UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	
LONG ISLAND LIGHTING COMPANY	Docket Nos. 50-322 50-322-OLA, and 50-322-OLA-2
(Shoreham Nuclear Power Station, Unit 1)	

PETITIONERS' JOINT REPLY TO OPPOSITIONS
TO THEIR JOINT MOTION TO STAY
LICENSE ISSUANCE AND OTHER MATTERS

Petitioners Shoreham-Wading River Central School District and Scientists and Engineers for Secure Energy, Inc. (jointly "Petitioners") hereby reply to the four oppositions[1/] filed to their Joint Motion urging the Commission to grant the stays requested because (a) there are three independent bases for the granting of those motions, (b) the opponents of those motions have misapprended the law applicable to the three independent bases for stays, (c) those opponents have made no showing of harm or, at least, cognizable harm that would result from the granting

1/ NRC Staff Response to Petitioners' Joint Motion to Stay ("Staff") (March 25, 1991); Opposition of the Long Island Power Authority to Joint Motion to Stay ("LIPA") (March 25, 1991); LILCO's Opposition to Joint Motion for Stay ("LILCO") (March 25, 1991); Reply of Mario M. Cuomo, Governor of the State of New York, as Friend of the Commission in Opposition to the Joint Motion to Stay or Vacate License Issuance and Other Matters ("Cuomo"), (March 22, 1991).

of those motions, and (d) comparable relief is not available from the New York Court of Appeals.[2/]

I. THE OPPOSITIONS

Four entities filed Oppositions to Petitioners' Joint Motion. These Oppositions neglect the fact that Petitioners' Joint Motion was premised on three independent bases: (a) the Nuclear Regulatory Commission's ("NRC" or "Commission") duty to refrain from decisions premised on assumptions as to the resolution of crucial state law issues as a matter of comity, (b) its power to provide interim equitable relief, or (c) its

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2/ In their Joint Motion, Petitioners argued that the requested stays by the Commission were "all the more necessary because [interim injunctive relief] is not available from the New York Court of Appeals . . . ." Joint Motion at 2 n.2. Neither of the other parties, Staff and LILCO, assert that appropriate interim injunctive relief is available in the New York Court of Appeals. Staff, passim; LILCO, passim. And it is significant and refreshing that counsel for the Governor of that State concedes that even he cannot find "any reported case in which the Court of Appeals discusses its authority to issue preliminary injunctions or temporary restraining orders." Cuomo at 9.

While amicus LIPA properly characterizes part of Professor Siegel's analysis as being that "such relief should be available" (LIPA at 7 (emphasis added)), the fact that Professor Siegel considers that it would be "wise" for the Court of Appeals to have such power does not detract from his unmistakable legal conclusion that "[t]he language of CPLR 5518 . . . would seem to apply only when the appeal is pending in the Appellate Division, ... [This] is apparently what the Legislature stated to be its intention." N.Y.Civ.Prac.L.&R. C5518:1 (McKinney 1978). In short, both opposing parties concede Petitioners' allegation that comparable relief is not available in the N.Y. Court of Appeals and the absence of even a single instance of the granting of such relief is powerful evidence of its unavailability.

inherent authority to exercise discretionary supervisory authority. Joint Motion at 1.

The Staff concentrates on a discussion of the four factors normally relevant to the Commission's power to provide interim equitable relief as set out in 10 C.F.R. § 2.788(e) (Staff at 2-11), while briefly discussing comity as a basis for the stays (Staff at 11-13) and relegating discussion of the Commission's inherent supervisory authority to a footnote (Staff at 2 n.2).

LILCO also devotes the majority of its opposition to the Commission's ordinary interim equitable relief standards (LILCO at 2-5, 10-18), while superficially opposing Petitioners' arguments on the basis of comity (LILCO at 8-10), totally omitting any reference to the Commission's inherent supervisory authority, and waving its arms saying it won't operate Shoreham in any event.[3/]

3/ The Commission should give no weight to LILCO's frantic arm waving regarding its intention never to operate Shoreham, because LILCO is currently contractually bound to make such assertions under the Settlement Agreement and, more particularly, pursuant to the Asset Transfer Agreement executed pursuant to that Settlement Agreement. In particular, the Settlement Agreement requires LILCO to "cooperate in obtaining any regulatory approval required to effectuate this agreement and the transactions that it contemplates, including transfer Shoreham to LIPA, [and] the decommissioning of Shoreham as promptly as possible . . . ." Settlement Agreement at ¶9. And the Amended and Restated Asset Transfer Agreement also sets out those commitments in greater and more precise detail. However, both of those agreements are currently under review in the highest Court of the State of New York, and may be voided by that court. In particular, the Transfer Agreement provides that its "validity" is "governed by

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Amicus LIPA also focuses on the Commission's Section 2.788(e) standards for interim equitable relief (LIPA at 15-22) and adds some discussion of a stay on the basis of comity (LIPA at 9-12), while totally omitting any discussion of a stay pursuant to the Commission's inherent supervisory authority.[4/] LIPA prefers to argue that interim injunctive relief is available from the New York Court of Appeals (LIPA at 6-9) without being able to cite a single judicial decision in support of that proposition, and tries to assert that the existence of the Settlement Agreement (and, hence, the importance of the question of its validity or invalidity) is irrelevant to the license amendments, exemptions and other approvals sought by LILCO in furtherance of decommissioning.[5/] LIPA at 12-15.

3/ (...continued)
the laws of the State of New York" (Article 10.7), and further provides for the termination of that agreement "if any Court of competent jurisdiction has issued a final decision, not subject to appeal, prohibiting consummation of the transactions contemplated by this Agreement" (Article 9.1(c)).

4/ LIPA faults the Motion because "Petitioners have not specifically identified all activities sought to be stayed." LIPA Opposition at 1. In addition to the four proceedings currently before the Atomic Safety and Licensing Board, Petitioners seek stays of all NRC and NRC Staff actions on the 14 matters identified by LILCO as pending on December 13, 1990 (attached) and all requests made by LILCO since that date, as well as all requests made by LIPA.

5/ LIPA has no basis for asserting "even if the Settlement Agreement should fail for some reason, Shoreham would remain closed and in need of prompt decommissioning as a result of non-federal initiatives." LIPA at 13-14. That Shoreham would remain closed is a matter of LIPA's desire; if the Settlement Agreement "should fail," it would no longer be a matter that LIPA could (continued...)

Amicus Cuomo not only omits any discussion of whether this situation would be appropriate for the Commission's exercise of its inherent supervisory authority, but also totally fails to address Petitioner's arguments on the basis of comity. Further, in discussing the normal standards for interim equitable relief, Cuomo confines himself to a discussion of whether Petitioners have shown that they are likely to prevail on the merits without suggesting that there is any reason why they won't. Cuomo at 2-8. Cuomo prefers to argue that Petitioners have not shown that interlocutory relief is unavailable from the New York Court of Appeals (Cuomo at 8-11) while, refreshingly, conceding that even the Governor's counsel has not been able to find any reported cases asserting such authority (Cuomo at 8). Finally, Cuomo argues that LILCO's authority to seek a POL is "not dependent on the Shoreham settlement" (Cuomo at 11-13), while inconsistently conceding that if the settlement were voided by the Court of

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5/ (...continued)
control. Further, the fact that a plant is "closed" does not dictate that it is "in need prompt decommissioning"; plants have remained closed for years without decommissioning, as in the case of Browns Ferry units. LIPA at 13-14. If the Agreements are invalidated, the question of whether the Shoreham license would ever be transferred to LIPA "under appropriate alternative arrangements" is a matter for another day. LIPA at 16. The decommissioning plan submitted by LIPA in December 1990 is irrelevant since LIPA is not the licensee and, therefore, has no right or obligation to submit such a plan for Shoreham. LIPA at 16; 10 CFR § 50.82 (1990).

Appeals, a "modified or renewed" agreement would be required in order to proceed with decommissioning.[6/] Cuomo at 12.

II. COMITY DICTATES THAT THE STAYS SHOULD BE GRANTED.[7/]

In their Joint Motion, Petitioners argued that stays on the basis of comity are demanded here because t.. U.S. Supreme Court's decision in Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594, 88 S.Ct. 1753, 1754 (1968) fits "the facts of this case like a glove." Joint Motion at 12. However, the Staff argues that the circumstances considered in Kaiser are "inapposite to those here" because the Kaiser decision turned on the fact that the ultimate decision "required interpretation of provisions in New Mexico constitution," impliedly denying that state constitutional law issues exist in the cases in the NY Court of Appeals.[8/] Staff at 12-13. LILCO also stresses the fact that the stay in Kaiser was "to allow a state court to

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6/ Cuomo's argument that the Settlement Agreement and LILCO's decision not to operate Shoreham are unrelated cannot survive the "red face" test. Cuomo at 11-12. The Settlement Agreement is the embodiment of the decision not to operate Shoreham which was forced on LILCO in return for cessessation of the illegal and abusive harassment of LILCO by the Governor and various State agencies (issues currently before the New York Court of Appeals). See n.3 supra.

7/ If stays are warranted on this basis, there is no need to reach the tests relevant to the other independent bases for stays.

8/ This Staff argument is almost inexplicable since the Staff earlier concedes in its Opposition that the cases before the NY Court of Appeals do present issues of "New York constitutional" law. Staff at 6 n.6.

interpret the meaning of a term in the state constitution." LILCO at 9.

The simple fact is, that all three cases pending before the New York Court of Appeals do involve state constitutional issues, that is, whether state statutory law and particular acts by the Governor and state governmental entities are in violation of the state constitution.[9] Therefore, Kaiser Steel is controlling here.[10]

Further, the NRC has previously recognized that when "a state court litigation [a relevant] issue of New York law" exists it is error if the Commission "fail[s] to base its determination of the issue upon the highest state court decision in that litigation." Consolidated Edison Co. (Indian Point Station, Unit

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9/ Both Citizens for an Orderly Energy Policy Inc. v. Cuomo and Dollard v. Long Island Power Authority, 559 N.Y.S.2d 381, 383 (A.D.3Dept. 1990) involve issues of whether "the agreements are in excess of the public respondents' statutory and constitutional authority" (emphasis added) and those appellate division opinions also recognize that those two cases present issues of "separation of powers doctrine" under the state constitution. 559 N.Y.S.2d at 387. Likewise, Nassau Suffolk Contractor's Association Inc. v. Public Service Commission, 559 N.Y.S.2d 393, 394 (A. 3Dept. 1990) presents issues of including the issue of whether the PSC violated appellants "procedural due process rights."

10/ The Staff appears to argue that Petitioners have not shown probability of success on the merits in the New York Court of Appeals ("conjecture to suppose that the New York Court of Appeals will overrule") and irreparable harm. Staff at 5-6. However, those considerations are irrelevant to stays based on comity. See, e.g., Kaiser, supra.

No. 2), ALAB-399, 5 NRC 1156, 1168 (1977) (emphasis added).[11/] In this case, the importance of awaiting final decision by New York's highest court is emphasized by the Staff's combined concessions (a) that this Commission has premised its decisions thus far on an assumption of the Agreement's "validity" (Staff at 7) and (b) that that state law issue is "a matter not even subject to the Commission's jurisdiction." Staff at 10.

Finally, in this very docket, when LILCO filed a motion for summary disposition on August 6, 1984, while the Board did not style its action as a "stay on the basis of comity," it "deferred its consideration of the motion," urging "the parties to resolve the issue in [state] court," waited almost seven months for the issuance of the initial state court decision, and

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11/ While the Appeal Board also found that it could not "in good conscience permit the matter to remain in limbo pending final resolution of the appeal in the Court of Appeals," it did not wait because waiting "would be pointless because the Court of Appeals could not give the Zoning Board of Appeals any greater powers than those afforded to it by the decision of the Appellate Division and still remain consistent with the federal law." Id. at 1170. That rationale does not apply in the current NRC proceedings: any NY Court of Appeals decision voiding the agreements on basis of New York statutory and/or constitutional law would not run afoul of federal preemption.

Petitioners recognize that the Board also noted that resolution by the New York Court of Appeals "could easily be the better part of a year coming." While Petitioners regard that as dicta, time uncertainty does not exist here because oral argument has already been scheduled in the three cases currently pending before the Court of Appeals for September 11, 1991 (see attached letters to counsel). Even LILCO concedes that the stay sought by Petitioners would involve a delay of only "some number of months". LILCO at 14. When the Commission has expended over 20 years of its resources issuing the Shoreham license, a pause of some months is surely warranted to determine whether the authority for giving up that license is valid under state law.

then took another two months to issue its decision denying LILCO's motion. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-818, 22 NRC 651, 659-60 & nn.15-20 (1985); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LPB-85-12, 21 NRC 650 (April 17, 1985). Thus, there is even NRC precedent for stays on the basis of comity in this very docket.

A few other issues raised by the Oppositions with respect to comity may be disposed of briefly. First, the Staff argument that the agreements cannot "fairly be viewed as a 'pendent state law claim' in this proceeding" is more than passing strange, given its prior concession that the claim is beyond the Commission's jurisdiction.[12/] Compare Staff at 13 with Staff at 10. Second, the various arguments that "pending court proceedings do not present a ground to stay Commission action even where the court's decision might affect the Commission's action or proposed actions" is based on decisions which are analytically irrelevant to the circumstances here. Staff at 12; LILCO at 8-9; LIPA at 12. The authorities cited in those Oppositions refer to federal judicial review of federal agency (NRC) decisions; the circumstances presented here involve state court review of state statutory and constitutional issues going

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12/ That is, if a stay should issue on the basis on comity when the federal judicial body has jurisdiction, albeit pendant, of the state law claim, comity demands stays when a federal quasi-judicial body totally lacks jurisdiction of relevant state law claims, especially state constitutional law claims.

to the heart of the predicate (i.e., the Settlement Agreement and its subsidiary agreements) for LILCO's proposals for federal actions in furtherance of the decommissioning of Shoreham.[13/] Third, LILCO mischaracterizes the Petitioners as relying on "abstention cases [which] seek to adjust the relationship between federal courts and state courts when both have jurisdiction over the same question, so as to avoid unreliable interpretation of state law issues by federal courts." LIPA at 9-10 (emphasis in original). While Petitioners rely on comity rather than abstention, LILCO is correct in saying that the purpose of the comity doctrine is "to avoid unreliable interpretations of state law issues by federal courts." That purpose would be served by stays here.[14/] However, the federal and state courts need not

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13/ Contrary to the characterization in the Oppositions, Petitioners do not attack LILCO's "decision not to operate" but the Commission's consideration of ensuing proposals for major federal action on particular license exemptions, amendments and other approvals to implement decommissioning subsequent to that "decision."

14/ LIPA argues that it would be

> highly inappropriate for this Commission to stay its Shoreham-related activities pending the outcome of the appeals [because] the decisions of the Appellate Division in the Shoreham cases are res judicata despite the pendency of a further appeal. See Restatement (Second) of Judgments § 13 & Comment f (1982). Thus, there is no conceivable basis for this Commission to accord less weight to the Appellate Division decisions and due to courts of the State of New York.

LIPA at 8. First, Section 13 of the Restatement is addressed to finality for purposes of res judicata, that is, when

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have "jurisdiction over the same question," rather the federal court's stay is appropriate where the state court decision of a logically prior question (in this case the validity of the agreement) might make federal court (or agency's) consideration of the same or logically subsequent questions unnecessary.[15/]

III. INDEPENDENT OF COMITY, STAYS ARE ALSO APPROPRIATE UNDER TRADITIONAL JUDICIAL TESTS.[16/]

Petitioners suggest that when the highest court has discretionary jurisdiction (whether by petition for certiorari or

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14/ (...continued)
determination of an issue in a prior adjudication bars its relitigation in a second law suit. However, no one is seeking to litigate the validity of the Settlement Agreement before the NRC or in any other "second" legal action. That is much different from the question whether the New York Courts have finally decided the validity of the agreements in question here. In fact, the very comment relied upon by LIPA (Comment f) states:

> The pendency of . . . an appeal from a judgment, is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone decision of that question until the proceedings addressed to the judgment are concluded. Application of this Comment may give raise to a problem of inconsistent judgments when a judgment under appeal, relied on as a basis for a second judgment, is later reversed.

Thus, the Restatement suggests the contrary of what LIPA represents it to say. The Restatement recommends stays ("postpone decision") in order to avoid the "problem of inconsistent judgments when a judgment is under appeal."

15/ And the need for a stay is even stronger here because the NRC lacks the power (jurisdiction) to resolve the state law issues. See n.12 supra.

16/ See n.7 supra.

by motion for leave to appeal), the traditional judicial test for the appropriateness of a stay pending review changes significantly. See, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 257 (1990) ("criteria . . . are the same as those the courts apply in granting or denying a stay pending appeal"); compare Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, 559 F.2d 841 (1977) (normal situation) with Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in Chambers) (criteria for a stay pending discretionary review). Petitioners address both sets of criteria below.

Discretionary Review by the Highest Court. When a party seeks a stay pending petition for certiorari, the most important consideration is whether there is a "reasonable probability" that four justices will consider the issue sufficiently meritorious to grant certiorari. 448 U.S. at 1308. In the present matters in the NY Court of Appeals, this is not subject to doubt: Discretionary review has already been granted by the New York Court of Appeals.

The second prong of the test is whether there is "a fair prospect that a majority of the court will conclude that the decision below was erroneous." Id. The concept of "fair prospect" is defined by Rostker's reliance on Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301, 1308-09 (1974), where Justice Powell granted a stay "[w]ithout anticipating my

views on the merits", noting that the "issues underlying this case are important and difficult." There can be little doubt but that the issues underlying the three cases currently before the New York Court of Appeals are both "important and difficult".

The third prong of the test is a "demonstration that irreparable harm is likely to result from the denial of the stay." Petitioners note that, for example, if a possession only license is issued, the harm would be "irreparable" since there is no precedent or established administrative review path for reconversion from a possession only license to a full power operating license.[17/] Additionally, Petitioners suggest that, in this context, the harm need not be irreparable in the most absolute meaning of that word but only a "significant harm" which is surely met by the facts of this case. See, Warm Springs Dam Task Force v. Gribble, 439 U.S. 1392, 1394, 99 S.Ct. 54, 55 (1978).

And the fourth prong is the balance of the equities which it "may be appropriate" to address only "in a close case" in order to "explore the relative harms to applicant and respondent, as well as the interest of the public at large." Hostker, 448 U.S. at 1308, 101 S.Ct. at 2-3 (emphasis added). Petitioners submit that, given their showing on the first

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17/ LILCO appears to concede that issuance of a POL would be irreversible and irretrievable as alleged by Petitioners (Joint Motion at 16) saying rather that that is "beside the point" because LILCO would not choose to operate Shoreham. LILCO at 12; but see n.3 supra.

elements, this is not a "close case" and, therefore, the balance of the equities need not be reached. However, if the Commission should reach that balance, the interest of Petitioners and of significant federal amici (CEQ and DOE)[18/] as representatives of the public interest, as well as Petitioners' interest in having a decision made only after the validity of its predicate has been established outweigh the interest of the NRC Staff in expediting the matter and any economic harm alleged by the licensee LILCO.[19/]

18/ Special deference is due the U.S. Secretary of Energy as an appellant-intervenor before the NY Court of Appeals seeking to vindicate his Department's position that the agreements violate New York law.

19/ LILCO has made only the most conclusory LILCO at 17 ("the more wasteful expense it incurs") allegation of economic harm from delays resulting from the stays. LILCO has submitted no affidavit particularizing such economic harm. See 10 C.F.R. § 2.730(c) (1990). For that reason alone, its assertion of economic harm should be disregarded. Fire Protection for Operating Nuclear Power Plants (10 C.F.R. 50.48), CLI-81-11, 13 NRC 778, 806 (1981) ("movants have not provided details of cost estimates which can be reviewed and corroborated by the staff."); Uranium Mill Licensing Requirements (10 C.F.R. Parts 30, 40, 70 & 150), CLI-81-9, 13 NRC 460, 465 (1981) ("no factual support for their bald allegations [of] heavy expenses"). Moreover, LILCO attachments (attached hereto) to a recent NRC inspection report of Shoreham indicate that if the license approvals being considered by the Commission are approved on the currently anticipated schedule, LILCO's costs would not be diminished during 1991, but rather would be increased by $39.28 million, or 27% more than the cost of maintaining Shoreham in its current state during 1990. To allow a stay to determine whether LILCO has the authority to expend this additional $40 million is actually in the interest of LILCO and its ratepayers.

LIPA recognizes that the cost involved will be passed through to LILCO ratepayers. LIPA at 20. Thus, there is no harm to LILCO; to the extent there may be economic "harm," it is to LILCO ratepayers. The Commission should recognize not only that that harm is very diffuse (and therefore insignificant to the individual ratepayer), but also that both the School District and

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The Commission's Usual Test. The first prong of the Commission's usual four part test is whether the moving party has made a strong showing that is likely to prevail on the merits. 10 C.F.R. § 2.788(e)(1) (1990). While it is recognized that such a showing is not indispensable to the grant of a stay, the mere granting of discretionary review should satisfy this test given the infrequency with which such review is granted since the "wooden probability" test (i.e., better than a 50% chance of success) is not favored and the Oppositions concede that the issues presented are at least "novel" or of "public importance." E.g., LIPA at 17 n.8. Further, applying the rule of multiplication of independent events to the three cases is valid since all Oppositions admit that there are some distinct issues involved in each of the three cases. Staff at 6 n.6 ("many similar issues"); LILCO at 15 n.5 ("interrelated cases"); LIPA at 5 n.4 ("intimately intertwined"); Cuomo at 5 ("interrelated"). It is also worthy of note that if one assumes only two distinct sets of issues to be presented, the probability of reversal in at least one of the cases would be 65.2% ($1-0.59^2$), thus satisfying

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19/ (...continued)
the person it represents, as well as the persons that SE2 represents are such ratepayers and seek such stays. Therefore, the Commission should give greater weight to the ratepayers' minimization of the importance of such harm, than to LIPA's trying to "protect" them from the alleged "harm".

even the "wooden probability" test.[20/] In considering Petitioners' argument that it will prevail on the merits, the Commission should also weigh the fact that none of the Oppositions even attempted to argue that the issues presented to the New York Court of Appeals are "well settled" or "clear."

As to the existence of irreparable injury (10 C.F.R. § 2.788(e)(2)), it is clear that the U.S. Court of Appeals for the District of Columbia Circuit based its favorable ruling for the I.C.C. in Illinois Commerce Commission v. I.C.C., 848 F.2d 1246, 1260 (1988) on the Commission's willingness to grant a stay without a "showing of irreparable injury." Nonetheless, for the reasons described above, Petitioners would suffer irreparable injury if a possession only license issues before resolution of the New York State cases as well as the Commission's own decision on whether an environmental assessment or an environmental impact statement is appropriate. Id.

20/ Cuomo states that Petitioners "have not explained why they have not used data from 1990 and 1991. One assumes that more recent data is more predictive of the Court of Appeals' current thinking." Cuomo Reply at 7. Passing over the fact that Cuomo does not offer data from any year more recent than 1989, and in fact relies on an earlier, and by its own argument, less reliable year (Cuomo at 8 n.1), Petitioners stated in their original motion that they were furnishing data from the "most recent year available." Joint Motion at 22.

Cuomo also asserts that Petitioners have "made no effort to provide" an explanation of "why the category under which the court gets an appeal is significant." Cuomo at 8. The answer is obvious from the data supplied by both Petitioners and by Cuomo: There are different probabilities of reversal or modification for different categories of cases reviewed; the relevant probability of success is the probability of success for the category of review in which the appeals lie.

The third prong (whether the granting of a stay would harm other parties), is addressed above at 14 & n.19. The fourth prong (where the public interest lies) is also addressed above at 14 & n.18. Thus, Petitioners also satisfy the Commission's usual standards for the grant of stays.

IV. STAYS ARE INDEPENDENTLY APPROPRIATE AS AN EXERCISE OF THE COMMISSION'S INHERENT SUPERVISORY AUTHORITY.[21]

The Commission's inherent supervisory authority over adjudicatory proceedings is well established. E.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990). Only the NRC Staff opposes issuance of stays on the basis of this inherent supervisory authority, and then only in cursory fashion. Staff at 2 n.2. Relying on Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 & 12-13 (1986) (subsequent history omitted), the Staff argues that there are no "special circumstances" present in this case to justify stays.

The Staff errs. While the "special circumstances" are different here, they are still "special" and there are other parallels between the current posture of this case and the bases for the Commission's decision in the Pacific Gas decision which support the grant of stays here.

21/ See n.7 supra.

In Pacific Gas, the Commission found that Petitioners had not "demonstrated error"; in this case, the Staff has conceded that the Commission is in no position to judge whether there is "error" on the state legal issues. 24 NRC at 12; Staff at 10. In Pacific Gas, the Commission found that Petitioners had not made a strong showing that they were likely to prevail on the merits; that issue is still open in this case and even the Staff concedes that the Commission can make no judgment on the state law issues. Id.

In Pacific Gas, the Commission held that having made the foregoing two negative findings, those findings do "not necessarily end our inquiry. We will still balance the harms that might result to the parties or to the public should a stay be granted or denied." Id. The Commission then determined that the licensee had no need for the increased capacity authorized by the amendment "for another five years" and, therefore, a stay "will result in no harm to PG&E or the public interest." Id. In this case, there is "no need" under the Atomic Energy Act or the National Environmental Policy Act for Commission review and approval of pending applications for amendments, exemptions and other approvals in any definite time frame. And LILCO has not even attempted to make such a showing. Therefore, the Commission should issue the stays because the grant of stays in this case "will result in no harm to [LILCO] or the public interest." Id.

In Pacific Gas, the Commission then proceeded to a balancing of "the asserted harm to petitioners (i.e., the denial of their right to a prior hearing)." Id. The Commission found: "Notwithstanding our views on the petitioners' likelihood of success on the merits, a balancing of these equities argues in favor of staying the second portion of the amendment . . . ." and it issued the stay. Id. In this case, Petitioners also seek a right to a prior hearing, as well as other rights pursuant to NEPA. The same balancing of equities favor the issuance of stays in these circumstances.

And, as to the second stay sought in Pacific Gas, the Commission found that issuance of the stay would lead to a shutdown of the facility costing up to $1 million a day and "attendant radiological risks to the workers."[22/] 24 NRC at 13. On the basis of these facts, the Commission denied that portion of the stay. In the current circumstances, maintaining the status quo would not interfere with operation of facility since LILCO has already said that it eschews that option. The costs during the stays would not be borne by LILCO but its ratepayers and such costs would be less than the costs if stays were denied

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22/ The NRC Staff states cryptically that "this question of validity is not relevant to the Commission's duty under AEA to ensure that Shoreham, in whatever mode it is in, remains radiologically safe for its workers and the surrounding public." Staff at 11. However, the NRC Staff does not suggest any way in which stays pending decision in the N.Y. Court of Appeals would or could be inconsistent with the radiological health and safety of workers and the surrounding public.

during 1991 (see n.19 supra) and there is no allegation of any increase in radiological risks from maintaining the facility in its current state. Therefore, all parts of the stays requested should be granted.

There are also other "special circumstances" supporting the stays as discussed at greater length above, including allowing a Federal Cabinet Officer to pursue vindication of his claims in state court.

CONCLUSION

WHEREFORE, for all the reasons stated above, Petitioners urge the Commission to grant the requested stays.

Respectfully submitted,

April 5, 1991

James P. McGranery, Jr.
Dow, Lohnes & Albertson
Suite 500
1255 Twenty-Third Street, N.W.
Washington, D.C. 20037
202-857-2929

Counsel for Petitioners
Shoreham-Wading River Central
School District and Scientists and
Engineers for Secure Energy, Inc.

U. S. NUCLEAR REGULATORY COMMISSION

REGION 1

DOCKET/REPORT No.	50-322/90-08 LICENSE No. NPF-82
LICENSEE:	Long Island Lighting Company P. O. Box 618, North Country Road Wading River, New York 11792
FACILITY NAME:	Shoreham Nuclear Power Station
DATES:	August 26 - December 29, 1990
INSPECTORS:	S. Brown, Project Manager, NRR P. Harris, Reactor Engineer, RI B. Norris, Project Inspector (Shoreham) J. Raleigh, Project Engineer, NRR

INSPECTOR: _____ 1/11/91
B. S. Norris
Project Inspector (Shoreham)

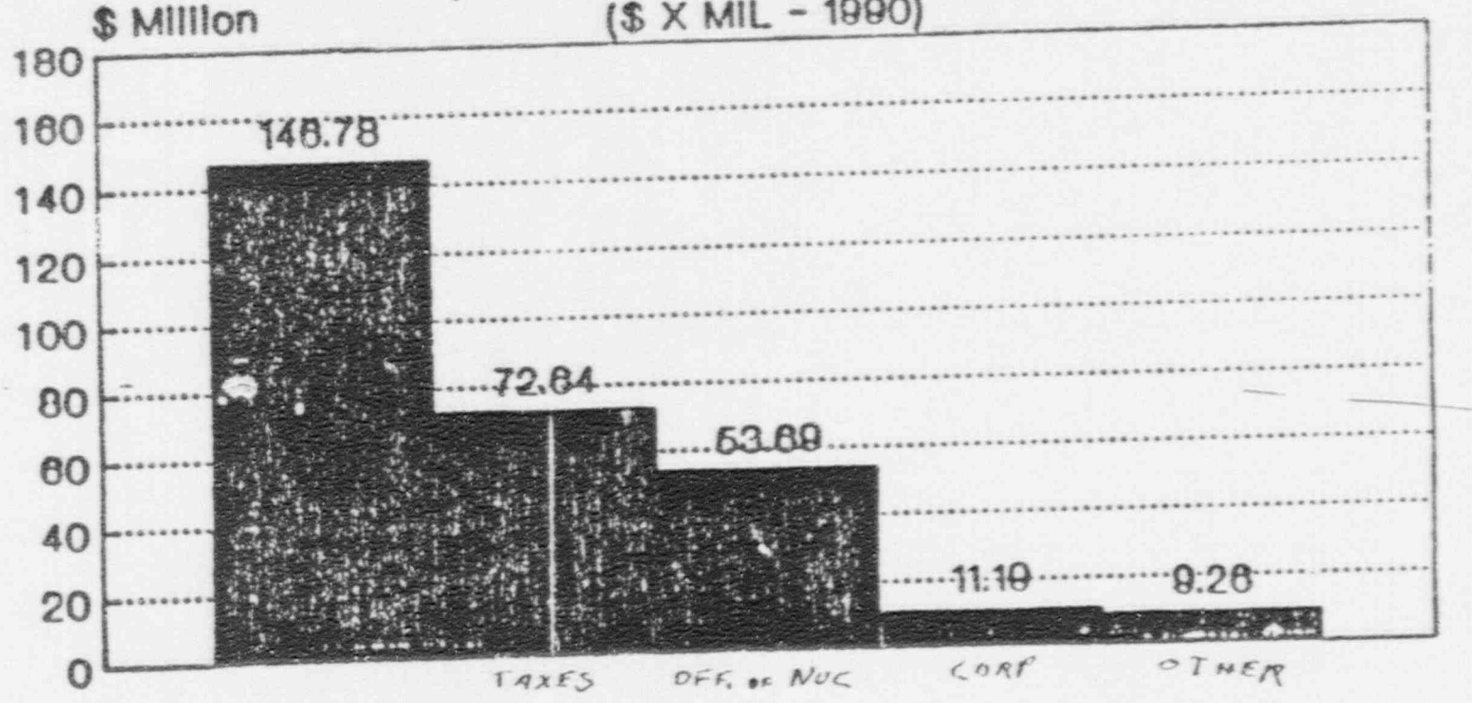
APPROVED BY: _____ 2/7/91
L. T. Doerflein, Chief
Reactor Projects Section 2B

AREAS INSPECTED:

Routine, on-site inspection by members of the Region 1 Office and NRR staff consisting of facility tours, fitness for duty program, system layup review, housekeeping, maintenance observations, modification of ventilation system, physical plant security, and review of licensee reports.

1990 BUDGET
PROJECTED YEAR END

(EXCLUDING CARRYING COSTS)
($ X MIL - 1990)



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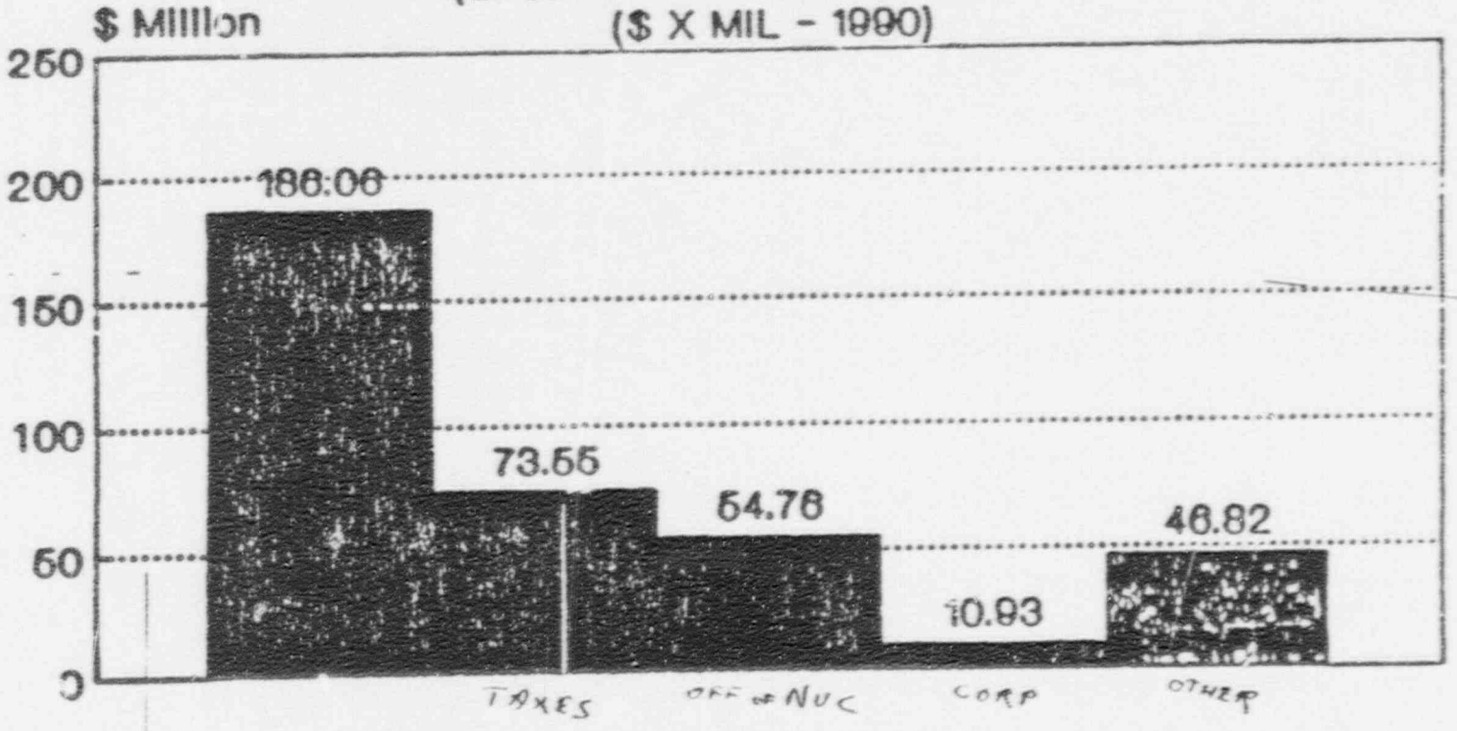
1991 BUDGET
ESTIMATED

(EXCLUDING CARRYING COSTS)
($ X MIL - 1990)



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December 13, 1990

STATUS LIST OF PENDING SHOREHAM REQUESTS

I. LILCO's Requests to the NRC to Implement the Shoreham Settlement

Description of Request	Purpose of Request	Date of Filing	Status
1. DSAR Submittal:			
a) LILCO's Application for an Amendment to Facility Operating License NPF-82 (SNRC-1664).	To remove LILCO's authorization to operate Shoreham and to allow LILCO to implement a revised set of technical specifications for fuel handling operations and create a Possession Only License.	1/5/90	Pending
b) Revise Set of DSAR T.S. Based on 8/2/90 NRC Meeting (SNRC-1752).	To resolve NRC comments documented in NRC letter 6/27/90 and NRC Meeting on 8/2/90.	8/30/90	Pending
2. TDI Emergency Diesel Generators:			
a) LILCO's Request for Interim Relief from the One-Time Five Year Inspection Requirement of Paragraph A, Attachment 2 to NPF-82 and Technical Specification Surveillance Requirements 4.8.1.1.2.e2, 3, 4, 5, 6, 7, 8 and 10 pending Disposition of January 5, 1990 License Amendment Application (SNRC-1694).	To allow LILCO to defer performing the one-time five year 25% sample inspection of the emergency diesel generators and to suspend certain emergency diesel generator surveillances, with resulting costs savings.	3/16/90	Pending
b) Revision to Interim Relief Request (SNRC-1694) on TDI EDGs one-time 5 Year Inspection Requirement and Technical Specification Surveillance Requirements by deleting Tech Spec portion (SNRC-1766).	To allow LILCO to defer performing the one-time five year 25% sample inspection of the emergency diesel generators, with resulting cost savings.	10/23/90	Pending

December 13, 1990

STATUS LIST OF PENDING SHOREHAM REQUESTS

I. LILCO's Requests to the NRC to Implement the Shoreham Settlement

Description of Request	Purpose of Request	Date of Filing	Status
3. Funding For Decommissioning			
a) LILCO's Request for Exemption (V. Staffieri letter).	To allow LILCO to use the Site Corporation Agreement in lieu of filing a Funding Report necessary for decommissioning. The Funding Report required by 10 CFR 50.33(K)(2) and 50.75(b) would result in undue hardship and costs to LILCO and its ratepayers.	6/11/90	Pending
4. Operators' Licenses Requirements			
- LILCO's Request for an Exemption From the Operators Licenses Requirements of 10 CFR 55 (SNRC-1719).	To document the inability to comply with 10 CFR 55. Alleviate LILCO's additional costs associated with the completion of the certification of a plant referenced simulator.	6/5/90	Pending
- As Amended to Revise SNPS Operator Licenses Program (SNRC-1749).	1) Eliminate the use of the simulator in its entirety. 2) Forwarded LILCO's proposed revision to LILCO's NRC-approved operator requalification training program.	8/31/90	Pending
5. License Transfer Request			
LILCO's and LIPA's Joint Application for a License Amendment to Authorize the Transfer of Shoreham (SNRC-1734).	To amend Shoreham's license to designate LIPA as the Plant's licensee.	6/28/90	Pending

STATUS LIST OF
PENDING SHOREHAM REQUESTS

I. LILCO's Requests to the NRC
to Implement the Shoreham Settlement

Description of Request	Purpose of Request	Date of Filing	Status
6. Annual License Fee			
LILCO's request that the Annual License Fee for FY 1991 for SNPS be held in abeyance pending disposition of LILCO's 1/5/90 license amendment application (SNRC-1754).	Has the potential of saving LILCO $719,000 annually until a POL is granted.	9/7/90	Pending NRC letter dtd 10/2/90 stated LILCO need not send money pending completion of NRC review.
7. Security Plan			
LILCO's request to revise Security Plan for Long Term Defueled Condition (SNRC-1762).	To redefine protected area, establish a "Security Area," relocate access control, reduce extent of Plan in 2 phases. To reduce costs.	10/9/90	Pending
8. Deletion of ISEG			
LILCO's request to amend NPF-82 by deleting ISEG and its associated admin. controls (SNRC-1745).	To provide a significant reduction in LILCO's costs ($600,000 annually) associated with ISEG.	8/21/90	Pending

December 13, 1990

STATUS LIST OF
PENDING SHOREHAM REQUESTS

II. Other LILCO Request to the NRC
Not Related to the Shoreham Settlement

Description of Request	Purpose of Request	Date of Filing	Status
1. Fire Protection			
a) Removal of Fire Protection Program from Tech Specs. Revisions per Generic Letters 86-10 and 88-12 (SNRC-1737).	To conform with GL 86-10 and 88-12 to replace current license conditions with a new standard condition and remove unnecessary fire protection technical specifications.	7/20/90	Pending FR Notice & Proposed Finding of No Significant Hazards Consideration 9/5/90
b) Revised Attachment 2 (license conditions) based on 9/12 discussions w/S. Brown (NRC) (SNRC-1761).	To eliminate unnecessary reidentification/renumbering of license.	9/24/90	Pending
c) LILCO's Requests for Interim Relief from: a) establishing continuous fire watches per TS and b) establishing hourly fire watch patrol per TS (SNRC-1721).	A substantial reduction in costs associated with fire watches.	6/5/90	Pending

State of New York
Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

March 26, 1991

Lewis & Greer, P.C.
Attn: J. Scott Greer, Esq.
11 Raymond Avenue
P.O. Box 2990
Poughkeepsie, New York 12603

William J. Cowan, Esq.
Counsel, PSC
Attn: Lawrence G. Malone, Esq.
Three Empire State Plaza
Albany, New York 12223

Victor A. Staffieri, Esq.
Counsel, LILCO
Attn: Richard Rapp, Jr., Esq.
175 East Old Country Road
Hicksville, New York 11801

Hon. Robert Abrams
Attorney General
Attn: Samuel Cherniak, Esq.
120 Broadway, 3rd Floor
New York, New York 10271

Charles M. Pratt, Esq.
Counsel, Power Authority
Attn: Arthur Camboris, Esq.
1633 Broadway
New York, New York 10019

Stanley B. Klimberg, Esq.
Counsel, LI Power Authority
200 Garden City Plaza
Suite 201
Garden City, New York 11530

Skadden Arps Slate Meagher
& Flom
Attn: George Zimmerman, Esq.
919 Third Avenue
New York, New York 10022

Re: M/O Citizens for an Orderly Energy Policy, Inc. v. Cuomo

Dear Counselors:

This appeal has been calendared for argument on Wednesday, September 11, 1991 at 2:00 p.m.

Questions may be directed to Martin F. Strnad at (518) 455-7702.

Very truly yours,

Donald M. Sheraw

Donald M. Sheraw

mec

State of New York
Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

March 26, 1991

Atlantic Legal Foundation
Attn: Martin Kaufman, Esq.
205 East 42nd Street
9th Floor
New York, New York 10017

Frederick Scullin, Jr., Esq.
United States Attorney
Attn: Jacob Lewis, Esq.
Department of Justice, Rm 3617
Appellate Staff, Civil Div.
Washington, D.C. 20530-0001

Lewis & Greer, P.C.
Attn: J. Scott Greer, Esq.
11 Raymond Avenue
P.O. Box 2990
Poughkeepsie, New York 12603

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Counsel, PSC
Attn: Lawrence G. Malone, Esq.
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Charles M. Pratt, Esq.
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1633 Broadway
New York, New York 10019

Stanley B. Klimberg, Esq.
Counsel, LI Power Authority
200 Garden City Plaza,
Suite 201
Garden City, New York 11530

Re: M/O Dollard and United States of America v.
Long Island Power Authority

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cc: Skadden Arps Slate Meagher & Flom

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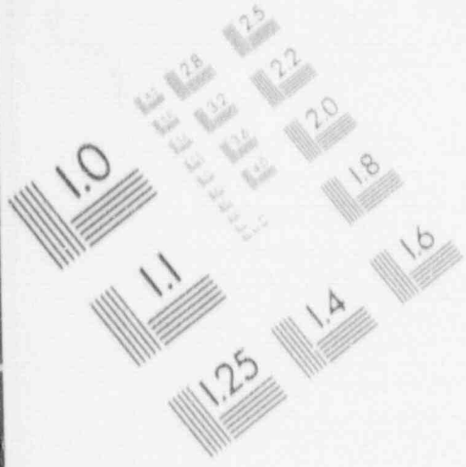
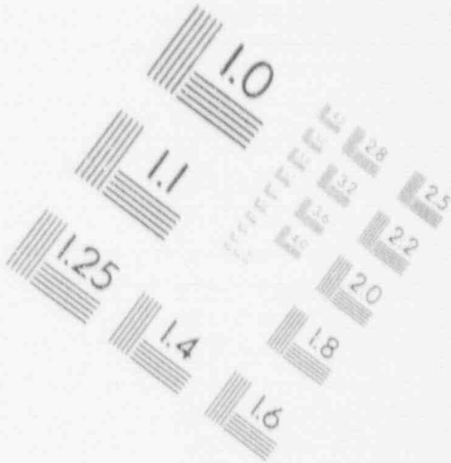
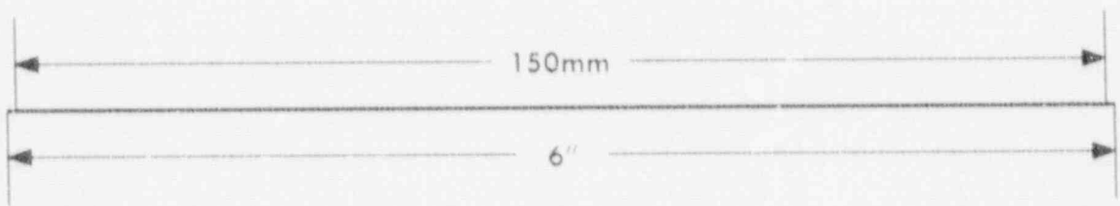
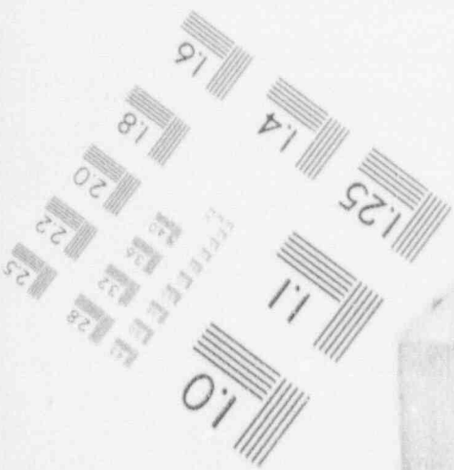
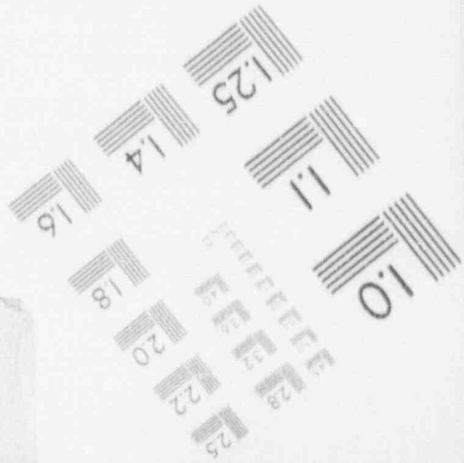
IMAGE EVALUATION
TEST TARGET (MT-3)











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Attn: Michael Englert, Esq.
11 Raymond Avenue
P.O. Box 2990
Poughkeepsie, New York 12603

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Counsel, PSC
Attn: Lawrence G. Malone, Esq.
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Albany, New York 12223

Victor A. Staffieri, Esq.
Counsel, LILCO
Attn: Richard A. Rapp, Jr., Esq.
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Re: M/O Nassau Suffolk Contractor's Assn. v. PSC

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mcc

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket Nos. 50-322 50-322-OLA, and 50-322-OLA-2

CERTIFICATE OF SERVICE

I hereby certify that one copy of the Petitioners' Joint Motion for Leave to File Joint Reply (with the attached Joint Reply to Oppositions to Their Joint Motion to Stay License Issuance and Other Matters) is being served upon the following by first-class mail, postage prepaid on this 5th day of April, 1991:

Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge
Jerry R. Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edwin J. Reis, Esq.
Deputy Assistant General Counsel
for Reactor Licensing
Mitzi A. Young, Esq.
Senior Supervisory Trial Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Carl R. Schenker, Jr., Esq.
Counsel, Long Island Power Authority
O'Melveny & Myers
555 13th Street, N.W.
Washington, D.C. 20004

Administrative Judge
Morton B. Margulies, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge
George A. Ferguson
ASLBP
5307 A1 Jones Drive
Columbia Beach, Maryland 20764

Michael R. Deland, Chairman
Council on Environmental Quality
Executive Office of the President
Washington, D.C. 20500

Samuel A. Cherniak, Esq.
NYS Department of Law
Bureau of Consumer Frauds
and Protection
120 Broadway
New York, New York 10271

Stephen A. Wakefield, Esq.
General Counsel
U.S. Department of Energy
Washington, D.C. 20585

Donald P. Irwin, Esq.
Hunton & Williams
P.O. Box 1535
Richmond, Virginia 23212

James P. McGranery, Jr.
Counsel for Petitioners
Shoreham-Wading River Central School
District and Scientists and Engineers
for Secure Energy, Inc.