effectiveness, finding that the Licensing Board applied the correct standards. It, however, stated that the immediate effectiveness decision was without prejudice to the Appeal Board review. Intervenors immediately filed a petition for review and a temporary injunction in the Court of Appeals seeking to test not only the low power determination itself, but also prior determinations allowing low power licensing without the preparation of an ultimate approval of a full power license and whether Chairman Palladino should have recused himself from the proceeding. On February 21, 1985, in ALAB-800, the Appeal Board in its review reversed and remanded the proceeding for failure of the Licensing Board to properly consider issues relating to the security to be provided to the low power emergency A/C equipment. Issues are being formulated on this matter. The Court of Appeals' case was then dismissed as moot. Both Applicant and Intervenors have filed petitions for review of ALAB-800 with the Commission.

Off-Site Emergency Planning Litigation

The full power phase of the Shoreham proceeding involves offsite emergency planning. Because Suffolk County and the State of New York would not adopt an offsite emergency response plan for Shoreham, LILCO submitted an offsite emergency response plan generally providing for LILCO to supervise offsite evacuation and perform other functions normally performed by local and state governments. See CLI-83-13, April 30, 1983. Hearings on the adequacy of this LILCO plan started on December 6, 1983, before a separate Licensing Board. The Federal Emergency Management Agency testified that it found the LILCO plan was generally adequate, but that there were 32 technical inadequacies in the

LILCO plan based upon NUREG-0654 standards and criteria. In addition, FEMA marked with an asterisk many items where there were questions involving the legal authority of LILCO to carry out some of the NUREG items normally performed by local or state governments. On July 3, 1984, LILCO submitted a Revision 4 to its emergency plan to meet FEMA's comments. The hearing concluded on August 29, 1984, and the filing of proposed findings was completed on November 14, 1984. On November 15, 1984, as a result of its review of Revision 4 of the LILCO plan, FEMA found that 24 of 32 FEMA-identified deficiencies had been corrected. LILCO has also filed a motion with the Licensing Board seeking a determination that State law does not prevent implementation of LILCO's off-site emergency response plan. The intervenors sought clarification of this issue in state court where it was held that LILCO does not have the power to carry out its off-site emergency plan. See below. On February 27, 1985, LILCO renewed its motion seeking a determination of the legal authority question on the grounds that the State court has now ruled on the State law issues and the Board can rule on the Federal preemption questions. The Board has indicated that it will likely rule upon this issue at the time it issues its emergency planning findings in April, 1985. LILCO's motion to reopen and complete the record by designating a relocation center was granted on January 28, 1985. The intervenors have submitted extensive affidavits seeking a hearing on that issue, and submitted a motion on February 25, 1985, to reopen the record on the adequacy of health care facilities to treat radiologically contaminated individuals. Motions to reopen the record might also be submitted by the intervenors concerning FEMA's review of Revision 4 and an as yet unscheduled FEMA graded exercise of the off-site emergency plan. LILCO has requested that a graded exercise be scheduled. No determination has been made by FEMA on that request.

Ancillary Court Suits

In the meantime, the State of New York and Suffolk County filed lawsuits in New York State courts to have LILCO enjoined from carrying out its emergency plan on the ground that the plan has LILCO performing functions reserved to governmental units under New York State laws. LILCO countered with a suits in Federal court for declaratory and injunctive relief, and for $4.5 billion in damages arguing that Suffolk County is acting unlawfully in its refusal to cooperate on emergency planning. LILCO's motions to consolidate all the suits in Federal court were denied. Motions to dismiss the suits in Federal court were argued on July 20, 1984. Motions dealing with the authority of LILCO to carry out emergency planning were argued in the state trial court on January 15, 1985, and on February 20, 1985, that court issued a declaratory judgment that LILCO had no authority to carry out an off-site emergency response plan. Questions pertaining to whether the Atomic Energy Act and other Federal statutes preempt state law in this area were not ruled upon. On March 18, 1985, the U.S. District Court ruled that federal law did not require the County to cooperate with LILCO in emergency planning, and that the suit for damages was premature as LILCO's license application has not yet been denied. It is expected that the state court determination dealing with the authority of LILCO to carry out its emergency response plan and the federal court determination that the County is not obligated to cooperate in emergency planning will be appealed.

Dave Matthews
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SHOREHAM LITIGATION STATUS REPORT (UPDATED AS OF 3/4/85)

There are five distinct proceedings related to the Shoreham operating license. They encompass general safety, site security, qualification of the on-site emergency A/C power sources (the TDI diesels), low-power authorization without TDI diesels, and off-site emergency planning. The general site security matters were settled by stipulation ratified by the Licensing Board on December 3, 1982. The other proceedings are discussed below.

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By the terms of the PID, the only issues still pending for resolution by the Licensing Board prior to possible issuance of a low-power license concern provision for on-site emergency AC power as required by GDC-17. A major crankshaft failure in Shoreham TDI diesels and subsequent problems caused the start of the hearing on these issues to be delayed from August 1983, to September 1984. The issues involve the adequacy of the diesel crankshafts, blocks and pistons. On November 1, 1984, during hearing, LILCO proposed to amend its application to qualify the diesels to bear loads of 3300 KW instead of 3800 KW. Hearings on the qualification of the TDI diesels at 3300 KW and the loads they would encounter in an emergency are in progress. Proposed findings of fact on the crankshaft issue have been filed with the Licensing Board.

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As an alternative to the qualification of the TDI diesels, LILCO filed a motion on March 20, 1984, under 10 C.F.R. § 50.57(c), for a low-power (5% power) license without having a qualified onsite AC power source that meets GDC-17. A hearing before a separate Licensing Board

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To. Dave Matthews
FR. OELD

3. Pages

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