LIPA March 25, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

BEFORE THE COMMISSION

In the Matter of	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322
(Shoreham Nuclear Power Station, Unit 1)	)	

OPPOSITION OF THE LONG ISLAND POWER AUTHORITY TO JOINT MOTION FOR STAY

The Shoreham-Wading River Central School District ("SWRCSD") and Scientists and Engineers for Secure Energy, Inc. (jointly "petitioners") have moved the Nuclear Regulatory Commission ("NRC" or "Commission") to stay all Commission proceedings and Staff reviews concerning "pending applications for license amendments, exemptions, and other forms of permission" related to the Shoreham Nuclear Power Station, Unit 1 ("Shoreham"). (See Petitioners' Joint Motion to Stay or Vacate License Issuance and Other Matters (dated March 8, 1991) ("Jt. Motion"), pp. 1-2.) Petitioners have not specifically identified all activities sought to be stayed, but their motion expressly embraces "various applications" filed by the Long Island Lighting Company ("LILCO") and by the Long Island Power Authority ("LIPA"). (Id., p. 13.)

LIPA vigorously opposes this frivolous motion in its entirety and particularly as it relates to joint applications by LILCO and LIPA and to applications by LIPA alone. Petitioners have shown no justification whatever for the proposed stay, and LIPA urges the NRC to deny it and to proceed expeditiously with Shoreham-related matters.[1]

In brief, the Joint Motion is simply another phase of petitioners' continuing crusade against the closure of Shoreham. The Joint Motion is not even based on new developments. The grant of review by the New York Court of Appeals ("Court of Appeals") was known to, and remarked upon by, the Commission in its Memorandum Opinion and Order CLI-91-02 (dated Feb. 22, 1991) ("CLI-91-02"), where the Commission rejected the same arguments for delay that are raised again here in the Joint Motion. (See Part I below.) Petitioners have not sought a stay pending appeal from the state courts in New York; hence, the relief petitioners seek from the NRC is forbidden, not required, by principles of "comity." (See Part II below.) Contrary to petitioners' repeated assertions, the validity of the 1989 Settlement Agreement is not essential to questions that have been or will be resolved by this Commission. (See Part IV below.)

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[1] If the Commission considers that the 10-page limits of 10 C.F.R. § 2.788 apply to the Joint Motion and oppositions thereto, LIPA respectfully requests leave to exceed the page limit in view of the length of petitioners' motion.

Moreover, LILCO's opposition to the Joint Motion, filed today, strongly reaffirms its intention never to operate Shoreham, even in the unlikely event that the Settlement Agreement is invalidated. Thus, granting the requested stay would accomplish nothing, while conflicting with the considered policy of New York State and seriously prejudicing the NRC and the public interests it regulates, LILCO, LIPA, and Long Island ratepayers. (See Parts III and V below.)

I. THE JOINT MOTION SIMPLY REHASHES ARGUMENTS FOR DELAY ALREADY REJECTED BY THIS COMMISSION.

The NRC is well aware of the motivation for, and nature of, petitioners' scorched-earth campaign to frustrate the orderly conduct of Shoreham-related activities before the Commission. Shoreham represents 90 percent of the SWRCSD's tax base,[2] and the longer petitioners succeed in delaying transfer of the Shoreham license to LIPA, the more tax revenues SWRCSD will collect. See N.Y. Pub. Auth. Law § 1020-q(1) (McKinney Supp. 1990). As the Commission recently stated concerning petitioners' strategy, in its February 7, 1990 brief to the U.S. Court of Appeals for the District of Columbia Circuit:

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[2] See SWRCSD Petition for Leave to Intervene and Request for Prior Hearing (dated Sept. 20, 1990), p. 20.

> Petitioners' real quarrel is not with anything the NRC has done or not done but rather with LILCO's decision to give up its long fight to bring the Shoreham nuclear plant into service . . . . Hoping somehow to reverse that decision or at least make it more painful, petitioners are now trying to block LILCO's efforts to reduce the burdens of maintaining a facility it no longer intends to operate. . . . Petitioners' effort to make the NRC an ally in a campaign to pressure LILCO into changing its mind is misguided.

(Brief for Respondents in No. 90-1241 (dated Feb. 7, 1990), p. 23.)

Petitioners' campaign is renewed here with shopworn arguments that the Commission's processing of Shoreham-related applications, "especially the issuance of [a] possession only license" ("POL"), would violate supposed rights of petitioners under the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. § 2011 et seq., and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 et seq. (Jt. Motion, pp. 3-4.) The Commission itself already has issued three major opinions rejecting such arguments. (See Memorandum and Order CLI-90-08, 32 NRC 201 (1990) ("CLI-90-08"); Memorandum and Order CLI-91-01 (dated Jan. 24, 1991) ("CLI-91-01"); CLI-91-02.) In addition, the Atomic Safety and Licensing Board has twice determined that petitioners have failed to identify any litigable contention under either the AEA or NEPA.[3]

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[3] Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC ___ (Jan. 8, 1991); Long (continued...)

The supposed justification for petitioners' renewed requests for delay is the February 19, 1991 action of the Court of Appeals. On that date, the court granted review in three closely related cases presenting overlapping challenges to the Settlement Agreement whereby LILCO agreed not to operate Shoreham and to sell the plant to LIPA for decommissioning. (Jt. Motion, p. 20.)[4]

But the action of the Court of Appeals in granting review clearly is not new matter. In the Commission's most recent rejection of petitioners' arguments for delay, the NRC specifically noted that leave to appeal had been granted in the two cases reported at Citizens for an Orderly Energy Policy, Inc. ("COEP") v. Cuomo, 159 A.D.2d 141, 559 N.Y.S.2d 381 (App. Div. 1990). (See CLI-91-02, p. 10 n.2.) The Commission squarely rejected the notion that the NRC's Shoreham-related activities should be brought to a standstill by the continued pendency of legal challenges in

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[3](...continued)
Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC ___ (Mar. 6, 1991).

[4] The three cases in which review has been granted are intimately intertwined. Two of the matters were resolved in a single opinion by the Appellate Division. These were Citizens for an Orderly Energy Policy, Inc. ("COEP") v. Cuomo and Dollard v. LIPA, both reported at 159 A.D. 141, 146, 559 N.Y.S.2d 381, 383 (App. Div. 1990) ("claims raised in each proceeding are essentially the same"). The third case was decided the same day by the same appellate panel in a three-page decision relying substantially upon the decision in COEP/Dollard. See Nassau Suffolk Contractors' Ass'n v. Public Service Comm'n, 559 N.Y.S.2d 393 (App. Div. 1990).

New York. (Id., p. 15 ("&ny legal challenge to the agreement itself appears properly to lie in the New York courts") (emphasis in original).) The Joint Motion shows no basis whatever for the Commission to reverse field and stay its Shoreham-related activities pending outcome of the litigation in the Court of Appeals.

II. THE JOINT MOTION IMPROPERLY SEEKS RELIEF FROM THE NRC NOT REQUESTED IN NEW YORK AND ASKS THE NRC TO ACCORD LESS WEIGHT TO THE APPELLATE DIVISION DECISIONS THAN DO THE COURTS OF NEW YORK.

Incredibly, the remedy sought from the NRC -- a stay during New York appellate proceedings -- was never even sought in New York, the logical place to vindicate rights claimed under New York law. Both LILCO and LIPA were parties to the COEP v. Cuomo cases. But petitioners sought no stay of LILCO/LIPA actions implementing the Settlement Agreement (1) while the matter was pending before the Appellate Division, (2) while leave for appeal was sought from the Court of Appeals, (3) nor after grant of the leave to appeal.[5] It is highly incongruous for petitioners to seek from this Commission relief that they have not even attempted to apply for at any stage of the New York appellate proceedings.

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[5] Injunctive relief was sought at the trial-court level, but denied. See COEP v. Cuomo, 159 A.D.2d at 151, 559 N.Y.S.2d at 386. This aspect of the matter was not appealed, nor was a stay pending appeal sought at the Appellate Division level.

In this regard, without explaining their failure to seek such relief at the Appellate Division level, petitioners claim that injunctive relief pendente lite would not be available from the Court of Appeals. (Jt. Motion, p. 2 n.2.) But petitioners fail to support this claim. Their assertion is premised upon snippets quoted from a McKinney's Practice Commentary by Professor David D. Siegel. (Id.) In fact, petitioners have misrepresented the thrust of Professor Siegel's comments.

Far from concluding that injunctive relief cannot be had during the pendency of a matter before the Court of Appeals, Professor Siegel concludes that such relief should be available:

> It is doubtful that CPLR 5518 was intended to bring on [the] irrational results [of making injunctive relief unavailable from the Court of Appeals]. . . . A sounder argument, though not clearly the law, is that as soon as an appellate court's jurisdiction is invoked -- any appellate court's -- that court should be deemed to stand in the position of the court of original instance in respect of the provisional remedies, including the injunction and restraining order of Article 63. . . . If, during the appellate stage of a case, the appellate court is without power to affect the provisional remedies, then the trial court should be deemed to retain such power during the appellate process. Alternatively, the Appellate Division, as an arm of the Supreme Court, should be deemed to have the power while the case is on appeal to it or to the Court of Appeals. Rejecting all of these alternatives would be to hold the judiciary impotent to supervise the often drastic provisional remedies during the possibly prolonged pendency of an appeal.

N.Y. Civ. Prac. L. & R. C5518:1 (McKinney 1978) (attached).[6] It thus appears that petitioners may well have had a remedy at the Court of Appeals.

But even if petitioners are correct that the Court of Appeals could not grant a stay of activities pursuant to the Settlement Agreement, it still would be highly inappropriate for this Commission to stay its Shoreham-related activities pending the outcome of the appeals. If petitioners are correct about the powers of the Court of Appeals, then New York has determined as a matter of its appellate policies that, without regard to equitable considerations, the Settlement Agreement will be treated as valid and effective pendente lite. It is also black letter law that 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 than do the courts of New York State.

The Joint Motion is predicated entirely on the concept that the NRC should, as a matter of comity, defer to the New York courts on questions as to the validity of the

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[6] Petitioners claim to have attached this Commentary to the Joint Motion (Jt. Motion, p. 2 n.2), but it was omitted from the copy served on LIPA.

Settlement Agreement. (Jt. Motion, pp. 1, 12-13.) If comity is to be the guiding principle, the NRC can hardly refuse to continue processing Shoreham-related applications when New York law treats the Settlement Agreement as binding and effective. Indeed, petitioners seek to create a situation in which the NRC is the only forum not recognizing the res judicata effect of the Appellate Division decisions. This would not be extending comity to the New York courts; it would be flouting the judgment of the Appellate Division and the supposed policy of New York precluding an injunction during proceedings in the Court of Appeals. See Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 500 (1941) ("[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies").

III. PETITIONERS' ABSTENTION AUTHORITIES ARE INAPPOSITE.

The foregoing section demonstrates that principles of comity forbid, rather than require, the entry of the requested stay. Even if this were not the case, the Joint Motion would independently suffer from another fatal defect -- the entire concept of abstention on which the motion rests is inapposite.

Abstention cases seek to adjust the relationship between federal courts and state courts when both have

jurisdiction over the same question, so as to avoid unreliable interpretations of state law issues by federal courts. The NRC has not been called upon, nor will it be, to resolve the controversy concerning the Settlement Agreement. To the contrary, the Commission has specifically eschewed any intention to develop an independent view on the state law dispute, simply noting the "current status" of the Settlement Agreement and observing that "any legal challenge to the agreement itself appears properly to lie in the New York courts." (CLI-91-02, p. 15 (emphasis in original).) By thus declining to become embroiled in those questions of New York law, the Commission has fully effectuated any conceivable obligation of federal administrative agencies under principles of comity. The NRC is not further obliged to allow the pendency of litigation in the New York courts to bring to a halt the Commission's own business of reviewing applications properly before it, none of which turn on the validity of the Settlement Agreement. (See p. 16 infra.)

Petitioners cite no authority for the proposition that abstention principles foreclose a federal administrative agency from processing technical applications made under its authorizing statute simply because those applications implement policies which are being challenged, thus far unsuccessfully, in related litigation in state courts. Lacking authorities, petitioners simply assert that this result should follow "a fortiorari" [sic] from the

principles governing judicial abstention. (Jt. Motion, p. 12.) Petitioners are plainly incorrect.

As a federal regulatory agency, the NRC is obliged to exercise active supervision over the regulatory matters within its jurisdiction and to control its regulatory agenda and is not subject to "wholesale transplantation" of rules "which have evolved from the history and experience of courts." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 141-43 (1940). Hence, federal agencies do not routinely defer their proceedings pending the outcome of related cases. See, e.g., United States v. Kordel, 397 U.S. 1, 11 (1970) (FDA did not stay civil proceedings pending criminal trial).

If accepted, petitioners' abstention contentions would strip the NRC of control over its calendar and transfer such control to litigants and courts all over the country, with deleterious results for the public health and safety. For example, the Commission has recognized the importance of formulating decommissioning plans shortly after the cessation of operations. See 53 Fed. Reg. 24,018, 24,024 (1988). Operations have ceased at the Shoreham plant and, consistent with its existing rights under New York law, LIPA has presented a comprehensive decommissioning plan (which LILCO also has asked the NRC to review). Yet, according to petitioners, the NRC may not continue with

timely processing of that plan merely because of the possibility that the Court of Appeals will reverse the Appellate Division. The petitioners' approach would hobble the NRC in a fashion that would be entirely inconsistent with the regulatory mandates imposed by Congress.

Evidence that federal agencies cannot be tied into knots by the pendency of litigation in state courts also is provided by the NRC's own practice. The NRC does not routinely grant a stay of its proceedings during the pendency of either an administrative appeal or an appeal to a United States Court of Appeals on issues within the NRC's own jurisdiction. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1619 (1985); Uranium Mill Licensing Requirements, CLI-81-9, 13 NRC 460, 461-62 & n.4 (1981); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10, 13-14 (1976). There would be even less reason to stay the NRC's ongoing proceedings due to an appeal of a state law issue falling outside the NRC's cognizance.

IV. THE VALIDITY OF THE SETTLEMENT AGREEMENT IS NOT A PREREQUISITE FOR ONGOING NRC ACTIVITIES.

There is yet another fatal deficiency afflicting the Joint Motion, especially insofar as petitioners focus principally on LILCO's application for a POL. Petitioners

assert that, in CLI-90-08, CLI-91-01, and CLI-91-02, "[t]he Commission has consistently recognized that the validity of the Settlement Agreement is the essential basis" for the Commission's Shoreham-related activities. (Jt. Motion, p. 10 (emphasis in original).) In this regard, the Joint Motion plainly misrepresents the relevant Commission decisions, attributing a false significance to the Settlement Agreement.

First, the NRC's fundamental holding in rejecting petitioners' previous bids for delay has not been the status of the Settlement Agreement, much less its "validity," but rather the lack of federal action in LILCO's decision not to operate Shoreham. (See 32 NRC at 207-08; CLI-90-02, pp. 7-9.) The validity or invalidity of the Settlement Agreement is irrelevant to that fundamental holding. Whatever the reason for LILCO's decision not to operate Shoreham, that decision did not constitute federal action. Moreover, invalidation of the Settlement Agreement would not change LILCO's decision. LILCO has today filed an opposition to the Joint Motion which emphatically states that LILCO intends never to operate Shoreham as a nuclear facility, no matter what the outcome of the cases before the Court of Appeals. Thus, 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.[7]

It is only under the Commission's "alternative" holding in CLI-90-08 concerning the NEPA "rule of reason" that the validity of the Settlement Agreement would have any relevance whatever. (See 32 NRC at 208.) Even in that regard, however, the Commission's prior decisions did not rely solely upon the validity of the Settlement Agreement; in fact, CLI-90-02 expressly acknowledged the action of the Court of Appeals in granting review. The Settlement Agreement simply was cited as one factor among the many factors indicating that operation of Shoreham is not a

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[7] Petitioners claim that the validity of the Settlement Agreement determines "whether LILCO even has the ability to make an application for decommissioning." (Jt. Motion, p. 12; see id., pp. 6, 19, 25.) This assertion is premised on a sentence quoted from CLI-90-02 (p. 9). As the NRC is well aware, however, it is LIPA that will seek approval of a decommissioning plan; presumably CLI-90-02 was intended to indicate that "'but for' the decision [of LILCO] not to operate Shoreham, [LIPA] would not be able to seek permission to decommission the facility." (CLI-90-02, p. 9.) Obviously, LIPA would not be in a position to submit a decommissioning plan for Shoreham if the Settlement Agreement or some similar arrangement did not exist. By contrast, however, LILCO has an unfettered right to determine whether and when operations at Shoreham will cease in favor of decommissioning. (32 NRC at 207 ("the NRC lacks authority to direct a licensee to operate a licensed facility"); id. ("LILCO is legally entitled under the Atomic Energy Act and our regulations to make, without any NRC approval, an irrevocable decision not to operate Shoreham").) Thus, it is clear that the validity of the Settlement Agreement could not possibly be relevant to LILCO's ability to submit a decommissioning plan to the Commission.

reasonable alternative required to be considered under NEPA. (32 NRC at 208-09; CLI-91-02, pp. 9-10.)

The opposition in New York to operation of Shoreham remains fundamental and broad based, and it is obvious that other mechanisms would be sought to assure the closure and decommissioning of Shoreham if the Court of Appeals invalidated the Settlement Agreement as presently formulated. Now, as before, consideration of the supposed alternative of operating Shoreham as a nuclear power facility requires numerous layers of speculation, clearly setting that possibility outside the bounds of the NEPA "rule of reason" on grounds entirely independent of the validity of the Settlement Agreement.

V. PETITIONERS ALSO FAIL TO SATISFY THE TRADITIONAL REQUIREMENTS FOR ISSUANCE OF A STAY.

The Joint Motion collapses entirely under the weight of the fundamental defects already discussed. In addition to those defects, however, petitioners have failed to demonstrate satisfaction of the traditional four-part test for granting a motion for stay.

A. Petitioners Have Not Demonstrated A Likelihood Of Prevailing On The Merits.

Petitioners' omnibus motion to stay numerous, mostly unspecified, Commission activities never comes to grips with the likely merits outcome of any decision that this Commission will be called upon to make. For example, petitioners make no showing that, on the merits under the AEA, LILCO is not entitled to a POL. Instead of focusing on the merits of questions that will be before this Commission, petitioners focus solely on the alleged likelihood that the New York Court of Appeals will invalidate the Settlement Agreement as a matter of New York law. Such a step, however, would not lead to the conclusion that LILCO is not entitled to a POL. Nor would invalidation lead to the conclusion that the Shoreham license should not be transferred to LIPA under appropriate alternative arrangements. Nor would invalidation change the merits of the decommissioning plan submitted by LIPA in December 1990. Since petitioners have completely failed to show that they are likely to prevail on any question to be considered by the NRC, there is no basis for the NRC to suspend the orderly conduct of its activities.

Even if it would suffice to show that the Court of Appeals is likely to invalidate the Settlement Agreement, petitioners have not done so. In fact, petitioners admit

that they have not even attempted to show a likelihood that the Court of Appeals will reverse a unanimous five-judge panel of the Appellate Division on the law and facts specifically applicable to the issues actually raised before the Court of Appeals regarding Shoreham. (Jt. Motion, pp. 24-25.)[8]

Instead of addressing the merits of the New York appeals, petitioners' argument on the likelihood criterion is confined to meaningless derivations of mathematical probabilities that are completely divorced from the particular cases involving Shoreham. The absurdity of petitioners' approach is underscored by their assertion that the closely intertwined cases decided on a single day by the same panel of the Appellate Division (see p. 5 supra) should be treated as independent variables in the already far-fetched exercise of relying on generalized statistics to guide the equitable powers of the Commission. Such gimmickry could not possibly sustain issuance of a stay.

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[8] Notably, the standard applied by the Court of Appeals for granting motions for leave to appeal involves "novel[ty]" and "public importance," not alleged error in the decision below. See McKinney's New York Rules of Court § 500.11(d)(1)(v) (1991) (22 N.Y.C.R.R. § 500.11(d)(1)(v)).

B. **Petitioners Have Not Shown Irreparable Injury.**

Petitioners' perfunctory efforts to establish the threat of irreparable injury are equally unavailing. This failing alone is critical given the importance of the irreparable injury requirement. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-03, 31 NRC 219, 258 (1990) (irreparable injury is the "most crucial" factor) (citation omitted).

First, petitioners contend that they have "rights under AEA to the benefits of nuclear generated electricity from Shoreham." (Jt. Motion, p. 15.) Petitioners cite no authority for this extraordinary contention, and the Commission has already rejected it. (32 NRC at 207 ("LILCO is legally entitled under the Atomic Energy Act and our regulations to make, without any NRC approval, an irrevocable decision not to operate Shoreham").)

With respect to NEPA, petitioners contend that the Commission "should presume" potential irreparable harm from the alleged violation of their rights under NEPA. (Jt. Motion, pp. 16-17.) But the Commission already has rejected the contention that NEPA has been violated by any action taken to date, and there plainly is no basis to issue a stay to protect NEPA rights concerning NRC activities that are not even underway.

Absent a stay, such rights as petitioners have under the AEA or NEPA will be fully preserved. All Shoreham-related applications will be processed in compliance with NRC regulations which will fully protect the substantive and procedural rights of all interested persons, including petitioners.

C. The Balance Of Equities Precludes Issuance Of A Stay.

Even if a showing of probable success on the merits and irreparable harm had been made, a stay still would be improper if it "would have a serious adverse effect on other interested persons." Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). This is clearly a situation where the balance of equities would preclude issuance of a stay even if petitioners' showings were far less deficient than they are.

The Commission is well aware of the very substantial expenses presently being incurred by LILCO to maintain Shoreham in a non-degraded state. After nearly 15 months of NRC review, the anticipated issuance of a POL offers the prospect of substantially reducing those costs. Staying issuance of the POL until final decision by the Court of Appeals would perpetuate the imposition of these costs on LILCO's ratepayers, contrary to the desires of the

ratepayers, LILCO, LIPA, and New York State. Similarly, delay in processing the joint LILCO/LIPA application for license transfer and LIPA's decommissioning plan would increase the cost of decommissioning.

Petitioners cavalierly dismiss these massive delay costs on the grounds that LILCO will be made whole by ratemaking and that economic losses are "'disparaged'" injuries. (Jt. Motion, p. 26.) But there is no one to make the ratepayers whole, and the injury imposed on them by wasted expenditures are palpable and irreparable.[9] Moreover, in exercising its equitable discretion, the Commission is hardly required to disregard the effect that a stay would have in imposing millions of dollars of needless costs on Long Island ratepayers. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-808, 21 NRC 1595, 1603 (1985) ("[f]or stay purposes," the NRC has "taken into account the economic harm that an applicant might suffer if a stay of its license is granted").

Consideration of the costs that would be imposed on ratepayers by the requested stay is particularly appropriate in the circumstances presented here. Despite

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[9] The New York Legislature has determined that the entire Long Island area is prejudiced by ongoing Shoreham costs. See N.Y. Pub. Auth. Law § 1020-a (excessive electricity rates have caused "a serious threat to the economic well-being, health and safety" in the Long Island service area of LILCO).

petitioners' repeated invocations of supposed environmental concerns, it is clear that the underlying motivation of the SWRCSD in seeking delay before the NRC is purely economic -- to maintain Shoreham as an element of its tax base. (See p. 3 supra.) But that interest cannot be preferred over the interest of ratepayers in achieving reductions in Shoreham costs. The Legislature of the State of New York has specifically determined that the broad economic interests of the Long Island ratepayers are to be put ahead of SWRCSD's narrower interests. See N.Y. Pub. Auth. Law § 1020-q (addressing payments to SWRCSD). This Commission should be significantly influenced by the policy decisions of the New York Legislature in exercising its equitable discretion. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-86-12, 24 NRC 1, 5 n.2 (1986) (in weighing equities, the NRC took account of "Congress' special concerns").

Moreover, as already suggested, delay in the NRC's processing of Shoreham-related applications is contrary to the NRC policy of making provisions for decommissioning as soon as possible after the cessation of operations. Contrary to petitioners' apparent belief, the NRC does not have a roving mandate to advance the general public interest. See, e.g., NAACP v. FPC, 425 U.S. 662, 669 (1976) ("use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public

welfare," but "take[s] meaning from the purposes of the regulatory legislation"). Rather, the NRC has a mandate to assure public health and safety from radiological hazards at Shoreham. It would be inconsistent with that mandate for the Commission to defer processing of applications seeking to assure prompt decommissioning of a non-operating plant at the behest of these petitioners, who persist in raising frivolous arguments in favor of delay.

CONCLUSION

For the foregoing reasons, petitioners' Joint Motion should be denied forthwith.

Respectfully submitted,

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Dated: March 25, 1991

§ 5518. Preliminary injunction or temporary restraining order by appellate division

The appellate division may grant, modify or limit a preliminary injunction or temporary restraining order pending an appeal or determination of a motion for permission to appeal in any case specified in section 6301.

L.1962, c. 308.

Historical Note

Derivation. C.P.A.1920, § 880. C.P. (Field Code) 1848, § 318.
C.C.P.1876, § 606 amended L.1913, c. 112.

Practice Commentaries

by David D. Siegel

C5518:1. Preliminary Injunction from Appellate Division.

This statute gives the Appellate Division the power to grant, modify, limit and presumably vacate either a preliminary injunction or a temporary restraining order while the case is on appeal (i. e., after a notice of appeal has been served), or while a motion for permission to appeal is pending (i. e., after the motion papers have been served). In effect, it gives the Appellate Division during the appeal stage the same powers that the Supreme Court has during the action's pretrial and trial stage. The application is governed by Article 63, including the restriction that the injunction is permissible only in the situations set forth in CPLR 6301.

This is a carry over from prior law, inserted into the Advisory Committee's work product after it had been submitted to legislative committees. See 5th Rep.Leg.Doc. (1961) No. 15, p. 654. It comes from § 880 of the old Civil Practice Act.

The language of CPLR 5518 would suggest that it applies regardless of the court in which the appeal is pending. From another aspect, it would seem to apply only when the appeal is pending in the Appellate Division, since its injunctive powers are conferred on that court. The latter is apparently what the Legislature stated to be its intention. Old § 880 specifically afforded the Appellate Division these powers whether the case was on appeal to it or to the Court of Appeals. The omission of the Court of Appeals suggests that the power to effect preliminary injunctions is to apply only when the appeal is at Appellate Division level. This would in turn suggest that once the case is on appeal to the Court of

Appeals, neither the Appellate Division nor the Court of Appeals can affect the injunction during the pendency of the appeal, and it would also seem that the trial court cannot do so at this stage either. See Ahern v. McNab, 18 Misc.2d 899, 189 N.Y.S.2d 816 (Sup.Ct.Queens County 1959).

It is doubtful that CPLR 5518 was intended to bring on such irrational results. Should it become appropriate, for some pressing reason, to modify a preliminary injunction during the Court of Appeals phase of the case, are we to conclude that the modification is precluded because no court can entertain it? A sounder argument, though not clearly the law, is that as soon as an appellate court's jurisdiction is invoked—any appellate court's—that court should be deemed to stand in the position of the court of original instance in respect of the provisional remedies, including the injunction and restraining order of Article 63. If that is the rule, then CPLR 5518 is superfluous. Certainly civil practice would be better off without it. When one juxtaposes CPLR 5518 with its avowed model, Civil Practice Act § 880, it is difficult to perceive how the one could give rise to the other. If, during the appellate stage of a case, the appellate court is without power to affect the provisional remedies, then the trial court should be deemed to retain such power during the appellate process. Alternatively, the Appellate Division, as an arm of the Supreme Court, should be deemed to have the power while the case is on appeal to it or to the Court of Appeals. Rejecting all of these alternatives would be to hold the judiciary impotent to supervise the often drastic provisional remedies during the possibly prolonged pendency of an appeal.

These conclusions are the more compelling when one considers that the preliminary injunction of Article 63 is a status quo retainer, and that any construction of CPLR 5518 which would frustrate judicial power to retain the status quo during all of the appellate stages of the case would frustrate the purpose of Article 63 altogether. CPLR 5518 obviously does not intend that.

Nothing contained in CPLR 5518 should be confused with the stay provisions of CPLR 5519. The latter is concerned with suspending enforcement of the order or judgment being appealed, and in the sense that a stay of the enforcement keeps status quo there is some analogy to the Article 63 injunction and therefore some tendency to confuse the two.

UNITED STATES OF AMERICA
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In the Matter of	)	
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(Shoreham Nuclear Power Station, Unit 1)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

Name: - Carl R. Schenker, Jr.

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Admission: - U.S. Supreme Court
U.S. Court of Appeals, D.C. Circuit
U.S. District Court, District of Columbia
District of Columbia Court of Appeals

Name of Party: - The Long Island Power Authority

Respectfully submitted,

Carl R. Schenker, Jr.
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March 25, 1990

CERTIFICATE OF SERVICE

Pursuant to the service requirements of 10 C.F.R. § 2.712 (1990), I hereby certify that on March 25, 1991 I served the accompanying Opposition of the Long Island Power Authority to Joint Motion to Stay, Notice of Appearance, and transmittal letter via Courier upon the following, except where otherwise indicated:

Commissioner Kenneth M. Carr
Chairman
Nuclear Regulatory Commission
One White Flint North Building
11555 Rockville Pike
Rockville, Maryland 20852

Commissioner Kenneth C. Rogers
Nuclear Regulatory Commission
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Commissioner James R. Curtiss
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Commissioner Forrest J. Remick
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Michael R. Deland, Chairman
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DATED: March 25, 1991