UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before Administrative Judges:
Ivan W. Smith, Chairperson
Gustave A. Linenberger, Jr.
Dr. Jerry Harbour

In the Matter of	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL. (Seabrook Station, Units 1 and 2),	Docket Nos. 50-443-444-OL (Off-site EP) June 17, 1988

EXHIBITS 1-4

TO

REPLY OF THE MASSACHUSETTS ATTORNEY GENERAL TO THE RESPONSES OF THE NRC STAFF AND THE APPLICANTS TO THE FIRST SIX CONTENTIONS FILED BY THE MASSACHUSETTS ATTORNEY GENERAL

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EXHIBIT 1

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

Evaluation of the Adequacy of Off-Site Emergency Planning for Nuclear Power Plants at the Operating License Review Stage Where State and/or Local Governments Decline To Participate in Off-Site Emergency Planning

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is amending its rules to provide criteria for the evaluation at the operating license review stage of utility-prepared emergency plans in situations in which state and/or local governments decline to participate further in emergency planning. The rule is consistent with the approach adopted by Congress in section 109 of the NRC Authorization Act of 1980, Pub. L. 96-295, described in the Conference Report on that statute (H.R. 96-1070, June 4, 1980), twice re-enacted by the Congress (in Pub. L. 97-415, Jan. 4, 1983, and Pub. L. 98-553, Oct. 30, 1984), and followed in a prior adjudicatory decision of the Commission, *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986). The rule

recognizes that though state and local participation in emergency planning is highly desirable, and indeed is essential for maximum effectiveness of emergency planning and preparedness, Congress did not intend that the absence of such participation should preclude licensing of substantially completed nuclear power plants where there is a utility-prepared emergency plan that provides reasonable assurance of adequate protection to the public.

EFFECTIVE DATE: December 3, 1987.

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SUPPLEMENTARY INFORMATION:

Discussion

On March 6, 1987, the NRC published its notice of proposed rulemaking in the Federal Register, at 52 FR 6980. The period for public comment (60 days, subsequently extended for an additional 30 days) expired on June 4, 1987.

The proposed rule drew an unprecedentedly large number of comments. Some 11,500 individual letters were sent to NRC, as well as 27,000 individually signed form letters sent to Congress or the White House and forwarded to NRC. Approximately 18,300 persons signed petitions to the NRC. Every comment was read, including form letters, which were examined one by one so that any individual messages added by the signatories could be taken into account. NRC attempted to send cards of acknowledgment to each commenter.

The sheer volume of the comments received makes it clearly impracticable to discuss them individually. As a result, the following discussion will focus on the principal issues raised in the comments.

Issue #1. Is the proposed rule legal? Specifically, is it in accord with the language and legislative history of the emergency planning provisions enacted by the Congress in 1980?

Answer: Yes. The intent of the proposed rule, as clarified in Commission testimony and in other responses to the Congress, is to give effect to the Congress's 1980 compromise approach to emergency planning, not go beyond it. To explain this requires a somewhat detailed discussion of the background of the actions taken in 1980 by Congress and by the Commission with regard to emergency planning.

The backdrop for the actions taken by the Congress and the Commission in 1980 was, of course, the 1979 accident at Three Mile Island. The accident changed the NRC's regulatory approach to radiological emergency planning. Before the accident, emergency planning received relatively little attention from nuclear regulators. The prevailing assumption was that engineered safety features in nuclear power plants, coupled with sound operation and management, made it unlikely that emergency planning would ever be needed. At that time, only a limited evaluation of offsite emergency planning issues took place in the pre-construction review of applications to build nuclear power plants. The Three Mile Island accident led to the widespread recognition that, while there is no substitute for a well built, well run and well regulated nuclear power plant, a substantial upgrading of the role of emergency planning was necessary if the public health and safety were to be adequately protected.

The Commission issued an advance notice of proposed rulemaking in July 1979, and in September and December of the same year it issued proposed emergency planning rules. 44 FR 54308 (September 19, 1979); 44 FR 75167 (December 19, 1979). Before the Commission took final action on the rules, however, the Congress took action, writing emergency planning provisions into the NRC Authorization Act for fiscal year 1980, Pub. L. No. 96-295. It is extremely important to focus on what the Congress did in that Act, because Congress' actions were the starting point for all the NRC did subsequently in the emergency planning area, as the written record makes clear.

Section 109 of the NRC Authorization Act directed the Commission to establish regulations making the existence of an adequate emergency plan a prerequisite for issuance of an operating license to a nuclear facility. The NRC was further directed to promulgate standards for state radiological response plans.

In the same section of the 1980 Act, Congress specified the conditions under which the Commission could issue operating licenses, and in doing so, it made clear its preferences with regard to state and local participation. Its first preference, reflected in section 109(b)(1)(A)(i)(I), is for a "State or local radiological emergency response plan which provides for responding to any radiological emergency at the facility concerned and which complies with the Commission's standards for such plans." In section 109(b)(1)(B)(i)(II), however, the Congress set out a second option: "In the absence of a plan which satisfies the requirements of subclause (I), there exists a State, local, *or utility* plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned." (Emphasis added.) In addition, section 109 provided that the Commission's determination under the first but not the second of the two options could be made "only in consultation with the Director of the Federal Emergency Management Agency and other appropriate agencies." Section 109(b)(1)(B)(ii). The statute further directed the Commission to "establish by rule * * * a mechanism to encourage and assist States to comply as expeditiously as practicable" with the NRC's standards for State radiological emergency response plans. Section 109(b)(1)(C).

The Conference Report on the legislation, H. 96-1070 (June 4, 1980) explained in clear terms, at p. 27, the rationale for the two-tiered approach: "The conferees sought to avoid penalizing an applicant for an operating license if a State or locality does not submit an emergency response plan to the NRC for review or if the submitted plan does not satisfy all the guidelines or rules. In the absence of a State or local plan that complies with the guidelines or rules, the compromise permits NRC to issue an operating license if it determines that a State, local *or utility* plan, such as the emergency preparedness plan submitted by the applicant, provides reasonable assurance that the public health and safety is not endangered by operation of the facility." (Emphasis added.)

The statute, which was enacted on June 30, 1980, and the Conference Report make abundantly clear that in Congress' view, the ideal situation was one in which there is a state or local plan that meets all NRC standards. It is generally clear that in Congress' view, there could be emergency planning under a utility plan that in some degree fell short of the ideal but was nevertheless adequate to protect the health and safety of the public.

That Congressional judgment was before the Commission when it considered final emergency planning rules only a few weeks later, and the Commission took pains to make clear on the record that it was following the Congress' approach. As the Commission stated in its notice of final rulemaking, published on August 19, 1980, at 45 FR 55402:

Finally, on July 23, 1980, at the final Commission consideration of these rules, the Commission was briefed by the General Counsel on the substance of conversations with Congressional staff members who were involved with the passage of the NRC Authorization Act for fiscal year 1980, Pub. L. No. 96-295. The General Counsel advised the Commission that the NRC final rules were consistent with that Act. The Commission has relied on all of the above information in its consideration of these final rules. In addition, the Commission directs that the transcripts of these meetings shall be part of the administrative record in this rulemaking.

In addition, in a key portion of the rule, dealing with the question of whether NRC should automatically shut down nuclear plants in the absence of an NRC-approved state or local emergency plan, or should instead evaluate all the relevant circumstances before deciding on remedial action, the NRC again explicitly followed the Congress lead. In determining what action to take, the Commission said, it would look at the significance of deficiencies in emergency planning, the availability of compensating measures, and any compelling reasons arguing in favor of continued operation. 10 CFR 50.47(c). The Commission explained: "This interpretation is consistent with the provisions of the NRC Authorization Act for fiscal year 1980, Pub. L. 96-295." 45 FR 55403. Thus in deciding that the lack of an approved state or local plan should not be grounds for automatic shutdown of a nuclear power plant, the Commission expressly declared itself to be following the statutory approach.

This background sheds considerable light on a passage from the *Federal Register* notice which some commenters saw as indication that the Commission consciously decided in 1980 that states and localities should have the power to exercise a veto over nuclear power plant operation. The Commission said:

> The Commission recognizes that there is a possibility that the operation of some reactors may be affected by this rule through inaction of State and local governments or an inability to comply with these rules. The Commission believes that the potential restriction of plant operation by State and local officials is not significantly different in kind and effect from the means already available to prohibit reactor operation. . . . Relative to applying this rule in actual practice, however, the Commission need not shut down a facility until all factors have been thoroughly examined.

45 FR 55404. (Emphasis added.)

It has been argued that the language just quoted indicates that the Commission made a conscious decision in 1980 to allow states and localities to exercise a veto power over completed nuclear power plants. Seen in context, however, it is apparent that the Commission did no such thing. Rather, the Commission was acknowledging the fact that under the approach it was taking, the action (or inaction) of a state or locality had the potential to affect the operation of nuclear power plants, since state and local non-participation would clearly make it more difficult for an applicant to demonstrate the adequacy of emergency planning. It is worth emphasizing the word "potential" in the quoted passage. It indicates that the Commission believed that in some cases, state and local action or inaction might have the effect of restricting plant operation, while in other cases it would not. In other words, the Commission foresaw a case-by-case evaluation, with the result not foreordained either in the direction of plant operation or of shutdown. Clearly, neither the Commission nor the Congress envisioned that state or local non-participation should automatically bar plant operation without further inquiry.

The mechanism adopted by the Commission for implementing the two-tiered approach was set forth in 10 CFR 50.47 of the Commission's regulations. For the first tier, sixteen planning standards for a state or local emergency plan were spelled out in 10 CFR 50.47(b)(1-16) of the Commission's regulations. The second tier, by contrast, was dealt with in a brief and unspecific provision, 10 CFR 50.47(c)(1):

> Failure to meet the [16] applicable standards set forth in paragraph (b) of this section may result in the Commission declining to issue an operating license; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation.

In a 1986 decision, the Commission declared that in a situation in which state and local authorities decline to participate in emergency planning, the NRC has the authority and the legal obligation to consider a utility plan and render a judgment on the adequacy of emergency planning and preparedness. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22. The Commission observed in *LILCO* that the emergency planning standards of 10 CFR 50.47(b)—the regulation which establishes the 16 planning standards by which a state and local plan is to be measured—"are premised on a high level of coordination between the utility and State and local governments," so that "[i]t should come as no surprise that without governmental cooperation [the utility] has encountered great difficulty complying with all of these detailed planning standards." 22 NRC [illegible] 28. The Commission noted, however, that its emergency planning rules were intended to be "flexible," and that a utility plan will pass muster under 10 CFR 50.47(c) "notwithstanding noncompliance with the NRC's detailed planning standards . . . (1) if the defects are not significant; (2) if there are adequate interim compensating actions; or (3) if there are other compelling reasons." The Commission added: "The decision below focus on (1) and (2) and we do likewise."

The Commission then explained that the "measure of significance under (1) and adequacy under (2) is the fundamental emergency planning standard of § 50.47(a) that 'no operating license . . . will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.'" The "root question," the Commission said, was whether a utility plan "can provide for 'adequate protective measures . . . in the event of a radiological emergency.'" To answer that question, the Commission continued, requires recognition of the fact that emergency planning requirements do not have fixed criteria such as prescribed evacuation times or radiation dose savings, but rather aim at "reasonable and feasible dose reduction under the circumstances." 24 NRC 22.

Thus the Commission is already on record as believing itself legally obligated to consider the adequacy of utility plan in a situation of state and/or local non-participation in emergency planning. Likewise, it is on record as believing that the evaluation of a utility plan takes place in the context of the overriding obligation that no license can be issued unless the emergency plan is found to provide reasonable assurance of adequate protective measures in an emergency. The Commission believes that the planning standards of 10 CFR 50.47(b), which are used to evaluate a state or local plan, also provide an appropriate framework to evaluate a utility plan. Therefore, the new rule provides for the first time that where a utility plan is submitted, in a situation of state and/or local non-participation in emergency planning, it will be evaluated for adequacy against the same standards used to evaluate a state or local plan. However, due allowance will be made both for the non-participation of the state and/or local governmental authorities and for the compensatory

measures proposed by the utility in reaching a determination whether there is "reasonable assurance that adequate protective measures can and will be taken."

To sum up, therefore, the rule is in accord with legal requirements for emergency planning at nuclear power plants because:

—The rule is consistent with section 109 of the NRC Authorization Act of 1980, a measure which has twice reenacted by the Congress, though it has since expired. In addition, the House of Representatives recently rejected an amendment designed to bar implementation of the rule for two specific plants.

—The rule is consistent with existing NRC regulations, and is well within NRC's rulemaking authority.

—Since the rule provides for no diminution of public protection from what was provided under existing regulations, it cannot be in contravention of any statutory requirements governing the level of NRC safety standards.

Issue #2: Is this a generic rule, or is this proposal really aimed at the Shoreham and Seabrook plants?

The rule is generic in the sense that it is of general applicability and future effect, covering future plants as well as existing plants. At present, however, there are only two plants with pending operating license applications for which state and/or local non-participation is an issue. Those plants are Shoreham and Seabrook. The NRC's 1980 rules, perhaps because of optimism that states and localities would always choose to be partners in emergency planning, included only a general provision, 10 CFR 50.47(c), dealing with cases in which utilities are unable to satisfy the standards for state and local emergency plans, and had no specific discussion of the evaluation of a utility plan in cases of state or local non-participation. This does not mean that the NRC was compelled to adopt new regulations in order to act on the Shoreham and Seabrook license applications. On the contrary, the NRC has always had the option of proceeding by case-by-case adjudication under its 1980 regulations.

Issue #3: Will this rule assure licenses to the Shoreham and Seabrook plants?

It will not assure a license to any particular plant or plants. It will establish a framework in which a utility seeking an operating license can, in a case of state and/or local non-participation, attempt to demonstrate to the NRC that emergency planning is adequate. Whether a utility could succeed in making that showing would depend on the record developed in a specific adjudication, the results of which would be subject to multiple levels of review within the Commission as well as to review in the courts.

Issue #4: Is state or local participation essential for the NRC to determine that there will be adequate protection of the public health and safety?

We do not have a basis at this time for determining generically whether state and local participation in emergency planning is essential for NRC to determine that there will be adequate protection of the public health and safety. There has yet to be a final adjudicatory determination in any proceeding on the adequacy of a utility plan where state and local governmental authorities decline to participate in emergency planning. Clearly, it will be more difficult for a utility to satisfy the NRC of the adequacy of its plan in the absence of state and local participation, but whether it would be impossible remains to be seen. The fact that Congress provided for evaluation of a utility plan in section 109 of the NRC Authorization Act of 1980 (and in two subsequent Authorization Acts) indicates that Congress believed that it was at least possible in some cases for a utility plan to be found to provide "reasonable assurance that public health and safety is not endangered by operation of the facility concerned," in the words of the "second tier" provided in section 109.

Issue #5: Is emergency planning as important to safety as proper plant design and operation?

First of all, this issue does not have to be addressed in the context of the final rule announced in this notice, since the present rule involves no redrawing by NRC of the balance between emergency planning and other provisions for the protection of health and safety. Having said that, we turn to the question of the place of emergency planning in the overall regulatory scheme for the protection of public health and safety.

Though the Commission in its 1980 rulemaking explicitly described emergency planning as "essential," it is less clear what importance the Commission assigned to emergency planning, as compared to the importance accorded to other means of protecting public health and safety, notably sound siting, design, and operation. In the Supplementary Information explaining the 1980 rulemaking, the Commission stated that "adequate emergency preparedness is an *essential* aspect in the protection of the public health and safety," 55 FR 55404, and commented that "onsite and offsite emergency preparedness as well as proper siting and engineered design features are *needed* to protect the health and safety of the public." (Emphasis added.) 45 FR 55403. The Commission also explained that in light of the Three Mile Island accident it had become "clear that the protection provided by siting and engineered design features must be bolstered by the ability to take protective measures during the course of an accident." *Id.* Though the word "bolstered" suggests that the Commission of 1980 viewed emergency planning as a backstop for other means of public protection rather than as of equal importance to them, the issue cannot be resolved definitively by microscopic analysis of the particular words chosen in 1980.

More relevant to the task of ascertaining the intent of the 1980 rulemaking is the regulatory structure established under the 1980 rules. In 10 CFR 50.54(s)(2)(ii), the Commission provided that if it "finds that the state of emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency * * * and if the deficiencies * * * are not corrected within four months of that finding, the Commission will determine whether the reactor shall be shut down until such deficiencies are remedied or whether other enforcement action is appropriate." In other words, a plant ordinarily may operate for at least four months with deficiencies in emergency planning before the NRC is required even to decide whether remedial action should be taken. This approach, the Commission said in the Supplementary Information to the 1980 rule, was consistent with section 109 of the NRC Authorization Act of 1980. 45 FR 55407. At the time that the Commission created the so-called "120-day clock" for deficiencies in emergency planning, it was settled Commission law (and remains so today) that the NRC must issue an order directing a licensee to show cause why its license should not be modified, revoked or suspended whenever it concludes that "substantial health or safety issues have been raised" about the activities authorized by the license. *Consolidated Edison Company of New York* (Indian Point, Units No. 1, 2 and 3), CLI-75-8, 2 NRC 173, 178. That standard was endorsed by the Court of Appeals for the District of Columbia Circuit in *Porter County Chapter of the Izaak Walton League* v. *NRC*, 606 F.2d 1363 (1979). In the context of that standard, the 120-day clock provision for emergency planning deficiencies amounts to a Commission

finding that, at least for the first 120 days, even a major deficiency in emergency planning does not automatically raise a "substantial health or safety issue" with regard to plant operation. By contrast, a major safety deficiency relating to emergency conditions—for example, the availability of the emergency core cooling system—would warrant immediate shutdown.

In sum, despite language indicating that emergency planning was "essential," the Commission in 1980 created a regulatory structure in which emergency planning was treated somewhat differently, in terms of the corrective actions to be taken when deficiencies are identified, from the engineered safety features ("hardware") that would be relied on in an emergency.

Issue #6: Assuming that NRC should consider a utility plan, what criteria should apply? In particular:

(a) Should the utility plan provide just as much protection as a state or local plan, or may less protection be adequate?

(b) If less protection may be adequate, must NRC still find reasonable assurance that under the utility plan, adequate protective measures can and will be taken? Or is it sufficient for NRC to find that the totality of the risk, including all relevant factors, including the likelihood of an accident, assures that there is adequate protection of public health and safety?

Under the rule adopted in this notice, a utility plan, to pass muster, is required to provide reasonable assurance that adequate protective measures can and will be taken in an emergency. The rule recognizes—as did Congress when it enacted and re-enacted the provisions of Section 109 of the NRC Authorization Act of 1980—that no utility plan is likely to be able to provide the same degree of public protection that would obtain under ideal conditions, i.e., a state or local plan with full state and local participation, but that it *may* nevertheless be adequate. The rule starts from the premise that accidents can happen, and that at every plant, adequate emergency planning measures are needed to protect the public in the event an accident occurs. Whether in fact a particular utility plan will be found adequate would be a matter for adjudication in individual licensing proceedings.

Issue #7: May NRC assume that a state or local government which refuses to cooperate in emergency planning will still respond to the best of its ability in an actual emergency? If so:

(a) May NRC assume that the state or local response will be in accord with the utility plan?

(b) May NRC assume that the state or local response will be adequate?

(c) If the NRC rule calls for reliance on FEMA, and FEMA says that it can't judge emergency planning except when there is state and local participation in an exercise, how can the NRC ever make a judgment on emergency planning in a situation in which state and local authorities do not participate?

In this rule, the Commission adheres to the "realism doctrine," enunciated in its 1986 decision in *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI–86–13, 24 NRC 22, which holds that in an actual emergency, state and local governmental authorities will act to protect their citizenry, and that it is appropriate for the NRC to take account of that self-evident fact in evaluating the adequacy of a utility's emergency plan. The NRC's realism doctrine is grounded squarely in common sense. As the Commission stated in *LILCO*, even where state and local officials "deny they ever would or could cooperate with [a utility] either before or even during an accident," the NRC "simply cannot accept these statements at face value." 24 NRC 22, fn. 8. It would be irrational for anyone to suppose that in a real radiological emergency, state and local public officials would refuse to do what they have always done in the event of emergencies of all kinds: do their best to help protect the affected public.

The *Long Island Lighting Co.* decision included the observation that in an accident, the "best effort" of state and county officials would include utilizing the utility's plan as "the best source for emergency planning information and options." 24 NRC 22, 31. This rule leaves it to the Licensing Board to judge what form the "best efforts" of state and local officials would take. However, the rulemaking record strongly supports the proposition that state and local governments believe that a planned response is preferable to an ad hoc one. Therefore it is only reasonable to suppose that in the event of a radiological emergency, state and local officials, in the absence of a state or local radiological emergency plan approved by state and local governments, will either look to the utility and its plan for guidance or will follow some other plan that exists. Thus the presiding Licensing Board may presume that state and local governmental authorities will look to the utility for guidance and generally follow its plan in an actual emergency; however, this presumption may be rebutted by, for example, a good faith and a timely proffer of an adequate and feasible state or local radiological response plan which would in fact be relied upon in an emergency. The presiding Licensing Board should not hesitate to reject any claim that state and local officials will refuse to act to safeguard the health and safety of the public in the event of an actual emergency. In actual emergencies, state, local, and federal officials have invariably done their utmost to protect the citizenry, as two hundred years of American history amply demonstrates.

At the present time, the Commission does not have a basis in its adjudicatory experience to judge either that a utility plan would be adequate in every case or that it would be inadequate in every case. Implementation of this rule may ultimately provide that informational basis.

The problem of how the NRC can decide the adequacy of emergency planning in the face of FEMA's declared reluctance to make judgments on emergency planning in cases of state and local non-participation does not appear insoluble. Though FEMA has expressed its reluctance to make judgments in such circumstances, because of the degree of conjecture that would in FEMA's view be called for, we do not interpret its position as one of refusal to apply its expertise to the evaluation of a utility plan. For FEMA to engage in the evaluation of a utility plan would necessitate no retreat from its stated view that it is highly desirable to have, for each nuclear power plant, a state or local plan with full state and local participation in emergency planning, including emergency exercises. (The Commission shares that view.) FEMA's advice would undoubtedly include identification of areas in which judgments are necessarily conjectural, and NRC's overall judgment on whether a utility's plan is adequate would in turn have to take account of the uncertainties included in FEMA's judgment. Beyond a certain point, uncertainty as to underlying facts would plainly make a positive finding on "reasonable assurance" increasingly difficult. These are issues, however, which can be addressed in the case-by-case adjudications on individual fact-specific situations. It should be noted that while the rule makes clear that ultimate decisional authority resides with NRC, it does envision a role for FEMA in the evaluation of utility plans, although section 109 of the NRC Authorization Act of 1980 did not specify any role for

FEMA in the evaluation of utility plans (as opposed to state and local plans).

Issue #6: If this is a national policy question, why doesn't the Commission leave the issue to the Congress to resolve?

Congress did address in 1980 the issue of what should be done in the event there is no acceptable state or local emergency plan: it directed the NRC to evaluate a state, local, or utility plan to determine whether it provided "reasonable assurance that public health and safety is not endangered by operation of the facility concerned." Perhaps because it was overly optimistic that there would be an acceptable state or local plan in every case, the Commission did not, except in general terms (at 10 CFR 50.47(c)), provide in its regulations for the evaluation of a utility plan. The present rule is an effort to make up for that omission by incorporating provisions implementing the Congress's 1980 policy decision into the NRC's rules. As noted elsewhere, the 1980 statute, twice re-enacted, has expired, but the NRC does not need the specific authority of that statute to adopt this rule, which is promulgated pursuant to the NRC's general authority, under section 161(b) and other provisions of the Atomic Energy Act, to regulate the use of nuclear energy.

The House of Representatives, as has been described above, voted 251–150 on August 5, 1987 to reject an amendment which would have barred the application of this rule to two specific plants. The Congress is thus well aware of the Commission's emergency planning rulemaking.

For the Commission to terminate its rulemaking and ask the Congress to address the policy issues involved thus seems unwarranted at this time. The Commission is still well within the framework of the guidance which the Congress gave it in 1980 (and in the two re-enactments of the statute) and also well within its rulemaking authority. It has yet to carry through that guidance to the point of making an adjudicatory decision on the adequacy of a utility plan. If and when the Commission determines, through adjudications in individual cases, that there is a continuing problem which only Congressional action can solve, it can so notify the Congress, but that point has not yet been reached.

Issue #7: Doesn't the proposed rule still leave open the possibility that state or local action or inaction can have the effect of blocking operation of a plant? If so, how can the proposed rule be said to effectuate the Congressional intent that licensees not be penalized for the inaction or inadequate action of state and local authorities?

Yes, the proposed rule does leave open the possibility that state or local non-participation can indirectly block the operation of a nuclear plant. This is so because under the particular facts of an individual case it may be impossible for the NRC to conclude that a utility plan is adequate, as defined in this rule. That does not mean, however, that the Congress's intent, as expressed in the 1980 statute and its re-enactments, is thereby frustrated. The Congress was concerned that utilities not be "penalized," but not to the extent that it was willing to countenance operation of a nuclear power plant in a situation where the public was not adequately protected. Congress intended to give a utility the opportunity to demonstrate that its plan provided "reasonable assurance," but it also provided that the NRC could not permit a plant to operate unless it found that the utility had met that burden.

Issue #10: Will the proposed rule discourage cooperation between licensees and state and local governments in emergency planning?

There is no reason to believe that the rule would discourage cooperation between licensees and state and local governments in emergency planning. Realistically, the only way in which the rule could discourage such cooperation would be if utilities were to decide that because of the new rule, they had less of an incentive to accommodating to the needs and concerns of state and local authorities. That might be a possible result if it appeared that the new rule make it easy and fast for a utility to obtain approval for its plan in cases of state and local non-participation.

In reality, it is likely to be much more difficult and time-consuming for a utility to obtain approval of its plan in the face of state and local opposition. The problems highlighted by this rulemaking are likely, if anything, to impress utilities anew with the desirability of doing everything necessary to obtain and retain full state and local participation in emergency planning.

Issue #11: Is the proposed rule based on an NRC consideration of economic costs?

The NRC rule is an effort to bring the NRC's regulations more clearly into line with a policy decision made by the Congress in 1980. The NRC's rule is thus based on economic considerations only to the extent that the Congress's policy decision of 1980 was based on economic considerations. In the Conference Report on the NRC Authorization Act of 1980 (H.Rpt.96-1070, June 4, 1980), the conferees stated that they did not wish utilities to be "penalized" in situations in which there was no acceptable state or local plan. That could be taken as a reference to economic costs or simply to considerations of fairness, or that the issue was whether a utility was to be barred from operating a plant by the actions of third parties over which it had no control.

The NRC's motivation in promulgating this rule is not economics. Its motivation is to assure that the NRC is in a position to make the decisions that Congress intended that it make, and that the Commission has declared that it would make.

Issue #12: Is the proposed rule intended to read states and localities out of the emergency planning process?

Emphatically not. The rule leaves the existing regulatory structure unchanged for cases in which state and local authorities elect to participate in emergency planning. The NRC, in common with the Congress and FEMA, regards full state and local participation in emergency planning to be necessary for optimal emergency planning. The rule change is directed to the question of what the NRC's regulatory approach should be in which states and localities decide to take themselves out of the emergency planning process. Ideally, in the NRC's view, the new rule would never have to be used, because states and localities would never refuse to participate in emergency planning.

Issue #13: Does the proposed rule alter the place of emergency planning in the overall safety finding that the Commission must make?

It does not. As described above, the Commission must make both a finding of "adequate protective measures . . . in an emergency" and an overall safety finding of "reasonable assurance that the health and safety of the public will not be endangered" (10 CFR 50.35(c), implementing section 182 of the Atomic Energy Act, 42 U.S.C. 2232). The rule does nothing to alter either the requirement that emergency planning must be found adequate or the place of emergency planning in the overall safety finding.

Issue #14: What effect, if any, does the proposed rule have on nuclear plants that are already in operation?

The rule does not specifically apply to plants that already have operating licenses. As described above, 10 CFR 50.54(s)(2)(ii) of the Commission's regulations already provides a mechanism (the "120-day clock") for addressing situations in which deficiencies are identified in emergency planning at operating plants. To the extent that this rule provides criteria by

which a utility plan would be judged by state and local withdrawal from participation in emergency planning. Those criteria would presumably be of assistance to decisionmakers in determining, under 10 CFR 50.54(s)(2)(ii), whether remedial action should be taken, and if so, what kind, where deficiencies in emergency planning remain uncorrected after 120 days.

Issue #5. Does the Commission's rule mean that the NRC does not have to find that a utility plan would offer protection equivalent to what a plan with full state and local participation would provide?

As stated previously, under the rule adopted in this notice, a utility plan, to pass muster, is required to provide reasonable assurance that adequate protective measures can and will be taken in emergency. The rule recognizes—as did Congress when it enacted and re-enacted the provisions of Section 109 of the NRC Authorization Act of 1980—that no utility plan is likely to be able to provide the same degree of public protection that would obtain under ideal conditions, i.e. a state or local plan with full state and local participation, but that it may nevertheless be adequate.

The Commission's rule, as modified and clarified, would establish a process by which a utility plan can be evaluated against the same standards that are used to evaluate a state or local plan (with allowances made both for those areas in which compliance is infeasible because of governmental non-participation and for the compensatory measures proposed by the utility). It must be recognized that emergency planning rules are necessarily flexible. Other than "adequacy," there is no uniform "passing grade" for emergency plans, whether they are prepared by a state, a locality, or a utility. Rather, there is a case-by-case evaluation of whether the plan meets the standard of "adequate protective measures . . . in the event of an emergency." Likewise, the acceptability of a plan for one plant is not measured against plans for other nuclear plants. The Commission, in its 1986 *LILCO* decision, stressed the need for flexibility in the evaluation of emergency plans. In that decision, the Commission observed that it "might look favorably" on a utility plan "if there was reasonable assurance that it was capable of achieving dose reductions in the event of an accident that are generally comparable to what might be accomplished with government cooperation." 24 NRC 22, 30. We do not read that decision as requiring a finding of the precise dose reductions that would be accomplished either by the utility's plan or by a hypothetical plan that had full state and local participation; such findings are never a requirement in the evaluation of emergency plans. The final rule makes clear that every emergency plan is to be evaluated for adequacy on its own merits, without reference to the specific dose reductions which might be accomplished under the plan or to the capabilities of any other plan. It further makes clear that a finding of adequacy for any plan is to be considered generally comparable to a finding of adequacy for any other plan.

The rule change is designed to establish procedures and criteria governing the case-by-case adjudicatory evaluation, at the operating license review stage, of the adequacy of emergency planning in situations in which state and/or local authorities decline to participate further in emergency planning. It is not intended to assure the licensing of any particular plant or plants. The rule is intended to remedy the omission of specific procedures for the evaluation of a utility plan from the NRC's existing rules, adopted in 1980. In providing for the evaluation of a utility plan, however, the rule represents no departure from the approach envisioned in 1980 by the Congress and by the Commission. In 1980, the supplementary information to NRC's final rule stated that the rule was consistent with the approach taken by Congress in Section 109 of the NRC Authorization Act of 1980 (which, in a compromise between House and Senate versions, provided for the NRC to evaluate a utility's emergency plan in situations where a state or local plan was either nonexistent or inadequate), though the rule itself included no explicit provisions governing the NRC's evaluation of a utility plan in such circumstances. It should be emphasized that the rule is not intended to diminish public protection from the levels previously established by the Congress or the Commission's rules, since the Commission's rules and the Congress have since 1980 provided for a two-tier approach to emergency planning. The rule takes as its starting point the Congressional policy decision reflected in section 109 of the NRC Authorization Act of 1980. That statute adopted a two-tier approach to emergency planning. The preferred approach was for operating licenses to be issued upon a finding that there is a "State or local radiological emergency response plan . . . which complies with the Commission's standards for such plans." but failing that, it also permitted licensing on a showing that there is a "State, local, or utility plan which provides reasonable assurance that the public health and safety is not endangered by operation of the facility concerned."

Under the Commission's 1980 rules, the regulatory provision that implemented the second of the two tiers of Section 109 was general and unspecific. The relevant regulation, 10 CFR 50.47(c), allowed a nuclear power plant to be licensed to operate, notwithstanding its failure to comply with the planning standard of 10 CFR 50.47(b), on a showing that "deficiencies in the plans are not significant for the plant in question, that adequate interim compensating measures have been or will be taken promptly, or that there are other compelling reasons to permit plant operation," without defining those terms further. The Commission currently believes that the planning standards of 10 CFR 50.47(b), which are used to evaluate a state or local plan, also provide an appropriate framework to evaluate a utility plan. Therefore, the new rule provides for the first time that where a utility plan is submitted, in a situation of state and/or local non-participation in emergency planning, it will be evaluated for adequacy against the same standards used to evaluate a state or local plan. However, due allowance will be made both for the non-participation of the state and/or local governmental authorities and for the compensatory measures proposed by the utility in reaching a determination whether there is "reasonable assurance that adequate protective measures" can and will be taken.

The approach reflected in this rule amplifies and clarifies the guidance provided in the Commission's decision in *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986). The rule incorporates the "realism doctrine," set forth in that decision, which holds that in an actual emergency, state and local governmental authorities will act to protect the public, and that it is appropriate therefore for the NRC, in evaluating the adequacy of a utility's emergency plan, to take into account the probable response of state and local authorities, to be determined on a case-by-case basis.

That decision also included language which could be interpreted as envisioning that the NRC must estimate the radiological dose reductions which utility plan would achieve, compare them with the radiological dose reductions which would be achieved if there were a state or local plan with full

state and local participation in emergency planning, and permit licensing only if the dose reductions are "generally comparable." Such an interpretation would be contrary to NRC practice, under which emergency plans are evaluated for adequacy without reference to numerical dose reductions which might be accomplished, and without comparing them to other emergency plans, real or hypothetical. The final rule makes clear that every emergency plan is to be evaluated for adequacy on its own merits, without reference to the specific dose reductions which might be accomplished under the plan or to the capabilities of any other plan. It further makes clear that a finding of adequacy for any plan is to be considered generally comparable to a finding of adequacy for any other plan.

The *Long Island Lighting Co.* decision included the observation that in an accident, the "best effort" of state and county officials would include utilizing the utility's plan as "the best source for emergency planning information and options." 24 NRC 22, 31. This rule leaves it to the Licensing Board to judge what form the "best efforts" of state and local officials would take, but that judgment would be made in accordance with certain guidelines set forth in the rule and explained further below. The rulemaking record strongly supports the proposition that state and local governments believe that a planned response is preferable to an ad hoc one. Therefore it is only reasonable to suppose that in the event of a radiological emergency, state and local officials, in the absence of a state or local radiological emergency plan approved by state and local governments, will either look to the utility and its plan for guidance or will follow some other plan that exists. Thus, the presiding Licensing Board may presume that state and local governmental authorities will look to the utility for guidance and generally follow its plan in an actual emergency; however, this presumption may be rebutted by, for example, a good faith and timely proffer of an adequate and feasible state or local radiological response plan which would in fact be relied upon in an emergency. The presiding Licensing Board should not hesitate to reject any claim that state and local officials will refuse to act to safeguard the health and safety of the public in the event of an actual emergency. In actual emergencies, state, local, and federal officials have invariably done their utmost to protect the citizenry, as two hundred years of American history amply demonstrates.

The rule thus establishes the framework by which the adequacy of emergency planning in cases of state and/or local non-participation can be evaluated on a case-by-case basis in operating license proceedings. The rule does not presuppose, nor does it dictate, what the outcome of that case-by-case evaluation will be. As with other issues adjudicated in NRC proceedings, the outcome of case-by-case evaluations of the adequacy of emergency planning using a utility's plan will be subject to multiple layers of administrative review within the Commission and to judicial review in the courts.

Backfit Analysis

This amendment does not impose any new requirements on production or utilization facilities; it only provides an alternative method to meet the Commission's emergency planning regulations. The amendment therefore is not a backfit under 10 CFR 50.109 and a backfit analysis is not required.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule will not have a significant economic impact upon a substantial number of small entities. The proposed rule applies only to nuclear power plant licensees which are electric utility companies dominant in their service areas. These licensees are not "small entities" as set forth in the Regulatory Flexibility Act and do not meet the small business size standards set forth in Small Business Administration regulations in 13 CFR Part 121.

Paperwork Reduction Act

This final rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). These requirements were approved by the Office of Management and Budget, approval No. 3150-0011.

List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting and Recordkeeping requirements.

Environmental Assessment and Finding of No Significant Environmental Impact

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR Part 51, that this rule is not a major Federal action significantly affecting the quality of the human environment and therefore an environmental impact statement is not required. The Commission has prepared, in support of this finding, an environmental assessment which is available for inspection and copying, for a fee, at the NRC Public Document Room, 1717 H Street NW., Washington, DC.

Regulatory Analysis

The Commission has prepared a regulatory analysis for this regulation. This analysis further examines the costs and benefits of the proposed action and the alternatives considered by the Commission. The analysis is available for inspection and copying, for a fee, at the NRC Public Document Room, 1717 H Street, NW., Washington, DC.

For the reasons set out in the preamble, and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the Commission is adopting the following amendments to 10 CFR Part 50:

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for Part 50 continues to read as follows:

Authority: Secs. 103, 104, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2133, 2134, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, 202, 206, 88 Stat. 1242, 1244, 1246, as amended (42 U.S.C. 5841, 5842, 5846), unless otherwise noted.

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Sections 50.57(d), 50.58, 50.91, and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2071, 2073 (42 U.S.C. 2132). Sections 50.80-50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Sections 50.100-50.102 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), secs. 50.10(a), (b), and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); secs. 50.10 (b) and (c) and 50.54 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and secs. 50.55(e), 50.59(b), 50.70, 50.71, 50.72, 50.73, and 50.78 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

§ 50.47 [Amended]

2. In 10 CFR Part 50, paragraph (c)(1) of § 50.47 is revised to read as follows:

* * * * *

(c)(1) Failure to meet the applicable standards set forth in paragraph (b) of this section may result in the

Commission declining to issue an operating license; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operations. Where an applicant for an operating license asserts that its inability to demonstrate compliance with the requirements of paragraph (b) of this section results wholly or substantially from the decision of state and/or local governments not to participate further in emergency planning, an operating license may be issued if the applicant demonstrates to the Commission's satisfaction that:

(i) The applicant's inability to comply with the requirements of paragraph (b) of this section is wholly or substantially the result of the non-participation of state and/or local governments.

(ii) The applicant has made a sustained, good faith effort to secure and retain the participation of the pertinent state and/or local governmental authorities, including the furnishing of copies of its emergency plan.

(iii) The applicant's emergency plan provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned. To make that finding, the applicant must demonstrate that, as outlined below, adequate protective measures can and will be taken in the event of an emergency. A utility plan will be evaluated against the same planning standards applicable to a state or local plan, as listed in paragraph (b) of this section, with due allowance made both for—

(A) Those elements for which state and/or local non-participation makes compliance infeasible and

(B) The utility's measures designed to compensate for any deficiencies resulting from state and/or local non-participation.

In making its determination on the adequacy of a utility plan, the NRC will recognize the reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public. The NRC will determine the adequacy of that expected response, in combination with the utility's compensating measures, on a case-by-case basis, subject to the following guidance. In addressing the circumstance where applicant's inability to comply with the requirements of paragraph (b) of this section is wholly or substantially the result of non-participation of state and/or local governments, it may be presumed that in the event of an actual radiological emergency state and local officials would generally follow the utility plan. However, this presumption may be rebutted by, for example, a good faith and timely proffer of an adequate and feasible state and/or local radiological emergency plan that would in fact be relied upon in a radiological emergency.

Appendix E—[Amended]

1. In 10 CFR Part 50, Appendix E, a new paragraph 6 is added to section IV.F to read as follows:

6. The participation of state and local governments in an emergency exercise is not required to the extent that the applicant has identified those governments as refusing to participate further in emergency planning activities, pursuant to 10 CFR 50.47(c)(1). In such cases, an exercise shall be held with the applicant or licensee and such governmental entities as elect to participate in the emergency planning process.

Dated at Washington, DC, this 29th day of October, 1987.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[Editorial note: The following regulatory analysis and environmental assessment will not appear in the Code of Federal Regulations.]

Regulatory Analysis—Evaluation of the Adequacy of Offsite Emergency Planning for Nuclear Power Plants at the Operating License Review Stage Where State and/or Local Governments Decline to Participate in Offsite Emergency Planning

Statement of the Problem

In 1980, Congress enacted provisions dealing with emergency planning for nuclear power plants in the NRC Authorization Act for fiscal year 1980. Section 109 of that Act provided for the NRC to review a utility's emergency plan in situations in which a state or local emergency plan either did not exist or was inadequate. The NRC published regulations later than year that were designed to be consistent with the Congressionally mandated approach, but they did not include specific mention of utility plans. The absence of such a provision has led to uncertainty about the NRC's authority to consider a utility plan and the criteria by which such a plan would be judged. The present rulemaking is designed to clarify both the NRC's obligation to consider a utility plan at the operating license stage in cases of state and/or local non-participation in emergency planning and the standards against which such a plan would be evaluated.

Objective

The objective of the proposed amendments are to implement the policy underlying the 1980 Authorization Act and to resolve, for future licensing, what offsite emergency planning criteria should apply where state or local governments decide not to participate in offsite emergency planning or preparedness.

Alternatives

Five alternatives were considered, including leaving the existing rules unchanged. The pros and cons of these alternatives are discussed in the rule preamble published in the Federal Register.

Consequences

NRC

The amendments will probably not impact on NRC resources currently being used in licensing cases because current NRC policy, developed in the adjudicatory case law, is to evaluate utility plans as possible interim compensating actions under 10 CFR 50.47(c)(1). Thus, while there could be extensive litigation and review regarding whether the rule's criteria are met, this would likely be similar to the review and litigation under current practice.

Other Government Agencies

No impact on other agency resources should result with the possible exception that FEMA will need to devote resources to develop criteria for review of utility plans and/or to review the plans on a case-by-case basis.

Industry

Impacts on the industry are speculative because there is no way to predict, in advance of their actual application, whether any particular utility plan will satisfy the rule. However, industry should generally benefit from knowing that rules are in place so that plans for compliance can be formulated.

Public

Under the rule being adopted a utility plan, to pass muster, is required to provide reasonable assurance that adequate protective measures can and will be taken in an emergency. The rule recognizes—as did Congress when it enacted and re-enacted the provisions of Section 109 of the NRC Authorization Act of 1980—that while no utility plan is likely to be able to provide precisely the same degree of public protection that would obtain under ideal conditions, i.e., a state or local plan with full state and local participation, such a plan may nevertheless be adquate. The rule starts from the premise that accidents can happen, and that at every plant, adequate emergency planning measures are needed to protect the public in the event an accident occurs. Whether in fact a particular utility plan will be found adequate would be a matter for adjudication in individual licensing proceedings.

Impact on Other Requirements

The proposed amendments would not affect other NRC requirements.

Constraints

No constraints have been identified that affect implementation of the proposed amendments.

Decision Rationale

The decision rationale is set forth in detail in the preamble to the rule change published in the **Federal Register**.

Implementation

The rule should become effective 30 days after publication in the **Federal Register**. Implementation will involve cooperation with FEMA and the development of FEMA/NRC criteria for review of utility plans may be required before the rule is applied to specific cases.

Environmental Assessment for Amendments to Emergency Planning Regulations Dealing With Evaluation of Offsite Emergency Planning for Nuclear Power Plants at the Operating License Review Stage Where State and/or Local Governments Decline to Participate in Offsite Emergency Planning

Identification of the Action

The Commission is amending its regulations to provide criteria for the evaluation at the operating license stage of offsite emergency planning where, because of the non-participation of state and/or local governmental authorities, a utility has proposed its own emergency plan.

The Need for the Action

As described in the **Federal Register** notice accompanying the final rule, the Commission's emergency planning regulations, promulgated in 1980, did not explicitly discuss the evaluation of a utility emergency plan, although Congress expressly provided that in the absence of a state or local emergency plan, or in cases where a state or local plan was inadequate, the NRC should consider a utility plan. That omission has led to uncertainty as to whether the NRC is empowered to consider a utility plan in cases of state and/or local non-participation, as well as about what the standards for the evaluation of such a plan would be.

Alternatives Considered

The Commission published a proposed rule change on March 6, 1987, at 52 FR 6960. In deciding on a final rule, the Commission considered four options in addition to the one reflected in the final rule. These were: issuance of the rule as originally proposed and described; issuance of a rule making clear that in cases of state and/or local non-participation, licenses could be issued on the basis of the utility's best efforts; issuance of a rule barring the issuance of licenses in cases of state and/or local non-participation; and termination of the rulemaking without the issuance of any rule change.

Environmental Impacts of the Action

The rule does not alter in any way the requirement that for an operating license to be issued, emergency planning for the plant in question must be adequate. The rule is designed to effectuate the second track of the two-track approach adopted by the Congress in the NRC Authorization Act of 1980 and two successive authorization acts, as described in detail in the **Federal Register** notice. The rule does not affect the place of emergency planning in the overall safety finding which the Commission must make prior to the licensing of any plant. Accordingly, the rule change does not diminish public protection and has no environmental impact.

Agencies and Persons Consulted

A summary of the very numerous comments appears as part of the **Federal Register** notice. Shortly before presenting an options paper to the Commission, NRC representatives briefed representatives of the Federal Emergency Management Agency on the contents of the options paper.

Finding of No Significant Impact

Based on the above, the Commission has decided not to prepare an environmental impact statement for the rule changes.

(FR Doc. 87-25438 Filed 11-2-87; 8:45 am)

BILLING CODE [illegible]

EXHIBIT 2

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Lando W. Zech, Jr., Chairman
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal

In the Matter of **Docket No. 50-322-OL-3**
(Emergency Planning)

LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)

July 24, 1986

In its review of ALAB-818, the Commission reverses and remands to the Licensing Board for further evidentiary hearings on (1) the adequacy of Applicant's offsite emergency response plan, assuming some "best effort" governmental response in the event of an emergency; and (2) the likely effect of the lack of State and local cooperation in emergency planning on emergency response.

EMERGENCY PLANS: STATE AND LOCAL GOVERNMENT (UTILITY PLAN AS SUBSTITUTE)

The NRC is legally obligated to consider whether a utility plan, prepared without government cooperation, can pass muster. Commission regulations provide for licensing notwithstanding noncompliance with the NRC's detailed planning standards: (1) if the defects are "not significant"; (2) if there are "adequate interim compensating actions"; or (3) if there are "other compelling reasons." 10 C.F.R. § 50.47(c).

EMERGENCY PLANS: STATE AND LOCAL GOVERNMENT (UTILITY PLAN AS SUBSTITUTE)

Where State and local governments refuse to cooperate in emergency planning, and where license applicants are prohibited from performing some emergency functions usually performed by the governmental authorities, the plan is not necessarily fatally defective. Rather, the plan is to be assessed pursuant to 10 C.F.R. § 50.47(c)(1).

EMERGENCY PLANS: STATE AND LOCAL GOVERNMENT (UTILITY PLAN AS SUBSTITUTE)

The fundamental emergency planning licensing standard is the provision in 10 C.F.R. § 50.47(a) that "no operating license . . . will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." The significance of "defects" in emergency plans, and adequacy of interim compensating actions, are measured by this standard.

EMERGENCY PLANS: STATE AND LOCAL GOVERNMENT (UTILITY PLAN AS SUBSTITUTE)

State law prohibits applicants from performing some emergency planning functions which are fundamental to emergency planning, e.g., "making decisions and recommendations to the public concerning protective actions." However, in the event of a serious accident at Shoreham requiring consideration of protective actions for the public, State and County officials would be obligated to assist, both as a matter of law and as a matter of discharging their public trust. *See* N.Y. Exec. Law art. 2-B, § 25.1. *See also* H.R. Rep. No. 212, 99th Cong., 1st Sess., 131 Cong. Rec. 15,358 (1985).

EMERGENCY PLANS: STATE AND LOCAL GOVERNMENT (UTILITY PLAN AS SUBSTITUTE)

The adequacy of applicant's offsite emergency response plan should be measured against a standard that would require protective measures generally comparable to what might be accomplished, assuming a "best effort" governmental response.

EMERGENCY PLANS: STATE AND LOCAL GOVERNMENT (UTILITY PLAN AS SUBSTITUTE)

Although some emergency planning measures are not explicitly mentioned in NRC's emergency planning regulations, such measures may nevertheless be required in order to provide reasonable assurance of adequate protective measures in the event of a radiological emergency.

DECISION

Before us is Long Island Lighting Company's (LILCO) petition for review of the October 18, 1985 Appeal Board decision holding inadequate as a matter of law LILCO's emergency plan for the Shoreham Nuclear Power Plant. ALAB-818, 22 NRC 651. The Appeal Board based its decision largely on the refusal of New York State and Suffolk County to participate in the planning, and on LILCO's lack of legal authority to implement certain features of its plan. For the reasons explained below, we reverse and remand for further evidentiary hearings on issues raised by LILCO's so-called "realism" and "materiality" arguments. We do not address LILCO's preemption arguments at this time.

BACKGROUND

After having initially supported the licensing of Shoreham, Suffolk County later withdrew its support and moved the Shoreham Licensing Board to terminate the proceeding on the ground that the NRC could not grant a license for Shoreham in the absence of a government-sponsored emergency plan. The Board denied the motion, reasoning that the agency was required to afford LILCO an opportunity to show that its utility-only plan was an adequate one. The Commission affirmed, stating that the agency was *obligated* to consider a utility-only plan. CLI-83-13, 17 NRC 741, 743 (1983). In a later order we also observed that "[t]he emergency planning issues . . . do not appear to us to be categorically unresolvable." CLI-83-17, 17 NRC 1032, 1034 (1983).

Subsequently, LILCO submitted its plan for NRC consideration, and Suffolk County responded with its 97 contentions encompassing 174 pages. Contentions 1-10 asserted that LILCO lacked the legal authority to implement certain features of its radiological emergency plan, including the authority to control traffic and to inform the public.[1] From December 1983 until August 1984, the parties and the Licensing Board operated under an agreement that no evidentiary hearings were required on these "legal contentions." Then, in August 1984, LILCO submitted a Motion for Summary Disposition on the legal authority contentions, arguing that it should prevail on these contentions for three reasons: first, that State and local law were preempted by federal law to the extent that the State and local laws deprived LILCO of authority to plan for and implement its radiological emergency plan ("Preemption"); second, that even if LILCO lacked legal authority, the State and the County would respond in a real emergency either by implementing the plan themselves or by deputizing LILCO personnel to implement the plan ("Realism");[2] and third, that some of the functions which LILCO purportedly lacked authority to implement were not NRC requirements in any event ("Immateriality").

The NRC Staff and Intervenors opposed the motion, and the Licensing Board denied it, concluding that LILCO did not gain *via* preemption the legal authority it otherwise lacked; that even assuming an emergency response by the State and the County, there was no assurance that the response would be other than *ad hoc* and uncoordinated with LILCO's actions, contrary to the very reason for the emergency planning regulations which require advance planning; that while few of the actions listed in Contentions 1-10 were explicitly required by the regulations, these actions were nonetheless necessary to comply with the explicit requirement in 10 C.F.R. § 50.47(b)(10) for plan features which will permit "a range of protective actions" in the event of an emergency;[3] and that LILCO's plan couldn't be considered an "adequate interim compensating measure" under 10 C.F.R. § 50.47(c)(1) because there was nothing in the record to indicate that the State or local governments would ever participate in Shoreham emergency planning, and the Board couldn't speculate on what the governments might do if and when Shoreham began full-power operation. LBP-85-12, 21 NRC 644 (1985) (hereinafter cited as PID). In

[1] Contentions 1-10 are set forth in full in LBP-83-27, 17 NRC 949, 958-63 (1983).

[2] LILCO's basis for its realism argument before the Licensing Board was a December 1983 press release by Governor Cuomo stating that "if the plant were to operate and a misadventure were to occur, the State and County would help to the extent possible," before the Appeal Board, the basis was the asserted "undeniable truth" that in an emergency the State and County would respond and would permit LILCO to implement its plan. Appeal Brief at 45 (June 3, 1985).

[3] The Licensing Board found that an uncontrolled evacuation would take longer than a controlled evacuation (about 1½ hours more in good weather, about 3 hours in inclement weather). From this it concluded that the range of protective actions was impermissibly restricted because sheltering would have to be used in some fast-breaking events, when otherwise evacuation might have been possible.

every important respect, the Appeal Board in ALAB-818 agreed with the Licensing Board. 22 NRC 651 (1985).[4]

LILCO petitioned for Commission review of ALAB-818, and we granted the petition but deferred any further action until the Appeal Board rendered its decision on then-pending Intervenor appeals. Unpublished Order dated December 19, 1985. Recently, in ALAB-832, 23 NRC 135 (1986), the Appeal Board resolved all remaining Intervenor appeals, reversing and remanding a few issues to the Licensing Board but staying the remand until the Commission completed its review of ALAB-818 or directed otherwise. The Appeal Board also left undecided LILCO's appeals on three other emergency planning issues.

Below we analyze LILCO's petition for Commission review on the realism and immateriality decisions, leaving for a later time review of the legal authority preemption issues. In doing our review we have carefully reviewed both Boards' decisions, and all of the extensive briefs that have been filed with both Boards on the realism and materiality issues. While we did not request additional briefing, the parties nevertheless filed several additional papers with us, and we have considered all of them.[5]

REALISM

LILCO's Arguments

LILCO argues essentially that the Boards' holdings would approve only those utility plans which fill minor gaps in State and local government participation, and that this cannot be correct in light of the Commission's denial of the County's 1983 motion to terminate the proceeding, a motion based on the absence of *any* local government participation in Shoreham planning. The Commission stated in its denial that it was "*obligated* to consider a utility plan submitted in the absence of State and local government-approved plans . . . ." CLI-83-13, *supra*, 17 NRC at 743 (emphasis added).

If only minor gap fillers are permitted, asks Licensee, then what was the purpose of the provisions in the NRC Authorization Acts beginning in 1980 permitting NRC consideration of utility plans? The answer, says LILCO, is that these statutes evidence Congress' intent to permit utility-only plans, and that no legislation would have been necessary to permit minor gap fillers.

LILCO also argues that the Board erred by failing to presume that State and local officials would fulfill their duties by responding in an emergency, citing New York Executive Law article 2-B which requires such response,[6] and language in the Conference Report accompanying the FY 1985 HUD-Independent Agencies Appropriations Act favoring such a presumption.[7]

Moreover, says LILCO, the Board erred in deciding the summary disposition motion by raising *sua sponte* the question whether a State and local response, if there were one, would be *coordinated* with LILCO's. The only issue raised by Contentions 1-10 and by the motion was legal authority. The factual issue of coordination was not raised by the motion or by Contentions 1-10, but by Contention 92, which was not then before the Board. However, even if coordination were a proper question, the record shows that the plan is designed to accommodate previously uncooperative government personnel, according to LILCO.

Staff's and Intervenors' Arguments

Staff and Intervenors argue that even assuming that the State and local authorities might themselves respond in an emergency or delegate some functions to LILCO, the regulations require comprehensive, cooperative, and detailed preplanning which includes various governmental groups.

[4] The Appeal Board added that

> [T]he Board properly rejected LILCO's "immateriality" argument. We recognize that the Commission's regulations do not spell out the precise manner in which an evacuation is to be conducted, if necessary. Nonetheless, the Commission has construed its emergency planning regulations to require "*provisions* for evacuating the public in times of radiological emergencies." We have likewise observed that the Commission's emergency planning scheme contemplates that emergency evacuation *procedures* be developed for the 10-mile [EPZ] . . . . LILCO included traffic control as part of its proposed evacuation procedures in light of such requirements. We believe that such inclusion was proper. In the context of this case, at least, something more is needed than an aspiration that the public will be able to fend for itself in the event an evacuation is required.

ALAB-818, *supra*, 22 NRC at 677 (footnotes omitted, emphasis added by the Appeal Board).

[5] These pleadings are: Statement of Suffolk County Executive Peter F. Cohalan (June 23, 1986); LILCO's Reply to Unauthorized Pleading filed on June 23 by Suffolk County; LILCO's Motion to Strike Unauthorized Pleading filed on June 23 by Suffolk County (June 30, 1986); Statement by Governor Mario M. Cuomo (June 30, 1986); Response of Long Island Lighting Company to Governor Cuomo's June 30, 1986 "Statement"; Letter dated July 7, 1986, from Lawrence Coe Lanpher, Suffolk County's Answer to LILCO's "Motion to Strike Unauthorized Pleading Filed on June 23 by Suffolk County" (July 15, 1986); State of New York Response to "Response of Long Island Lighting Company to Governor Cuomo's June 30, 1986 'Statement' "

Intervenors also submitted two pleadings not directly related to the legal authority issues, and we do not consider them at this juncture. *See* Suffolk County, State of New York, and Town of Southampton Motion for Reconsideration of CLI-86-11 (July 21, 1986); Suffolk County, State of New York, and Town of Southampton Supplemental Answer to LILCO's Petition for Review of ALAB-832 (July 22, 1986).

[6] *See, e.g.*, § 25 of the Executive Law, which provides that

> [u]pon the threat or occurrence of a disaster, the chief executive of any political subdivision is hereby authorized and empowered to and shall use any and all facilities, equipment, supplies, personnel and other resources of his political subdivision in such manner as may be necessary or appropriate to cope with the disaster or any emergency resulting therefrom.

[7] "[I]n its review [of emergency plans], FEMA should presume that Federal, State and local governments will abide by their legal duties to protect public health and safety in an actual emergency . . . ." H.R. Rep. No. 212, 99th Cong., 1st Sess., 131 Cong. Rec. 15,358 (1985).

The current evidentiary record does not reveal what the nature of a local governmental response might be, and thus the Board correctly denied the motion.

As to LILCO's argument that the Board shouldn't have considered the coordination issue in ruling on the summary disposition motion, Staff argues that LILCO's motion itself raised factual issues necessary for the Board to resolve, one of them being the coordination question.

Staff and Intervenors also argue that realism and immateriality could have been rejected on procedural grounds since LILCO and the other parties had litigated from December 1983 to August 1984 on the assumption that LILCO alone would implement its plan. Thus LILCO's assertion of the realism theory late in the game was an attempt to prosecute its case on a theory different from that which the parties had litigated, and it was necessary to offer those parties an opportunity to submit evidence on the new theory.

LILCO's Reply to Staff and Intervenors

First, the utility argues, the Governor's press release statement that the State and County would respond in an emergency supports a finding in LILCO's favor on the "realism" issue because the press release is in the evidentiary record, no one has attempted to refute it, there's a presumption that governmental officials will perform their legal duties, and an inference should be drawn against a party who fails to produce evidence in his control which could refute evidence in the record.

Second, LILCO asserts that the County's response in an emergency would not be *ad hoc* and uncoordinated because the County Executive has directed County employees to study the plan with an eye to giving advice and assistance to the County Legislature. Thus relevant County employees will be familiar with the plan.[8]

Third, LILCO asserts that it is not prosecuting its case on a theory different from that litigated initially. At the outset of the evidentiary hearing, Applicant sought to litigate several variations of its plan, including a "principle offsite plan" involving *County* implementation; at the same time, Applicant noted that the plan was flexible enough to incorporate County personnel after the onset of an emergency. Despite LILCO's request, the Board permitted LILCO to litigate only the LILCO-implemented variation.

[8] At oral argument before the Appeal Board on August 12, 1985, when the County Executive was at odds with the Legislature over Shoreham, counsel representing the Executive supported this LILCO argument, adding that County personnel were already familiar with plans to deal with natural disasters. Furthermore, despite Justice Geiler's opinion that police powers could not be delegated to private companies, Counsel noted as well that the County charter provides for the appointment of special patrolmen in emergencies, and that state law provides for the appointment in emergencies of special deputy sheriffs. Tr. 83-88.

Commission Decision

There is no doubt that the Commission's emergency planning regulations were generally intended to prevent a recurrence of the situation that arose shortly after the TMI-2 accident when, based on the facts as they then appeared, some emergency response was called for but the prior planning and coordination between the utility and local governments proved inadequate. The emergency planning standards in 10 C.F.R. § 50.47(b) and Part 50, Appendix E, are premised upon a high level of coordination between the utility and State and local governments. It should come as no surprise that without governmental cooperation LILCO has encountered great difficulty complying with all of these detailed planning standards.

However, we intended our rules to be flexible. As we have stated before, we are legally obligated to consider whether a utility plan, prepared without government cooperation, can pass muster. A utility plan might pass muster under 10 C.F.R. § 50.47(c). Section 50.47(c) provides for licensing notwithstanding noncompliance with the NRC's detailed planning standards: (1) if the defects are "not significant"; (2) if there are "adequate interim compensating actions"; or (3) if there are "other compelling reasons." The decisions below focus on (1) and (2) and we do likewise.

The measure of significance under (1) and adequacy under (2) is the fundamental emergency planning licensing standard of § 50.47(a) that "no operating license . . . will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." The root question becomes whether the LILCO plan can provide for "adequate protective measures . . . in the event of a radiological emergency."[9]

[9] Under § 50.47(c) a compensating action should be "interim." We have no difficulty calling the LILCO plan "interim." Certainly LILCO intends it as such because it stands ready to cooperate with the governments in preparing a fully coordinated plan. But County Executive Cohalan and Governor Cuomo deny that they ever would or could cooperate with LILCO either before or even during an accident, citing both distrust of the utility company and Suffolk County's ordinance prohibiting implementation of LILCO's emergency plan. Statement of Peter F. Cohalan (June 23, 1986); Statement by Governor Mario M. Cuomo (June 30, 1986). We simply cannot accept these statements at face value, as we could not automatically accept earlier, similar statements by the County. *See* January 30, 1986 Commission Memorandum and Order, CLI-86-14, 24 NRC 36, 40 n.1. *See also* LILCO's Reply to Unauthorized Pleading filed on June 23 by Suffolk County at 10.

These statements by the Governor and the County Executive do not convince us that the LILCO plan is anything more than an interim plan which likely will be superseded or supplemented by the State and County if Shoreham is permitted to operate at full power. To conclude otherwise would require us to assume that the governments will not seek to improve the protection available for their citizens.

This root question cannot be answered without some discussion of what is meant by "adequate protective measures." Our emergency planning regulations are an important part of the regulatory framework for protecting the public health and safety. But they differ in character from most of our siting and engineering design requirements which are directed at achieving or maintaining a minimum level of public safety protection. *See, e.g.*, 10 C.F.R. § 100.11. Our emergency planning requirements do not require that an adequate plan achieve a preset minimum radiation dose saving or a m[illegible]tion time for the plume exposure pathway eme[illegible]anning zone in the event of a serious acci[illegible] attempt to ac[illegible]e reasonable and feasible dose reduction under the circumstances; what may be reasonable or feasible for one plant site may not be for another. And, in the past, what was reasonable and feasible in a given case depended on the cooperative planning efforts of the utility and State and local governments. But what should we regard as reasonable and feasible for Shoreham, where the governments refuse to cooperate?

In addressing this question the Boards below presumed that the LILCO plan must essentially achieve all that a fully coordinated plan can achieve. In essence, the Boards defined what is reasonable and feasible for Shoreham solely in terms of the nature of the site and environs without regard for the degree of possible government cooperation. This inexorably led the Boards to rejection of the LILCO plan on the ground that LILCO could not lawfully accomplish all that cooperating governments might in the event of an accident.

We believe that flexibility is called for by the legal requirement that we consider a utility emergency plan. It is very unlikely that *any* utility plan could ever pass such a strict test. We could conceivably define what is reasonable and feasible dose reduction for Shoreham solely in terms of what LILCO *itself* can reasonably and feasibly achieve, but we are not prepared to do so. Rather, we might look favorably on the LILCO plan if there was reasonable assurance that it was capable of achieving dose reductions in the event of an accident that are generally comparable to what might be accomplished with government cooperation. With this in mind, we turn to LILCO's realism argument.

We assume that LILCO is prohibited from performing the State or County roles in the following areas:

(1) guiding traffic;
(2) blocking roadways, erecting barriers in roadways, and channeling traffic;
(3) posting traffic signs on roadways;

(4) removing obstructions from public roadways, including towing private vehicles;
(5) activating sirens and directing the broadcasting of emergency broadcast system messages;
(6) making decisions and recommendations to the public concerning protective actions;
(7) making decisions and recommendations to the public concerning protective actions for the ingestion exposure pathways;
(8) making decisions and recommendations to the public concerning recovery and reentry;
(9) dispensing fuel from tank trucks to automobiles along roadsides; and
(10) performing access control at the Emergency Operations Center, the relocation centers, and the EPZ perimeters.

Some of these areas, such as making decisions and recommendations to the public on protective actions, are fundamental to emergency planning. However, if Shoreham were to go into operation and there were to be a serious accident requiring consideration of protective actions for the public, the State and County officials would be obligated to assist, both as a matter of law and as a matter of discharging their public trust. *See* N.Y. Exec. Law art. 2-B, § 25.1. *See also* H.R. Rep. No. 212, 99th Cong., 1st Sess. (1985), *quoted in part* in note 7, *supra*. Thus, in evaluating the LILCO plan we believe that we can reasonably assume some "best effort" State and County response in the event of an accident. We also believe that their "best effort" would utilize the LILCO plan as the best source for emergency planning information and options. After all, when faced with a serious accident, the State and County must recognize that the LILCO plan is clearly superior to no plan at all.

Nevertheless, we are unwilling to *assume*, as LILCO would have us, that this kind of best-effort government response would necessarily be adequate. In point of fact, there are questions about the familiarity of State and County officials with the LILCO plan, about how much delay can be expected in alerting the public and in making decisions and recommendations on protective actions, or in making decisions and recommendations on recovery and reentry, and in achieving effective access controls. The record tells us that an evacuation without traffic controls would be delayed from 1½ to 3 hours, but how important is this time delay? For which scenarios, if any, does it eliminate evacuation as a viable protective action?

To answer these questions, more information is needed about the shortcomings of the LILCO plan in terms of possible lesser dose savings and protective actions foreclosed, assuming a best-effort State and

County response using the LILCO plan as the source for basic emergency planning information and options. Accordingly, we remand LILCO's realism argument to the Licensing Board for further proceedings in accord with this Decision. The Board should use the existing evidentiary record to the maximum extent possible, but should take additional evidence where necessary.[10]

IMMATERIALITY

As noted above, Intervenors asserted in Contentions 1-10 that LILCO lacks legal authority to implement certain features of its plan, including controlling traffic. LILCO argues that with the exception of the alerting and broadcasting functions, the features mentioned in the legal authority contentions are not required by the regulations — it is immaterial that LILCO might lack authority to implement them.

Staff and Intervenors opposed the immateriality argument principally on the ground that the inability to impose traffic control would impermissibly restrict "the range of protective actions" available in an emergency. Intervenors also asserted that the immateriality theory was essentially factual in nature, and thus required further evidentiary hearings.

Commission Decision

While NRC regulations may make no explicit mention of some of these emergency planning measures, such measures may nevertheless be required in order that there be reasonable assurance of adequate protective measures. LILCO's materiality argument presents issues that are primarily factual rather than legal. The factual issues are subsumed within the scope of factual issues presented by LILCO's realism argument and can be considered by the Board in the remanded proceeding on realism.

CONCLUSION

In sum, we conclude that LILCO's plan should be measured against a standard that would require protective measures that are generally comparable to what might be accomplished with governmental cooperation.

[10] Since LILCO raised factual issues in its summary disposition papers, it was entirely appropriate for the Board itself to have discussed them by addressing coordination issues in its ruling. However, given the pleadings that have been filed on realism, and the further proceedings directed by this Decision, there is no prejudice to the parties even assuming *arguendo* that LILCO's argument rested on some new "theory" not previously disclosed to the parties.

We also conclude that more information is needed in order to decide how the LILCO plan measures up to this standard. In applying additional information to the analysis of the LILCO plan, the Board should assume that the State and County would in fact respond to an accident at Shoreham on a best-effort basis that would use the LILCO plan as the only available comprehensive compendium of emergency planning information and options.

Finally, we direct the Appeal Board to reconsider its deferral of LILCO's other emergency planning appeals in light of this Decision.

Commissioner Asselstine dissents. His separate views are attached.

It is so ORDERED.

For the Commission

Samuel J. Chilk
Secretary of the Commission

Dated at Washington, D.C.,
this 24th day of July 1986.

DISSENTING VIEWS OF COMMISSIONER ASSELSTINE

The Commission's Decision today endorses the idea that a nuclear plant may be allowed to operate without State and local government participation in or cooperation with emergency planning. This Decision, in effect, takes the "planning" out of emergency planning and thereby undermines the foundation upon which our emergency planning regulations are based. The Commission's Decision is riddled with assumptions which seem to be supported by nothing more than wishful thinking.

The whole reason for the Commission's emergency planning regulations was the realization after the Three Mile Island accident that in the case of an emergency with the potential for significant offsite radiation releases there would be insufficient time to make arrangements to protect the people living around nuclear plants. For this reason, the Congress and the Commission felt it essential to require advance planning. This prior planning is designed to ensure that a variety of protective actions are available to respond to serious nuclear accidents and that whichever

protective actions are necessary can be implemented quickly and smoothly. In adopting its new emergency planning regulations, the Commission expressly recognized that participation in planning by State and local governments and coordination between the governments and the licensee was central to effective emergency planning.

Congress provided, however, that the Commission could consider, in the absence of an approved State or local plan, whether a State, local, or utility emergency preparedness plan, or some integration of these plans, provides reasonable assurance that public health and safety is not endangered by the operation of the plant. Thus, as a purely abstract legal matter, the Commission is correct in saying that we are authorized to consider a utility plan alone. However, that should not end the inquiry. The Commission must also consider whether the Commission should permit consideration of a utility plan where not only no State or local plan exists, but where the State and local governments refuse to participate in or cooperate with emergency planning.

This is not a case in which one local government or the State government alone has refused to participate in emergency planning and another governmental unit can take up the slack. *All* of the responsible governmental entities are refusing to participate in any way, shape, or form in emergency planning for the Shoreham plant. There will, therefore, be *no* governmental preplanning and *no* governmental coordination with LILCO. Moreover, according to the New York courts, LILCO does not have the legal authority to carry out certain governmental functions which are fundamental to an emergency response.[1] All governmental responses will, therefore, be *ad hoc* even if, as the Commission assumes, the State and local governments do respond in the case in an emergency, and even if, as the Commission assumes, the State and local governments decide to implement the LILCO plan.[2] Emergency plans are complicated. If an emergency plan is to work smoothly, everyone must be familiar with the plan and his or her responsibilities under the plan. As the Commission's regulations recognize, this requires governmental cooperation, training, and rehearsal. Given the positions of the State and local governments in this case, none of these fundamental preparatory steps will be taken.

[1] I also believe that we should have considered the preemption issues raised by ALAB-818 at the same time we considered the issues decided in this Order.

[2] The Commission also assumes that the LILCO plan is really only an interim compensating measure because once the Shoreham plant is licensed the State or County will see the light and begin to cooperate with LILCO and participate in emergency planning for Shoreham. The Commission's assumptions seem to be based on not much more than wishful thinking.

The question is, then, should the Commission under these circumstances consider a utility plan alone? I believe not. What the Commission decides today is that a completely *ad hoc* response by the State and local governments might be sufficient to provide reasonable assurance that there will be adequate protection of the public in the event of an emergency. I cannot conceive of circumstances in which that would be the case. The Commission's Decision amounts to a judgment that the core of emergency planning need not exist. The Commission's endorsement of such an idea undercuts the very foundation of emergency planning.

I am equally troubled by another aspect of the Commission's Order. The Commission says that LILCO ought to be given a chance to show that even if the State and local emergency response is *ad hoc* there will be reasonable assurance that the LILCO plan is, in the event of an accident, capable of achieving dose reductions "that are generally comparable to what might be accomplished with governmental cooperation." (Order, p. 32) Unfortunately, it is not clear exactly what that means. The Commission specifically rejects the Licensing Board and Appeal Board decisions which presumed that the LILCO plan must be capable of establishing the same level of assurance that a plan with governmental cooperation would achieve. Is the Commission permitting a lesser level of assurance for the LILCO plan? For example, if the *ad hoc* nature of governmental response would foreclose certain protective actions, would the Commission still find the LILCO plan acceptable as long as the dose reductions would be "generally comparable" to a plan with governmental cooperation? Unfortunately, the Commission does not clearly explain what it intends. The Commission certainly should not be permitting Shoreham to meet a lesser standard of protection for the public than other plants in the country have been required to meet.

I am not convinced that the Licensee could, in the absence of any governmental cooperation, establish the same level of assurance as if there were a plan coordinated with the State and local governments. Further, I do not believe that the Commission should establish a precedent which would allow for an *ad hoc* response on fundamental aspects of emergency planning — in this case the core of emergency planning.

EXHIBIT 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CONSOLIDATED CASES
Nos. 87-2032, 87-2033, 88-1121

COMMONWEALTH OF MASSACHUSETTS, et al.

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

Respondents,

and

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.,

Intervenors.

ON PETITION TO REVIEW A FINAL RULE OF THE
UNITED STATES NUCLEAR REGULATORY COMMISSION

BRIEF FOR RESPONDENTS

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April 8, 1988

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FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS, et al, Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents, and PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al., Intervenors.	Consolidated Cases Nos. 87-2032, 87-2033, 88-1121

BRIEF FOR RESPONDENTS

ISSUES PRESENTED

1. Whether the NRC acted in accordance with the Atomic Energy Act and every NRC Authorization Act passed since 1980 when it promulgated a rule which declared that in the absence of an emergency plan prepared by state or local authorities, the NRC would evaluate the adequacy of a utility-prepared emergency plan.

2. Whether the NRC acted lawfully when it codified its preexisting "realism doctrine" into a regulatory presumption that in the event of a radiological emergency states and localities would exercise their "best efforts" to protect the citizenry and, in the absence of any other plan to follow, would generally follow an existing, approved utility-prepared plan.

3. Whether the NRC gave adequate notice of this presumption when (1) the information accompanying the proposed rule made it clear that the Commission was relying on its established assumption that state and local governments would perform their traditional public health and safety roles in an emergency and would follow a comprehensive utility plan and (2) petitioners and others commented on this established Commission assumption.

STATEMENT OF THE CASE

A. Nature of the Case

This case involves a consolidated attack on the Nuclear Regulatory Commission's ("NRC" or "Commission") adoption of a rule setting forth generic standards for evaluating the adequacy of a utility-prepared emergency plan in situations in which states and/or localities refuse to participate in emergency planning. The NRC's final rule reaffirmed the principle that there must be an adequate emergency plan for every nuclear plant, even if that means that in individual cases the non-participation of state and local governments may render emergency planning inadequate and thereby make plant licensing impossible.

The NRC's final rule included two presumptions, both derived from existing NRC adjudicatory practice. The first, unrebuttable presumption stated that in a real emergency, states and localities would do their best to protect the public. The second presumption, explicitly made rebuttable, reasoned that in an emergency states and localities would generally follow a utility plan in the absence of any better plan to follow.

To the extent that the petitioners attack what the NRC has actually done in the rule before the Court, their challenges amount to a claim that the NRC is absolutely precluded from authorizing issuance of an operating license whenever a state or locality decides not to participate further in emergency planning at a nuclear power plant. This claim flies in the face of unequivocal Congressional intent, expressed in the Atomic Energy Act and a series of more recent NRC Authorization Acts. The NRC has acted entirely lawfully in promulgating the rule here at issue. The petitions for review all lack merit and should be dismissed.

B. General Statutory Background

The NRC establishes standards that govern the operation of nuclear power plants both through its broad rulemaking authority and through its case-by-case adjudicatory procedures.

With regard to NRC rulemaking, the Atomic Energy Act gives the NRC authority, inter alia, to regulate the commercial uses of nuclear energy. That authority includes the power to "prescribe such regulations or orders as it may deem necessary ... to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property." Section 161(i)(3), 42 U.S.C. § 2201(i)(3), cited in New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 90-91 (1st Cir. 1978). See also Section 161(b), 42 U.S.C. § 2201(b).

NRC adjudicatory rulings generally arise out of the agency's extensive, multi-tiered process for the review of individual applications for licenses to construct and operate nuclear power plants. A utility wishing to construct and operate a facility must submit detailed health, safety, and environmental documentation for review by the NRC staff. Once the NRC staff completes its review, it participates as a party in the licensing process. In accordance with the Administrative Procedure Act, 5 U.S.C. § 551, et seq., and with Commission regulations, 10 C.F.R. Part 2, formal adjudicatory hearings are then held on all construction permit applications and on all contested operating license applications. Public Service Co. of New Hampshire v. NRC, 582 F.2d 77, 80 n.4 (1st Cir. 1978).

C. Emergency Planning and the "State Veto" Issue

1. Background

Until the 1979 accident at Three Mile Island, neither the NRC nor Congress attached a high priority to emergency planning. Adequate offsite emergency planning was not a pre-condition to obtaining an operating license for a nuclear power plant.

The Three Mile Island accident brought an immediate recognition that a substantial upgrading in emergency planning was needed, both for existing reactors and for those not yet licensed to operate. Shortly after that accident the NRC began preparing extensive revisions of its emergency planning requirements. After issuing an advance notice of proposed rulemaking in July 1979, the NRC proposed emergency planning

rules in September and December, 1979. 44 Fed. Reg. 54309 (Sept. 19, 1979); 44 Fed. Reg. 75167 (Dec. 19, 1979).

2. Congress Establishes Emergency Planning Requirements.

In 1980, while the NRC's emergency planning rulemaking was still pending, Congress included emergency planning provisions in the NRC's authorization legislation. In relevant part Section 109 of the statute provided:

> (a) Funds authorized to be appropriated pursuant to this Act may be used by the Nuclear Regulatory Commission to conduct proceedings, and take other actions, with respect to the issuance of an operating license for a utilization facility only if the Commission determines that--
>
> (1) there exists a State or local emergency preparedness plan which--
>
> (A) provides for responding to accidents at the facility concerned, and
>
> (B) as it applies to the facility concerned only, complies with the Commission's guidelines for such plans, or
>
> (2) in the absence of a plan which satisfies the requirements of paragraph (1), there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned.
>
> A determination by the Commission under paragraph (1) may be made only in consultation with the Director of the Federal Emergency Management Agency....

Pub. L. No. 96-295, § 109(a).

Importantly for purposes of this case, the legislation did not make the existence of a state or local emergency plan a condition of plant operation. To the contrary, the statute provided two means by which emergency planning requirements could be satisfied: through either (1) a state or local plan that met

all NRC guidelines and criteria, or (2) where a state or local plan was nonexistent or failed to meet all the NRC's guidelines, on the basis of a state, local, or utility plan, so long as NRC determined that operation of the plant would provide "reasonable assurance" that the health and safety of the public was not endangered.

Congress' two-tiered approach to emergency plans was directed to a dilemma of law and policy: while on the one hand, states and localities had experience and knowledge about emergency planning within their jurisdictions, on the other hand, if plant licensing were made conditional on the existence of a state or local emergency plan, state or local officials could veto the operation of a completed plant by withholding their cooperation in emergency planning.

As stated by the Conference Committee that drafted the final version of the legislation,

> The conferees sought to avoid penalizing an applicant for an operating license if a State or locality does not submit an emergency response plan to the NRC for review or if the submitted plan does not satisfy all the guidelines or rules. In the absence of a State or local plan that complies with the guidelines or rules, the compromise permits NRC to issue an operating license if it determines that a State, local or utility plan, such as the emergency preparedness plan submitted by the applicant, provides reasonable assurance that the public health and safety is not endangered by operation of the facility.

H. R. Conf. Rept. No. 1070, 96th Cong., 2d Sess. 27 (1980). Thus Congress clearly contemplated that the NRC could license a nuclear power plant on the basis of a utility emergency plan that provided "reasonable assurance" that public health and safety was not endangered. Significantly, the agency was

authorized to make this decision notwithstanding the total absence of a state or local plan and the inability of the utility plan to meet all NRC guidelines. Moreover, the NRC was empowered to make this decision without consultation with FEMA.[1]

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[1]The legislative history prior to the Conference resolution of the dilemma presented by possible state veto reflects that both the Senate and the House struggled with different solutions. For example, Senator Johnston of Louisiana proposed that in the absence of an acceptable state or local plan, the federal government should step in and prepare a plan. Without such a provision, Senator Johnston explained, a Governor opposed to a particular plant (such as then Governor Brown of California) would have a "weapon with which to kill" a completed nuclear plant. 125 Cong. Rec. S9477 (1979).

Senators Hart and Simpson urged a different approach. Senator Hart, accusing some states of putting their citizens' lives "in jeopardy" by failing to adopt emergency plans, declared that instead of relieving states of their traditional responsibility to protect the public, Congress should adopt another mechanism to "force" them to meet that responsibility. 125 Cong. Rec. S9476 (1979). The mechanism proposed by Senators Hart and Simpson was the mandatory shutdown of reactors in the absence of an approved plan, coupled with a provision by which plan approvals already granted would in effect be irrevocable. 125 Cong. Rec. S9466 (1979).

The House of Representatives voted not to condition plant operation on the existence of an adequate emergency plan. It rejected an amendment, offered by Representative Weaver, which would have barred the issuance of an operating license to any new nuclear plant in a state which lacked an NRC-approved emergency plan. The case against the amendment was expressed by Representative Rinaldo:

> This amendment would allow a utility to be denied an operating license by the NRC, even though it had complied with every NRC requirement, because of a State's failure to approve an emergency plan. In effect, States could impose their own moratoriums on new nuclear power facilities by failing to develop adequate State emergency response plans.

125 Cong. Rec. H11347 (1979).

3. The NRC Adopts Its 1980 Emergency Planning Rules.

On July 23, 1980, the NRC Commissioners met to consider the draft of a final emergency planning rule. It included specific provisions dealing with the evaluation of state and local emergency plans, 10 C.F.R. § 50.47(b), and a general provision, 10 C.F.R. § 50.47(c)(1), covering circumstances in which the requirements applicable to state and local emergency plans could not be met. The Commissioners gave particular attention to the question of whether the final rule was in harmony with the approach taken by Congress in Section 109 of the Appropriation Act, passed only a few weeks earlier. At issue was whether the NPC's rule permitted the same degree of latitude that Congress had provided for cases in which no adequate state or local plan existed, and in which a utility plan would therefore be evaluated. The Commission was advised by its General Counsel that its final rule was consistent with Section 109. 45 Fed. Reg. at 55402 (col. 3) (Aug. 19, 1980).[2]

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[2]Subsequently, in an adjudicatory decision the Commission also made it clear that, consistent with Section 109 of its Authorization Act, it would consider a utility-only emergency plan. In May 1983, the Commission responded to Suffolk County's assertion that its refusal to participate in emergency planning for the Shoreham plant required the NRC to terminate the Shoreham operating license proceeding. The Commission declared that under its 1980 regulations and the 1982-83 NRC Authorization Act, see Statement of the Case at C, 4, infra, the NRC was "not only authorized but also obligated to at least consider any proferred utility offsite emergency plan" in cases of state or local refusals to participate in emergency planning. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-83-13, 17 NRC 741, 743 (1983).

4. Subsequent Congressional Enactments Relevant To The State Veto Issue

Congress re-enacted the relevant provisions of Section 109 of the 1980 NRC Authorization Act in Section 5 of the 1982-83 Authorization Act. That statute provided that

> Of the amounts authorized to be appropriated ... the Nuclear Regulatory Commission may use such sums as may be necessary, in the absence of a State or local emergency preparedness plan which has been approved by the Federal Emergency Management Agency, to issue an operating license ... for a nuclear power reactor, if it determines that there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned.

Pub. L. 97-415, § 5.

In connection with the next NRC authorization bill, for fiscal years 1984-85, the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works held hearings on April 15, 1983, specifically addressed to the emergency planning state veto issue. In the hearings, a key threshold issue was whether the NRC was empowered to consider and approve a utility plan in the face of state or local non-participation. All NRC Commissioners declared that the NRC had the legal power to consider a utility plan under such circumstances, while also recognizing that it would be very difficult for the NRC to find such a plan to be adequate. The representative of petitioner Union of Concerned Scientists ("UCS") saw the problem similarly, declaring:

> [T]he central issue here this morning is whether a utility plan can substitute for the offsite plans of the State and the local governments. I think we would agree with the general sentiment of the NRC Commissioners, that while theoretically it is possible that that could be the case, in practice, it is very difficult to see how it could be.

Nuclear Emergency Planning Hearing, 98th Cong., 1st Sess. 29 (statement of Steven C. Sholly, UCS).

A particular question in the hearings was whether there was a need for new legislation to address situations of State or local non-participation. On this point, NRC Commissioner Asselstine testified:

> I also think that the existing provision in the authorization act does at least provide some leverage by at least permitting a utility to submit a plan and have that plan reviewed. My own view is that that provision does at least provide some leverage or inducement to the State and local government to fulfill their responsibilities and to be involved in the process.

Id. at 17 (statement of Commissioner Asselstine).

Following these hearings, Congress reenacted verbatim the relevant statutory provision which it had enacted in the 1982-83 NRC Authorization Act. P.L. 98-553, Section 108. Moreover, the Senate report on the Authorization Act provided instructions to the NRC and FEMA:

> In the course of the Subcommittee's hearings, however, two potentially significant problems have been raised. First, witnesses expressed concern that under the existing process, state or local governments, by acting or failing to act, could keep FEMA and the NRC from evaluating an emergency preparedness plan for a nuclear powerplant that was prepared or submitted, or both, by the applicant or licensee, and, as a result, prevent the NRC from issuing an operating license to such applicant or licensee if the NRC determines that the plan submitted by the applicant or licensee provides reasonable assurance that public health and safety is not endangered by operation of the plant.
>
> The Committee reiterates that the adoption of the provision is intended to reconfirm the authority of the NRC and FEMA to evaluate an emergency preparedness plan submitted by an applicant or licensee pursuant to this section.

S. Rep. No. 546, 98th Cong., 2d Sess. 14. (1984).

In Supplemental Views attached to the Senate Report, Senator Simpson commented that the statutory provision and the accompanying language in the report reflected the Committee's concern that, "in certain isolated instances," the process for preparation and evaluation of emergency plans was not working as Congress had originally intended. He declared:

> With the adoption of section 108, this Committee has now made it clear in three successive NRC authorization bills that it is not our intention to allow a state or locality to prevent a completed facility from operating by refusing to prepare an emergency preparedness plan. It necessarily follows that the Committee did not intend to allow such governmental entities to accomplish the same result by refusing to participate in the exercise or implementation of an otherwise acceptable emergency plan. To accept such a situation would be to completely frustrate this thrice-stated authority....

Id. at 22.

There has been no NRC Authorization Act since that for 1984-85. However, the Conference Report on the HUD-Independent Agencies Appropriations Act of 1986, House Report 99-212, 99th Cong., 1st Sess. (July 18, 1985), included the "state veto" issue in its discussion of FEMA's responsibilities:

> In particular, the Committee is concerned about situations where State or local government entities arbitrarily refuse to develop radiological emergency preparedness plans or to participate in the exercise or implementation of such plans. The Committee does not believe that the State and local government entities should be permitted to veto the operation of commercial nuclear facilities simply by refusing to participate in the preparation, exercise or implementation of such plans.
>
> It is the Committee's desire that FEMA explore all alternatives for establishing adequate offsite preparedness at commercial nuclear facilities in the event that State and local governments do not participate in the preparation, exercise or implementation of radiological preparedness plans. In that regard, it is still the Committee's intention

> that, in its review of such plans, FEMA should presume that Federal, State and local governments will abide by their legal duties to protect public health and safety in an actual emergency. The Committee expects that States and localities will fulfill their responsibilities to carry out critical aspects of the emergency planning process and will take the necessary steps to be able to implement the resulting plan if an emergency occurs.[3]

H.R. Conf. Rept. No. 212, 99th Cong., 1st Sess. 37 (1985)

5. The NRC's "Realism" Decision

In Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986) ("LILCO"), the Commission reiterated its obligation to consider a utility plan in cases of state or local non-participation and offered its fullest explanation to that date of the principles that should govern the NRC's evaluation of a utility plan. Noting that the sixteen planning standards of 10 C.F.R. § 50.47(b)(1) were geared to the evaluation of a state or local plan, the Commission commented that a utility plan might be expected to have difficulty meeting those standards if the rule were applied rigidly. However, the Commission said, the NRC's emergency planning rules were intended to be applied flexibly, adding that it might approve an emergency plan that provided

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[3] In House Report 99-363, 99th Cong., 1st Sess., dated November 8, 1985, the Conference Committee makes no reference to and does not include the above quoted language from H.R. Conf. Rept. No. 99-212 in pages 15-18 of the report discussing the Federal Emergency Management Agency. It was omitted by error according to the Conferees and was then added in the Congressional Record of November 13, 1985. 131 Cong. Rec. S15359 (1985).

reductions in radiological dose to the public that were "generally comparable" to what could be accomplished with full state and local cooperation. The term "generally comparable" was not defined further.

In that adjudicatory decision the Commission also declared what has become known as the "realism" doctrine:

> [I]f Shoreham were to go into operation and there were to be a serious accident requiring consideration of protective actions for the public, the State and County officials would be obligated to assist, both as a matter of law and as a matter of discharging their public trust.... Thus, in evaluating the LILCO plan we believe that we can reasonably assume some "best effort" State and County response in the event of an accident. We also believe that their "best effort" would utilize the LILCO plan as the best source for emergency planning information and options. After all, when faced with a serious accident, the State and County must recognize that the LILCO plan is clearly superior to no plan at all.

Id. at 31 (citations omitted). In conclusion the Commission instructed the Licensing Board as follows:

> [T]he Board should assume that the State and County would in fact respond to an accident at Shoreham on a best-effort basis that would use the LILCO plan as the only available comprehensive compendium of emergency planning information and options.

Id. at 33. The decision said nothing about permitting parties to attempt to rebut these conclusions.

D. The NRC's Proposed Emergency Planning Rule

Though the Commission's ruling in LILCO made clear to the parties to that particular adjudication that state or local non-participation in emergency planning did not automatically bar plant operation, it was not so apparent in late 1986 that this principle was understood nationwide. On the contrary, the

argument that state or local opposition could automatically block plant operation appeared to be gaining currency in a variety of jurisdictions. For example, in August 1986, the Governor of Ohio announced that he was withdrawing his support for emergency planning for two Ohio nuclear plants (one of which was on the verge of being licensed to operate) and was rescinding an implementing directive related to emergency planning. Soon thereafter, the Sixth Circuit granted, at Ohio's request, a stay of operation of one of the plants, although the stay was later vacated. State of Ohio v. Nuclear Regulatory Commission, 814 F.2d 258 (6th Cir. 1987). Similar claims had been made in North Carolina and Illinois.[4]

Thus, as stated in the proposed rule the Commission felt that it should consider:

> [W]hat should be the appropriate underlying philosophy or approach to emergency planning as a prelicensing regulatory requirement -- a consideration which is prompted by the change in circumstances which have been experienced since the regulations were promulgated in 1980, i.e., the phenomenon, not then expected, of

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[4]On May 27, 1986, the Commissioners of Chatham County, North Carolina, passed a resolution rescinding their approval of the emergency response plan for the Shearon Harris nuclear plant. In July 1986, a petition to the NRC asserted that Chatham County's withdrawal automatically barred operation of the Shearon Harris plant. (The County ultimately reversed itself.) See Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), 24 NRC 618 (1986). On June 17, 1986, the Village of Seneca, Illinois, withdrew its support from the state-prepared emergency plan for the LaSalle nuclear plant and in August, 1986, filed suit in the Seventh Circuit Court of Appeals asserting that the NRC was barred from allowing the plant to operate. Village of Seneca v. NRC, No. 86-2304 (7th Cir. 1986). (A motion for voluntary dismissal of the case was granted by order dated September 2, 1986.)

> State and local governments, refusing to cooperate in emergency planning.

52 Fed. Reg. at 6983 (col. 1).

The proposed rule was published on March 6, 1987, with a 60-day period for public comment. 52 Fed. Reg. 6980. (The comment period was later extended by 30 days, finally expiring on June 4, 1987.) The proposed rule requested comments from the public on two possible approaches to emergency planning. 52 Fed. Reg. at 6981 (col. 2). The first was to keep the existing regulatory approach, under which a license can be issued only when there is "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." (Emphasis in original.) The notice observed that although under existing regulations, as interpreted in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986), it was legally possible for the NRC to evaluate a utility-prepared plan, it would be difficult for a utility plan to meet the "reasonable assurance" standard in cases where states and localities declined to participate in emergency planning. 52 Fed. Reg. at 6981 (col. 2).

The notice therefore asked for public comment on a second possible approach to emergency planning. Under this alternative the NRC proposed to examine whether the utility had done all within its power to make emergency planning satisfactory, rather than whether the outcome was a plan that provided adequate protection. The notice suggested that if a plant were licensed under this approach, even states and localities whic had previously opposed licensing the plant would

join in the emergency planning process in order to assure the best possible protection of the public. 52 Fed. Reg. at 6983 (col. 1). In support of this second possible approach to emergency planning the Commission noted that, "[a] forced abandonment of a completed nuclear plant for which billi ns for [sic] dollars have been invested also poses obvious serious financial consequences to the utility, ratepayers and taxpayers." 52 Fed. Reg. 6981 (col. 3). It thus requested comment on the "important and difficult question [of] whether or to what extent these non-safety consequences should be a matter of concern to the Commission in setting pre-licensing emergency planning requirements." 52 Fed. Reg. 6982 (col. 1).

Importantly, for purposes of this litigation, the notice made clear that under both approaches the Commission intended to rely on the "realism" assumption: that states and localities would do their best to protect the public in an actual accident, and that those best efforts would reasonably mean following a comprehensive utility plan. As noted above, the first alternative on which comments were requested would simply have left in place the LILCO adjudicatory decision that first articulated the realism approach. Moreover, the proposed second approach would specifically have required utilities to submit an emergency plan which took "into account a likely State or local response to an actual emergency." 52 Fed. Reg. at 6984 (col. 2). In explaining the underlying assumptions which led the Commission to propose the second approach, the notice specifically stated:

> [T]he Commission believes that State and local governments which have not cooperated in planning will carry out their traditional public health and safety

> roles and would therefore respond to an accident. It is reasonable to expect that this response would follow a comprehensive utility plan.

52 Fed. Reg. at 6983 (col. 2).[5]

Finally, the Commission specifically noted, even with regard to its proposed second alternative:

> Any consideration of possible changes in the Commission's emergency planning requirements must recognize one central and salient fact: That a change would not alter the Commission's paramount obligation to assure public health and safety. For each license application, the Commission would remain obligated to determine that there is reasonable assurance that the public health and safety will be adequately protected. If the Commission, for whatever reason, cannot find that the statutory standard has been met, then the license cannot be issued.

52 Fed. Reg. 6981 (col. 2).

E. The NRC's Final Emergency Planning Rule

On November 3, 1987, the Commission published its final emergency planning rule in the Federal Register. 52 Fed. Reg. 42078. Relying heavily on Congressional intent, as expressed in the 1980, 1982-83, and 1984-85 NRC Authorization Acts,[6] the Commission declared that it is obligated to evaluate a utility plan in cases of state or local non-participation, notwithstanding that it might be difficult for a utility plan to pass muster.

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[5] That the Commission's realism doctrine was central to its alternative proposals is underscored by the dissenting views of then-Commissioner Asselstine, who emphasized his disagreement with the realism assumptions. 52 Fed. Reg. at 6986 (col. 1).

[6] The Commission also noted that on August 5, 1987, the House [Footnote Continued]

The Commission emphasized that it was amending its emergency planning rules "to provide criteria for the evaluation at the operating license review stage of utility-prepared emergency plans in situations in which state and/or local governments decline to participate further in emergency planning." Id. at 42078 (col. 3). In this regard the Commission observed that

> [T]he new rule provides for the first time that where a utility plan is submitted, in a situation of state and/or local non-participation in [an] emergency planning, it will be evaluated for adequacy against the same standards used to evaluate a state or local plan. However, due allowance will be made both for the non-participation of the state and/or local governmental authorities and for the compensatory measures proposed by the utility in reaching a determination whether there is "reasonable assurance that adequate protective measures can and will be taken."

Id. at 42080 (col. 3) - 42081 (col. 1).

Moreover, the Commission also observed that

> [A] utility plan, to pass muster, is required to provide reasonable assurance that adequate protective measures can and will be taken in [an] emergency. The rule recognizes -- as did Congress when it enacted and re-enacted the provisions of Section 109 of the NRC Authorization Act of 1980 -- that no utility plan is likely to be able to provide the same degree of public protection that would obtain under ideal conditions, i.e., a state or local plan with full state and local participation, but that it may nevertheless be adequate.

Id. at 42084 (col. 1). The Commission explained that the rule does not "diminish public protection from the levels previously established by the Congress or the Commission's rules," inasmuch

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[Footnote Continued]

of Representatives defeated, 261-160, an amendment which would have barred application of the NRC's proposed rule to two specific plants. 52 Fed. Reg. 42083 (col. 1).

as both the Authorization Acts and the NRC's emergency planning rules had provided for a two-tier approach to emergency planning since their inception in 1980.[7] Id. at 42084 (col. 2).

Thus, in its final rule the Commission rejected the proposed alternative which would have shifted the NRC's focus from evaluating the adequacy of the utility's emergency plan to evaluating whether the utility had done all it could to provide effective emergency planning. Rather, the Commission adhered to the basic approach to emergency planning established by its 1980 regulations. As finally promulgated the rule does not alter the principle that before any nuclear plant can operate, there must be an emergency plan that provides "reasonable assurance that adequate protective measures can and will be taken" in the event of an emergency. Id. at 42084 (col. 1).

To those who advocated licensing a power plant based on a utility "best efforts" emergency plan, the Commission frankly acknowledged that the approach it was adopting did not solve the "state veto" problem, and indeed made a "state veto" a de facto

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[7] The Commission did, however, clarify language in LILCO, which could have been interpreted to require NRC not only to estimate the reduction in radiological dose to the public that a utility plan could achieve in an accident, but also to estimate the dose that might be achieved if there were a state or local plan, to compare the two figures, and to permit operation only if the dose reductions were "generally comparable." The final rule points out that evaluations of emergency plans have always been made on a case-by-case basis, without reference to the specific dose reductions that a plan might accomplish or to the level of protection provided by other emergency plans, real or hypothetical. The rule explains that any plan -- state, local, or utility -- found to be adequate should be considered "generally comparable" to any other plan found to be adequate. 52 Fed. Reg. at 42084 (col. 2).

(though not a de jure) possibility. The Commission explained, however, that it did not view this result as frustrating Congress's will:

> The Congress was concerned that utilities not be "penalized," but not to the extent that it was willing to countenance operation of a nuclear power plant in a situation where the public was not adequately protected.

52 Fed. Reg. at 42083 (col. 2).

On the other hand, in response to charges that its new rule was motivated by a desire to improve the financial status of certain utilities, the Commission responded directly:

> The NRC rule is an effort to bring the NRC's regulations more clearly into line with a policy decision made by the Congress in 1980. The NRC's rule is thus based on economic considerations only to the extent that the Congress's policy decision of 1980 was based on economic considerations. In the Conference Report on the NRC Authorization Act of 1980 ... the conferees stated that they did not wish utilities to be "penalized" in situations in which there was no acceptable state or local plan. That could be taken as a reference to economic costs or simply to considerations of fairness, in that the issue was whether a utility was to be barred from operating a plant by the actions of third parties over which it had no control.
>
> The NRC's motivation in promulgating this rule is not economics. Its motivation is to assure that the NRC is in a position to make the decisions that Congress intended that it make, and that the Commission has declared that it would make.

Id. at 42083 (cols. 2 and 3).

In one important respect, for purposes of this case, the rule codifies existing NRC practice as set forth in the 1986 LILCO decision; it adheres to the two-pronged "realism doctrine" first enunciated in that case.

The first prong of the Commission's realism doctrine holds that in an actual emergency, states and localities will use their best efforts to assist the public.

> As the Commission stated in LILCO, even where state and local officials "deny they ever would or could cooperate with [a utility] either before or even during an accident," the NRC "simply cannot accept these statements at face value." 24 NRC 22, 29 n.9. It would be irrational for anyone to suppose that in a real radiological emergency, state and local public officials would refuse to do what they have always done in the event of emergencies of all kinds: do their best to help protect the affected public.

Id. at 42082 (col. 2). The rule makes this an irrebuttable presumption.

> The presiding Licensing Board should not hesitate to reject any claim that state and local officials will refuse to act to safeguard the health and safety of the public in the event of an actual emergency. In actual emergencies, state, local, and federal officials have invariably done their utmost to protect the citizenry, as two hundred years of American history amply demonstrates.

Id. at 42082 (col. 3).

The second prong of the Commission's realism doctrine is that it is reasonable to presume that the "best effort" state and local response will be generally to follow the detailed utility plan which has been approved for the affected plant. As explained by the Commission,

> [T]he "best effort" of state and county officials would include utilizing the utility's plan as "the best source for emergency planning information and options." 24 NRC 22, 31.... [T]he rulemaking record strongly supports the proposition that state and local governments believe that a planned response is preferable to an ad hoc one. Therefore it is only reasonable to suppose that in the event of a radiological emergency, state and local officials in the absence of a state or local radiological emergency plan approved by state and local governments, will either look to the utility and its plan for guidance or will follow some other plan that exists. Thus the

> presiding Licensing Board may presume that state and local governmental authorities will look to the utility for guidance and generally follow its plan in an actual emergency....

Id. at 42082 (col. 2). Unlike the first prong of the realism doctrine, however, the rule makes this presumption rebuttable. As the Commission made clear,

> This rule leaves it to the Licensing Board to judge what form the "best efforts" of state and local officials would take. [Thus, the second realism presumption] may be rebutted by, for example, a good faith and a timely proffer of an adequate and feasible state or local radiological response plan which would in fact be relied upon in an emergency.

Id. at 42082 (cols. 2 and 3).

The Commission also discussed in some detail the comments of FEMA on the proposed rule. Importantly, the Commission continued FEMA's role in the evaluation process, even though Congressional action in the 1980, 1982-83, and 1984-85 NRC Authorization Acts did not require the NRC to consult with FEMA for approval of utility plans. While the NRC recognized FEMA's "declared reluctance to make judgments on emergency planning in cases of state and local non-participation," it did not view FEMA as unwilling to apply its expertise to the evaluation of a utility plan. Indeed, the Commission recognized that

> FEMA's advice would undoubtedly include identification of areas in which judgments are necessarily conjectural, and NRC's overall judgment on whether a utility's plan is adequate would in turn have to take account of the uncertainties included in FEMA's judgment. ... These are issues, however, which can be addressed in the case-by-case adjudications on individual fact-specific situations.

Id. at 42082 (col. 3).

SUMMARY OF ARGUMENT

Although rulemakings of the kind at issue here are reviewed against the deferential "arbitrary and capricious" standard, and NRC decisions are entitled to particularly broad deference, the NRC's emergency planning rule would pass muster even under far more stringent standards. The rule corrected what had become an increasingly troublesome omission from the NRC's emergency planning regulations, i.e., the lack of specific criteria for evaluating a utility-prepared emergency plan. The course of action adopted by the Commission was fully consistent with the approach established by Congress in 1980 and reaffirmed in a series of subsequent enactments, by which the NRC was directed to evaluate a utility plan, even in the complete absence of state and local participation in emergency planning, and to authorize plant operation if the utility plan is found to provide reasonable assurance that plant operation will not endanger the public. For the NRC to have provided otherwise would have defeated Congress' repeatedly expressed intent that utilities not be "penalized" by the actions of state and local governments over which they have no control, and that states and localities not be accorded an automatic veto over nuclear plant operations. The NRC's view of its obligations under these statutes is also supported by every court decision to have considered the issue.

In a codification of pre-existing NRC case law, the NRC reasonably adopted two "realism" presumptions. The first, which no petitioner contests, provides that states and localities will do their best to help the public in a radiological emergency,

regardless of any prior statements to the contrary. The second presumption, which follows from the first and from the states' and localities' own strongly held view that planned emergency responses are far superior to unplanned, ad hoc responses, provides that states and localities will follow the utility's site-specific, federally approved emergency plan in an actual accident unless they have a better plan to follow. This second presumption is expressly made rebuttable by a showing of what other plan the states and localities in fact intend to follow. This aspect of the rule accords with common sense and all legal standards for presumptions.

With regard to petitioners' Atomic Energy Act claims, most are not directed to the rule itself but rather to the way in which they fear the rule will be misapplied in individual licensing proceedings. Such objections are simply not before this Court at this time; if petitioners' fears are realized they will have ample opportunity to raise their Atomic Energy Act claims before whatever court reviews the NRC licensing decision they deem objectionable. To the extent that petitioners' objections are in fact aimed at the rule, such as their claims that the rule is based on economic considerations or that it lowers Congressionally mandated standards of public protection, they are wholly without merit as a review of the rule reveals.

ARGUMENT

I. The Standard Of Review For Commission Rulemakings Is Highly Deferential.

In reviewing the Commission's rulemaking action this Court must determine whether the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

This standard accords broad deference to agencies generally. With regard to NRC actions in particular, this Court has joined an unbroken line of judicial precedent in observing that the Atomic Energy Act has established a regulatory scheme that "is virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." Public Service Co. of New Hampshire v. NRC, 582 F.2d 77, 82 (1st Cir. 1978), quoting Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968). In so doing, this Court observed "[t]he Atomic Energy Act of 1954 is hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends." Public Service Co. of New Hampshire, supra, 582 F.2d at 82. The NRC's organic statutes "confer broad regulatory functions on the Commission and specifically authorize it to promulgate rules and regulations it deems necessary to fulfill its responsibilities under the Acts.... In a regulatory scheme where substantial discretion is lodged with the administrative agency charged with its effectuation, it is to be expected that the agency will fill in the interstices left vacant by Congress." Id.

Petitioners offer a laundry list of reasons why this Court ought not to defer to the NRC rulemaking judgment under review here. None of their assertions has merit.[8] Nevertheless, it is not essential that the Court resolve any disputes over the deference to be accorded to the Commission in this case. For regardless of what standard is applied to judge the Commission's actions, they easily pass muster. As set forth below, the Commission's rule is, in all respects, a rational, reasonable exercise of the agency's authority, well supported in fact, law and logic, and promulgated in full accord with applicable procedures.

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[8]For example, petitioners assert that it is state and local governments and FEMA, not the NRC, who are entitled to deference on emergency planning matters. C-10 Brief at 7-8; NY Brief at 30-32. While other governmental entities may well have important roles in emergency planning at nuclear power plants, the NRC's judgments on the measures necessary and the planning required to cope with a radiological emergency are well within that agency's expertise, and have properly been accorded judicial deference. See, e.g. Duke Power Co. v. NRC, 770 F.2d 386, 390 (4th Cir. 1985); Ohio v. NRC, 814 F.2d 258, 264-65 (6th Cir. 1987). Additionally, petitioners argue that the issue before the Court is a pure question of law to which no judicial deference is appropriate. UCS Brief at 14-16. Of course, the issues raised in this case are not purely legal. However, even if they were simply questions of whether the NRC had properly followed the Atomic Energy Act and the NRC Authorization Acts, the agency's interpretation of such statutes would be accorded deference unless it violated a clearly expressed Congressional mandate. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). UCS's legal position that Chevron somehow has no applicability here is based on a misreading of precedent. See National Labor Relations Board v. United Food and Commercial Workers Union, ___ U.S. ___, 56 U.S.L.W. 4037, 4040 (Dec. 14, 1987). Petitioners also assert that the NRC's rule represents a change in prior NRC positions and thus must be subjected to more rigorous judicial scrutiny under Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 41 (1983). NY Brief at 31-32. Whatever the merits of petitioners'

[Footnote Continued]

II. The NRC's Final Rule Is A Sensible And Legally Sound Approach To A Pressing Regulatory Issue.

A. The NRC's Final Rule Is An Appropriate Response To A Gap In NRC Regulations.

The emergency planning rules which the NRC promulgated in 1980 did not explicitly state that a utility plan alone might support the issuance of an operating license. Nor did they provide explicit procedures for the evaluation of such a utility-prepared plan. Instead, the NRC's 1980 rules relied on a generally worded provision to deal with what was then a purely hypothetical situation,[9] the need to review a utility plan. However, by 1987, when the NRC initiated the rulemaking under review in this case, a regulatory gap clearly had been revealed. The lack of specificity in the NRC's regulations had led some states and localities to believe that their refusal to participate in emergency planning could automatically halt or prevent operation of a nuclear power plant. Moreover, by 1987 the need for the NRC to evaluate a utility plan was no longer hypothetical but real, and the omission of specific procedures

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[Footnote Continued]

views of the State Farm holding, the fact is that the NRC's rule makes no change in a previously settled agency direction.

[9] That provision, 10 C.F.R. § 50.47(c)(1), provided:

> Failure to meet the applicable standards set forth in paragraph (b) of this section may result in the Commission declining to issue an operating license; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation.

from the 1980 rule had developed into a problem requiring correction.[10] See Statement of the Case at D., supra.

The NRC's final emergency planning rule was promulgated to fill that regulatory gap. Reduced to its essentials, the rule before the Court reiterates in generic form what the Commission had already established in a 1986 adjudicatory decision: that in situations of state or local non-participation in emergency planning, the NRC will evaluate a utility-prepared emergency plan and will authorize plant operation if it finds that the plan provides reasonable assurance of adequate protection for the public. The rule thus makes clear that the refusal of a state or locality to participate in the emergency planning process will not automatically operate to prevent a nuclear plant from being licensed. In addition, the rule provides the criteria by which a utility plan will be evaluated.

By addressing these issues, the Commission brought renewed clarity to an area that, as the rulemaking record showed, had become obscured by controversy. Moreover, it did so in a manner that was entirely reasonable and fully consistent with Congress' enactments on the same issue in the 1980, 1982-83, and 1984-85 NRC Authorization Acts.

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[10] There is no merit to New York's assertion that the NRC's final rule abandoned this rationale. NY Brief at 26. It cannot be seriously disputed that between 1980 and 1987 the need for the agency to evaluate the adequacy of utility plans had changed from a hypothetical possibility to a concrete reality, or that the NRC adhered to that position in its final rule.

B. The NRC's Final Rule Is Entirely Consistent With All Pertinent Congressional Enactments And Court Decisions.

At the beginning of this century, Finlay Peter Dunne's Mr. Dooley observed: "Th' paramount issue f'r our side is th' wan th' other side doesn't like to have mintioned." Mr. Dooley's Philosophy (New York, 1902), p. 259. The aphorism applies forcefully to the present case. What none of the petitioners likes to have mentioned is that it was Congress that directed the NRC to evaluate utility-prepared emergency plans in situations where no state or local plan existed and Congress that in successive Authorization Acts made increasingly pointed its insistence that states and localities should not be permitted to use emergency planning issues to gain an effective veto over nuclear plant operation.

As fully described in the Statement of the Case at C, 2 and 4, supra, Congress provided for a two-tier approach to the NRC's evaluation of emergency planning. The first and preferred tier called for the NRC to determine whether a state-prepared or locally-prepared emergency plan complied with all NRC standards and guidelines. The second tier was a fallback, to be used where the state or local plan was inadequate or did not exist at all. Under this tier, the NRC could approve plant licensing on a finding that there was a state, local, or utility plan which, while failing to meet the standards of the preferred first tier, nonetheless provided reasonable assurance that the public would not be endangered by operation of the facility in question. For decisions made under the second tier, consultation with FEMA was not required.

The rationale for the two-tier approach was set forth straightforwardly in the Conference Committee report. Congress "sought to avoid penalizing an applicant for an operating license if a State or locality does not submit an emergency response plan to the NRC...." Statement of the Case at C, 2, supra. While Congress recognized the important role of states and localities in the emergency planning process, it was willing neither to require state and local participation as a matter of federal law, nor to give states and localities a veto over nuclear plant operation. Accordingly, it provided for the NRC to evaluate a utility plan in cases of state or local non-participation and to approve plant operation on the basis of a utility plan, notwithstanding that a state or local plan with full participation was likely to provide a greater measure of public protection.

The relevant legislative history is neither complicated nor ambiguous. Indeed, it took Judge Altimari of the Eastern District of New York only two succinct sentences to sum it up:

> This passage [from p. 27 of the Conference Committee Report on the 1980 legislation] indicates that Congress considered the possibility that a state or local government would fail to participate in emergency planning. Rather than require participation, Congress provided that the utility could provide a plan.

Citizens for an Orderly Energy Policy v. Suffolk County, 604 F.Supp. 1084, 1095-96 (E.D.N.Y. 1985), aff'd, 813 F.2d 570 (2d Cir. 1987).

To varying degrees petitioners attempt to obscure this pellucid reality by selective editing of the legislative history. More relevant than a truncated presentation of the views of some

Senators, NY Brief at 10,[11] are the views of the entire Congress which are reflected in the legislation that was passed after the compromise reached by the Conference Committee.[12]

UCS makes an ingenious but unpersuasive effort to explain away the "penalize" language in the Conference Report. According to UCS, Congress was concerned solely that utilities might be penalized by the failure of states and localities to submit emergency plans. UCS Brief at 30. This argument is fallacious, as is apparent from the decision of the District Court for the Eastern District of New York in Long Island

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[11] In reality, however, even those Senators who opposed direct federal government involvement in emergency planning argued that the Congress should not relieve states of their responsibility to plan for emergencies, but should instead "find some mechanism to force States to do that." 125 Cong. Rec. at S.9476. See note 1, supra.

[12] Similarly Massachusetts attributes to "the House of Representatives" the position that the law "does not authorize the Commission to license a plant when lack of participation in emergency planning by state, county or local governments means it is unlikely that a utility plan could be successfully carried out," and asserts that the NRC's rule "permits the precise result that Congress prohibited." Mass. Brief at 40. See also NY Brief at 12, n.32. In fact, the quoted language comes from the House Interior Committee's report on the legislation, and before the full House passed the legislation, the Chairman and ranking minority member of the Interior Committee explained, in letters which are part of the legislative history of the statute, that their Committee had not meant to suggest that licensing by the NRC required state and local participation in emergency planning. Committee Chairman Udall wrote that the Interior Committee's intent was "that the mere existence of a utility plan is not a sufficient basis for issuing an operating license, but that if the NRC can make the statutory determination set out in Section 6 [reasonable assurance that the public health and safety is not endangered by operation of the facility concerned], a state, county or local government's belief that planning issues are unresolved would not in itself stand as a bar to such a determination." 130 Cong. Rec. H12195 (1984).

Lighting Co. v. County of Suffolk, 628 F.Supp. 654 (E.D.N.Y. 1986). In that case the court granted a preliminary injunction against enforcement of a Suffolk County law making it a misdemeanor, punishable by a year in prison or a $1000 fine, to conduct or participate in an exercise of a radiological response plan if that exercise included simulating the roles of Suffolk County officials and if it had been disapproved by the County. The court held:

> It is manifestly clear from an examination of the legislative history ... that Congress by no means intended to allow local governments to frustrate or impede the NRC's ability to evaluate a utility's [emergency response plan], either passively, through non-acquiescence, or actively, through a prohibition such as Local Law 2-86.

Id. at 664.

The court reviewed both the 1980 Authorization Act and the Congress's 1984 re-enactment of the emergency planning provisions of the 1980 Act:

> Congress clearly anticipated that the public furor over Three Mile Island could cause states and localities to withdraw from the development of nuclear power plants, but that this withdrawal should not act as a penalty against or veto of the local utility's undertaking. The compromise fashioned by Congress enabled the NRC to issue a license even if the utility had the sole responsibility for the development of an emergency response plan.

Id. The court then confirmed its reading of Congressional intent by reviewing the same legislative history set forth in the Statement of Considerations at C, 4, supra. including Senator Simpson's statement concerning the passage of the 1984-85 Authorization Act.

> With the adoption of section 108, this Committee has now made it clear in three successive NRC authorization bills that it is not our intention to allow a state or locality to prevent a completed facility from operating by refusing to prepare an emergency preparedness plan. It necessarily follows that the Committee did not intend to allow such governmental entities to accomplish the same result by refusing to participate in the exercise or implementation of an otherwise acceptable emergency plan.

Id., quoting Supplemental Views of Senator Simpson.

In short, every Congressional enactment,[13] as well as every court decision to consider those enactments, has confirmed that the NRC has a duty to evaluate such a plan and to authorize plant operation if the plan passes muster. There is nothing in the NRC's rule (including, as we shall discuss in greater detail below, the presumptions in it) that is not directly related to the fulfillment of that responsibility.

At bottom, petitioners' claims are an attack on the Congressional judgment that the NRC should have the responsibility for making decisions on radiological health and safety issues, including the responsibility to decide whether a

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[13] In addition to the NRC Authorization Acts of 1980, 1982-83, and 1984-85, Congress has, on at least one other occasion, indicated its view that state and local governments ought not be able automatically to veto the operation of nuclear power plants by their non-cooperation with emergency planning matters. Conference Report, HUD-Independent Agencies Appropriations Act of 1986, H. Rep. 99-212, 99th Cong., 1st Sess. (July 8, 1985). Statement of the Case at C, 4, supra.

Moreover, on August 5, 1987, the House of Representatives voted 261-160 to reject an amendment which would have barred the application of the rule to the Shoreham and Seabrook plants. See note 6, supra.

utility's emergency plan may provide adequate protection in the absence of state and local cooperation.[14]

III. Petitioners' Attacks On The Rule Lack Merit.

A. The "Realism" Presumption Is Rational And Supported By The Record.

Petitioners' challenges to the NRC's final rule are concentrated on the second of two presumptions through which the rule incorporates the "realism doctrine," first set forth by the Commission in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986). As described above, the first presumption holds that in an actual emergency, states and localities will use their best efforts to protect the public, regardless of any prior statements to the contrary they may have made. The second presumption proceeds from the first presumption, in conjunction with the strongly held view of states and localities that planned responses to emergencies are more effective than ad hoc responses. It reasons that in an actual emergency, states and localities will cooperate with utilities and will generally follow a comprehensive, site-specific,

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[14] The Chief Legal Counsel of petitioner Commonwealth of Massachusetts acknowledged this, and spoke to the heart of this case, when he wrote to Senator Breaux that any proposal dealing with emergency planning "takes on an ominous tone if it involves allowing the NRC to make judgments about the health and safety of our citizens." Reauthorization of the NRC for Fiscal Years 1988 and 1989 and Nuclear Emergency Planning, Before the Senate Subcommittee on Nuclear Regulation, 100th Cong., 1st Sess. (1987) ("1987 Senate Hearings") at 256. JA .

federally-approved utility plan in the absence of any better plan to follow. While the first presumption is irrebuttable, the second may be rebutted by a showing of what other plan the state or local government would actually rely upon in an emergency.

None of the petitioners challenges the first realism presumption, i.e., the irrebuttable assumption that states and localities will do their best to protect the public in the event of an actual emergency. That aspect of the rule is therefore not at issue.[15] Petitioners make numerous charges against the second

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[15]Petitioners were not always so ready to concede the proposition, self-evident as it might seem. For example, petitioner Suffolk County, in its comments on the proposed rule, declared that "there is no support whatsoever for the Commission's predictions that [inter alia] ... 'governments which have not cooperated in planning will carry out their traditional public health and safety roles and would therefore respond to an accident.'" Suffolk County Comments at 21. JA .

Likewise, in Congressional hearings on the NRC's proposed emergency planning rule, where the validity of the realism doctrine was a central issue, the Attorney General of petitioner Commonwealth of Massachusetts refused to say, despite repeated questions from a Member of Congress, whether the Commonwealth would even attempt to assist its citizens in the event of a nuclear accident at the Seabrook plant. Emergency Planning for Nuclear Power Plants, Oversight Hearing Before the House Subcommittee on Energy and the Environment, 100th Cong., 1st Sess. at 70-72 (1987). JA .

Similarly, the Chief Legal Counsel to the Governor of Massachusetts responded as follows to Senator Breaux's question whether, if rules were changed to permit a utility plan to be tested without a prior endorsement from the Governor, Massachusetts would take part in a test: "The State of Massachusetts is not saying that it would or would not cooperate." 1987 Senate Hearings at 253. JA .

prong of the realism doctrine, however. None of these claims has merit.[16]

1. The rebuttable presumption that a best efforts state or local response to an emergency will be to follow the utility's plan is a valid exercise of NRC's rulemaking authority.

It is unquestioned that federal agencies can create evidentiary presumptions, so long as they are consistent with pertinent statutes and are rational. NLRB v. Baptist Hospital, 442 U.S. 773, 787 (1979). Rationality, for this purpose, means that there must be "a sound factual connection between the proved and the inferred facts." Id. An agency's "conclusions on such matters are traditionally accorded deference." Id. at 796 (Brennan, J. concurring). Courts have also observed that

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[16]UCS claims that the NRC's "further interpretation" of the final rule includes a third presumption that states and localities have adequate resources to implement those portions of the utility plan for which state and local responses are necessary. UCS Brief at 19. Like much of petitioners' case this claim is an attack on something nowhere found in the rule at issue. There is nothing in the rule or the Statement of Considerations interpreting the rule that supports a claim that UCS's phantom "third" presumption is before this Court.

The NRC staff and FEMA have worked together to develop written NRC staff instructions to enable FEMA to evaluate utility plans. Moreover, under those instructions FEMA is to assume, inter alia, adequate state resources for purposes of its evaluation of a utility plan. Nevertheless, nothing in those instructions binds, or even acts as a rebuttable presumption on, the NRC adjudicatory boards that must resolve specific challenges to a proposed utility emergency plan for a particular plant. If a party to an NRC licensing proceeding wishes to argue that, in fact, adequate state resources do not exist, nothing in this rule precludes him from making that contention or dictates what the NRC's resolution of the issue should be.

presumptions may be based on policy as well as factual probability and that the usefulness of the presumption is a factor to be considered in assessing its validity. Holland Livestock Ranch v. United States, 655 F.2d 1002, 1006 (9th Cir. 1981). Moreover, the reasonableness of an agency presumption is enhanced if the presumption is rebuttable. Jersey City v. Pierce, 669 F. Supp. 103, 110 (D.N.J. 1987).

The NRC's presumption that a utility plan will be followed easily meets these tests. As we have shown, the presumption is fully consistent with the Atomic Energy Act and with all the NRC Authorization Acts in which Congress has addressed the emergency planning issue. Indeed, if the NRC could not adopt such a presumption, a refusal on the part of a state or local government to state what it would do in an emergency could unjustifiably complicate evaluation of a utility plan which attempted to take into account the reasonably likely actions of state and local authorities in the event of an accident. As a practical matter, therefore, Congress' intent that the NRC evaluate a utility plan could be frustrated by strategic silence. See note 15, supra.

Likewise, the connection between the facts found and the facts inferred is entirely rational. As to the facts "found," no petitioner disputes that states and localities will use their best efforts in the event of an actual accident. Nor do they dispute that states and localities believe that planned emergency responses are more effective than unplanned, ad hoc responses. From these undisputed "facts found" the Commission has rationally inferred that, absent a showing of a better plan

to follow, it may be presumed that state and local governments will generally follow the utility's plan.

Petitioners' arguments against the logic of the second presumption go no further than the following syllogism: If affected state and local governments have refused to submit plans because they believe that an adequate emergency plan for a particular plant is impossible, and if the NRC's rule presumes that these governments will follow a utility plan which they believe to be inadequate, then it follows that the rule is arbitrary and capricious.[17] There are two related flaws in this argument, one legal and one factual.

Nothing in the NRC's rule precludes a state or local government from arguing to the NRC that adequate emergency planning at a particular site is inherently impossible. However, the law gives the NRC the authority to decide whether that argument is valid in a particular case. If the NRC decides that emergency planning at a particular site is not inherently

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[17] Petitioners also argue that the omission of the realism presumptions from the NRC staff recommendation to the Commission confirms that the presumptions lack any basis. See, e.g. UCS Brief at 21, n.31. However, nothing in the staff recommendation stated or implied that the realism doctrine of the Commission's LILCO decision was invalid in fact or law. Even if the staff recommendation had urged repudiation of the realism doctrine, however, "the Commission majority [is not] required to accept the advice of some members of their staff (and no inference of bad faith can be derived from their failure to do so): the Commissioners are appointed by the President to administer the agency, the agency's staff is not." San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1327 (D.C. Cir. 1984), aff'd on other grounds, 789 F.2d 26 (D.C. Cir. 1986) (en banc), cert. denied, 107 S. Ct. 330 (1986). Even more fundamentally such deliberative process material should not be any part of this Court's consideration. Id. at 1326.

impossible, then it must go on to decide whether the utility's emergency plan provides reasonable assurance of adequate protection in an accident. In making that latter factual finding, it is in no sense unreasonable for the NRC to find that states and localities, in the absence of a better plan to follow, will generally follow the utility's plan in an emergency, notwithstanding that they averred it to be inadequate at a time when the utility's application for a license was pending before the NRC. Before the plant can operate, the objections of the states and localities will have been addressed on the record, and a site-specific, comprehensive utility plan will have been found adequate by the NRC, after consultation with FEMA. Given those findings; given the undisputed desire of states and localities to protect their citizens; and given the preference of states and localities for planned over ad hoc emergency responses, it is not unreasonable for the NRC to presume that states and localities would follow a utility plan in an emergency in the absence of a better plan to follow, whether or not they held the utility plan in high regard. On the other hand, it transcends reason to believe that in a real emergency, states and localities will boycott the utility plan on principle rather than protect their citizens in the best way possible.[18]

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[18]New York's brief misleadingly depicts FEMA as telling the NRC that there is "no basis in fact" for the NRC's realism presumptions. NY Brief at 34. A more accurate representation of FEMA's views is that, because there never has been a nuclear accident in circumstances of state and local non-participation in emergency planning, there is no hard factual data on which FEMA

[Footnote Continued]

Finally, and importantly, this entirely rational, reasonable presumption is rebuttable on a case-by-case basis. In fashioning this presumption the Commission has merely drawn a logical inference and asked the parties to speak up if the facts of a particular case suggest that the inference is invalid as applied to that case. The use of a rebuttable presumption in these circumstances serves to encourage those in control of the evidence to come forward and present it. Without question, the presumption forecloses a state or locality from gaining anything by "standing dumb at the bar," see, e.g., note 15, in an effort to prevent the NRC from judging how it is likely to act in an actual emergency. But that is hardly an improper effect: like courts, administrative agencies are not obligated to let parties make sport of the adjudicatory process.

2. Petitioners had ample notice of the realism presumptions.

The APA's procedural rules requiring "a description of the subjects and issues involved" in a proposed rule, 5 U.S.C. § 553(b)(3), "were meant to ensure meaningful public participation in agency proceedings, not to be a straitjacket for agencies." BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980). "Even

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[Footnote Continued]

or anyone else can rely, either for the proposition that such states and localities will do their best to help their citizens in an emergency or for the proposition that they will follow a utility's plan in the absence of a better plan to follow. FEMA Comments at 4. The NRC's rule does not depend, however, on hard factual data about past responses of non-participating states and localities to nuclear emergencies.

substantial changes in the original plan may be made so long as they are 'in character with the original scheme' and 'a logical outgrowth' of the notice and comment already given." Id., quoting South Terminal Corp. v. EPA, 504 F.2d 646, 658, 659 (1st Cir. 1974).

Petitioners' claim that the NRC's proposed rule failed to give adequate notice of the realism presumptions is frivolous. The realism doctrine was central both to the Commission's 1986 LILCO decision, which as the notice of proposed rulemaking noted, represented existing NRC practice, 52 Fed. Reg. 6980, col. 1, and to the alternative approach on which the proposed rule also requested comment. Indeed, the information accompanying the proposed rule made clear that

> [T]he Commission believes that State and local governments which have not cooperated in planning will carry out their traditional public health and safety roles and would therefore respond to an accident. It is reasonable to expect that this response would follow a comprehensive utility plan.

52 Fed. Reg. 6983 (col. 2). See also 52 Fed. Reg. 6986 (col. 1) (Commissioner Asselstine's comments).

Importantly, the realism assumptions in the proposed rule were sufficiently noticeable for petitioners themselves to denounce them vigorously in their comments. Thus New York's assertion to this Court that the "NRC's failure to include the presumption" in the proposed rule converted the rulemaking into an "empty charade" and "mere bureaucratic sport," NY Brief at 45, may be contrasted with the first page of New York's comments to the Commission on the same proposed rule:

> The proposed rule would ... [include] the unsupported presumption [t]hat ... in the event of a radiological

> emergency, a state with no plan of its own would attempt to implement the utility's plan.

Comments of Robert Abrams, New York Attorney General at 1. In the same vein, Suffolk County's comments on the proposed rule recognized that the NRC "grounds its belief on [the] assumption ... that, in the event of an actual emergency, the state and local governments would respond and would decide to follow the utility's plan ...." Suffolk County Comments at 33-34.[19]

In addition to the present petitioners, comments on the realism assumptions were submitted by numerous others including, for example, intervenor Scientists and Engineers for Secure Energy ("SE2"), which urged that they be turned into an "irrebuttable presumption of law," SE2 Comments at 9, and FEMA, which discussed the NRC's belief "that state and local governments ... would ... respond to an actual emergency and follow a comprehensive utility plan...." FEMA Comments at 4.

In short there was ample notice of the Commission's realism presumptions, and petitioners and others took advantage of the opportunity to comment on the issue.[20]

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[19] Some petitioners argue, with no apparent awareness of inconsistency, both that the NRC failed to give notice of the realism presumptions and that it ignored the views of commenters who contested the validity of the realism doctrine. Compare UCS Brief at 34 with UCS Brief at 26 n.38. See also, Mass. Brief at 27-28.

[20] Related to the claim that the NRC adopted the realism presumptions without notice, petitioners suggest that they were incorporated at the last moment because of pressure from several Congressmen. See, e.g. Mass. Brief at 29. However, the Commissioners needed no prompting from Congressmen to adopt realism presumptions equivalent to those set forth in the LILCO

[Footnote Continued]

B. The NRC's Final Rule Is Fully Consistent With The Atomic Energy Act.

Petitioners offer a grab-bag of arguments that the NRC's final emergency planning rule violates the Atomic Energy Act, most of which are reducible to the claim that the NRC will apply the rule in individual licensing cases so as to permit the operation of plants with inadequate emergency plans. But these are not challenges to the rule which the Commission promulgated; rather they are assertions that the rule may be incorrectly applied in future cases. Even if we were to assume -- in direct contradiction to the plain language of the NRC's final rule and Statement of Considerations -- that some plant will be licensed with inadequate emergency planning, such a final NRC licensing decision is reviewable. 28 U.S.C. § 2342(4); 42 U.S.C. § 2239(b). So long as the rule itself does not dictate the outcome that petitioners fear, anxiety that the rule may be misapplied in individual cases hardly justifies setting it aside as a prophylactic measure.[21]

[Footnote Continued]

decision, issued only 15 months earlier. UCS hints at secret communications between the NRC and the Congressmen in question. UCS Brief at 11. In reality, however, the NRC delivered the October 13 staff memorandum to 80 members of Congress (including petitioner Edward J. Markey) on October 15, 1987. The release of the staff memorandum prompted letters both from public officials who thought that the rule did not go far enough to facilitate licensing such as Congressmen Pashayan and Hall (letter of October 20, 1987, JA) and from those who thought the rule went too far in easing licensing requirements, such as Governor Dukakis of Massachusetts (letter of October 21, 1987, JA) and petitioner Edward J. Markey (letter of October 23, 1987, JA).

[21]New York's discussion of a February 25, 1988 telephone conference call, in which the Atomic Safety and Licensing Board

[Footnote Continued]

Moreover, as set forth below, petitioners seriously mischaracterize the NRC's final rule in their effort to show that it violates the Atomic Energy Act.

1. The NRC's rule is not based on economic considerations.

Petitioners repeatedly assert that the NRC's motivation in adopting the rule under review in this case was to prevent economic harm to utilities, thus suggesting a violation of UCS v. NRC, 824 F.2d 108 (D.C. Cir. 1987), which holds that the NRC may not take costs into account in determining what constitutes "adequate protection." See e.g., UCS Brief at 35. Petitioner UCS, boldly lifting a phrase from its context, even claims that the NRC has admitted that "the NRC's rule is thus based on economic considerations." UCS Brief at 38. Contrary to UCS's claim, the Commission has categorically stated that "[t]he NRC's motivation in promulgating this rule is not economics." The NRC's position, and the audacity with which UCS distorts that position, are readily apparent when the relevant passage in the

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[Footnote Continued]

in the Shoreham proceeding gave advance notice of an about-to-be-issued decision, fits in this category. NY Brief at 20-21. That decision is subject to multiple layers of review within the NRC, and if the agency licenses the Shoreham facility, that final decision will be reviewable in the Court of Appeals. There is no reason why this Court should be called upon to review an interlocutory order of an NRC Licensing Board. Indeed, because it involves a matter that may subsequently come before it for adjudicatory resolution, the Commission cannot, and does not offer an opinion as to the merits of the Licensing Board's decision. We do observe, however, that there are some significant differences between the condensed description provided in the February 25 telephone call and the written order issued four days later, JA -- differences which readily explain why New York relies on the transcript rather than the full written expression of the Licensing Board's position.

final rule is viewed in full. See Statement of the Case at ¶ E, supra.

Moreover the argument that the rule is in violation of UCS v. NRC also ignores the fact that the notice of proposed rulemaking, in requesting comments on the extent to which the Commission should consider economics in relation to emergency planning, was exploring a possible approach which the Commission in its final rule decided not to adopt. In particular, the final rule preserves the requirement that there be "reasonable assurance that adequate protective measures can and will" be taken. In making this finding, the Commission does not consider the economic impact on applicants. Indeed the Commission has explicitly recognized that the rule "does leave open the possibility that state or local non-participation can indirectly block the operation of a nuclear plant ... because under the particular facts of an individual case it may be impossible for the NRC to conclude that a utility plan is adequate, as defined in this rule." 52 Fed. Reg. at 42083 (col. 2).

UCS has yet another string to its "economic considerations" bow, however, for it claims that the inclusion of the word "feasible" in the final rule implies an intent to take economic considerations into account. UCS Brief at 37. To the contrary no such meaning is intended or fairly implied. The Commission has simply recognized that it is "infeasible" to demand utility compliance with requirements relating to state or local authorities. It is ironic indeed that UCS should make this argument, since less than a year ago it argued to the Commission that the omission of the word "feasible" from the proposed rule

revealed exactly the same thing -- an improper intent to take economic considerations into account. UCS Comments at 16. JA . Describing as "extremely significant" the change from "feasible" in an early draft to "achievable" in the proposed rule, UCS cited American Textile Manufacturers Institute v. Donovan, 452 U.S. 490, 509 (1981), in which the Court, according to UCS, found that "Congress' use of the word feasible precludes the agency from considering costs in setting safety standards." Id. (Emphasis in the original.)

2. Petitioners' other allegations that the rule violates the Atomic Energy Act are wholly without merit.

Petitioners argue that the rule violates the Atomic Energy Act because it lowers standards of public protection, eliminates the requirement for state and local participation in exercises, and represents a return to pre-Three Mile Island ad hoc emergency planning. None of these assertions has merit.

The baselessness of the claim that the NRC has lowered standards of public protection is apparent from the fact that 10 C.F.R. § 50.47(c) has, since the NRC's emergency planning rules first went into effect, permitted the NRC to issue licenses notwithstanding an applicant's inability to meet regulatory emergency planning requirements. That regulation, indeed, permits licenses to be granted, inter alia, on a showing of "other compelling circumstances," not otherwise defined. The rule before this Court certainly goes no further than 10 C.F.R.

§ 50.47(c) in permitting licensing to go forward in circumstances of less than ideal emergency planning.[22]

The NRC's final rule is noteworthy for providing that utility plans are to be evaluated by the same 16 planning standards, set forth in 10 C.F.R. § 50.47(b), which are used to appraise a state or local plan. Petitioners assert, however, that the rule violated the Atomic Energy Act by providing that the NRC shall make "'due allowance' ... for those planning elements for which state and local non-participation makes compliance 'infeasible.'" UCS Brief at 37. Contrary to the hidden meaning UCS discovers in the word "infeasible," see Argument III, B, 1, supra, the "due allowance" language quoted above reflects the fact that a number of the 16 planning standards of 10 C.F.R. § 50.47(b) call for findings relating to state or local authorities.[23] This portion of the rule merely

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[22]Petitioners nevertheless suggest that the NRC has diminished public protection by clarifying that the NRC need not find "general comparability" between a utility emergency plan and a hypothetical state or local plan for the same plant. See, e.g. UCS Br. at 40. The criticism is misplaced. As the final rule notes, the NRC has always evaluated emergency plans individually, not in comparison to other existing plans or, a fortiori, to nonexistent, hypothesized plans. Moreover, by correcting any previous statements suggesting otherwise, the Commission was simply following the two tier approach to emergency planning. A utility plan may be found to provide adequate protection, notwithstanding that a state or local plan with full participation might offer even better protection.

[23]In its comments on the proposed rule, UCS made the identical point (in the context of arguing that without state and local participation, emergency planning could not be adequate): "[T]he 16 criteria ... include assignments of primary responsibilities to both the utility and State and local governments; arrangements for requesting and effectively

[Footnote Continued]

adds some definition to the broad language of 10 C.F.R. § 50.47(c) in the Commission's 1980 rule.

Petitioners also err in claiming the rule's elimination of any requirement for state and local participation in emergency exercises (in cases where states and localities have refused to submit emergency plans) shows the NRC's willingness to countenance inadequate emergency planning. See Mass. Brief at 39-40; NY Brief at 20; UCS Brief at 26. This claim, made in the full knowledge that NRC has no power to compel states and localities to take part in emergency exercises, is merely a reiteration of the legally baseless assertion that states and localities should be permitted an automatic veto over the operation of nuclear plants by their mere refusal to cooperate.[24]

Finally, there is no merit to petitioners' claims that the NRC's rule represents a return to the pre-Three Mile Island approach to emergency planning, or that it sanctions ad hoc responses to emergencies. See Mass. Brief at 37; C-10 Brief at 14; NY Brief at 38-40; UCS Brief at 28. In reality, the very point of the final rule is that it requires an adequate,

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[Footnote Continued]

implementing assistance resources, including those of State and local governments; [and] procedures for timely and effective notification of State and local officials and the public..." UCS Comments at 7.

[24]Under NRC's rules, state and local emergency plans are exercised prior to issuance of any full power license to see if the plans are fundamentally flawed. A utility plan would be exercised prior to any full power licensing decision with the same objectives. If the Commission finds that the utility plan is fundamentally flawed, the Commission will not license the plant.

site-specific emergency plan that "can and will" be implemented as a condition of licensing. In no way can this be fairly characterized as a return to a pre-Three Mile Island approach to ad hoc emergency planning.

In short, the NRC's final rule provides that a utility will have its "day in court" to try to establish the adequacy of its emergency plan, and that obstructionist strategems will not be permitted to make a mockery of that opportunity.

CONCLUSION

For the reasons stated herein, the petitions for review should be denied.

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Dated: April 8, 1988

STATUTORY AND REGULATORY APPENDIX

STATUTORY AND REGULATORY APPENDIX

A. Public Law 96-295 (NRC Authorization Act for Fiscal Year 1980), Sec. 109

B. Public Law 97-415 (NRC Authorization Act for Fiscal Years 1982 and 1983), Sec. 5

C. Public Law 98-553 (NRC Authorization Act for Fiscal Years 1984 and 1985), Sec. 108

D. NRC Proposed Rule, "Licensing of Nuclear Power Plants Where State and/or Local Governments Decline to Cooperate in Offsite Emergency Planning," 52 Fed. Reg. 6980 (March 6, 1987)

E. NRC Final Rule, 'Evaluation of the Adequacy of Off-site Emergency Planning for Nuclear Power Plants at the Operating License Review Stage Where State and/or Local Governments Decline to Participate in Off-site Emergency Planning," 52 Fed. Reg. 42078 (Nov. 3, 1987)

A.

PUBLIC LAW 96-295 (NRC AUTHORIZATION ACT FOR FISCAL YEAR 1980)

[96TH CONGRESS, S. 562]

[June 30, 1980]

AN ACT

To authorize appropriations to the Nuclear Regulatory Commission in accordance with section 261 of the Atomic Energy Act of 1954, as amended, and section 305 of the Energy Reorganization Act of 1974, as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Nuclear Regulatory Commission.

Appropriation authorization.

TITLE I—AUTHORIZATION OF APPROPRIATIONS FOR FISCAL YEAR 1980

SEC. 109. (a) Funds authorized to be appropriated pursuant to this Act may be used by the Nuclear Regulatory Commission to conduct proceedings, and take other actions, with respect to the issuance of an operating license for a utilization facility only if the Commission determines that—

(1) there exists a State or local emergency preparedness plan which—

(A) provides for responding to accidents at the facility concerned, and

(B) as it applies to the facility concerned only, complies with the Commission's guidelines for such plans, or

(2) in the absence of a plan which satisfies the requirements of paragraph (1), there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned.

A determination by the Commission under paragraph (1) may be made only in consultation with the Director of the Federal Emergency Management Agency. If, in any proceeding for the issuance of an operating license for a utilization facility to which this subsection applies, the Commission determines that there exists a reasonable assurance that public health and safety is endangered by operation of the facility, the Commission shall identify the risk to public health and safety and provide the applicant with a detailed statement of the reasons for such determination. For purposes of this section, the term "utilization facility" means a facility required to be licensed under section 103 or 104(b) of the Atomic Energy Act of 1954.

"Utilization facility."

42 U.S.C. 2133, 2134.

(b) Of the amounts authorized to be appropriated under section 101(a), such sums as may be necessary shall be used by the Nuclear Regulatory Commission to—

Rules.

(1) establish by rule—

(A) standards for State radiological emergency response plans, developed in consultation with the Director of the Federal Emergency Management Agency, and other appropriate agencies, which provide for the response to a radiological emergency involving any utilization facility,

(B) a requirement that—

(i) the Commission will issue operating licenses for utilization facilities only if the

Public Law 97-415
97th Congress

An Act

To authorize appropriations to the Nuclear Regulatory Commission in accordance with section 261 of the Atomic Energy Act of 1954, as amended, and section 305 of the Energy Reorganization Act of 1974, as amended, and for other purposes.

Jan. 4, 1983
[H.R. 2330]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Nuclear Regulatory Commission. Appropriations authorization.

AUTHORIZATION OF APPROPRIATIONS

SECTION 1. (a) There are hereby authorized to be appropriated to the Nuclear Regulatory Commission in accordance with the provisions of section 261 of the Atomic Energy Act of 1954 (42 U.S.C. 2017) and section 305 of the Energy Reorganization Act of 1974 (42 U.S.C. 5875), for the fiscal years 1982 and 1983 to remain available until expended, $485,200,000 for fiscal year 1982 and $513,100,000 for fiscal year 1983 to be allocated as follows:

* * *

AUTHORITY TO ISSUE LICENSES IN ABSENCE OF EMERGENCY PREPAREDNESS PLANS

SEC. 5. Of the amounts authorized to be appropriated under section 1, the Nuclear Regulatory Commission may use such sums as may be necessary, in the absence of a State or local emergency preparedness plan which has been approved by the Federal Emergency Management Agency, to issue an operating license (including a temporary operating license under section 192 of the Atomic Energy Act of 1954, as amended by section 11 of this Act) for a nuclear power reactor, if it determines that there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned.

Post, p. 2071.

Public Law 98-553
98th Congress

An Act

To authorize appropriations to the Nuclear Regulatory Commission in accordance with section 261 of the Atomic Energy Act of 1954, and section 305 of the Energy Reorganization Act of 1974.

Oct. 30, 1984
[S. 1291]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—AUTHORIZATION OF APPROPRIATIONS FOR FISCAL YEARS 1984 AND 1985

SEC. 108. Of the amounts authorized to be appropriated under this Act, the Nuclear Regulatory Commission may use such sums as may be necessary, in the absence of a State or local emergency preparedness plan which has been approved by the Federal Emergency Management Agency, to issue an operating license (including a temporary operating license under section 192 of the Atomic Energy Act of 1954, as amended) for a nuclear power reactor, if it determines that there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned.

42 USC 2242.

D. 6980

Federal Register
Vol. 52, No. 44
Friday, March 6, 1987

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

Licensing of Nuclear Power Plants Where State and/or Local Governments Decline To Cooperate in Offsite Emergency Planning

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is considering whether to amend its rules regarding offsite emergency planning at nuclear power plant sites. The amendment being considered would, in limited circumstances, allow the issuance of a full-power operating license even if the utility cannot meet all of NRC's current emergency planning requirements when, contrary to the Commission's expectations when its emergency planning rules were issued, there is a lack of cooperation by State and/or local governments in the development or implementation of offsite emergency plans. The Commission believes that adequate assurance of public health and safety can be achieved with this approach.

DATE: Comment period expires May 5, 1987.

Comments received after this date will be considered if it is practicable to do so, but assurance of consideration can be given only for comments filed on or before this date.

ADDRESSES: Submit written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, ATTN: Docketing and Service Branch. Deliver comments to: Room 1121, 1717 H Street, NW., Washington, DC, between 8:15 a.m. and 5:00 p.m. weekdays. Examine comments received at: NRC Public Document Room, 1717 H Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Peter G. Crane, Office of the General Counsel, U.S. Nuclear Regulatory

Commission, Washington, DC 20555 Telephone: (202) 634–1465.

SUPPLEMENTARY INFORMATION: In August of 1980, the Commission promulgated revised regulations governing emergency planning and preparedness at nuclear power plant sites (*see* 10 CFR 50.47 and 10 CFR Part 50, Appendix E). The need for improvements had been demonstrated by the inadequate offsite response to the accident at the Three Mile Island plant in March of 1979. Among other things, these regulations envisioned the development of offsite emergency plans with the cooperation of State and local governments in the vicinity of the reactor site.

The Commission's judgment that the new requirements were a reasonable exercise of Commission authority was premised in part on the Commission's belief that State and local governments would cooperate in the development and implementation of offsite plans. Thus, in response to comments that the proposed new emergency planning rules would vest State and local governments with *de facto* veto authority over plant operation, the Commission responded that "[t]he Commission believes, based on the record created by the public workshops, that State and local officials as partners in this undertaking will endeavor to provide fully for public protection."

In the years since 1980, offsite emergency plans have been completed and successfully exercised at nearly every nuclear power plant site in the United States. In few cases, however, State or local governments have not developed an offsite emergency plan of their own or cooperated with the utility in developing one. This lack of cooperation has even occurred after the affected plant was substantially constructed.

Existing regulations do not on their face require operation license denial where State or local governments do not cooperate in emergency planning. Rather, they permit the Commission to issue an operating license despite deficiencies in emergency planning, provided the deficiencies are "not significant," or that there are "adequate interim compensating actions" (*see* 10 CFR 50.47(c)(1) and (2)). However, the existing regulations also provide as a basic standard in all cases that "no operating license . . . will be issued [for a power reactor] unless a finding is made that there is reasonable assurance that adequate protective measure can and will be taken in the event of a radiological emergency." *Long Island Lighting Company* (Shoreham Nuclear Power Station), CLI–86–13, 24 NRC 22 (1986). The absence of State and local governmental cooperation makes it more difficult for utility applicants to demonstrate compliance with the basic emergency planning standard, especially that part of the standard which requires reasonable assurance that adequate protective measures "will be taken." This is especially onerous where a utility is powerless under applicable State or local law to itself implement all aspects of an offsite plan. Thus, in actual practice, under the Commission's existing rules State or local governments may possibly veto full-power operation, even after the plant has been substantially completed, by choosing not to cooperate.

As indicated above, when the Commission's emergency planning requirements were upgraded in August of 1980, the Commission believed that all affected State and local governments would continue to cooperate in emergency planning throughout the life of the license. In the rulemaking initiated by today's notice, the Commission is considering explicitly what regulatory approach it should follow in the future in the event that, contrary to the expectation in August of 1980, a State or local government declines to cooperate in the development or implementation of an offsite emergency plan for whatever reason and, as a result, the Commission may have difficulty finding, as required by existing regulations, that there is reasonable assurance that adequate protective measures can *and will* be taken in the event of a radiological emergency.

Any consideration of possible changes in the Commission's emergency planning requirements must recognize one central and salient fact: That such a change would not alter the Commission's paramount obligation to assure public health and safety. For each license application, the Commission would remain obligated to determine that there is reasonable assurance that the public health and safety will be adequately protected. If the Commission, for whatever reason, cannot find that the statutory standard has been met, then the license cannot be issued.

In particular, the Commission is considering two options. The first option would be to leave the existing regulations unchanged. This option provides one method to assure that offsite emergency plans will be adequate. However, this option depends on the continued cooperation of State and local governments in emergency planning and preparedness. The option has severe non-safety consequences where States and local governments choose not to cooperate, especially after a plant has been substantially constructed. Significant policy questions of equity and fairness are presented where a utility has substantially completed construction and committed substantial resources to a nuclear plant and then, after it is far too late realistically for the utility to reverse course, the State or local government opposes the plant by non-cooperation in offsite emergency planning. A forced abandonment of a completed nuclear plant for which billions for dollars have been invested also poses obvious serious financial consequences to the utility, ratepayers and taxpayers. Finally, at least in situations where non-cooperation in offsite emergency planning is motivated by safety issues, vesting State or local governments with *de facto* veto authority over full-power operation is inconsistent with the fundamental thrust of the Atomic Energy Act whereby the Commission is given exclusive *de jure* authority to license nuclear power plants and to impose radiological safety requirements for their construction and operation.

The second option under consideration by this rulemaking would be an amendment to the Commission's emergency planning regulations which would provide more flexibility than do the existing regulations to deal with the circumstance of non-cooperation. The essence of this option would be a new subsection (e) of 10 CFR 50.47 to read as follows:

(e) The Commission may issue a full power operating license for a facility notwithstanding non-compliance with other requirements of this section and 10 CFR Part 50, Appendix E, if non-compliance arises substantially from a lack of participation in the development or implementation of offsite emergency planning by a State or local government, and if the applicant demonstrates to the Commission's satisfaction that: (1) The non-compliance could be remedied, or adequately compensated for, by reasonable State or local governmental cooperation; (2) applicant has made a good faith and sustained effort to obtain the cooperation of the necessary governments; (3) applicants offsite emergency plan includes effective measures to compensate for the lack of cooperation which are reasonable and achievable under the circumstances and which take into account a likely State or local response to an actual emergency; and (4) applicant has provided copies of the offsite plan to all governments which would have otherwise participated in its preparation or implementation and has assured them that it stands ready to cooperate should they change their position.

If this option were adopted, the Commission expects that an adjudicatory record would need to be developed to substantiate a utility's claims that the preconditions for operation are fulfilled if any interested person or affected State or local government claims, with reasonable specificity and basis, that they are not fulfilled. Moreover, the Commission emphasizes that it would *not* be possible under this option to license a plant for full power operation unless the applicant demonstrates that adequate offsite emergency planning is achievable and all other aspects of the foregoing criteria are satisfied. This rulemaking is intended only to address non-cooperation by responsible State or local governments; it does not provide a remedy or excuse for other offsite emergency planning problems.

The additional flexibility provided by such a rule would obviously minimize the consequences from the lack of governmental cooperation in the development or implementation of offsite emergency plans. The more important and difficult question is whether or to what extent these non-safety consequences should be a matter of concern to the Commission in setting pre-licensing emergency planning requirements.

The Commission believes that the 1980 rule and the Commission's explanation of the basis and purpose for the 1980 rule in the rule preamble (45 FR 55402, August 18, 1980) reflect inconsistent concepts as to the proper place of offsite emergency planning and non-safety costs in the NRC safety licensing program. On the one hand, the Commission stated that the new requirements, as well as proper siting and engineered safety features, were needed to protect public health and safety. Taken in isolation, these statements can be read as evidencing a Commission decision that emergency planning and preparedness as provided in those revised rules were to be treated as measures essential to safe operation of nuclear facilities and therefore to be imposed rigorously without regard to equity or cost.

On the other hand, the Commission rejected an option in the rulemaking that could have lead to automatic plant shutdown if adequate plans were not filed because of commenters' concerns about "unnecessarily harsh economic and social consequences to State and local governments, utilities, and the public." Operating plants were given very substantial grace periods to come into compliance before shutdown would be considered or ordered. These provisions are not consistent with the concept that emergency planning and preparedness are as important to safety as such engineered safeguards as reactor containments or emergency core cooling systems. The Commission does not ordinarily permit any extended grace period for a large power reactor to operate without these safeguards, or allow a plant to operate for a significant period without these safeguards because of "harsh economic and social consequences." Rather, these provisions reflect a different concept—that adequate emergency planning and preparedness are needed and important, but that they represent an additional level of public protection that comes into play only after all of the other safety requirements for proper plant design, quality construction, and careful, disciplined operation have been considered, and that therefore some regulatory flexibility is warranted and the costs associated with alternative approaches may be taken into account.

The second more flexible emergency planning concept or approach is also reflected in consistent and repeated Commission pronouncement that the fundamental philosophy or approach of emergency planning is to assure reasonable and achievable dose reduction should an accident occur. *E.g., Long Island Lighting Company* (Shoreham Nuclear Power Station), *supra*; *Southern California Edison Company* (San Onofre), CLI-83-10, 17 NRC 528, 533 (1983). The existing emergency planning regulations does not require that plans achieve any pre-established minimum dose savings in the event of an accident. For example, approved emergency plans with full State and local governmental cooperation have highly variable evacuation time estimates ranging from several hours to over ten hours and the projected dose savings for such plans would vary widely. Thus the regulation is inherently variable in effect and there are no bright-line, mandatory minimum projected dose savings or evacuation time limites which could be viewed as performance standards for emergency plans in the existing regulation. Moreover, the dose savings achieved by implementation of an emergency plan under adverse conditions, *e.g.*, during or following heavy snow, could be substantially less than under perfect conditions. This variability is consistent with a concept or approach to emergency planning and preparedness that is flexible rather than rigid.

In the Commission's view, the narrow circumstance of non-cooperation by a State or local government in emergency planning and preparedness addressed by this rule requires the Commission to resolve, for the future, which of the two underlying emergency planning approaches it should follow: a relatively inflexible one, that will require adequate planning and preparedness with little or no concern for fairness or cost; or a more flexible one that focuses on what kind of accident mitigation (dose reduction to the public in the event of an accident) can be reasonably and feasibly accomplished, considering *all* of the circumstances. If sound safety regulation requires the former, then no rule change is warranted. If the latter, then a change would be in order for, if the fundamental philosophy or approach of emergency planning is reasonable and achievable dose reduction, this may properly be understood in the sense of what is reasonable and feasible for the *utility* to accomplish under all of the circumstances, including matters which are completely beyond the utility's control.

In the one licensing case to date in which this matter of basic emergency planning philosophy or approach has been considered, the Commission has taken the view that *under the existing regulations* an adequate plan must achieve dose reductions in the event of an accident that are generally comparable with what might be accomplished with governmental cooperation. *Long Island Lighting Company, supra*. But, as the above discussion makes clear, another regulatory approach is possible which is set out with option 2, and which focuses on what is prudent and achievable dose reduction taking into account lack of governmental cooperation. As noted earlier, the standards in our existing regulations contemplated governmental cooperation in offsite emergency planning and preparedness.

The types of measures, in addition to those normally provided by the licensee, to compensate for the lack of cooperation in planning by State and local governments would include:

(1) Added plans and procedures detailing compensating measures.

(2) Added personnel to accompany and advise State and local officials in an actual emergency;

(3) Facilities and equipment including vehicles, radios, telephone and radiation monitors as required by the plan;

(4) Special training for personnel implementing compensating measures;

(5) Arrangements including formalized agreements and contracts for supporting services;

(6) Close communication with members of the public in the emergency

planning zone (EPZ) to keep them informed of the status and provisions for response;

(7) Providing periodic notification of State and local government personnel of the details of the compensatory measures included in the plan, the arrangements included for their involvement in the event of a real emergency, and the availability of training; and

(8) Offsite exercises that demonstrate implementation of the plan of the extent feasible.

Comments are requested on these alternative approaches to emergency planning. The rule changes in option 2 are not dependent in any way on new information about nuclear plant accident source terms, probabilistic risk assessments, or scientific studies of the risk reduction potential of emergency planning.[1] The option would be based on the consideration of what should be the appropriate underlying philosophy or approach to emergency planning as a prelicensing regulatory requirement—a consideration which is prompted by the change in circumstances which have been experienced since the regulations were promulgated in 1980, i.e., the phenomenon, not then expected, of State and local governments refusing to cooperate in emergency planning.

The practical effects of Commission adoption of option two—a rule change—are difficult to estimate, but the Commission believes that the level of public protection associated with option two would not be significantly different from that provided by the current regulations. First, if a plant began operation under the circumstances permitted by the proposed regulation change, and all administrative and judicial remedies available to plant opponents have been exhausted, it seems reasonable to expect that the governments involved more likely than not would change their position and cooperate in planning. The governments or others may dispute whether planning is adequate, but it would seem fairly indisputable that the adequacy of a plan with cooperation will be enhanced relative to a utility-sponsored plan without it. In these circumstances, the governments and the citizens they represent would have much to gain and nothing to lose from cooperation.

Second, the Commission believes that State and local governments which have not cooperated in planning will carry out their traditional public health and safety roles and would therefore respond to an accident. It is reasonable to expect that this response would follow a comprehensive utility plan.

Third, the likelihood that State and local governments would cooperate may be bolstered by Title III of the Superfund Amendments and Reauthorization Act of 1986, which requires States to establish State emergency response commissions. The planning and notification requirements enacted in that Act are based on the same philosophy adopted by the Commission in its own emergency planning regulations. In fact, EPA's Chemical Emergency Preparedness Program is compatible in many respects with the Commission's emergency response program, and EPA's Interim Guidance issued in November 1985 (revision 1) specifically cross-references Commission and FEMA guidance on radiological emergency response. (It should be noted, however, that the Superfund amendments do not require that industrial facilities cease operation if a State refuses to establish the required State organization.) Since the Superfund amendments require States to establish emergency response organizations, a change in posture regarding cooperation in emergency planning for nuclear power plants may entail only small additional commitments of government resources.

Moreover, since it will have been established that adequate planning is achievable, and a utility plan will have been required which will include provisions for possible State and local cooperation in the event of an accident, any interim period after commencement of plant operation during which non-cooperating governments may re-evaluate their position may be short. The time period is, moreover, largely under the control of the governments. Not only may the governments accelerate their efforts to develop an improved plan once the plant is licensed, but should the option 2 rule change be adopted by the Commission, it may be reasonable for State or local governments which oppose plant operation to develop adequate contingent emergency plans that would only come into play should the plant be licensed over their objection.

Since an offsite plan developed without State or local cooperation is not likely to be fully exercised, it is necessary in conjunction with option 2 to amend Section F of 10 CFR Part 50, Appendix E, which currently requires that the offsite plan be fully exercised biennially.

The pendency of this proposal is not intended to affect any ongoing reviews or hearings of emergency planning issues under existing regulations, including 10 CFR 50.12.

The Commission is currently pursuing the feasibility of additional changes to emergency planning requirements based on the source term and severe accident programs. The proposal made in this notice is not based on either of these programs.

Backfit Analysis

This amendment does not impose any new requirements on production or utilization facilities; it only provides an alternative method to meet the Commission's emergency planning regulations. The amendment therefore is not a backfit under 10 CFR 50.109 and a backfit analysis is not required.

Paperwork Reduction Act Statement

This proposed rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). This rule is being submitted to the Office of Management and Budget for review and approval of the paperwork requirements.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule will not have a significant economic impact upon a substantial number of small entities. The proposed rule applies only to nuclear power plant licensees which are electric utility companies dominant in their service areas. These licensees are not "small entities" as set forth in the Regulatory Flexibility Act and do not meet the small business size standards set forth in Small Business Administration regulations in 13 CFR Part 121.

List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

Environmental Assessment and Finding of No Significant Environmental Impact

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the

[1] If in the future nuclear plant designs are proposed which offer greater protection of the public health and safety than do current designs, then additional rulemaking may be appropriate which examines the need for emergency planning in consideration of the reduced overall risk to the public. In this rulemaking, however, no assumptions are necessarily being made regarding possibly improved plant designs or operations since 1980 when the new emergency planning regulations were issued.

Commission's regulations in Subpart A of 10 CFR Part 51, that this rule is not a major Federal action significantly affecting the quality of the human environment and therefore an environmental impact statement is not required. The Commission has prepared, in support of this finding, an environmental assessment which is available for inspection and copying, for a fee, at the NRC Public Document Room, 1717 H Street, NW., Washington, DC.

Regulatory Analysis

The Commission has prepared a regulatory analysis for this regulation. This analysis further examines the costs and benefits of the proposed action and the alternatives considered by the Commission. The analysis is available for inspection and copying, for a fee, at the NRC Public Document Room, 1717 H Street, NW., Washington, DC.

For the reasons set out in the preamble, and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the Commission is considering whether it should adopt the following amendments to 10 CFR Part 50:

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for Part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.23, 50.35, 50.55, 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80 through 50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Appendix F also issued under sec. 187, 68 Stat. 954 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 50.10 (a), (b), and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)), §§ 50.10 (b) and (c) and 50.54 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)), and §§ 50.47(e), 50.55(e), 50.59(b), 50.70, 50.71, 50.72, 50.73, and 50.78 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. Section 50.47 is amended by adding a new paragraph (e) to read as follows:

§ 50.47 Emergency plans.

* * * * *

(e) The Commission may issue a full power operating license for a facility notwithstanding non-compliance with other requirements of this section and 10 CFR Part 50, Appendix E if non-compliance arises substantially from a lack of participation in the development or implementation of offsite emergency planning by a State or local government, and if the applicant demonstrates to the Commission's satisfaction that:

(1) The non-compliance could be remedied, or adequately compensated for by reasonable State or local governmental cooperation;

(2) Applicant has made a good faith and sustained effort to obtain the cooperation of the necessary governments;

(3) Applicant's offsite emergency plan includes effective measures to compensate for the lack of cooperation which are reasonable and achievable under the circumstances and which take into account a likely State or local response to an actual emergency; and

(4) Applicant has provided copies of the offsite plan to all governments which would have otherwise participated in its preparation or implementation and has assured them that it stands ready to cooperate should they change their position.

3. In Appendix E, section F is amended by adding a new paragraph 6 to read as follows:

Appendix E—Emergency Planning and Preparedness for Production and Utilization Facilities

* * * * *

F. Training * * *

6. Offsite governmental participation in an exercise is not required to the extent an applicant or licensee relies upon 10 CFR 50.47(e). In such cases, an exercise with participation by the applicant or licensee and other cooperating governmental entities shall be held.

* * * * *

The separate views of Commissioner Asselstine follow.

Dated at Washington, DC, this 2nd day of March, 1987.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

Separate Views of Commissioner Asselstine

Emergency planning is essential to protect public health and safety and the active participation of state and local governments in the planning process is fundamental to adequate emergency planning. These are the lessons we learned from the Three Mile Island accident, and this is the reason the Commission promulgated its emergency planning rules in 1980. However, these lessons seem to have been forgotten by the present Commission. In proposing this rule change, the Commission takes a step back in time to 1978 when emergency planning was relegated to a position of secondary importance because it was thought to be unlikely to ever be necessary. The Commission's proposal allows licensing of a nuclear power plant where there is absolutely no State or local government participation in emergency planning. The Commission thereby undermines the very foundation upon which emergency planning is based. Further, the Commission substitutes for the requirements of the regulations a "best efforts" standard of protection. The Commission is thus willing to accept a level of protection of the public health and safety which is lower than that afforded by the Commission's current regulations. I cannot support a rule which sanctions such an erosion of the Commission's emergency planning requirements.

Nor can I support the Commission's stated justification for this change—that adhering to current safety standards for emergency planning might impose economic costs on the utilities in cases in which, absent state and local government participation, the Commission is unable to make the public health and safety findings required by our current regulations. These adverse economic consequences simply cannot serve as a valid basis for relaxing the Commission's safety regulations and for abandoning the central elements of emergency planning. In the face of the experience of Three Mile Island and more recently at Chernobyl, the Commission should be seeking ways to strengthen our emergency planning requirements and to enhance state and local government preparedness to cope with a serious nuclear accident. That is one of the lessons of Chernobyl being learned by many European countries. Unfortunately, by its action in proposing

this rule, the Commission demonstrates that we in the United States are on the opposite course.

1980 Emergency Planning Rule

Prior to 1979 the Commission had concluded that siting of nuclear power plants coupled with the defense-in-depth approach to design of the plants was adequate to protect the public. The NRC considered the probability of an accident with offsite consequences to be so low as to make emergency planning unnecessary. As a result, there was little planning by state and local authorities to respond to an incident at a nuclear power plant.

In March of 1979 there was an accident at the Three Mile Island plant in Pennsylvania. There had been little planning by the state and local governments responsible for dealing with the emergency, and the response was confused. There were no procedures for coordination among various governments, there were no clear lines of authority; there were no clear procedures for or means to disseminate information, there were no clear procedures for determining whether to take protective action or how to carry it out once it had been decided upon; and few if any of the other elements essential to an effective emergency response existed. Because of the disarray on the part of nearly everyone involved in the response to the TMI accident, people living in the area around the plant did not know what information was accurate and did not know whether it was safe to stay in the area or whether to leave. Most people simply did whatever they thought best.

The Commission realized after this experience that improved advance planning was necessary to deal with similar situations in the future. The TMI accident made it clear that in the case of an emergency with a potential for significant offsite radiation releases there would be insufficient time during the course of an accident to make arrangements to protect the people living around the plants. The Commission recognized that, even if there were no offsite releases, an accident could affect what the state and local governments did in an attempt to protect their citizens. For this reason, the Commission proposed a rule requiring, as a condition of licensing plants, that there be state and local emergency response plans sufficient to meet Commission requirements. (44 FR 75167). The Commission expressly recognized that participation in planning by state and local authorities and coordination between the governments and the licensee was central to effective emergency planning. The Commission acknowledged that it's proposal to view emergency planning being as equivalent to, rather than secondary to, siting and design in public protection departed from the agency's earlier approach to emergency planning. However, the Commission stated:

> The Commission's perspective was severely altered by the unexpected sequence of events that occurred at Three Mile Island. The accident showed clearly that the protection provided by siting and engineered safety features must be bolstered by the ability to take protective measures during the course of an accident. The accident also showed clearly that on-site conditions and actions, even if they do not cause significant off-site radiological consequences, will affect the way various State and local entities react to protect the public from dangers, real or imagined, associated with the accident. A conclusion the Commission draws from this is that in carrying out its statutory mandate to protect the public health and safety, the Commission must be in a position to know that off-site governmental plans have been reviewed and found adequate. The Commission finds that the public can be protected within the framework of the Atomic Energy Act only if additional attention is given to emergency response planning. (44 FR 75169)

Thus, the Commission found that emergency planning was essential to protect the public and that state and local participation in emergency planning was central to adequate emergency preparedness.

1987 Emergency Planning Rule

The NRC's emergency planning rule has been in effect now for almost seven years. In general, it has worked well. State and local governments, the utilities and the Federal government have all worked together to develop emergency plans for most new and operating plants. However, there have been a few exceptions. The State and local governments responsible for emergency plans for two plants in particular have refused to submit emergency plans for approval or to participate in utility planning. These governments by refusing to participate are making it difficult, if not impossible, for the utilities to meet NRC requirements and to get licenses to operate their plants. This state of affairs has proven extremely frustrating for the Commission. The State and local government positions in these two cases have stretched out the licensing process for plants which the NRC Staff feels are otherwise safe to operate. The Commission's proposed rule is an effort to break the logjam in these two "hostage" plant cases.

The rule provides for an alternative to compliance with NRC requirements in those cases where the inability of the utility to meet the regulations is substantially the result of the failure of State and local governments to participate in the emergency planning process. The rule substitutes for compliance with the regulations a "best efforts" standard. The Commission may license a plant where there is *no* participation by State and local governments in emergency planning. The utility must instead submit its own plan for Commission approval. The utility must have tried to obtain governmental cooperation. The utility must have done the best it could in developing a plan and measures to compensate for lack of cooperation by government authorities given the circumstances and taking into account participation of the State and local governments in the case of an actual emergency. And, the utility must provide copies of the plan to responsible government entities.

The Commission states that it believes this rule change will not significantly alter the level of protection provided to the public for several reasons: (1) Once the rule goes into effect, non-participating governments are likely to drop their objections and begin to cooperate with emergency planning because they will not longer have any incentive to not cooperate.

(2) State and local governments who have not participated in planning will carry out their responsibilities in the event of an actual emergency.

(3) Title III of the 1986 Superfund Amendments make it more likely that State and local governments will participate.

Unfortunately, the Commission's assertions are either irrelevant, insufficient or based simply on wishful thinking. The Commission's assertion that as a result of this proposed rule State and local governments will suddenly see the light, drop all of their objections and begin to cooperate seems to be based on not much more than wishful thinking. The Commission's third argument relies on the Superfund Amendments which are largely irrelevant to the issues here. The mere fact that the States are required to establish emergency planning commissions to deal with planning for chemical plants and the like has little relevance to whether a State will give up its opposition to participating in site-specific emergency planning for a nuclear power plant. In fact, if anything, the Superfund Amendments cut against the Commission's argument. The

amendments demonstrate Congress' belief that State and local participation in emergency planning is essential. The Commission's second argument is its realism argument which is developed in more detail in the *Shoreham* decision. *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986). Basically the theory is that, even if States and localities are refusing to participate in the planning process, in the event of an actual emergency they will carry out their responsibilities and for lack of a better course will use the utility's plan. The Commission found in *Shoreham* that such an ad hoc response by the governments could be sufficient to protect the public.

In assuming that the governments will in fact particiate and that they will use the utility plan as a basis for their response to an emergency, the Commission once again enters the realm of wishful thinking.[1] There is little, if anything, to support this belief. Even if we accept the Commission's assumption, an ad hoc response by the responsible government officials is simply inconsistent with the fundamental precepts of emergency planning and clearly cannot provide the same level of protection as a plan with full cooperation would. An ad hoc response means that there will be no preplanning by the governments. Officials will be forced either to improvise during an accident (something which we know did not work at TMI) or to attempt to carry out a plan with which they are not familiar. They will not have been trained in the elements of the plan or their responsibilities, and they certainly will not have rehearsed their roles.

Emergency plans are very complicated. They must be in order to anticipate the many different situations that might occur during an accident and plan for them. Everyone must be familiar with the plan and his or her responsibilities if these plans are to work smoothly. Thus training and rehearsal are essential, and the Commission's regulations recognize this. If a particular government has not participated in advance planning, none of these fundamental preparatory steps will have been taken, and the governmental response will be less effective.

Another element essential to an effective and efficient emergency response is that the local populace must have confidence in the plan and in those implementing it. The people must believe that they are being kept accurately informed and that those implementing the plan know what they are doing. Otherwise, they are likely to ignore instructions and do what they think best to protect themselves and their families. An off-the-cuff emergency response like that approved by the Commission in this rule in unlikely to engender the confidence necessary to ensure that the plan really works adequately.

The proposed rule might be less objectionable if it required the Commission to find that reliance only on a utility plan with no State and local participation would in fact provide a level of protection to the public which is equivalent to an emergency preparedness plan with full cooperation. It does not even do that. Under this proposal, whether there is adequate protection will be determined based on what the utility can reasonably accomplish given the lack of government cooperation—a "best efforts" standard.[2] This means that a plant may be licensed with the core of emergency planning missing, with a less coordinated response than would normally be possible, and where some protective actions might no longer be available. The Commission is willing to accept this reduction in the level of protection of the public.

Rationale for Proposed Rule

What justification does the Commission provide for its willingness to accept a lower standard of public protection? The Commission asserts that the proposed rule is necessary to put emergency planning back into its proper place in the regulatory scheme. The Commission decision on this proposed rule amounts to a repudiation of the Commission's judgment in 1980 that emergency planning was just as important as other safeguards like engineered safety features. The Commission now argues that while emergency planning is important, it is really only of secondary importance. According to this argument, because it is only "an additional level of public protection that comes into play" only in the event that other safeguards fail, the Commission can justifiably take a more flexible approach and waive emergency planning requirements if they cost too much to implement.

This "new" emergency planning philosophy is nothing more than the Commission's pre-1980 philosphy in new trappings. Since emergency planning will only be necessary in the extremely unlikely event that another accident occurs, it is, according to the Commission, of only secondary importance.[3] However, the Commission cites no new safety information to support this about-face. In fact the Commission says that the rule is not based on any source term or severe accident research. The Commission states specifically that the rule change is not based on any finding that plants are safer now than they were in 1980 when the present emergency planning rules were issued and when planning was considered to be of primary importance to public protection. The Commission does not dispute its 1980 conclusion that State and local participation is the core of emergency planning and response. In fact the Commission admits the obvious—that an emergency response with governmental participation is better than one without. The Commission could come up with only one piece of information that is different from that available in 1980—in two cases governments have refused to cooperate in the emergency planning process. The Commission says that in 1980 it did not expect that State and local officials would actually refuse to participate. Since there are now cases of noncooperation, the mere fact that governments have refused to participate justifies waiving the central requirements of the emergency planning rule and accepting less protection for the public.

The Commission specifically recognized in 1980 the potential for governmental inaction to affect operation of plants, and the Commission specifically considered and rejected the argument presented by some who commented on the rule that the rule should not be promulgated because of the possibility that inaction by local governments might affect the operation of some reactors. The Commission responded to these commenters by stating that:

[1] If the governments do not participate, some utilities may not have the legal authority to carry out parts of their plans.

[2] This goes beyond the Commission decision in CLI-86-13 which stated that the Commission's existing regulations require that an adequate plan must achieve dose reductions generally comparable to those possible under a plan with government participation. 24 NRC 22,30.

[3] In support of its relegation of emergency planning to a secondary rule, the Commission cites the fact that in 1980 the Commission allowed existing plants to continue to operate while emergency plans were being developed as support for its theory that emergency planning is less important to safety than other safeguards. Unfortunately, that argument lacks merit. The Commission often provides grace periods for operating plants to come into compliance with new safety requirements. An excellent example is the fire protection rule.

The Commission believes that the potential restriction of plant operation by State and local officials is not significantly different in kind or effect from the means already available under existing law to prohibit reactor operation, such as zoning and land use laws, certification of public convenience and necessity, State financial and rate considerations (10 CFR 50.33(f)), and Federal environmental laws. (45 FR 55404).

The Commission noted that a local entity's support for emergency planning was something that would have to be renewed periodically, but the Commission believed that State and local officials would work with the Federal government and the utilities in planning to protect the public. The Commission recognized the potential that a State or local government could by its inaction affect the operation of nuclear plants and decide that that was not sufficient reason to alter the provisions of the emergency planning rule. Yet now, because the Commission is confronted with two very difficult cases, Seabrook and Shoreham, the Commission is willing to change the rule and waive what it considered in 1980 to be the core of adequate emergency planning. Obviously, the Commission's commitment to emergency planning only lasts as long as it does not get in the way of expeditious licensing of plants.

Narrow Circumstances?

The Commission also attempts to justify its rule change on the ground that the change really only applies in very narrow circumstances. However, the Commission's assertion misses a very important consideration. By allowing a utility to substitute its best efforts for State and local participation in emergency planning, the rule lessens the incentives for these governments to cooperate.[4] Governments, especially local governments, have limited personnel and resources, and any number of things on which to expend them. It is possible that in some cases these officials may choose to apply their scarce resources to something other than emergency planning if nonparticipation will not affect operation of the plant. The Commission should carefully consider this negative impact before going forward with the proposed rule.

Conclusion

While I can understand the Commission's frustration in dealing with the so-called "hostage" plant situation, I cannot support this rule. Emergency planning is essential to protect the public in the event of an accident at a nuclear power plant. State and local government participation in the process is essential to ensure that there will be an adequate emergency response and optimum protection of the public. The Commission's proposal undercuts both of these principles. The rule change is based on the concept that emergency planning is of only secondary importance—a concept which should have been unthinkable after TMI and Chernobyl, and accepts the idea that an emergency plan with absolutely no state and local participation is adequate as long as the utility does the best it can. That is simply nonsense. The Commission should not be willing to accept only best efforts solely in order to solve the problem it has with two reactor licensing cases. The Commission should heed the old legal adage "Hard cases make bad law," when considering whether to adopt a rule which waives requirements important to public protection in order to break the log-jam in those two cases.

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[4] In informal comments to the drafters of the proposed rule, FEMA apparently raised this same concern about the proposal.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

Evaluation of the Adequacy of Off-Site Emergency Planning for Nuclear Power Plants at the Operating License Review Stage Where State and/or Local Governments Decline To Participate in Off-Site Emergency Planning

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is amending its rules to provide criteria for the evaluation at the operating license review stage of utility-prepared emergency plans in situations in which state and/or local governments decline to participate further in emergency planning. The rule is consistent with the approach adopted by Congress in section 109 of the NRC Authorization Act of 1980, Pub. L. 96-295, described in the Conference Report on that statute (H.96-1070, June 4, 1980), twice re-enacted by the Congress (in Pub. L. 97-415, Jan. 4, 1983, and Pub. L. 98-553, Oct. 30, 1984), and followed in a prior adjudicatory decision of the Commission, *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986). The rule

recognizes that though state and local participation in emergency planning is highly desirable, and indeed is essential for maximum effectiveness of emergency planning and preparedness, Congress did not intend that the absence of such participation should preclude licensing of substantially completed nuclear power plants where there is a utility-prepared emergency plan that provides reasonable assurance of adequate protection to the public.

EFFECTIVE DATE: December 3, 1987.

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SUPPLEMENTARY INFORMATION:

Discussion

On March 6, 1987, the NRC published its notice of proposed rulemaking in the Federal Register, at 52 FR 6980. The period for public comment (60 days, subsequently extended for an additional 30 days) expired on June 4, 1987.

The proposed rule drew an unprecedentedly large number of comments. Some 11,500 individual letters were sent to NRC, as well as 27,000 individually signed form letters sent to Congress or the White House and forwarded to NRC. Approximately 15,300 persons signed petitions to the NRC. Every comment was read, including form letters, which were examined one by one so that any individual messages added by the signatories could be taken into account. NRC attempted to send cards of acknowledgment to each commenter.

The sheer volume of the comments received makes it clearly impracticable to discuss them individually. As a result, the following discussion will focus on the principal issues raised in the comments.

Issue #1. Is the proposed rule legal? Specifically, is it in accord with the language and legislative history of the emergency planning provisions enacted by the Congress in 1980?

Answer. Yes. The intent of the proposed rule, as clarified in Commission testimony and in other responses to the Congress, is to give effect to the Congress's 1980 compromise approach to emergency planning, not go beyond it. To explain this requires a somewhat detailed discussion of the background of the actions taken in 1980 by Congress and by the Commission with regard to emergency planning.

The backdrop for the actions taken by the Congress and the Commission in 1980 was, of course, the 1979 accident at Three Mile Island. The accident changed the NRC's regulatory approach to radiological emergency planning. Before the accident, emergency planning received relatively little attention from nuclear regulators. The prevailing assumption was that engineered safety features in nuclear power plants, coupled with sound operation and management, made it unlikely that emergency planning would ever be needed. At that time, only a limited evaluation of offsite emergency planning issues took place in the pre-construction review of applications to build nuclear power plants. The Three Mile Island accident led to the widespread recognition that, while there is no substitute for a well built, well run, and well regulated nuclear power plant, a substantial upgrading of the role of emergency planning was necessary if the public health and safety were to be adequately protected.

The Commission issued an advance notice of proposed rulemaking in July 1979, and in September and December of the same year it issued proposed emergency planning rules. 44 FR 54308 (September 19, 1979); 44 FR 75167 (December 19, 1979). Before the Commission took final action on the rules, however, the Congress took action, writing emergency planning provisions into the NRC Authorization Act for fiscal year 1980, Pub. L. No. 96–295. It is extremely important to focus on what the Congress did in that Act, because Congress' actions were the starting point for all the NRC did subsequently in the emergency planning area, as the written record makes clear.

Section 109 of the NRC Authorization Act directed the Commission to establish regulations making the existence of an adequate emergency plan a prerequisite for issuance of an operating license to a nuclear facility. The NRC was further directed to promulgate standards for state radiological response plans.

In the same section of the 1980 Act, Congress specified the conditions under which the Commission could issue operating licenses, and in doing so, it made clear its preferences with regard to state and local participation. Its first preference, reflected in section 109(b)(1)(B)(i)(I), is for a "State or local radiological emergency response plan which provides for responding to any radiological emergency at the facility concerned and which complies with the Commission's standards for such plans." In section 109(b)(1)(B)(i)(II), however, the Congress set out a second option: "In the absence of a plan which satisfies the requirements of subclause (I), there exists a State, local, *or utility* plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned." (Emphasis added.) In addition, section 109 provided that the Commission's determination under the first but not the second of the two options could be made "only in consultation with the Director of the Federal Emergency Management Agency and other appropriate agencies." Section 109(b)(1)(B)(ii). The statute further directed the Commission to "establish by rule * * * a mechanism to encourage and assist States to comply as expeditiously as practicable" with the NRC's standards for State radiological emergency response plans. Section 109(b)(1)(C).

The Conference Report on the legislation, H. 96–1070 (June 4, 1980) explained in clear terms, at p. 27, the rationale for the two-tiered approach: "The conferees sought to avoid penalizing an applicant for an operating license if a State or locality does not submit an emergency response plan to the NRC for review or if the submitted plan does not satisfy all the guidelines or rules. In the absence of a State or local plan that complies with the guidelines or rules, the compromise permits NRC to issue an operating license if it determines that a State, local *or utility* plan, such as the emergency preparedness plan submitted by the applicant, provides reasonable assurance that the public health and safety is not endangered by operation of the facility." (Emphasis added.)

The statute, which was enacted on June 30, 1980, and the Conference Report make abundantly clear that in Congress' view, the ideal situation was one in which there is a state or local plan that meets all NRC standards. It is generally clear that in Congress' view, there could be emergency planning under a utility plan that to some degree fell short of the ideal but was nevertheless adequate to protect the health and safety of the public.

That Congressional judgment was before the Commission when it considered final emergency planning rules only a few weeks later, and the Commission took pains to make clear on the record that it was following the Congress' approach. As the Commission stated in its notice of final rulemaking, published on August 19, 1980, at 45 FR 55402:

Finally, on July 23, 1980, at the final Commission consideration of these rules, the Commission was briefed by the General Counsel on the substance of conversations with Congressional staff members who were involved with the passage of the NRC Authorization Act for fiscal year 1980, Pub. L. No. 96-295. The General Counsel advised the Commission that the NRC final rules were consistent with that Act. The Commission has relied on all of the above information in its consideration of these final rules. In addition, the Commission directs that the transcripts of these meetings shall be part of the administrative record in this rulemaking.

In addition, in a key portion of the rule, dealing with the question of whether NRC should automatically shut down nuclear plants in the absence of an NRC-approved state or local emergency plan, or should instead evaluate all the relevant circumstances before deciding on remedial action, the NRC again explicitly followed the Congress' lead. In determining what action to take, the Commission said, it would look at the significance of deficiencies in emergency planning, the availability of compensating measures, and any compelling reasons arguing in favor of continued operation. 10 CFR 50.47(c). The Commission explained: "This interpretation is consistent with the provisions of the NRC Authorization Act for fiscal year 1980, Pub. L. 96-295." 45 FR 55403. Thus in deciding that the lack of an approved state or local plan should not be grounds for automatic shutdown of a nuclear power plant, the Commission expressly declared itself to be following the statutory approach.

This background sheds considerable light on a passage from the Federal Register notice which some commenters saw as indication that the Commission consciously decided in 1980 that states and localities should have the power to exercise a veto over nuclear power plant operation. The Commission said:

> The Commission recognizes that there is a possibility that the operation of some reactors may be affected by this rule through inaction of State and local governments or an inability to comply with these rules. The Commission believes that the potential restriction of plant operation by State and local officials is not significantly different in kind and effect from the means already available to prohibit reactor operation. . . . Relative to applying this rule in actual practice, however, the Commission need not shut down a facility until all factors have been thoroughly examined.

45 FR 55404. (Emphasis added.)

It has been argued that the language just quoted indicates that the Commission made a conscious decision in 1980 to allow states and localities to exercise a veto power over completed nuclear power plants. Seen in context, however, it is apparent that the Commission did no such thing. Rather, the Commission was acknowledging the fact that under the approach it was taking, the action (or inaction) of a state or locality had the potential to affect the operation of nuclear power plants, since state and local non-participation would clearly make it more difficult for an applicant to demonstrate the adequacy of emergency planning. It is worth emphasizing the word "potential" in the quoted passage. It indicates that the Commission believed that in some cases, state and local action or inaction might have the effect of restricting plant operation, while in other cases it would not. In other words, the Commission foresaw a case-by-case evaluation, with the result not foreordained either in the direction of plant operation or of shutdown. Clearly, neither the Commission nor the Congress envisioned that state or local non-participation should automatically bar plant operation without further inquiry.

The mechanism adopted by the Commission for implementing the two-tiered approach was set forth in 10 CFR 50.47 of the Commission's regulations. For the first tier, sixteen planning standards for a state or local emergency plan were spelled out in 10 CFR 50.47(b)(1-16) of the Commission's regulations. The second tier, by contrast, was dealt with in a brief and unspecific provision, 10 CFR 50.47(c)(1):

> Failure to meet the [16] applicable standards set forth in paragraph (b) of this section may result in the Commission declining to issue an operating license; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation.

In a 1986 decision, the Commission declared that in a situation in which state and local authorities decline to participate in emergency planning, the NRC has the authority and the legal obligation to consider a utility plan and render a judgment on the adequacy of emergency planning and preparedness. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22. The Commission observed in *LILCO* that the emergency planning standards of 10 CFR 50.47(b)—the regulation which establishes the 16 planning standards by which a state and local plan is to be measured—"are premised on a high level of coordination between the utility and State and local governments," so that "[i]t should come as no surprise that without governmental cooperation [the utility] has encountered great difficulty complying with all of these detailed planning standards." 22 NRC 22, 29. The Commission noted, however, that its emergency planning rules were intended to be "flexible," and that a utility plan will pass muster under 10 CFR 50.47(c) "notwithstanding noncompliance with the NRC's detailed planning standards * * * (1) if the defects are 'not significant'; (2) if there are 'adequate interim compensating actions'; or (3) if there are 'other compelling reasons.'" The Commission added: "The decisions below focus on (1) and (2) and we do likewise."

The Commission then explained that the "measure of significance under (1) and adequacy under (2) is the fundamental emergency planning standard of § 50.47(a) that 'no operating license * * * will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.'" The "root question," the Commission said, was whether a utility plan "can provide for 'adequate protective measures * * * in the event of a radiological emergency.'" To answer that question, the Commission continued, requires recognition of the fact that emergency planning requirements do not have fixed criteria, such as prescribed evacuation times or radiation dose savings, but rather aim at "reasonable and feasible dose reduction under the circumstances." 24 NRC 22, 30.

Thus the Commission is already on record as believing itself legally obligated to consider the adequacy of a utility plan in a situation of state and/or local non-participation in emergency planning. Likewise, it is on record as believing that the evaluation of a utility plan takes place in the context of the overriding obligation that no license can be issued unless the emergency plan is found to provide reasonable assurance of adequate protective measures in an emergency. The Commission believes that the planning standards of 10 CFR 50.47(b), which are used to evaluate a state or local plan, also provide an appropriate framework to evaluate a utility plan. Therefore, the new rule provides for the first time that where a utility plan is submitted, in a situation of state and/or local non-participation in emergency planning, it will be evaluated for adequacy against the same standards used to evaluate a state or local plan. However, due allowance will be made both for the non-participation of the state and/or local governmental authorities and for the compensatory

measures proposed by the utility in reaching a determination whether there is "reasonable assurance that adequate protective measures can and will be taken."

To sum up, therefore, the rule is in accord with legal requirements for emergency planning at nuclear power plants because:

—The rule is consistent with section 109 of the NRC Authorization Act of 1980, a measure which has twice reenacted by the Congress, though it has since expired. In addition, the House of Representatives recently rejected an amendment designed to bar implementation of the rule for two specific plants.

—The rule is consistent with existing NRC regulations, and is well within NRC's rulemaking authority.

—Since the rule provides for no diminution of public protection from what was provided under existing regulations, it cannot be in contravention of any statutory requirements governing the level of NRC safety standards.

Issue #2: Is this a generic rule, or is this proposal really aimed at the Shoreham and Seabrook plants?

The rule is generic in the sense that it is of general applicability and future effect, covering future plants as well as existing plants. At present, however, there are only two plants with pending operating license applications for which state and/or local non-participation is an issue. Those plants are Shoreham and Seabrook. The NRC's 1980 rules, perhaps because of optimism that states and localities would always choose to be partners in emergency planning, included only a general provision, 10 CFR 50.47(c), dealing with cases in which utilities are unable to satisfy the standards for state and local emergency plans, and had no specific discussion of the evaluation of a utility plan in cases of state or local non-parucipation. This does not mean that the NRC was compelled to adopt new regulations in order to act on the Shoreham and Seabrook license applications. On the contrary, the NRC has always had the option of proceeding by case-by-case adjudication under its 1980 regulations.

Issue #3: Will this rule assure licenses to the Shoreham and Seabrook plants?

It will not assure a license to any particular plant or plants. It will establish a framework in which a utility seeking an operating license can, in a case of state and/or local non-participation, attempt to demonstrate to the NRC that emergency planning is adequate. Whether a utility could succeed in making that showing would depend on the record developed in a specific adjudication, the results of which would be subject to multiple levels of review within the Commission as well as to review in the courts.

Issue #4: Is state or local participation essential for the NRC to determine that there will be adequate protection of the public health and safety?

We do not have a basis at this time for determining generically whether state and local participation in emergency planning is essential for NRC to determine that there will be adequate protection of the public health and safety. There has yet to be a final adjudicatory determination in any proceeding on the adequacy of a utility plan where state and local governmental authorities decline to participate in emergency planning. Clearly, it will be more difficult for a utility to satisfy the NRC of the adequacy of its plan in the absence of state and local participation, but whether it would be impossible remains to be seen. The fact that Congress provided for evaluation of a utility plan in section 109 of the NRC Authorization Act of 1980 (and in two subsequent Authorization Acts) indicates that Congress believed that it was at least possible in some cases for a utility plan to be found to provide "reasonable assurance that public health and safety is not endangered by operation of the facility concerned," in the words of the "second tier" provided in section 109.

Issue #5: Is emergency planning as important to safety as proper plant design and operation?

First of all, this issue does not have to be addressed in the context of the final rule announced in this notice, since the present rule involves no redrawing by NRC of the balance between emergency planning and other provisions for the protection of health and safety. Having said that, we turn to the question of the place of emergency planning in the overall regulatory scheme for the protection of public health and safety.

Though the Commission in its 1980 rulemaking explicitly described emergency planning as "essential," it is less clear what importance the Commission assigned to emergency planning, as compared to the importance accorded to other means of protecting public health and safety, notably sound siting, design, and operation. In the Supplementary Information explaining the 1980 rulemaking, the Commission stated that "adequate emergency preparedness is an *essential* aspect in the protection of the public health and safety," 55 FR 55404, and commented that "onsite and offsite emergency preparedness as well as proper siting and engineered design features are *needed* to protect the health and safety of the public." (Emphasis added.) 45 FR 55403. The Commission also explained that in light of the Three Mile Island accident it had become "clear that the protection provided by siting and engineered design features must be bolstered by the ability to take protective measures during the course of an accident." *Id.* Though the word "bolstered" suggests that the Commission of 1980 viewed emergency planning as a backstop for other means of public protection rather than as of equal importance to them, the issue cannot be resolved definitively by microscopic analysis of the particular words chosen in 1980.

More relevant to the task of ascertaining the intent of the 1980 rulemaking is the regulatory structure established under the 1980 rules. In 10 CFR 50.54(s)(2)(ii), the Commission provided that if it "finds that the state of emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency * * * and if the deficiencies * * * are not corrected within four months of that finding, the Commission will determine whether the reactor shall be shut down until such deficiencies are remedied or whether other enforcement action is appropriate." In other words, a plant ordinarily may operate for at least four months with deficiencies in emergency planning before the NRC is required even to decide whether remedial action should be taken. This approach, the Commission said in the Supplementary Information to the 1980 rule, was consistent with section 109 of the NRC Authorization Act of 1980. 45 FR 55407. At the time that the Commission created the so-called "120-day clock" for deficiencies in emergency planning, it was settled Commission law (and remains so today) that the NRC must issue an order directing a licensee to show cause why its license should not be modified, revoked or suspended whenever it concludes that "substantial health or safety issues ha[ve] been raised" about the activities authorized by the license. *Consolidated Edison Company of New York* (Indian Point, Units No. 1, 2 and 3), CLI-75-8, 2 NRC 173, 176. That standard was endorsed by the Court of Appeals for the District of Columbia Circuit in *Porter County Chapter of the Izaak Walton League* v. *NRC*, 606 F.2d 1363 (1978). In the context of that standard, the 120-day clock provision for emergency planning deficiencies amounts to a Commission

finding that, at least for the first 120 days, even a major deficiency in emergency planning does not automatically raise a "substantial health or safety issue" with regard to plant operation. By contrast, a major safety deficiency relating to emergency conditions—for example, the availability of the emergency core cooling system—would warrant immediate shutdown.

In sum, despite language indicating that emergency planning was "essential," the Commission in 1980 created a regulatory structure in which emergency planning was treated somewhat differently, in terms of the corrective actions to be taken when deficiencies are identified, from the engineered safety features ("hardware") that would be relied on in an emergency.

Issue #6: Assuming that NRC should consider a utility plan, what criteria should apply? In particular:

(a) Should the utility plan provide just as much protection as a state or local plan, or may less protection be adequate?

(b) If less protection may be adequate, must NRC still find reasonable assurance that under the utility plan, adequate protective measures can and will be taken? Or is it sufficient for NRC to find that the totality of the risk, including all relevant factors, including the likelihood of an accident, assures that there is adequate protection of public health and safety?

Under the rule adopted in this notice, a utility plan, to pass muster, is required to provide reasonable assurance that adequate protective measures can and will be taken in an emergency. The rule recognizes—as did Congress when it enacted and re-enacted the provisions of Section 109 of the NRC Authorization Act of 1980—that no utility plan is likely to be able to provide the same degree of public protection that would obtain under ideal conditions, i.e., a state or local plan with full state and local participation, but that it *may* nevertheless be adequate. The rule starts from the premise that accidents can happen, and that at every plant, adequate emergency planning measures are needed to protect the public in the event an accident occurs. Whether in fact a particular utility plan will be found adequate would be a matter for adjudication in individual licensing proceedings.

Issue #7: May NRC assume that a state or local government which refuses to cooperate in emergency planning will still respond to the best of its ability in an actual emergency? If so:

(a) May NRC assume that the state or local response will be in accord with the utility plan?

(b) May NRC assume that the state or local response will be adequate?

(c) If the NRC rule calls for reliance on FEMA, and FEMA says that it can't judge emergency planning except when there is state and local participation in an exercise, how can the NRC ever make a judgment on emergency planning in a situation in which state and local authorities do not participate?

In this rule, the Commission adheres to the "realism doctrine," enunciated in its 1986 decision in *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, which holds that in an actual emergency, state and local governmental authorities will act to protect their citizenry, and that it is appropriate for the NRC to take account of that self-evident fact in evaluating the adequacy of a utility's emergency plan. The NRC's realism doctrine is grounded squarely in common sense. As the Commission stated in *LILCO*, even where state and local officials "deny they ever would or could cooperate with [a utility] either before or even during an accident," the NRC "simply cannot accept these statements at face value." 24 NRC 22, 29 fn. 9. It would be irrational for anyone to suppose that in a real radiological emergency, state and local public officials would refuse to do what they have always done in the event of emergencies of all kinds: do their best to help protect the affected public.

The *Long Island Lighting Co.* decision included the observation that in an accident, the "best effort" of state and county officials would include utilizing the utility's plan as "the best source for emergency planning information and options." 24 NRC 22, 31. This rule leaves it to the Licensing Board to judge what form the "best efforts" of state and local officials would take. However, the rulemaking record strongly supports the proposition that state and local governments believe that a planned response is preferable to an ad hoc one. Therefore it is only reasonable to suppose that in the event of a radiological emergency, state and local officials, in the absence of a state or local radiological emergency plan approved by state and local governments, will either look to the utility and its plan for guidance or will follow some other plan that exists. Thus the presiding Licensing Board may presume that state and local governmental authorities will look to the utility for guidance and generally follow its plan in an actual emergency; however, this presumption may be rebutted by, for example, a good faith and a timely proffer of an adequate and feasible state or local radiological response plan which would in fact be relied upon in an emergency. The presiding Licensing Board should not hesitate to reject any claim that state and local officials will refuse to act to safeguard the health and safety of the public in the event of an actual emergency. In actual emergencies, state, local, and federal officials have invariably done their utmost to protect the citizenry, as two hundred years of American history amply demonstrates.

At the present time, the Commission does not have a basis in its adjudicatory experience to judge either that a utility plan would be adequate in every case or that it would be inadequate in every case. Implementation of this rule may ultimately provide that informational basis.

The problem of how the NRC can decide the adequacy of emergency planning in the face of FEMA's declared reluctance to make judgments on emergency planning in cases of state and local non-participation does not appear insoluble. Though FEMA has expressed its reluctance to make judgments in such circumstances, because of the degree of conjecture that would in FEMA's view be called for, we do not interpret its position as one of refusal to apply its expertise to the evaluation of a utility plan. For FEMA to engage in the evaluation of a utility plan would necessitate no retreat from its stated view that it is highly desirable to have, for each nuclear power plant, a state or local plan with full state and local participation in emergency planning, including emergency exercises. (The Commission shares that view.) FEMA's advice would undoubtedly include identification of areas in which judgments are necessarily conjectural, and NRC's overall judgment on whether a utility's plan is adequate would in turn have to take account of the uncertainties included in FEMA's judgment. Beyond a certain point, uncertainty as to underlying facts would plainly make a positive finding on "reasonable assurance" increasingly difficult. These are issues, however, which can be addressed in the case-by-case adjudications on individual fact-specific situations. It should be noted that while the rule makes clear that ultimate decisional authority resides with NRC, it does envision a role for FEMA in the evaluation of utility plans, although section 109 of the NRC Authorization Act of 1980 did not specify any role for

FEMA in the evaluation of utility plans (as opposed to state and local plans).

Issue #8: If this is a national policy question, why doesn't the Commission leave the issue to the Congress to resolve?

Congress did address, in 1980, the issue of what should be done in the event there is no acceptable state or local emergency plan: it directed the NRC to evaluate a state, local, or utility plan to determine whether it provided "reasonable assurance that public health and safety is not endangered by operation of the facility concerned." Perhaps because it was overly optimistic that there would be an acceptable state or local plan in every case, the Commission did not, except in general terms (at 10 CFR 50.47(c)), provide in its regulations for the evaluation of a utility plan. The present rule is an effort to make up for that omission by incorporating provisions implementing the Congress's 1980 policy decision into the NRC's rules. As noted elsewhere, the 1980 statute, twice re-enacted, has expired, but the NRC does not need the specific authority of that statute to adopt this rule, which is promulgated pursuant to the NRC's general authority, under section 161(b) and other provisions of the Atomic Energy Act, to regulate the use of nuclear energy.

The House of Representatives, as has been described above, voted 281–160 on August 5, 1987 to reject an amendment which would have barred the application of this rule to two specific plants. The Congress is thus well aware of the Commission's emergency planning rulemaking.

For the Commission to terminate its rulemaking and ask the Congress to address the policy issues involved thus seems unwarranted at this time. The Commission is still well within the framework of the guidance which the Congress gave it in 1980 (and in the two re-enactments of the statute) and also well within its rulemaking authority. It has yet to carry through that guidance to the point of making an adjudicatory decision on the adequacy of a utility plan. If and when the Commission determines, through adjudications in individual cases, that there is a continuing problem which only Congressional action can solve, it can so notify the Congress, but that point has not yet been reached.

Issue #9: Doesn't the proposed rule still leave open the possibility that state or local action or inaction can have the effect of blocking operation of a plant? If so, how can the proposed rule be said to effectuate the Congressional intent that licensees not be penalized for the inaction or inadequate action of state and local authorities?

Yes, the proposed rule does leave open the possibility that state or local non-participation can indirectly block the operation of a nuclear plant. This is so because under the particular facts of an individual case it may be impossible for the NRC to conclude that a utility plan is adequate, as defined in this rule. That does not mean, however, that the Congress's intent, as expressed in the 1980 statute and its re-enactments, is thereby frustrated. The Congress was concerned that utilities not be "penalized," but not to the extent that it was willing to countenance operation of a nuclear power plant in a situation where the public was not adequately protected. Congress intended to give a utility the opportunity to demonstrate that its plan provided "reasonable assurance," but it also provided that the NRC could not permit a plant to operate unless it found that the utility had met that burden.

Issue #10: Will the proposed rule discourage cooperation between licensees and state and local governments in emergency planning?

There is no reason to believe that the rule would discourage cooperation between licensees and state and local governments in emergency planning. Realistically, the only way in which the rule could discourage such cooperation would be if utilities were to decide that because of the new rule, they had less of an incentive to be accommodating to the needs and desires of state and local authorities. That might be a possible result if it appeared that the new rule make it easy and fast for a utility to obtain approval for its plan in cases of state and local non-participation.

In reality, it is likely to be much more difficult and time-consuming for a utility to obtain approval of its plan in the face of state and local opposition. The problems highlighted by this rulemaking are likely, if anything, to impress utilities anew with the desirability of doing everything necessary to obtain and retain full state and local participation in emergency planning.

Issue #11: Is the proposed rule based on an NRC consideration of economic costs?

The NRC rule is an effort to bring the NRC's regulations more clearly into line with a policy decision made by the Congress in 1980. The NRC's rule is thus based on economic considerations only to the extent that the Congress's policy decision of 1980 was based on economic considerations. In the Conference Report on the NRC Authorization Act of 1980 (H.96–1070, June 4, 1980), the conferees stated that they did not wish utilities to be "penalized" in situations in which there was no acceptable state or local plan. That could be taken as a reference to economic costs or simply to considerations of fairness, in that the issue was whether a utility was to be barred from operating a plant by the actions of third parties over which it had no control.

The NRC's motivation in promulgating this rule is *not* economics. Its motivation is to assure that the NRC is in a position to make the decisions that Congress intended that it make, and that the Commission has declared that it would make.

Issue #12: Is the proposed rule intended to read states and localities out of the emergency planning process?

Emphatically not. The rule leaves the existing regulatory structure unchanged for cases in which state and local authorities elect to participate in emergency planning. The NRC, in common with the Congress and FEMA, regards full state and local participation in emergency planning to be necessary for optimal emergency planning. The rule change is directed to the question of what the NRC's regulatory approach should be in which states and localities decide to take *themselves* out of the emergency planning process. Ideally, in the NRC's view, the new rule would never have to be used, because states and localities would never refuse to participate in emergency planning.

Issue #13: Does the proposed rule alter the place of emergency planning in the overall safety finding that the Commission must make?

It does not. As described above, the Commission must make both a finding of "adequate protective measures * * * in an emergency" and an overall safety finding of "reasonable assurance that the health and safety of the public will not be endangered" (10 CFR 50.35(c), implementing section 182 of the Atomic Energy Act, 42 U.S.C. 2232). The rule does nothing to alter either the requirement that emergency planning must be found adequate or the place of emergency planning in the overall safety finding.

Issue #14: What effect if any does the proposed rule have on nuclear plants that are already in operation?

The rule does not specifically apply to plants that already have operating licenses. As described above, 10 CFR 50.54(s)(2)(ii) of the Commission's regulations already provides a mechanism (the "120-day clock") for addressing situations in which deficiencies are identified in emergency planning at operating plants. To the extent that this rule provides criteria by

which a utility plan would be judged by state and local withdrawal from participation in emergency planning. Those criteria would presumably be of assistance to decisionmakers in determining, under 10 CFR 50.54(s)(2)(ii), whether remedial action should be taken, and if so, what kind, where deficiencies in emergency planning remain uncorrected after 120 days.

Issue #15. Does the Commission's rule mean that the NRC does not have to find that a utility plan would offer protection equivalent to what a plan with full state and local participation would provide?

As stated previously, under the rule adopted in this notice, a utility plan, to pass muster, is required to provide reasonable assurance that adequate protective measures can and will be taken in emergency. The rule recognizes—as did Congress when it enacted and re-enacted the provisions of Section 109 of the NRC Authorization Act of 1980—that no utility plan is likely to be able to provide the same degree of public protection that would obtain under ideal conditions, i.e. a state or local plan with full state and local participation, but that it may nevertheless be adequate.

The Commission's rule, as modified and clarified, would establish a process by which a utility plan can be evaluated against the same standards that are used to evaluate a state or local plan (with allowances made both for those areas in which compliance is infeasible because of governmental non-participation and for the compensatory measures proposed by the utility). It must be recognized that emergency planning rules are necessarily flexible. Other than "adequacy," there is no uniform "passing grade" for emergency plans, whether they are prepared by a state, a locality, or a utility. Rather, there is a case-by-case evaluation of whether the plan meets the standard of "adequate protective measures . . . in the event of an emergency." Likewise, the acceptability of a plan for one plant is not measured against plans for other nuclear plants. The Commission, in its 1986 *LILCO* decision, stressed the need for flexibility in the evaluation of emergency plans. In that decision, the Commission observed that it "might look favorably" on a utility plan "if there was reasonable assurance that it was capable of achieving dose reductions in the event of an accident that are generally comparable to what might be accomplished with government cooperation." 24 NRC 22, 30. We do not read that decision as requiring a finding of the precise dose reductions that would be accomplished either by the utility's plan or by a hypothetical plan that had full state and local participation; such findings are never a requirement in the evaluation of emergency plans. The final rule makes clear that every emergency plan is to be evaluated for adequacy on its own merits, without reference to the specific dose reductions which might be accomplished under the plan or to the capabilities of any other plan. It further makes clear that a finding of adequacy for any plan is to be considered generally comparable to a finding of adequacy for any other plan.

The rule change is designed to establish procedures and criteria governing the case-by-case adjudicatory evaluation, at the operating license review stage, of the adequacy of emergency planning in situations in which state and/or local authorities decline to participate further in emergency planning. It is not intended to assure the licensing of any particular plant or plants. The rule is intended to remedy the omission of specific procedures for the evaluation of a utility plan from the NRC's existing rules, adopted in 1980. In providing for the evaluation of a utility plan, however, the rule represents no departure from the approach envisioned in 1980 by the Congress and by the Commission. In 1980, the supplementary information to NRC's final rule stated that the rule was consistent with the approach taken by Congress in Section 109 of the NRC Authorization Act of 1980 (which, in a compromise between House and Senate versions, provided for the NRC to evaluate a utility's emergency plan in situations where a state or local plan was either nonexistent or inadequate), though the rule itself included no explicit provisions governing the NRC's evaluation of a utility plan in such circumstances. It should be emphasized that the rule is not intended to diminish public protection from the levels previously established by the Congress or the Commission's rules, since the Commission's rules and the Congress have since 1980 provided for a two-tier approach to emergency planning. The rule takes as its starting point the Congressional policy decision reflected in section 109 of the NRC Authorization Act of 1980. That statute adopted a two-tier approach to emergency planning. The preferred approach was for operating licenses to be issued upon a finding that there is a "State or local radiological emergency response plan * * * which complies with the Commission's standards for such plans," but failing that, it also permitted licensing on a showing that there is a "State, local, or utility plan which provides reasonable assurance that the public health and safety is not endangered by operation of the facility concerned."

Under the Commission's 1980 rules, the regulatory provision that implemented the second of the two tiers of Section 109 was general and unspecific. The relevant regulation, 10 CFR 50.47(c), allowed a nuclear power plant to be licensed to operate, notwithstanding its failure to comply with the planning standard of 10 CFR 50.47(b), on a showing that "deficiencies in the plans are not significant for the plant in question, that adequate interim compensating measures have been or will be taken promptly, or that there are other compelling reasons to permit plant operation," without defining those terms further. The Commission currently believes that the planning standards of 10 CFR 50.47(b), which are used to evaluate a state or local plan, also provide an appropriate framework to evaluate a utility plan. Therefore, the new rule provides for the first time that where a utility plan is submitted, in a situation of state and/or local non-participation in emergency planning, it will be evaluated for adequacy against the same standards used to evaluate a state or local plan. However, due allowance will be made both for the non-participation of the state and/or local governmental authorities and for the compensatory measures proposed by the utility in reaching a determination whether there is "reasonable assurance that adequate protective measures" can and will be taken.

The approach reflected in this rule amplifies and clarifies the guidance provided in the Commission's decision in *Long Island Lighting Co.*, (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986). The rule incorporates the "realism doctrine," set forth in that decision, which holds that in an actual emergency, state and local governmental authorities will act to protect the public, and that it is appropriate therefore for the NRC, in evaluating the adequacy of a utility's emergency plan, to take into account the probable response of state and local authorities, to be determined on a case-by-case basis.

That decision also included language which could be interpreted as envisioning that the NRC must estimate the radiological dose reductions which a utility plan would achieve, compare them with the radiological dose reductions which would be achieved if there were a state or local plan with full

state and local participation in emergency planning, and permit licensing only if the dose reductions are "generally comparable." Such an interpretation would be contrary to NRC practice, under which emergency plans are evaluated for adequacy without reference to numerical dose reductions which might be accomplished, and without comparing them to other emergency plans, real or hypothetical. The final rule makes clear that every emergency plan is to be evaluated for adequacy on its own merits, without reference to the specific dose reductions which might be accomplished under the plan or to the capabilities of any other plan. It further makes clear that a finding of adequacy for any plan is to be considered generally comparable to a finding of adequacy for any other plan.

The *Long Island Lighting Co.* decision included the observation that in an accident, the "best effort" of state and county officials would include utilizing the utility's plan as "the best source for emergency planning information and options." 24 NRC 22, 31. This rule leaves it to the Licensing Board to judge what form the "best efforts" of state and local officials would take, but that judgment would be made in accordance with certain guidelines set forth in the rule and explained further below. The rulemaking record strongly supports the proposition that state and local governments believe that a planned response is preferable to an ad hoc one. Therefore it is only reasonable to suppose that in the event of a radiological emergency, state and local officials, in the absence of a state or local radiological emergency plan approved by state and local governments, will either look to the utility and its plan for guidance or will follow some other plan that exists. Thus, the presiding Licensing Board may presume that state and local governmental authorities will look to the utility for guidance and generally follow its plan in an actual emergency; however, this presumption may be rebutted by, for example, a good faith and timely proffer or an adequate and feasible state or local radiological response plan which would in fact be relied upon in an emergency. The presiding Licensing Board should not hesitate to reject any claim that state and local officials will refuse to act to safeguard the health and safety of the public in the event of an actual emergency. In actual emergencies, state, local, and federal officials have invariably done their utmost to protect the citizenry, as two hundred years of American history amply demonstrates.

The rule thus establishes the framework by which the adequacy of emergency planning, in cases of state and/or local non-participation, can be evaluated on a case-by-case basis in operating license proceedings. The rule does not presuppose, nor does it dictate, what the outcome of that case-by-case evaluation will be. As with other issues adjudicated in NRC proceedings, the outcome of case-by-case evaluations of the adequacy of emergency planning using a utility's plan will be subject to multiple layers of administrative review within the Commission and to judicial review in the courts.

Backfit Analysis

This amendment does not impose any new requirements on production or utilization facilities; it only provides an alternative method to meet the Commission's emergency planning regulations. The amendment therefore is not a backfit under 10 CFR 50.109 and a backfit analysis is not required.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule will not have a significant economic impact upon a substantial number of small entities. The proposed rule applies only to nuclear power plant licensees which are electric utility companies dominant in their service areas. These licensees are not "small entities" as set forth in the Regulatory Flexibility Act and do not meet the small business size standards set forth in Small Business Administration regulations in 13 CFR Part 121.

Paperwork Reduction Act

This final rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). These requirements were approved by the Office of Management and Budget, approval No. 3150-0011.

List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting and Recordkeeping requirements.

Environmental Assessment and Finding of No Significant Environmental Impact

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR Part 51, that this rule is not a major Federal action significantly affecting the quality of the human environment and therefore an environmental impact statement is not required. The Commission has prepared, in support of this finding, an environmental assessment which is available for inspection and copying, for a fee, at the NRC Public Document Room, 1717 H Street NW., Washington, DC.

Regulatory Analysis

The Commission has prepared a regulatory analysis for this regulation. This analysis further examines the costs and benefits of the proposed action and the alternatives considered by the Commission. The analysis is available for inspection and copying, for a fee, at the NRC Public Document Room, 1717 H Street, NW., Washington, DC.

For the reasons set out in the preamble, and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the Commission is adopting the following amendments to 10 CFR Part 50:

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for Part 50 continues to read as follows:

Authority: Secs. 103, 104, 161, 182, 183, 186, 189, 68, Stat. 936, 937, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2133, 2134, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, 202, 206, 88 Stat. 1242, 1244, 1246, as amended (42 U.S.C. 5841, 5842, 5846); unless otherwise noted.

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Sections 50.57(d), 50.58, 50.91 and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2071, 2073 (42 U.S.C. 2152). Sections 50.80-50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Sections 50.100-50.102 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), secs. 50.10(a), (b), and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); secs. 50.10 (b) and (c) and 50.54 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and secs. 50.55(e), 50.59(b), 50.70, 50.71, 50.72, 50.73, and 50.78 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

§ 50.47 [Amended]

2. In 10 CFR Part 50, paragraph (c)(1) of § 50.47 is revised to read as follows:

* * * * *

(c)(1) Failure to meet the applicable standards set forth in paragraph (b) of this section may result in the

Commission declining to issue an operating license; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operations. Where an applicant for an operating license asserts that its inability to demonstrate compliance with the requirements of paragraph (b) of this section results wholly or substantially from the decision of state and/or local governments not to participate further in emergency planning, an operating license may be issued if the applicant demonstrates to the Commission's satisfaction that:

(i) The applicant's inability to comply with the requirements of paragraph (b) of this section is wholly or substantially the result of the non-participation of state and/or local governments.

(ii) The applicant has made a sustained, good faith effort to secure and retain the participation of the pertinent state and/or local governmental authorities, including the furnishing of copies of its emergency plan.

(iii) The applicant's emergency plan provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned. To make that finding, the applicant must demonstrate that, as outlined below, adequate protective measures can and will be taken in the event of an emergency. A utility plan will be evaluated against the same planning standards applicable to a state or local plan, as listed in paragraph (b) of this section, with due allowance made both for—

(A) Those elements for which state and/or local non-participation makes compliance infeasible and

(B) The utility's measures designed to compensate for any deficiencies resulting from state and/or local non-participation.

In making its determination on the adequacy of a utility plan, the NRC will recognize the reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public. The NRC will determine the adequacy of that expected response, in combination with the utility's compensating measures, on a case-by-case basis, subject to the following guidance. In addressing the circumstance where applicant's inability to comply with the requirements of paragraph (b) of this section is wholly or substantially the result of non-participation of state and/or local governments, it may be presumed that in the event of an actual radiological emergency state and local officials would generally follow the utility plan. However, this presumption may be rebutted by, for example, a good faith and timely proffer of an adequate and feasible state and/or local radiological emergency plan that would in fact be relied upon in a radiological emergency.

Appendix E—[Amended]

3. In 10 CFR Part 50, Appendix E, a new paragraph 6 is added to section IV.F to read as follows:

6. The participation of state and local governments in an emergency exercise is not required to the extent that the applicant has identified those governments as refusing to participate further in emergency planning activities, pursuant to 10 CFR 50.47(c)(1). In such cases, an exercise shall be held with the applicant or licensee and such governmental entities as elect to participate in the emergency planning process.

Dated at Washington, DC, this 29th day of October, 1987.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[Editorial note: The following regulatory analysis and environmental assessment will not appear in the Code of Federal Regulations]

Regulatory Analysis—Evaluation of the Adequacy of Offsite Emergency Planning for Nuclear Power Plants at the Operating License Review Stage Where State and/or Local Governments Decline to Participate in Offsite Emergency Planning

Statement of the Problem

In 1980, Congress enacted provisions dealing with emergency planning for nuclear power plants in the NRC Authorization Act for fiscal year 1980. Section 109 of that Act provided for the NRC to review a utility's emergency plan in situations in which a state or local emergency plan either did not exist or was inadequate. The NRC published regulations later than year that were designed to be consistent with the Congressionally mandated approach, but they did not include specific mention of utility plans. The absence of such a provision has led to uncertainty about the NRC's authority to consider a utility plan and the criteria by which such a plan would be judged. The present rulemaking is designed to clarify both the NRC's obligation to consider a utility plan at the operating license stage in cases of state and/or local non-participation in emergency planning and the standards against which such a plan would be evaluated.

Objective

The objective of the proposed amendments are to implement the policy underlying the 1980 Authorization Act and to resolve, for future licensing, what offsite emergency planning criteria should apply where state or local governments decide not to participate in offsite emergency planning or preparedness.

Alternatives

Five alternatives were considered, including leaving the existing rules unchanged. The pros and cons of these alternatives are discussed in the rule preamble published in the Federal Register.

Consequences

NRC

The amendments will probably not impact on NRC resources currently being used in licensing cases because current NRC policy, developed in the adjudicatory case law, is to evaluate utility plans as possible interim compensating actions under 10 CFR 50.47(c)(1). Thus, while there could be extensive litigation and review regarding whether the rule's criteria are met, this would likely be similar to the review and litigation under current practice.

Other Government Agencies

No impact on other agency resources should result with the possible exception that FEMA will need to devote resources to develop criteria for review of utility plans and/or to review the plans on a case-by-case basis.

Industry

Impacts on the industry are speculative because there is no way to predict, in advance of their actual application, whether any particular utility plan will satisfy the rule. However, industry should generally benefit from knowing that rules are in place so that plans for compliance can be formulated.

Public

Under the rule being adopted a utility plan, to pass muster, is required to provide reasonable assurance that adequate protective measures can and will be taken in an emergency. The rule recognizes—as did Congress when it enacted and re-enacted the provisions of Section 109 of the NRC Authorization Act of 1980—that while no utility plan is likely to be able to provide precisely the same degree of public protection that would obtain under ideal conditions, i.e., a state or local plan with full state and local participation, such a plan may nevertheless be adquate. The rule starts from the premise that accidents can happen, and that at every plant, adequate emergency planning measures are needed to protect the public in the event an accident occurs. Whether in fact a particular utility plan will be found adequate would be a matter for adjudication in individual licensing proceedings.

Impact on Other Requirements

The proposed amendments would not affect other NRC requirements.

Constraints

No constraints have been identified that affect implementation of the proposed amendments.

Decision Rationale

The decision rationale is set forth in detail in the preamble to the rule change published in the **Federal Register**.

Implementation

The rule should become effective 30 days after publication in the **Federal Register**. Implementation will involve cooperation with FEMA and the development of FEMA/NRC criteria for review of utility plans may be required before the rule is applied to specific cases.

Environmental Assessment for Amendments to Emergency Planning Regulations Dealing With Evaluation of Offsite Emergency Planning for Nuclear Power Plants at the Operating License Review Stage Where State and/or Local Governments Decline to Participate in Offsite Emergency Planning

Identification of the Action

The Commission is amending its regulations to provide criteria for the evaluation at the operating license stage of offsite emergency planning where, because of the non-participation of state and/or local governmental authorities, a utility has proposed its own emergency plan.

The Need for the Action

As described in the **Federal Register** notice accompanying the final rule, the Commission's emergency planning regulations, promulgated in 1980, did not explicitly discuss the evaluation of a utility emergency plan, although Congress expressly provided that in the absence of a state or local emergency plan, or in cases where a state or local plan was inadequate, the NRC should consider a utility plan. That omission has led to uncertainty as to whether the NRC is empowered to consider a utility plan in cases of state and/or local non-participation, as well as about what the standards for the evaluation of such a plan would be.

Alternatives Considered

The Commission published a proposed rule change on March 6, 1987, at 52 FR 6980. In deciding on a final rule, the Commission considered four options in addition to the one reflected in the final rule. These were: issuance of the rule as originally proposed and described; issuance of a rule making clear that in cases of state and/or local non-participation, licenses could be issued on the basis of the utility's best efforts; issuance of a rule barring the issuance of licenses in cases of state and/or local non-participation; and termination of the rulemaking without the issuance of any rule change.

Environmental Impacts of the Action

The rule does not alter in any way the requirement that for an operating license to be issued, emergency planning for the plant in question must be adequate. The rule is designed to effectuate the second track of the two-track approach adopted by the Congress in the NRC Authorization Act of 1980 and two successive authorization acts, as described in detail in the **Federal Register** notice. The rule does not affect the place of emergency planning in the overall safety finding which the Commission must make prior to the licensing of any plant. Accordingly, the rule change does not diminish public protection and has no environmental impact.

Agencies and Persons Consulted

A summary of the very numerous comments appears as part of the **Federal Register** notice. Shortly before presenting an options paper to the Commission, NRC representatives briefed representatives of the Federal Emergency Management Agency on the contents of the options paper.

Finding of No Significant Impact

Based on the above, the Commission has decided not to prepare an environmental impact statement for the rule changes.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Brief for Respondents" were forwarded on April 8, 1988, postpaid, to the following:

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EXHIBIT 4

UNOFFICIAL TRANSCRIPT OF PORTIONS OF THE ORAL ARGUMENT
BEFORE THE
COURT OF APPEALS FOR THE FIRST CIRCUIT ON JUNE 8, 1988

Solicitor Briggs: I am here representing the Nuclear Regulatory Commission and the United States Government in this case. This is a very contentious case. It's a very important case to a lot of people. There are some very strong feelings that are expressed in that pile of briefs that you've all waded through and there have been some strong feelings expressed in the arguments that you have heard today, and probably are yet to hear. I think it might be useful if I start my comments on a point where there is some agreement. In fact, I believe it is a point of complete agreement. And I refer the Court to the Union of Concerned Scientists' reply brief at p. 8, where they made the following statement:

> The Authorization Acts [and we're talking about the congressional Authorization Acts that authorized the NRC to consider utility plans] reflected a delicate balance between three competing concerns -- the desire through emergency preparedness to ensure public safety, the desire to avoid "penalizing" utilities, and the desire to avoid a wholesale intrusion into areas of traditional state responsibility.

Those same three factors that were before the Congress when it did those Authorization Acts, every one since 1980, were before the NRC when it embarked on its rulemaking and were considered by the NRC and implemented by the NRC in its rulemaking and in the presumption which is the heart of the

challenges that are before the Court. The NRC had to balance the concern that it maintain emergency planning to ensure public safety and it did so. It kept the standard that existed prior to the rule that in order to get a license a utility must demonstrate that there is reasonable assurance of adequate emergency planning can and will be taken in the event of a radiological emergency.

Chief Judge Campbell: Why did this rule become necessary in your view?

Solicitor Briggs: I think the rule was necessary, Your Honor, to fill what had become an increasingly troubling gap in the NRC's regulations. When the original rules were promulgated in 1980 the NRC had before it the 1980 Authorization Act and made very clear that its intention was to apply those rules consistent with the Authorization Act and that is to say to consider these three factors in applying those rules in a case-by-case basis. It became important, however, because a number of state and local governments, not just the ones before you, began to take action which suggested that in the absence of some specific rule in the NRC's rules that they believe that they by not cooperating with emergency plan might have the effect of actually shutting the plant down and vetoing the operation of a plant. The NRC felt it important to maintain the policy that Congress had set forth in its Authorization Acts and therefore it came forth with the

rulemaking and vented this issue so the public could comment on it. I think the rulemaking has clarified, although not greatly changed, the position the NRC had on this issue before the rulemaking was ever promulgated.

Chief Judge Campbell: Now suppose a State wanted to show that it was unrealistic to -- the presumption or whatever you want to call it was unrealistic because let us say the state authorities wouldn't be trained and perhaps wouldn't be authorized by their local laws to comply and so forth and so on. In other words, their argument would be that it's an unrealistic presumption that we will follow out this plan but not because we have a plan of our own but because there are a lot of impediments in the way to our people doing it. I had the impression from your opponents that their argument was that that material would be regarded as irrelevant and would not be taken into account.

Solicitor Briggs: I think your question, Judge Campbell, really embodies two sets of considerations. One is would a statement that we will not follow a utility plan and we will basically wing it be enough to rebut the presumption, and secondly, can a state and local government . . .

Chief Judge Campbell: No, my question really was very precise, I thought. I didn't say that if someone comes up and says we won't follow it. I said if someone comes up and says we have a lot of reasons to show why it's unrealistic for you

to expect to make this presumption but it has nothing to do with us having formulated a plan of our own. My understanding was your opponents argued that that would be regarded as essentially irrelevant and is not going to the question of the presumption and I think that that's an important point because the question is, is it what we call a rebuttable presumption or as Judge Breyer put it, is it a matter of simply burdenshifting or are we talking about something more rigid and more limiting.

Solicitor Briggs: And we are talking about a rebuttable presumption and burdenshifting but to answer your question there is nothing in this rule that prevents a state and local government from arguing that adequate emergency planning even with our presumed response, even assuming we would follow the utility plan, simply cannot be.

Judge Breyer: That isn't the point.

Solicitor Briggs: I'm sorry.

Judge Breyer: The point is suppose they get up and they say you have presumed we will follow the utility plan.

Solicitor Briggs: That's right.

Judge Breyer: I will tell you right now we won't and here is why. First, the utilities haven't taken into account that those streets freeze up in the winter. Second, the utilities have not taken into account that the bridge is always up and in order to get the bridge down what you have to do is call some people who work under certain rules and we can't get them there

and the third thing they haven't taken account is the laws in five towns which show that you can't call them up on the phone and therefore, the people won't be in the right place. And the fourth thing is and the fifth thing is and the sixth thing is and they show you convincingly that they will not follow the utility plan, indeed, legally they can't because of all those rules and regulations and at that point lets suppose any reasonable person, I'm assuming this hypothetically, any reasonable person would conclude they're right. They won't follow. Okay, what happens under this rule?

Solicitor Briggs: The rule, with all due respect to the Court's question really doesn't specifically address what is necessary to rebut the presumption.

Judge Breyer: I didn't say what was necessary. What I said is, what happens if they show that they won't follow the plan? Forget what's necessary to show it. I'm saying suppose they show it. Now what I read here is it says it may be presumed that they will generally follow the plan. However, this presumption may be rebutted by, for example, and then they give one example. Now, as I read that, I thought that's an example for whatever reasons they come up if they show they won't follow it, then they've shown it and the presumption goes away. Am I right? Cause they've then said no, that isn't so, what they're worried about is that you will not allow them to show and even if they do show they won't follow the plan, the

Commission will still grant, say that there is an adequate plan. Now, I want to know what this rule is, I mean does it or does it not allow them to rebut this?

Solicitor Briggs: It certainly allows them to make those kind of arguments.

Judge Breyer: You mean if they make it and they show it, do they win?

Solicitor Briggs: If they show that they will not follow the plan, if they convincingly show that the presumption has no basis in fact then it seems to me it would be patently arbitrary and capricious to apply a presumption that will not be sound.

Judge Breyer: So, in other words, you're saying, and I'm going to hold you to this in a sense, that if they show they will not follow the plan and that's shown convincingly, they win.

Solicitor Briggs: But the question . . . that's correct.

Judge Breyer: That's correct.

Solicitor Briggs: That's correct, Your Honor. But the question is, how can they show . . .

Judge Breyer: Well, I don't know . . .

Solicitor Briggs: . . . and <u>that</u> is a case-by-case question.

Judge Breyer: Well, that is a case-by-case question.

* * *

Judge Breyer: All right, so is this your point? You say, if they show it convincingly, they win. Now in the future, it could happen that they think they've shown it convincingly and the Commission thinks they haven't shown it convincingly.

Solicitor Briggs: That is correct.

Judge Breyer: And at that point they'd be right back in Court and it would be the Court's job to decide whether the Commission was being reasonable or not.

Solicitor Briggs: I think that's absolutely correct.

* * *

Judge Breyer: And we can take this, in your view, as simply burden-shifting?

Solicitor Briggs: I think that's right. And ultimately . . . and ultimately, the Court will have approved it . . .

Judge Breyer: Well . . .

Solicitor Briggs: . . . it seems to be a very simple proposition, and a very logical one, to say based on that, it is not arbitrary and capricious, but to the contrary it is quite rational to conclude that State governments would

generally follow that utility plan. Now if the State government wants to, for example, to take a hypothetical case, say "no, for evacuating the Seabrook facililty and certain beaches, we're going to follow a hurricane plan that we have used for 20 or 30 years there," and put that on the table, then that would rebut the presumption, in all likelihood, if that was a good faith proffer, and not a plan that was jimmied up to play games, and the utility would say, "OK, that is going to be the predicted state response, and now we will have to see if we have to do anything to compensate for the failure of the plan to do other things that the NRC regulations require."

Judge Breyer: And if we say it is burden-shifting, if we take that as the assumption, then it <u>is</u> burden-shifting. I mean there isn't some other case going on on this issue, in some other Court which would say it wasn't burden-shifting. I mean if we say it's burden-shifting, then that's what it is.

Solicitor Briggs: I think . . . Yes sir, I mean this is the only challenge to the rule, and frankly what you gentlemen say about it, is, unless somebody else looks at it, is going to be what the rule is going to be held to say.

* * *