~~758~~
760

DOCKETED
USNRC

'84 APR 23 A8:39

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH


HUNTON & WILLIAMS

707 EAST MAIN STREET P.O. BOX 1535
RICHMOND, VIRGINIA 23212

TELEPHONE 804-788-8200
TWX-710-956-0061

2000 PENNSYLVANIA AVENUE, N.W.
P.O. BOX 19230
WASHINGTON, D.C. 20036
TELEPHONE 202-955-1500

333 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA 90071
TELEPHONE 213-617-3052
TELEX 754709

FIRST VIRGINIA BANK TOWER
P.O. BOX 3889
NORFOLK, VIRGINIA 23514
TELEPHONE 804-625-5501
TELEX 755628

339 PARK AVENUE
NEW YORK, NEW YORK 10171
TELEPHONE 212-980-6200
TELEX 754708

B.B.&T. BUILDING P.O. BOX 109
RALEIGH, NORTH CAROLINA 27602
TELEPHONE 919-828-9371

FIRST TENNESSEE BANK BUILDING
P.O. BOX 951
KNOXVILLE, TENNESSEE 37901
TELEPHONE 615-637-4311

FILE NO.

DIRECT DIAL NO. 804 788-


April 23, 1984

BY HAND

Chairman Nunzio J. Palladino
Commissioner James K. Asselstine
Commissioner Frederick M. Bernthal
Commissioner Victor Gilinsky
Commissioner Thomas M. Roberts
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Long Island Lighting Company
(Shoreham Nuclear Power Station)
Docket No. 50-322-OL-4
(Low Power)

Gentlemen:

Hearings on Long Island Lighting Company's motion for a low power license for Shoreham are scheduled to begin tomorrow, April 24, at 9:00 a.m. in Hauppauge, Long Island, pursuant to an interlocutory Memorandum and Order of the Atomic Safety and Licensing Board, issued on April 6, 1984 following motion, responses thereto and oral argument. On April 16, Suffolk County and New York State filed joint requests for a stay of the hearings ordered by that Memorandum and Order with the Licensing Board and a joint motion for directed certification with the



D503

Commission. On April 19, LILCO and the NRC Staff responded. In the afternoon of April 20, the Licensing Board issued a second Order, declining to stay the commencement of the low power hearings and declining to certify the matter.

Now pending before the Commission are the joint stay request of Suffolk County and New York State and LILCO's opposition thereto, both filed before issuance of the Board's April 20 Order.

Because of the imminence of the scheduled commencement of these hearings, their importance to LILCO, and the close time intervals between recent papers in this matter, LILCO wishes to ensure that the Commission is aware of all pertinent papers in the event that it decides to consider the County's and State's joint request for a stay. Accordingly, you will find attached copies of the following papers, all of which have previously been served on other parties:1/

1. Atomic Safety and Licensing Board, Memorandum and Order Scheduling Hearing on LILCO's Supplemental Motion for a Low Power Operating License (April 6, 1984);

---

1/ LILCO's initiating paper, its Supplemental Motion for Low Power Operating License, dated March 20, 1984, has already been served on the Commission and is not refiled here.

2. Suffolk County/New York State, Joint Objections . . . to Memorandum and Order Scheduling Hearing on LILCO's Supplemental Motion for Low Power Operating License (April 16, 1984) (Before the ASLB);

3. Suffolk County/New York State, Joint Request . . . for Commission to Direct Certification of Matters Addressed in the "Joint Objections . . ." if Licensing Board Fails to Vacate Such Memorandum and Order Promptly (April 16, 1984) (Before the Commission);

4. LILCO, Response to Various Suffolk County/New York State Requests Dated April 16 and Received April 17, 1984 (April 19, 1984) (Before the ASLB);

5. LILCO, Response to Various Suffolk County/New York State Requests Dated April 16 and Received April 17, 1984 (April 19, 1984) (Before the Commission);

6. NRC Staff, Response to Joint Objections of Suffolk County and New York State . . . (April 19, 1984) (Before the ASLB); and

7. ASLB, Order Denying Intervenors' Motion to Vacate Order (April 20, 1984).

The Licensing Board's April 6 Order merely permits the commencement of hearings on whose record that Board will determine either that a basis has been laid for fuel loading and low power operation at Shoreham, or that it has not. The Commission will surely review this matter at that time, with the benefit of a factual record but still before any action has been

taken. If, however, the Commission determines today to consider any course other than permitting the hearings to commence on schedule tomorrow, LILCO believes strongly that it has the right to be heard on the matter, and hereby requests that it be heard. LILCO counsel are available for appearance before the Commission on approximately two hours' notice.

Respectfully submitted,

W. Taylor Reveley, III
Donald P. Irwin
Counsel for Long Island Lighting Company

91/403

cc: Edwin H. Reis, Esq. (By Hand)
Herbert H. Brown, Esq. (By Hand)
Fabian G. Palomino, Esq. (By Telecopier)

Enclosure 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING BOARD



Before Administrative Judges
Marshall E. Miller, Chairman
Glenn O. Bright
Elizabeth B. Johnson

| | |
|---|---|
| In the Matter of<br><br>LONG ISLAND LIGHTING COMPANY<br><br>(Shoreham Nuclear Generating Plant, Unit 1) | Docket No. 50-322-OL-4 (Low Power)<br><br>April 6, 1984 |

MEMORANDUM AND ORDER SCHEDULING HEARING ON LILCO'S SUPPLEMENTAL MOTION FOR LOW-POWER OPERATING LICENSE

On March 20, 1984, LILCO filed its Supplemental Motion for Low Power Operating License. Suffolk County responded with its preliminary views on scheduling in this matter on March 26, and submitted a supplement to those views on March 30. The State of New York and the NRC Staff filed their responses to the LILCO Motion on March 28 and 30, respectively.

On March 30, 1984, via telephonic notice to the parties confirmed by a written Order of the same date, we scheduled a conference of counsel for the purpose of hearing oral arguments of the parties on "the issues that had been raised by the parties in their filings, as well as a schedule for their expedited consideration and determination." (Order

at 1) New York State then filed a Motion, dated April 3, in which it asked that the provision in our March 30 Order mandating "expedited consideration and determination" of the issues in the LILCO Motion be deleted as lacking in any valid basis.

The conference of counsel was held on April 4, 1984, in the NRC Hearing Room at Bethesda, Maryland. Attorneys attending the conference were:

W. Taylor Reveley, III; Anthony F. Earley and Robert M. Rolfe for LILCO

Alan R. Dynner, Herbert H. Brown and Lawrence Coe Lanpher for Suffolk County

Fabian Palomino for New York State

Edwin Reis and Robert Perlis for NRC Staff

LILCO's Motion asks us to grant a low-power operating license to its Shoreham Nuclear Power Station, pursuant to 10 CFR §50.57(c). It characterizes the present motion as "Supplemental" to the earlier motion for a low-power license which it had filed on June 8, 1983. In ruling on that motion, the Licensing Board indicated that it had resolved all contentions relevant to issuance of a low-power license for Shoreham in LILCO's favor except for certain recently-admitted contentions regarding reliability of diesel generators at the site. ("TDI's" or "TDI diesels", so called because of the manufacturer's name, Transamerica Delaval, Inc.). No low-power license could be issued, that Board said, "until such time as that portion of Suffolk County's recently admitted emergency diesel generator contention may be resolved in LILCO's favor,

at least insofar as necessary to support a finding of reasonable assurance that Shoreham can be operated at levels up to five percent of rated power without endangering the health and safety of the public." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 634 (1983). LILCO's Motion of March 20, 1984, purports to show that the pending diesel issues related to high-power operations need not be resolved prior to the granting of a low-power license for Shoreham.

At the conference of counsel, counsel for LILCO indicated that the TDIs are assumed not to operate in the accident analyses LILCO offers in support of its motion (Tr. 20). Therefore, LILCO's counsel agreed with the Board that no discussion of the TDI's possible or potential use in an emergency would be relevant.

LILCO frames the issues to be heard regarding its motion as one major issue with three factors thereunder.

Issue: Whether emergency power sources available are sufficient to ensure public health and safety during low-power testing

-- one 20 megawatt gas turbine (deadline blackstart)

-- four mobile diesel engines (deadline blackstart)

-- calculations regarding the amount of time available to react to certain events.[1]

Suffolk County argued against the LILCO motion. The County quoted the "law of the case" -- specifically the statement made on the record (Tr. 21,631) by the original Licensing Board in this matter that the usefulness or effectiveness of the TDI's is uncertain. The County pointed out that there is no qualified onsite AC power system at Shoreham, and that General Design Criterion (GDC) 17 specifically requires both an onsite and an offsite power system. Thus, the County argued, LILCO's efforts to disregard the requirements of GDC-17 -- absent any petition for waiver thereof -- was nothing more than an impermissible challenge to NRC regulations.

The Staff believes that the regulations have to be read as a whole, and that GDC-17 should be read in conjunction with our low-power license provision, 10 CFR §50.57(c). The Staff would thus view the requirements for full-power activities (e.g., GDC-17) as not totally applicable when the issue is whether low-power activities should be authorized.

---

1 In regard to the time question, LILCO's stated position, supported by affidavit, was that in the event of a loss-of-coolant accident while the plant was operating at five percent power, plant operators would have at least 55 minutes to restore coolant. The same calculation, when performed without some of the "conservatisms" that had been built into it, would show that operators had 110 minutes or three hours in which to restore coolant.

New York State, as an interested state, argued that 10 CFR §2.758 which prohibits attack on the other regulations specifically prohibits looking to the intent of a regulation rather than its explicit requirements, as the Staff would have us do with GDC-17. In addition, in its written response of March 28 it argued that LILCO had failed to comply not only with DGC-17, but also with GDC's 4, 5, 18, 19 and with 10 CFR 50, App. B.

All parties were heard on oral arguments by counsel regarding LILCO's motion for low-power operations at the hearing held April 4, 1984. Extensive arguments on all aspects of the low-power motion and the responses thereto enabled the Board to probe the underlying reasoning of the diverse views presented by the parties. Based upon a consideration of the LILCO motion and the facts alleged in its attached affidavits,[2] the matters contained in the responsive filings of the other parties and the arguments of counsel in depth, the Board concludes as follows:

1. LILCO has made a sufficient preliminary showing to justify holding a Section 50.57(c) limited hearing.[3]

---

2 Affidavits concerning the alleged facts and expert opinion were filed by Jack A. Notaro and William E. Gunther, Jr.; William G. Schiffmacher; Dr. Glenn G. Sherwood, Dr. Atambir S. Rao and Mr. Eugene C. Eckert; and William J. Museler.

3 10 CFR §50.57(c) provides:

(Footnote Continued)

2. The Board will be required to determine whether there is reasonable assurance that the activities associated with LILCO's request for a low-power license can be conducted without endangering the health and safety of the public, in the absence of resolution by another licensing board of the emergency diesel generator contentions related to full-power operation.

3. The provisions of Section 50.57 regarding low-power operations must be read together with the requirements of

---

(Footnote Continued)

An applicant may, in a case where a hearing is held in connection with a pending proceeding under this section make a motion in writing, pursuant to this paragraph (c), for an operating license authorizing low-power testing (operation at not more than 1 percent of full power for the purpose of testing the facility), and further operations short of full power operation. Action on such a motion by the presiding officer shall be taken with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized. Prior to taking any action on such a motion which any party opposes, the presiding officer shall make findings on the matters specified in paragraph (a) of this section as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized. The Director of Nuclear Reactor Regulation will make findings on all other matters specified in paragraph (a) of this section. If no party opposes the motion, the presiding officer will issue an order pursuant to §2.730(e) of this chapter, authorizing the Director of Nuclear Reactor Regulation to make appropriate findings on the matters specified in paragraph (a) of this section and to issue a license for the requested operation.

GDC 17[4] concerning emergency power needs for full-power operations.

4. If the evidence shows that the protection afforded to the public at low power levels without the diesel generators required for full-power operations, is equivalent to (or greater than) the protection afforded to the public at full-power operations with approved generators, then LILCO's motion should be granted.

5. In making such determinations, the record should establish the following:

   (a) Assuming an accident such as a LOCA at five percent power, how much time would plant operators have before emergency core cooling was necessary, and

   (b) Could such core cooling be supplied within that time.

6. An expedited hearing should be held on the discrete issues described above, to the extent that such matters are reasonably relevant to a low-power license.

---

4 GDC 17 requires that electric power systems assure that in the absence of either the onsite or offsite power system,

> (1) specified acceptable fuel design limits and design conditions of the reactor coolant pressure boundary are not exceeded as a result of anticipated operational occurrences and (2) the core is cooled and containment integrity and other vital functions are maintained in the event of postulated accidents.

Authority for the issuance of low-power licenses is contained in 10 CFR §50.57(c), as described above. Motions for a low-power operating license should be ruled on promptly, while decisions on full-power issues not associated with such operations may be resolved at a later time.[5] In ruling upon Section 50.57(c) motions, a clear distinction must always be made between low-power operations and full-power operations. At the threshold, the Board must consider and resolve the question of whether the factual record arguably supports the requirement of reasonable assurance that proposed low-power operations can be conducted without endangering public health and safety.

In this case LILCO's motion requested approval for the following activities:

(a) Phase I: fuel load and precriticality testing;

(b) Phase II: cold criticality testing;

(c) Phase III: heatup and low power testing to rated pressure/temperature conditions (approximately 1% rated power); and

(d) Phase IV: low power testing (1-5% rated power).

The original Licensing Board which issued a Partial Initial Decision on September 21, 1983, decided all issues before it except that

---

5 Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 362 (1981).

involving the adequacy of the emergency diesel generators.[6] That matter remains pending in adjudicatory proceeding involving full-power licensing being concurrently conducted by that Board. The jurisdiction of these two boards is separate and independent, and the instant low-power proceeding is not intended to duplicate or relitigate the massive record compiled in the extensive hearings preceding the issuance of the Partial Initial Decision.

Other licensing boards have considered the comparative risks associated with low-power versus full-power operations. It has been noted that the Commission endorsed the general proposition that fuel loading and low-power testing

> "involve minimal risk to the public health and safety, in view of the limited power level and correspondingly limited amounts of fission products and decay heat, and greater time available to take any necessary corrective action in the event of an accident."[7]

It has been held that the emergency planning measures required for low-power licenses are not the same as those required for full-power operation, but that the level of planning for a low-power license must be sufficient to provide the same level of protection to the public as

---

6 LBP-83-47, 18 NRC 445, 634 (1983).

7 Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-3, 18 NRC 61, 188, 190 (1982).

afforded by full compliance with the regulations at full-power operation.[8]

Without passing upon the ultimate merits of LILCO's supporting affidavits at this time, we observe that taken together they furnish sufficient analyses and data to provide a preliminary record to justify holding a limited evidentiary hearing on matters in controversy regarding low-power operations.

The Affidavit of Jack A. Nataro and William E. Gunther, Jr. describes in some detail the steps involved in each of LILCO's Phases I through IV. The affidavit of William G. Schiffmacher lists and describes all the normal and additional sources of offsite emergency AC power available to support the Shoreham plant. The affidavit of Dr. Glenn G. Sherwood, Dr. Atambir S. Rao and Mr. Eugene C. Eckert presents the results of the affiants' review of postulated accidents and transient events which must be accommodated by the Shoreham plant to demonstrate compliance with NRC regulations (Chapter 15, FSAR). The review specifically addressed the risk to public health and safety during low-power operations, taking into account such factors as reduced fission product inventory, increased time available for operators to take corrective or mitigating action, and the reduction in required

---

8 Pacific Gas and Electric Co. (Diablo Canyon Plant, Units 1 and 2), LBP-81-21, 14 NRC 107, 120-23 (1981). See also another decision in the same proceeding, LBP-81-5, 13 NRC 226 at 230 (1981).

capacity for mitigating systems at less than five percent of rated power. Included were findings as to the time in which lost AC power would have to be restored to prevent exceeding the regulatory limits in the event of a concurrent loss of cooling accident (LOCA). Lastly, the affidavit of William J. Museler sets forth LILCO's commitment to effect reactor shutdown in the event of hurricanes, tornadoes, earthquakes or similar happenings, or of power transmission line or onsite backup power problems.

In passing upon LILCO's motion, it is necessary to consider two NRC rules together, and seek to harmonize them in order to reach a sensible result and respect the purposes of both. GDC-17, as discussed above,[9] contains requirements for full-power operation regarding the absence of either the onsite or offsite power system. It also sets forth the intent of assuring that fuel design limits and design conditions of the reactor coolant pressure boundary are not exceeded by anticipated operational occurrences, and that the core is cooled and containment integrity and other vital functions are maintained in the event of postulated accidents.

The GDC-17 requirements, which govern full-power operation, must be read in light of the low-power operation provisions of Section

---

9 See footnote 3, pages 5-6, supra.

50.57(c).[10] That regulation gives applicants the right to seek a low-power license by a written motion, in cases where licensing proceedings are pending but uncompleted. The very purpose of this regulation is to permit motions for low-power operations where, as here, the licensing proceedings are not completed because of pending hearings on the satisfaction of all of the requirements of GDC-17, among others.

Looking at the provisions of GDC-17 is only the first step, not the last or only step, as urged by the State of New York and Suffolk County. It is unreasonable to refuse to consider the terms of Section 50.57 as applied to the requirements of GDC-17. This is also true of the findings required by subsection (c) of Section 50.57 on the matters specified in paragraph (a) of that section "as to which there is a controversy." The operation of the facility in conformity with the rules and regulations of the Commission includes the possibility of low-power operations equal to the full-power requirements of GDC-17, provided that (as the Staff states), it can be found by the Board that there is reasonable assurance that the low-power activities can be conducted with the protection to the public at least equal to the protection afforded at full-power operations with the approved diesel generators. The purpose of the limited evidentiary hearing established

---

10 See footnote 2, page 5, supra.

by the Board is to determine whether or not there is such "reasonable assurance."

Although LILCO's motion for a low-power license could probably be ruled upon without further evidentiary hearings[11] upon affidavits and counteraffidavits, the Board believes that the record would be more complete by granting a limited evidentiary hearing on an expedited basis. The issues should only be those relevant to low-power operations as set forth above.[12] There is no need to reinvent the wheel or to go into a mass of nonrelevant matters. A very substantial record has already been compiled by the Board which issued the Partial Initial Decision (18 NRC 445, supra). Any significant and relevant portions of that record may be used in this limited motion hearing, provided that such testimony or exhibits are specifically identified in advance and proffered in this proceeding.

The Board has also concluded that the taking of evidence on this Section 50.57 motion should be upon an expedited basis. That section itself contemplates prompt action on the motion, prior to the conclusion of the pending evidentiary hearings. The nature of and the risks associated with low-power operations are significantly different from

---

11 Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 at 362 (1981).

12 Id.

full-power operations. Where the construction of any large electric generating facility has been substantially completed and it is ready for testing, it would make no sense not to rule speedily and expeditiously on motions for low-power activities. Expedited proceedings do not prejudge the issues, as the decision on the motion can go either way depending upon the quality of the relevant evidence adduced by the parties. But no party has a right to delay for its own sake, or to engage in dilatory practices. The motion of the State of New York objecting to expeditious consideration, filed on the date of arguments (April 4, 1984), is denied.

Even in cases where power plants have not been completed, licensing proceedings should be conducted expeditiously. The Commission has published a Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981) to aid licensing boards in expediting hearings. Therein, the Commission said that

> "the actions consistent with applicable rules, which may be taken to conduct an efficient hearing are limited primarily by the good sense, judgment, and managerial skills of a presiding board which is dedicated to seeing that the process moves along at an expeditious pace, consistent with the demands of fairness." Id. at 453.

Our own Rules of Practice also permit the use of expedited procedures. For example, 10 CFR §2.711 gives a presiding officer the power to reduce established time limits when there is good cause for so doing, and §2.118 gives him all powers necessary "to conduct a fair and

impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order."

The Commission has also said that "as a general matter when expedition is necessary, the Rules of Practice are sufficiently flexible to permit it by ordering such steps as shortening -- even drastically in some circumstances -- the various time limits for the party's filings and limiting the time for, and types of, discovery." Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1) CLI-82-32, 16 NRC 1245, 1263 (1982).

Scheduling

The Board heard the opinions of all the parties upon scheduling of any hearing which might be held. LILCO suggested a time frame in which testimony would be filed by all the parties on April 17 or 19, 1984, and hearings would commence on April 24. Hearings on this motion, LILCO submitted, should last no more than one week (Tr. 99-101). The NRC Staff stood by the suggested schedule that it had presented in its written response (at footnote 3, pages 5-6): that LILCO's testimony should be filed on April 13, the testimony of the Intervenors and the Staff on April 23, and the hearing itself should commence by the end of April (Tr. 106-08). Suffolk County proposed a schedule which would include a lengthy discovery period to permit exploration of "a plethora of new, substantive, factual issues" (Tr. 114-17). Discovery, according to Suffolk County's proposed schedule, would continue through May 30. Specification of issues would be on June 15, responses thereto on

June 25, and prehearing conference on July 5. After submission of testimony on July 20, hearing would commence on August 5 (Tr. 113-14).

The Board considered the suggestions in light of the issues as we have framed them. We exercise our judgment on scheduling in accordance with our decision above. We find that the expedited schedule set forth below will not prejudice any party to this proceeding.

| Date | Event |
|---|---|
| April 6-16, 1984 | Discovery |
| April 19, 1984 | NRC Staff supplemental SER |
| April 20, 1984 | All direct written testimony filed |
| April 24-28, 30 through May 5, 1984 | Hearing |

No further adjudicatory hearing days will be scheduled in this matter.

Discovery shall be limited to documents and depositions. We expect the parties to exercise the maximum cooperation in this regard. All prefiled written testimony must be in question/answer format. Testimony filed April 20, including that for Judge Johnson, shall be sent to the Bethesda Office. All filings shall be hand delivered or expedited delivery, and no additional time shall be allowed for mailing. All filings shall be in the hands of the Board not later than 3:30 p.m. on the date due.

Parties to this proceeding are reminded that they have an affirmative duty to promptly inform the Board of any and all changes in

circumstances which might impact upon our hearing on the issues before it.

Standards of practice have been established by the Commission governing the "appearance and practice in adjudicatory proceedings."[13] The Rules of Practice expressly provide that parties and their representatives "are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law" (Id.). Counsel and parties have always conducted themselves with propriety and decorum in the past, and the Board is confident that orderly and expeditious procedures will continue to be followed.

Hearing will commence at 9:00 a.m., local time, on Tuesday, April 24, 1984 at Courtroom 1, State Office Building, Veterans Memorial Highway, Hauppauge, New York 11787.

---

13 10 CFR §2.713.

This decision was fully participated in by Judge Elizabeth B. Johnson, who concurs in the foregoing Order but was unavailable to sign it when issued.

THE ATOMIC SAFETY AND LICENSING BOARD

Glenn O. Bright, Member
ADMINISTRATIVE JUDGE

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 6th day of April, 1984.

Enclosure 2

4/16/84



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



Before the Atomic Safety and Licensing Board

| | | |
|---|---|---|
| In the Matter of | ) | |
| LONG ISLAND LIGHTING COMPANY | ) | Docket No. 50-322-OL-4 (Low Power) |
| (Shoreham Nuclear Power Station, Unit 1) | ) | |

JOINT OBJECTIONS OF SUFFOLK COUNTY AND THE STATE OF NEW YORK TO MEMORANDUM AND ORDER SCHEDULING HEARING ON LILCO'S SUPPLEMENTAL MOTION FOR LOW POWER OPERATING LICENSE

## I. Summary of Objections

Pursuant to 10 C.F.R. Section 2.751a(d) Suffolk County and the State of New York hereby object to the Licensing Board's April 6, 1984 Memorandum and Order Scheduling Hearing on LILCO's Supplemental Motion for Low Power Operating License (the "Low Power Order"), which was served April 9, 1984. The County's and State's specific objections are summarized as follows:

A. The Low Power Order establishes a schedule for a hearing on LILCO's Supplemental Motion for Low Power Operating License, filed on March 20, 1984 ("LILCO's Low Power Motion").

Such a hearing is not permitted under the NRC's regulations. LILCO is attempting to obtain a license to operate Shoreham without any onsite AC power system, as required by General Design Criterion 17 of 10 C.F.R. Part 50, Appendix A. LILCO's Low Power Motion therefore is an attack on the regulation, in violation of 10 C.F.R. Section 2.758. LILCO has not sought a waiver of the provisions of GDC 17 pursuant to the procedures of Section 2.758. Because LILCO's Low Power Motion violates NRC regulations, no hearing thereon may be held, the Board's Low Power Order must be vacated, and LILCO's Low Power Motion must be dismissed.

B. The expedited 29 day schedule for the low power proceeding set by the Board in the Low Power Order is arbitrary and deprives the County and the State of due process of law. LILCO's Low Power Motion raises a host of detailed factual issues concerning the reliability of the LILCO offsite AC power system. That system is comprised of multiple, interconnecting parts, including mobile diesels, gas turbines at several locations, transmission lines, and interconnections with the New York Power Pool and the New England power grid. To prepare for a hearing on LILCO's unprecedented low power proposal, the County and State must: (i) retain additional expert consultants; (ii) conduct discovery (through requests for documents,

depositions, and site visits) to understand precisely the details of the LILCO proposal; (iii) conduct independent studies and analyses of the LILCO proposal to test its reliability; (iv) review and analyze documents obtained by discovery from LILCO and the NRC Staff, depositions, and the Staff SER; (v) prepare direct testimony to document the results of the County and State experts' review and work; and (vi) prepare witnesses for examination at the hearing and prepare for cross-examination of LILCO's and the Staff's witnesses.

The Board's schedule is grossly inadequate. The Board allowed a total of 9 days for all discovery (items (i), (ii) and (iii) above), 4 days to prepare direct testimony (items (iv) and (v) above), and 4 days to prepare witnesses for trial and to prepare cross-examination (item (vi) above). On its face, this schedule deprives the County and the State of due process of law. The necessary preparation cannot possibly be completed in such a short period, a period which includes only 11 week days, Palm Sunday, Good Friday, Easter, and Passover as well.

The Board provides no justification for its expedited schedule. Neither LILCO nor the Staff, both of which urged unrealistically short schedules, explained why such extreme

expedition was required. In contrast, the County and the State of New York provided detailed unrebutted explanations of why such a schedule would cause them severe prejudice. Thus, there was no rational basis upon which the Board could fairly adopt its schedule.

Accordingly, the Board should immediately vacate the Low Power Order. If the Board fails or refuses to vacate the Low Power Order, the Board should immediately stay the Low Power Order and certify these issues to the Commission for its prompt decision. If the Board rules against the Joint Objections, such ruling and the Low Power Order should be referred forthwith to the Commission and the Low Power Order should be stayed pending a determination by the Commission. By service of these Objections on the Commission, the County and the State are requesting the Commission to direct the certification of these issues to it.

There are compelling reasons for the Commission to review immediately the Low Power Order. First, the LILCO Low Power Motion is the first time in history that a nuclear plant is proposed to be operated without any onsite AC power system -- a radical departure from NRC regulations. The Licensing Board has in this unprecedented case asserted the authority to

eliminate the requirements of GDC 17, where no exception to or waiver from those requirements has been requested pursuant to Section 2.758. The Commission should provide its guidance at the outset whether such a scheme merits even the most preliminary consideration.

Second, the unjustified schedule adopted by the Board precludes an adequate hearing for Suffolk County and New York State, and represents a radical departure from schedules established in other proceedings. This schedule suggests that fairness and public safety are being sacrificed to aid LILCO in addressing its severe financial difficulties. The Commission should itself rule on whether this proceeding on a unique license application, which permits a total of 17 days from the opening of discovery to the hearing, is unfair and denies the County and the State due process of law.

Finally, as detailed in Part II, the events leading to the Low Power Order are highly unusual and suggest the possibility of the successful personal intervention of Chairman Palladino to influence the quasi-judicial licensing proceedings. The County and the State believe that the shadow cast on the fairness of this proceeding by these events can be lifted, if at all, only if the Commission takes charge and vacates the Low Power Order.

II. Factual Background

1. On January 27, 1984, Suffolk County filed with a Licensing Board contentions challenging the adequacy of the onsite emergency power system at the Shoreham nuclear plant -- namely, three emergency diesel generators ("EDGs") manufactured by Transamerica Delaval, Inc. ("TDI"). See Suffolk County's Motion to Admit Supplemental Diesel Generator Contentions (January 27, 1984). These contentions, contending that the EDGs are over-rated and undersized, poorly designed, inadequately manufactured, and not constructed in accordance with the quality assurance requirements of the NRC regulations, supplemented and subsumed existing Suffolk County EDG contentions limited to the issues of cracked cylinder heads and excessive vibration.

2. LILCO opposed admission of the EDG contentions, and instead urged that the Board litigate the adequacy of selected components of the EDGs in the sole context of fuel load and low power testing. See LILCO's Response to Suffolk County's Motion to Admit Supplemental Diesel Generator Contentions (February 7, 1984). LILCO argued first, that at low power operation of Shoreham only one EDG at well below its power rating would be needed in the event of a LOCA during loss of offsite electric

power, and second, that LILCO's offsite AC power system was so reliable that less stringent requirements should apply for the adequacy of the onsite AC power system. As evidence of the reliability of its offsite AC power system, LILCO referred to (a) LILCO's interconnection capacity with the New York Power Pool and with the New England power grid, (b) the four 138 KV circuits and three 69 KV circuits supplying offsite electric power to Shoreham, (c) the availability to Shoreham of power from ten gas turbines at Holtsville, (d) other offsite gas turbines east of Shoreham, and (e) a 20 megawatt gas turbine to be installed at Shoreham (but not qualified for nuclear service).

3. The NRC Staff supported the admission of the County's new EDG contentions and opposed LILCO's arguments that "enhanced" offsite power could substitute for deficient onsite AC power. See NRC Staff's Response to Suffolk County's Motion to Admit Supplemental Diesel Generator Contentions (February 14, 1984). The Staff stated:

> In view of the past faults and failures in these [TDI] engines, the relationships between parts and soundness of the design, manufacture, and quality assurance process for the machine as a whole must be examined before consideration of the diesels could lead to any license for Shoreham.

Id. at 12. Further, the Staff would give no credit to LILCO's

offsite power system, including the gas turbines located at Shoreham, because "General Design Criteria 17 requires an independent, redundant and reliable source of on-site power." Ibid., footnote 7 (Emphasis added). The Staff indicated that it takes "no position upon whether applicant, upon a proper technical analysis, could or could not support an application for an exemption to allow it to go to low-power absent reliable safety-grade diesels." Ibid. (Emphasis added).

4. The Staff's position that no license could be issued for Shoreham without an adequate onsite AC power system -- here the TDI EDGs -- was publicly stated by Messrs. Harold Denton and Darrell Eisenhut at an open meeting between the Staff and the TDI owners group on January 26, 1984. Mr. Denton stated:

> [W]e are not prepared to go forth and recommend the issuance of new licenses on any plant that has Delaval diesels until the issues that are raised here today are adequately addressed.

Meeting transcript at 8. Those issues included the numerous serious problems with TDI diesels at Shoreham and other facilities and significant quality assurance deficiencies at TDI. Mr. Eisenhut added that "prior to licensing, even a low power license," the Staff must have confidence that the TDI diesel problems have been solved. Meeting transcript at 95-96 (Emphasis added).

5. On February 22, 1984, the Licensing Board held a conference of parties. LILCO reiterated its arguments for a low power license based upon the supposed reliability of its "enhanced" offsite AC power system together with the TDI onsite EDGs. The Licensing Board then issued an oral order admitting the first three EDG contentions (but not the contention on quality assurance) and setting a schedule for litigation. Tr. 21,611 et seq. The Board held:

> Based on what we have before us now, there is no basis to proceed towards litigation that could possibly lead to a low power license in advance of a complete litigation of Contentions 1, 2 and 3.

Tr. 21,615. The Board specifically did not preclude LILCO from making other proposals for a low power license meeting the standards of 10 C.F.R. Section 50.57(c), including seeking a waiver of NRC regulations under 10 C.F.R. Section 2.758,

> But whatever LILCO would propose, it would have to meet our present finding, that unless we consider Contentions 1, 2, and 3 on the merits, we do not presently have reasonable assurance that the TDI diesel generators can reliably be depended upon to start and generate electricity.

Tr. 21,617. In short, whatever LILCO might propose must not rely at all upon the TDI EDGs for any onsite emergency power.

The Board also stated that any new proposal by LILCO for a low power license must show how any proposed power sources meet all applicable regulatory requirements, including seismic qualification, or where such requirements are not met, why an exemption or waiver should be granted under Section 2.758. See Tr. 21,632.

6. The Licensing Board's February 22 order clearly stated that, short of a new acceptable proposal from LILCO meeting the requirements set by the Board, litigation of the EDG contentions was a prerequisite to a low power license for Shoreham. Tr. 21,615. The schedule for that litigation provided for a conference of the parties on May 10, after a discovery period of about two months, to determine subsequent procedures.1/ Tr. 21,623. Hence, the hearing would be unlikely to start before June, and a decision could not be expected before the Fall at the earliest.

---

1/ Suffolk County and the State of New York have since requested an extension of that schedule because most documents requested by the County during discovery have not been produced. See Joint Objections of Suffolk County and the State of New York to Board's Oral Order of February 22, 1984, and Request for Revision Thereof (April 10, 1984).

7. According to a memorandum dated March 20, 1984, from NRC Chairman Palladino to the other NRC Commissioners (the "Palladino Memo," Attachment 1 hereto), on March 9, 1984, the NRC Staff notified the Commissioners of "potential licensing delays" of 9 months for Shoreham. The "delays" no doubt referred to the estimated time for the litigation of the EDG contentions, since the duly established Licensing Board had ruled that unless and until a favorable decision for LILCO was provided on those contentions, no low power license could be issued for Shoreham.

8. The Palladino Memo, which followed reports in Newsday (February 24, 1984) that LILCO's chairman had met with the NRC Commissioners, stated that on March 16 Chairman Palladino had met with members of the NRC Staff, including lawyers and "Tony Cotter" (B. Paul Cotter, Jr., the NRC's Chief Administrative Judge), to discuss the "delay" in the licensing of Shoreham. The Memo proposed that in order to "reduce the delays at Shoreham" the Commission should "consider a proposal from OGC [Office of General Counsel] for an expedited hearing on the diesel problem, or proposals for other possible actions so that at least a low power decision might be possible while awaiting resolution of the emergency planning issue. I have asked the OGC to provide a paper on this subject soon."

9. Also on March 20, 1984, LILCO filed with the Licensing Board a proposal for a low power license, styled as a Supplemental Motion for Low Power Operating License (March 20, 1984) ("LILCO's Low Power Motion"). There LILCO made essentially the same arguments for a low power license that the Board had previously rejected, except that LILCO added that it also intends to install at Shoreham four mobile diesel generators, not qualified for nuclear service, to further "enhance" the AC electric power system. Several affidavits were attached to the Motion.

10. On March 22, the secretary to the Licensing Board's chairman telephoned the County's counsel to suggest a telephone conference to discuss when the parties would be prepared to respond to LILCO's Low Power Motion, and it was agreed that preliminary views on scheduling would be submitted by the County by Monday, March 26. The State of New York and the NRC Staff indicated that their preliminary views would be filed by March 30.

11. On March 26, 1984, the County filed Suffolk County's Preliminary Views on Scheduling Regarding LILCO's New Motion (the "County's Preliminary Views," a copy of which is Attachment 2 hereto). The County's Preliminary Views made the following major points:

(a) The County requires more than the normal ten-day period to respond to LILCO's Low Power Motion, because it raises many new, complex, factual issues. To respond the County must retain appropriate experts to analyze those issues. See the County's Preliminary Views at 1-4.

(b) Analysis of those factual issues will first require the County to obtain substantial information through informal discovery. See the County's Preliminary Views at 4-6.

(c) Additional time is required to address regulatory legal issues. See the County's Preliminary Views at 7.

(d) A number of threshold issues should be addressed before the merits of LILCO's Low Power Motion should be considered, including: (i) the Motion does not meet the criteria enunciated by the Licensing Board on February 22 for a new low power proposal, because it does not state how it meets regulatory requirements or why a waiver therefrom should be granted; (ii) the Motion relies upon power sources located at the

Shoreham site which are not seismically qualified, as required, but LILCO has sought no waiver of the seismic requirements: (iii) contrary to the Board's February 22 order, the Motion appears to rely upon the TDI EDGs; (iv) LILCO's arguments for referral or certification of its Motion to the NRC Commissioners contain false and misleading assertions which the County wishes to contest; and (v) LILCO's Low Power Motion is such a radical change from LILCO's initial June 8, 1983 motion for a low power license that it should be treated as a new application. See the County's Preliminary Views at 8-12.

The County requested a conference of counsel for all parties to discuss all of the procedural matters affecting the EDG litigation and LILCO's Low Power Motion.

12. On March 28, 1984, the State of New York filed its preliminary views on LILCO's Low Power Motion. See Preliminary Views of Governor Cuomo, Representing the State of New York, Regarding LILCO's So-Called Supplemental Motion for a Low Power Operating License (Attachment 3 hereto). The State supported

the views expressed by Suffolk County and urged that LILCO's Motion be summarily dismissed.

13. On March 29, 1984, the NRC Staff held an open meeting with LILCO to discuss LILCO's Low Power Motion; a transcript was made of the meeting. At that meeting LILCO expressly stated that the 20 MW gas turbine and the four mobile diesel generators being installed on the site at Shoreham ". . . are part of the off-site power system." Meeting transcript at 41-42 (Museler). LILCO clearly indicated that, notwithstanding the Licensing Board's February 22 admonition that no low power proposal could consider the TDI EDGs, LILCO was relying solely upon the TDI diesels for onsite AC electric power:

> MR. HODGES [NRC Staff]:
>
> > [I]t's my understanding that the ruling of the Board says assume TDIs don't exist, so no credit basically for the TDIs as to what your onsite power source [is] for the loss of offsite power.
>
> MR. MUSELER [LILCO]:
>
> > No. . . . Our view of what the Board said is that we had to provide reasonable assurance that reliability of the onsite power sources, the TDIs, was sufficient to allow operation up to 5 percent.

Meeting transcript at 43 (emphasis added).

MR. SHERON [NRC Staff]:

> In order to comply with the regulations, I said, just the appropriate GDC, which appeared at first blush like 1, 2, 4 and 17 -- some credit for the existence of TDI diesels on site and some proposed reliability must be assumed for those diesels. You can't assume a zero reliability for the diesels and still say, I meet the regulations.

MR. MUSELER:

> You can't assume that they are not there because the regulations say that you have to have an onsite power source meeting those requirements. . . . We do not assume that they are not there. We assume that they are there and they have to be operational in order to meet the tech specs.

Meeting transcript at 46 (Emphasis added). On March 30, 1984, the County sent the March 29 meeting transcript to the Board, brought the foregoing matters to the Board's attention, and urged that because LILCO's Low Power Motion did not comply with General Design Criterion 17, it should be summarily dismissed. See Supplement to Suffolk County's Preliminary Views on Scheduling Regarding LILCO's New Motion (March 30, 1984). The relevant portions of the March 29 meeting transcript (pp. 41-51) are attached as Attachment 4 hereto.

14. On March 30, 1984, the NRC Staff responded to LILCO's Low Power Motion. In a complete reversal from its position

issued for Shoreham until the TDI diesel problems are solved, the Staff stated:

> If the protection afforded to the public at low-power levels without diesel generators is found to be equivalent to (or greater than) the protection afforded to the public at full-power with approved diesel generators, the Staff submits that LILCO's motion should be granted.

NRC Staff Response to LILCO's Supplemental Motion for Low Power Operating License (March 30, 1984) (the "Staff Response") at 4. The Staff Response did not mention the position taken by LILCO at the March 29 meeting. Further, without addressing any of the County's and State's concerns regarding the time required to respond to LILCO's Low Power Motion, the Staff called without explanation for an expedited hearing on the Motion with all testimony to be filed by April 23, 1984. The Staff also suggested that the Board consider a "summary resolution" of LILCO's Low Power Motion to permit fuel load and cold criticality testing. Staff Response at 5, footnote 3.

15. On March 30, 1984, Chief Administrative Judge Cotter issued an order establishing a new licensing board "to hear and decide" LILCO's Low Power Motion. The order did not say that the proceeding should be expedited. The order noted the "advice" from the Licensing Board which has jurisdiction over all

non- emergency planning matters (the Board dealing with onsite power and EDG matters which had rejected LILCO's earlier low power proposal) that "two of its members are heavily committed to work on another operating license proceeding." However, according to a report in Nucleonics Week, April 5, 1984:

> Appointment of a board to hear Lilco's motion for a low-power license at Shoreham . . . [was] his idea, Cotter said through an agency spokesman. However, he said, Palladino's staff was "aware" of his decision.

16. On the same day, March 30, the parties were notified by telephone that the new Licensing Board (this Board) would hear oral arguments on April 4, 1984, on LILCO's Low Power Motion. The telephonic notice stated that this Board was "established to hear and decide the motion on an expedited basis." This oral notice was confirmed by this Board's Notice of Oral Arguments (March 30, 1984), which stated that at the oral argument this Board would hear the issues raised by the parties "in their filings, as well as a schedule for their expedited consideration and determination" (Emphasis added).

17. In response, on April 3, 1984, the County filed Suffolk County's Comments on Notice of Oral Arguments (Attachment 5 hereto), pointing out that "there is no basis for any

expedited process," and that this issue should be addressed by the parties at the oral argument. The County repeated its view that LILCO's Low Power Motion should not be argued on the merits until the County has an opportunity to retain experts and conduct adequate discovery, as discussed in the County's Preliminary Views.

18. On April 3, 1984, the State of New York filed a motion in opposition to this Board's ruling that LILCO's Low Power Motion would be given expedited consideration. See Motion by Governor Cuomo to Delete Provision in this Board's Order of March 30, 1984, Mandating Expeditious Consideration and Determination of Issues Raised in LILCO's Supplemental Motion (Attachment 6 hereto). The State argued that expediting LILCO's Low Power Motion is arbitrary and would deny the State due process of law.

19. On April 4, 1984, (according to a letter of April 12, 1984, to NRC Chairman Palladino from Congressman Edward J. Markey, Attachment 7 hereto), Chairman Palladino

> circulated a follow-up memorandum to the other Commissioners that included a proposed order drafted by Judge Cotter and a paper written by your staff that would have set forth an expedited schedule in which the Shoreham low power licensing proceeding would be completed in thirty to sixty days.

20. On April 6, 1984, following the April 4 prehearing conference of counsel, this Board issued its Memorandum and Order Scheduling Hearing on LILCO's Supplemental Motion for Low-Power Operating License (the "Low Power Order"). The Low Power Order set an expedited schedule for a hearing on LILCO's Low Power Motion which requires the hearing to terminate by May 5, 1984, which is 29 days after the date the Low Power Order was issued.

III. The Low Power Order Must be Vacated and LILCO's Low Power Motion Dismissed

A. The Hearing Scheduled by the Board is Prohibited by NRC Regulations.

At the April 4 conference, counsel for Suffolk County asked the Board to dismiss LILCO's Low Power Motion (see Low Power Tr. 48-51) because:

(a) General Design Criterion 17 expressly requires that there be both "an onsite electric power system and an offsite electric power system . . . to permit functioning of structures, systems, and components important to safety." The onsite electric power system must function "assuming the other [offsite] system is not functioning . . . ."

(b) The Shoreham plant has no onsite electric power system, because the TDI diesels are presumed not to operate and may not be considered, as conceded by LILCO and held by the Board's February 22 oral order. See Low Power Order at 3-4; Part II, paragraphs 5 and 13, supra.

(c) LILCO's Low Power Motion, which seeks an operating license for a nuclear plant with no onsite electric power system, is therefore a direct attack upon GDC 17. Such a challenge is a violation of 10 C.F.R. Section 2.758, which provides that except pursuant to the specific procedures of that Section for a waiver or exception,

> [A]ny rule or regulation of the Commission, or any provision thereof, issued in its program for the licensing and regulation of production and utilization facilities, . . . shall not be subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding involving initial licensing subject to this subpart . . . .

(d) Because LILCO's Low Power Motion is an argument in an adjudicatory proceeding for initial licensing directly attacking the provision of

GDC 17 that a plant must have an onsite electric power system, and because LILCO has not properly sought a waiver of or exception to that provision, the Motion must be dismissed and cannot be heard further by this Board.

This Board erred in rejecting the County's request to dismiss LILCO's Low Power Motion and in scheduling further proceedings on the Motion, for the following reasons:

(1) This Board states that the GDC 17 requirements govern full power operation and implies that those requirements are not applicable to or may be reduced for low power operation. Low Power Order at 11-12. The Board does not cite a single authority to support this novel interpretation. In fact, nothing in the NRC regulations or cases suggests that the GDC 17 requirement for an onsite electric power system is not applicable to a nuclear plant operating at less than full power.

The Introduction to the General Design Criteria provides that they "establish minimum requirements for the principal design criteria for water-cooled nuclear power plants . . . ." There is no suggestion that these minimum requirements, as for an onsite electric power system, do not apply during low power operation. In fact, GDC 17 clearly does apply during low power

operation. LILCO itself has admitted that the regulations require onsite AC power for low power operation (see Mr. Musseler's statement to the Staff, Part II, paragraph 13 supra). LILCO also admits that during five percent power operation, an accident can be postulated that would require AC power to keep the core cooled and the fuel within design limits. LILCO's Low Power Motion at 21-22. GDC 17 specifies that there must be an offsite and an onsite AC power system, such that if one is not functioning -- and GDC 17 specifies that it must be assumed that one does not function in an emergency -- the other is adequate to meet the safety functions. At Shoreham, one starts with zero onsite AC power; therefore, if offsite AC power is lost, there is no AC power. LILCO has thus asked this Board to eliminate the requirement of GDC 17 that there must be onsite AC power and to eliminate the requirement of GDC 17 that one must assume that offsite AC power will be lost. However, since LILCO has failed to comply with Section 2.758, the Board is barred from even hearing LILCO's Low Power Motion.

(2) The Board ruled that a licensing board has the power to "harmonize" the requirements of GDC 17 and other GDCs (and presumably other NRC regulations) with the provisions of 10 C.F.R. Section 50.57(c) for low power licenses, by reducing or eliminating regulatory requirements for a nuclear plant

operating at less than full power. Low Power Order at 11-12. The Board states

> The very purpose of this regulation [Section 50.57(c)] is to permit motions for low-power operations where, as here, the licensing proceedings are not completed because of pending hearings on the satisfaction of all of the requirements of GDC-17, among others.

Low Power Order at 12. Again, the Board does not cite any authority to support its conclusions.2/

In fact, there is no conflict between the requirements of GDC 17 and the provisions of Section 50.57(c) in this case

---

2/ The San Onofre and Diablo Canyon decisions relied upon by the Staff and perhaps considered by the Board are not on point. Each involved regulatory requirements for emergency planning that had to be satisfied for low power operation. In San Onofre, the Board specifically relied on 10 C.F.R. § 50.47(c)(1) to permit low power operation where all regulations were not met. Section 50.47(c)(1) is a specific exemption provision for emergency planning, which has no applicability to the instant case. Indeed, the San Onofre Board termed Section 50.47(c)(1) an "escape clause." See Southern Calif. Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-3, 15 NRC 61, 193 (1982). In Diablo Canyon, the Board also relied upon Section 50.47(c), as well as on SECY-81-188 (which was found to be an express Commission directive as to low power emergency planning) as its basis for finding that not all of the emergency planning regulations applied at low power. See Pacific Gas & Elect. Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-81-21, 14 NRC 107, 122 (1981).

which can be "harmonized." Section 50.57(c) eliminates any potential conflict by requiring a licensing board to make a finding as to matters in controversy under Section 50.57(a)(2) that "[t]he facility will operate in conformity with the application as amended, the provisions of the Act, and the rules and regulations of the Commission."

In the instant case, the very issue in controversy before this Board and before the Licensing Board hearing the County's diesel contentions is whether Shoreham meets the onsite emergency power requirements of GDC 17. Therefore, this Board could not make a finding that Shoreham can operate with no onsite AC power system in conformity with the application and NRC regulations, both of which through GDC 17 expressly require an onsite electric power system.

(3) In attempting to reconcile the provisions of Section 50.57(a) with its ruling, the Board states:

> The operation of the facility in conformity with the rules and regulations of the Commission includes the possibility of low-power operations equal to the full-power requirements of GDC-17, provided that (as the Staff states), it can be found by the Board that there is reasonable assurance that the low-power activities can be conducted with the protection to the public at least equal to the protection afforded at full-power operations with the approved diesel generators.

Low Power Order at 12. This statement, again without the support of any authority, would permit any licensing board to amend the NRC regulations if the board decided that the public is nevertheless protected. Applying the Board's statement to the instant case, the argument is (i) Section 50.57(a)(2) requires Shoreham to operate in conformity with GDC 17, in that it must have an adequate onsite electric power system; (ii) however, Shoreham's operation at low power without any onsite AC power system is equivalent to operation with an adequate onsite AC power system, if (iii) this Board finds that the public would nevertheless be protected to the same degree as if these were an adequate onsite AC system.3/

The NRC regulations constitute the standard which defines whether public health and safety are protected: if the regulations are satisfied, health and safety is deemed protected; if

---

3/ Such a finding would not be possible in the instant case. LILCO concedes that AC power would be necessary for postulated accidents during low power testing. LILCO's Low Power Motion at 21-22. Thus, a loss of offsite AC power, which must be assumed under GDC 17, would leave Shoreham with no AC power at all, since it lacks an onsite AC power system. A plant operating at low power which has no AC electric power at all when needed in a LOCA cannot possibly protect the public to the same extent as a plant at full power operation which must have an adequate and reliable onsite and offsite AC power system so that if one fails, the other will be operable in a LOCA.

the regulations are not met, health and safety are deemed not protected. Neither this Board nor any other licensing board has carte blanche to eliminate provisions of the NRC regulations simply because the motion before it is made under Section 50.57(c). Rather, the Commission has established a specific procedure in Section 2.758 for obtaining exceptions to or waivers of regulations. That procedure requires a decision by the Commission itself.

(4) The Board violates normal principles of regulatory construction in ruling that Section 50.57(c) permits the wholesale waiver of NRC regulations. As counsel for the State of New York argued at the April 4 conference, there is a specific regulation, Section 2.758, which provides for the only way waivers of or exceptions to NRC regulations may be obtained. Section 2.758 is an exclusive procedure; neither it nor any other regulation states that regulations may also be waived by a licensing board pursuant to Section 50.57(c). The purpose of Section 2.758 is obviously to prevent a waiver of the regulations by other means, such as licensing boards interpreting the intent of a regulation. See Low Power Tr. 59-60 (Palomino).

There is no justification for the Board's strained interpretation of Section 50.57(c) to permit the waiver procedures to be circumvented in this case. But it should be noted that those procedures take time and that the standard for a waiver of GDC 17 could not be met here. Section 2.758(b) provides that:

> The sole ground for a petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.

(Emphasis added). The purpose of the requirement of GDC 17 that a nuclear plant must have an independent, adequate and reliable onsite electric power system is, as GDC 17 states, to provide the necessary safety function "assuming the other [offsite] system is not functioning." What are the "special circumstances" at Shoreham to show that requiring Shoreham to have an onsite AC power system would not serve this purpose? There are none, and none have been pleaded by LILCO.

Further, requiring Shoreham to have an onsite AC power system must necessarily and by definition serve the purpose of GDC 17 -- to have a reliable AC power source onsite and able to

function in the assumed event of a total loss of offsite power. The standard of Section 2.758(b) is not whether some substitute for the requirements of GDC can be fashioned, as LILCO suggests in its arguments that Shoreham's "enhanced" offsite electric system could safely be restored if lost during low power operation. Rather, the standard, as quoted above, is that because of "special circumstances," at Shoreham, the purpose of GDC 17 -- having an onsite AC power system -- would not be served by having an onsite AC power system at Shoreham. LILCO simply cannot meet this standard.

Moreover, the procedures under Section 2.758 for obtaining a waiver take time. The petition, accompanied by an affidavit supporting the "sole ground" for a waiver, must be filed with the licensing board. If the presiding officer determines that a prima facie case has been made, the matter must be certified to the Commission for determination, and the Commission may direct that further proceedings be held to assist its decision.

Clearly, then, a correct application of Section 2.758 to LILCO's Low Power Motion would not, as the Palladino Memo states, "reduce the delays at Shoreham" or constitute action "so that at least a low power decision might be possible while awaiting resolution of the emergency planning issue." See

Part II, paragraphs 7 and 8, supra. But by adopting its unprecedented interpretation of Section 50.57(c) as permitting the licensing board to eliminate NRC regulations, this Board adopted "an expedited schedule in which the Shoreham low power licensing proceeding would be completed in thirty to sixty days," as reportedly urged in Chairman Palladino's follow-up memorandum. See Part II, paragraphs 19 and 20, supra.

This Board should now vacate the Low Power Order and dismiss LILCO's Low Power Motion for violating 10 C.F.R. Section 2.758, in that LILCO's Motion attacks the requirement of GDC 17 for an adequate and reliable independent onsite electric power system.

B. The Expedited Schedule Set by the Board is Unjustified, Prejudicial, and Denies the County and the State Due Process of Law.

The Low Power Order, issued on Friday afternoon, April 6, 1984, set the following 29 day expedited schedule for proceedings:

(a) Discovery of documents and taking of depositions to commence immediately and end on April 16. This 9-day period encompassed 5 business days and two weekends.

(b) The NRC Staff stated that its supplemental SER is to be issued on April 19. The SER is the Staff's evaluation of LILCO's technical proposal for operating a nuclear power plant, for the first time in the history, with no onsite electric power system.

(c) The next day, Good Friday, April 20, the County's and the State's direct written testimony must be filed. Such testimony should be written by expert consultants of the County and the State and contain their written opinions on the issues in contention, based upon their analyses of LILCO's Low Power Motion, supporting affidavits and information supplied by LILCO, documents obtained from LILCO and the NRC Staff through discovery, depositions taken of LILCO and Staff experts, and the Staff SER.

(d) April 24 -- The hearing commences on Long Island. This gives the County and the State Easter weekend and Easter Monday to review and analyze the written testimony of LILCO and the Staff to be filed on Good Friday, to prepare the County's and State's witnesses for the hearing, to prepare for cross-examination of LILCO's and the Staff's witnesses, and otherwise to prepare for trial.

(e) The hearing must end on Saturday, May 5. The hearing is scheduled for Saturdays, and runs for 11 days from April 24 through May 5, with a recess only on Sunday, April 29.

In setting the foregoing schedule, the Board stated:

> We find that the expedited schedule set forth below will not prejudice any party to this proceeding.

Low Power Order at 16. There are absolutely no grounds to support this [illegible], and the evidence on the record is precisely cont[illegible]

(1) [illegible] Board was established, the County filed on March 2[illegible]t. Licensing Board which then had jurisdiction over [illegible]ow power and onsite electric power issues at Shoreham, the County's Preliminary Views on LILCO's Low Power

Motion (Attachment 2). As described in Part II, paragraph 11, supra, the County's Preliminary Views listed many of the new factual issues raised by LILCO's Low Power Motion, set forth in three pages examples of the information which the County would need to respond meaningfully, and stated that significant time would be required to retain expert consultants, conduct discovery, and permit the review and analysis of material information.

(2) This Board was established on Friday, March 30, and that same day telephonically issued its order for the April 4 conference, stating for the first time that it would decide LILCO's Low Power Motion on an "expedited" basis. See Part II, paragraph 16, supra. On the following Monday the County filed its Comments (Attachment 5), objecting that there is no basis for expedited treatment, reiterating the points made in the County's Preliminary Views and the need for substantial discovery, and requesting that the Board direct the parties to address any justifications for an expedited proceeding at the April 4 conference. See Part II, paragraph 17, supra.

(3) Also on April 3, the State of New York filed its Motion by Governor Cuomo to Delete Provision in this Board's Order of March 30, 1984 Mandating Expeditious Consideration and

Determination of Issues Raised in LILCO's Supplemental Motion (Attachment 6). That Motion noted that there are no reasons justifying "expedited consideration and determination" of LILCO's Low Power Motion, and argued that without such justification New York State would be denied due process of law. See Part II, paragraph 18, supra.

(4) At the April 4 conference this Board did not order or permit any discussion of the reasons for expedited treatment of LILCO's Low Power Motion, and no reasons were given by any parties to justify anything other than normal judicious procedures. Without any evidence that an expedited schedule would be necessary or desirable, this Board asked the parties to give their proposed schedules, after first warning:

> We'll be discussing potential scheduling, and I will tell you we're considering a very tight, expeditious in the sense that this is a limited focus matter. If we get into it, we don't intend to have a lot of winding up in the ballgame.

Low Power Tr. 97.

(5) LILCO proceeded to propose its schedule. This Board stated in the Low Power Order (at 12), "LILCO suggested a time frame in which testimony would be filed by all the parties on April 17 or 19, 1984, and hearings would commence on April 24."

The transcript of the conference shows that this Board assisted LILCO in proposing such an early hearing date. Mr. Earley, counsel for LILCO, indeed proposed that "testimony be filed by all parties on April 17th or 19th," keyed to the Staff's SER preparation date, which, at that time, he thought was probably April 19. Low Power Tr. 99. Mr. Earley said:

> Seven days later [April 24 or 26], the parties ought to have an opportunity to reply, and that seven days after that [May 1 or May 3], any evidentiary hearings ought to begin . . . .
>
> JUDGE MILLER: Let's get down to dates on what you're proposing so I can follow you. April 17th or 19th, which we'll discuss in a moment, all parties simultaneously file written testimony. Is that correct?
>
> MR. EARLEY: Yes, sir.
>
> JUDGE MILLER: Okay. What's your next date?
>
> MR. EARLEY: The next date is April 24th.
>
> JUDGE MILLER: What day of the week is that?
>
> MR. EARLEY: That's a Tuesday.
>
> JUDGE MILLER: Okay. What happens then?
>
> MR. EARLEY: The parties would have an opportunity to file a written reply to the testimony filed the week before.
>
> JUDGE MILLER: Why are you going to do that? You're going to do that at a trial or a hearing. You're putting in an unnecessary step in there, as near as I can make

> it out. You all file your proposed written testimony the 17th or 19th of April. The next step isn't to look at your navels or talk to each other or have another go-round.
>
> MR. EARLEY: Judge, that's fine with us, then. A week later we could start hearings; it would be April 24th for the start of hearings.
>
> JUDGE MILLER: Okay. That's LILCO's proposal?
>
> MR. EARLEY: Yes, sir.

Low Power Tr. 100-101. It appears that this Board persuaded LILCO to shorten its proposed time for commencement of the hearing by 7 to 10 days. LILCO made no attempt to explain or justify its unusually expedited proposed schedule, and the Board did not ask LILCO to do so. However, later in the conference, after counsel for New York State objected to the "undue hasty schedule" because Shoreham's electricity is not needed for ten years, LILCO will not be able to operate Shoreham commercially for years because of pending litigation, and LILCO's serious financial situation should not be considered by the Board, (see Low Power Tr. 119-120), Mr. Reveley attempted to respond for LILCO:

> MR. REVELEY: Judge Miller, if you want to listen to it, I'll be delighted to respond to the rhetoric we've just heard about unfairness, lack of need, unjustifiable haste --

> JUDGE MILLER: We don't want to get into any matters extraneous to this record.
>
> MR. REVELEY: I think we've just heard, sir, a good many. I will respond to them if you wish.
>
> JUDGE MILLER: No, don't wish because I don't wish to encumber this record with extraneous comments about financial situations or need for power or matters of that kind which, in our judgment, the Board's judgment, are absolutely not relevant to this limited type of proceeding.

Low Power Tr. 120-121. It therefore appears that the Board considered matters bearing upon whether or not the hearing should be expedited to be "extraneous".

(6) The NRC Staff proposed that testimony be filed by the County by April 23 and the hearings begin at the end of April. The Staff made absolutely no attempt to explain or justify its unusually expedited proposed schedule, and the Board did not ask the Staff to do so.

(7) Unlike LILCO and the NRC Staff, Suffolk County explained and justified its proposed schedule. First, the County suggested, as it had in the County's Preliminary Views (Attachment 2) and in its Comments (Attachment 5), that the issue of GDC 17 should be briefed by all parties, with the County's brief due by April 11. Low Power Tr. 109. Counsel

for New York State had also requested that this issue be briefed. Low Power Tr. 67. The Board ruled against any such briefing. Low Power Tr. 111. Next, counsel for the County proposed a schedule:

> MR. DYNNER: The following schedule is what we propose. As indicated in our preliminary views, the County will need an opportunity to retain experts on the variety of issues, new issues, that are raised by LILCO in its motion, and for those experts to review the testimony, or rather, the submission by LILCO. We believe that that would be a period of 30 days.
>
> So we're talking -- I'm going to try to convert this for you -- if we're going to assume -- I don't know when the Board is going to rule, so I'm going from the date that you will rule on the GDC-17 issue . . . .
>
> JUDGE MILLER: I think we'll rule today orally. You're going to get an answer today and we'll follow it up by an order probably tomorrow. But we're going to go ahead. There's no sense in flogging a horse, especially a dead horse.
>
> MR. DYNNER: All right. Let me go on then and try to put this into perspective, although . . . .
>
> JUDGE MILLER: So your request for 30 days for experts will be denied, if you're again making that in the form of a motion.

Low Power Tr. 111-12.

The Board not only denied the County the opportunity to explain why it needed 30 days to retain expert consultants and have them review LILCO's Low Power Motion and its attached affidavits; it also denied that portion of the proposed schedule without giving any reasons for its ruling.4/ The County then proposed a 56-day discovery period ending, May 30; the County was going to propose a 60-day discovery period following the 30-day period to retain experts, but was forced to revise its position when the Bord summarily and arbitrarily rejected the 30-day period. The County fully justified the need for such a discovery period. See Low Power Tr. 114-117. Further, the County justified the provision in its proposed schedule for

---

4/ The lack of realism in the Board's schedule is highlighted by a matter which the Board entirely ignored. Both in its Preliminary Views (at 5), and twice on April 4 (Low Power Tr. 88-89; 122-23) the County raised the question of the adequacy of security for LILCO's "enhanced" offsite AC power system. The County, in fact, requested the Board specifically to specify the procedure by which security issues could be raised. Low Power Tr. 122-23. Even the Staff, in its March 29 meeting with LILCO, had raised questions concerning security. March 29 transcript at 94-95. The security issue is potentially significant, because there clearly is no Part 73 low power exemption and because security arrangements may directly involve Suffolk County. Yet the Board, despite the clear importance of this matter and repeated efforts by the County to bring it to the Board's attention, never even alludes to security matters in the Low Power Order. The County and State ask again in these Joint Objections that the Board establish the procedures under which security issues are to be pursued.

specification of issues (by June 15), which would include LILCO's financial ability to operate Shoreham and the technical capability of LILCO and its personnel. Low Power Tr. 117. Neither LILCO nor the Staff rebutted the County's justifications for its proposed schedule.

(8) The County also specifically argued that it would be severely prejudiced by the "unfair" schedules proposed by LILCO and the Staff (which initially called for the hearing to begin later than the date set by this Board in the Low Power Order):

> MR. DYNNER: I think that in fairness, it's important that the -- if this Board rules today against the County's position, that licensing of a nuclear plant with no on-site emergency power is an attack on the regulations of the NRC -- if this Board denies that and goes forward with the hearing, I think it's incumbent that that hearing be fair, that that hearing give the County and the State of New York and the other parties ample opportunity to have sufficient information to make meaningful arguments so that this Board can make a reasoned and careful determination.
>
> Our schedule we think, although tight, would give us that opportunity if LILCO were to cooperate with furnishing us the necessary information. We believe that the Staff's schedule as proposed and that LILCO's schedule as proposed is completely unfair. It does not take into consideration any of the factors that I have raised in discussion of our schedule. This is, as I said before, a unique, an unprecedented attempt to license a nuclear power plant without on-site emergency power. If you're

going to go forward and hear that issue, then we are entitled to the kind of fair and complete hearing that is postulated by the regulations of the Nuclear Regulatory Commission and the Administrative Procedure Act, not some, what I regard from what I heard just now from LILCO and the Staff, some slap-dash attempt to push this thing through at whatever cost and give no opportunity for us to find out the facts surrounding the LILCO motion, and no opportunity to collect adequate and present adequate testimony and have an adequate ablility to cross examine and have a fair and whole hearing.

JUDGE MILLER: Anything further?

MR. DYNNER: One moment, please.

(Counsel for Suffolk County conferring.)

MR. DYNNER: I would, Judge Miller, like to add one point. What we've heard today from LILCO and the Staff in terms of their proposed schedules is an extremely swift rush to give a low power license to the plant without a single reason for such an incredibly expedited procedure. The pacing item, the issue at stake, is fairness to the hearing and the safety of the facility and the people that are going to live on Long Island around it. There has not been a single reason given by anybody in this room as to why it is proposed to rush with such unprecedented speed to an unprecedented potential decision.

We don't know of any reason other than what we read in the newspapers about LILCO's financial situation. That is not something before this Board; that issue should not be considered in this Board's formulating or approving any schedule. The only issue is safety; the only issue is a fair hearing. Thank you.

Low Power Tr. 117-119 (Emphasis added).

(9) New York State joined in the comments of Suffolk County, agreed with the County's proposed schedule, and argued that no need had been shown for "an undue hasty schedule." Low Power Tr. 19-120.

The foregoing is the only evidence on the record at the conference regarding the issue of an expedited schedule. The Board has pointed out that "10 C.F.R. § 2.711 gives a presiding officer the power to reduce established time limits when there is good cause for so doing . . . ." Low Power Order at 14 (Emphasis added). In this case, however, there has been no showing of good cause to reduce the normal periods for discovery, specification of issues, prehearing conferences and submission of testimony. Indeed, there is no evidence to support an expedited hearing.

To the contrary, Suffolk County and New York State have made a detailed showing that there is no reason to expedite the proceeding on LILCO's Low Power Motion, that a reasonable discovery period is necessary in order to present their case, and that they would be severely prejudiced by the expedited and unjustified schedules proposed by LILCO and the Staff. The schedule established by this Board is even more expedited.

Accordingly, there is no basis for the Board's finding "that the expedited schedule set forth below will not prejudice any party to this proceeding." Low Power Order at 16.

In fact, Suffolk County and New York State maintain that the schedule is so arbitrary and unfair that, on its face, it constitutes a denial of a reasonable opportunity for the County and the State to prepare for the hearing and to be heard on the issue of a low power operating license for Shoreham. Assuming arguendo that the Board was correct in ordering a hearing, it is clear that to prepare properly, a party must examine the reliability of each of the offsite AC power sources relied upon by LILCO. That is, a party must obtain experts with necessary qualifications and then review and prepare testimony regarding all data pertinent to: the 4 mobile diesels; the 20 MW and 50 MW gas turbines located at Shoreham, Holtsville and elsewhere; the LILCO transmission system, including interconnections to the New York Power Pool and the New England power grid; and the details of procedures and mechanical devices for utilizing these power sources in an emergency at Shoreham. It is impossible for the County and the State to obtain experts, prepare discovery requests, review documents produced in discovery, prepare testimony, review the testimony of other parties, and prepare for the hearing in 17 days -- the

period the Board allowed between opening of discovery and the date the hearing starts.5/ Thus, the County and the State submit that the Board's schedule, on its face, deprives them of due process of law.

Actual attempts to comply with the Board's schedule have demonstrated that it is impossible. The County has diligently proceeded to attempt to retain expert consultants and to carry on discovery. Thus, the County expects to have three new experts (one company and two individuals) under contract by sometime this week: the company to perform a reliability analysis of the LILCO offsite power system; and the individuals to perform structural engineering analyses of how the LILCO AC power sources will perform in a seismic event. The County's new experts, however, cannot possibly perform their analyses by April 20. Rather, once necessary document discovery is completed, the experts will need to carefully review the data, have site visits, and then perform their own analyses of the data. Similarly, the County's other experts -- for example, the County's diesel consultant -- will have to perform similar

---

5/ The extreme shortness of the Board's schedule is shown by the fact that the NRC regulations provide for a minimum period of 15 days between the filing of the written testimony and the commencement of the hearing. 10 C.F.R. Section 2.743(b).

analyses, which cannot begin until necessary documentary data are obtained.

The County has pursued its document discovery vigorously. Within 5 days of the opening of discovery (i.e., on April 12), the County was able to send document discovery requests to both LILCO and the Staff. LILCO did offer to make many documents available for review at Shoreham and other locations. (The Staff has not yet responded to the County's discovery requests.) The County was unable to send expert consultants to carry on this review during the allotted discovery period of nine days; however, three representatives of the County's law firm did travel to Long Island to identify documents. Their review indicated that there are thousands of documents in the categories requested by the County during the discovery period. It is significant that LILCO did not object to any of the County's document discovery requests on grounds of relevancy. The County expects to begin receiving the documents it requested on April 16. The County has therefore been unable to review and analyze relevant documents within the nine day discovery period, and hence has not been able to take depositions during such period, since without first reviewing relevant documents, depositions would not be meaningful.

Based upon the volume of information disclosed to exist during the discovery period which has been permitted, it clearly is impossible for the County's experts to receive, review and analyze the thousands of relevant documents and the Staff SER, and prepare written testimony thereon, in the four days allowed between the close of discovery on Monday, April 16, and the testimony filing deadline of Good Friday, April 20. Indeed, County consultants, if all goes well, will just be beginning their review of the thousands of documents by April 20. Accordingly, it will similarly be impossible for the County to prepare adequately over Easter weekend and Easter Monday for the hearing to commence on April 24.

The foregoing demonstrates that the Board has established a schedule which precludes the County and the State from being heard in any meaningful way, and which accordingly violates the Administrative Procedure Act and deprives the County and the State of due process of law in violation of the Fifth Amendment of the United States Constitution.

## IV. Remedies Requested by Suffolk County and The State of New York

A.1. Because LILCO's Low Power Motion attacks the provisions of GDC 17, in violation of 10 C.F.R. Section 2.758, LILCO's Low Power Motion should be immediately dismissed and

the Low Power Order scheduling a hearing on the Motion should be vacated forthwith.

A.2. Because the Low Power Order is unjustified, prejudicial, and deprives Suffolk County and New York State of due process of law guaranteed by the Fifth Amendment to the United States Constitution, the Low Power Order should be vacated forthwith.

B. If the Board fails or refuses to vacate the Low Power Motion forthwith as requested herein, then, pursuant to 10 C.F.R. Sections 2.751a(d) and 2.718(i), the Board should immediately certify to the Commission for its determination the following questions:

1. Whether LILCO's Low Power Motion should be dismissed immediately and the Low Power Order forthwith vacated because LILCO's Low Power Motion attacks the provisions of GDC 17, in violation of 10 C.F.R. Section 2.758, as alleged herein by Suffolk County and New York State; and

2. Whether the Low Power Order should be forthwith vacated because it is unjustified, prejudicial to Suffolk County and New York State, and deprives

Suffolk County and New York State due process of law, as alleged herein by Suffolk County and New York State.

A prompt decision regarding these issues is necessary to prevent detriment to the public interest because, as shown herein, unless these issues are resolved in the County's and State's favor prior to the scheduled April 24 announcement of the hearing: (i) the integrity of the NRC's regulatory scheme will be seriously compromised, and public confidence therein may be diminished; (ii) the constitutional rights of Suffolk County and New York State will be violated; and (iii) Suffolk County and New York State will be unable adequately to represent the interests of the people of Suffolk County and New York State in the scheduled hearing on important matters of public health and safety. In addition, the matters raised herein would fundamentally affect the structure of the proceeding in a unique manner. See Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), 17 NRC 593, 598 (1983). To our knowledge, LILCO's Low Power Motion is the first time in NRC history that an operating license, whether for low or full power, may be granted for a nuclear power plant which has no onsite AC power system. The legal questions raised herein are, to our knowledge, of first impression.

Moreover, the circumstances leading to the establishment of this Board and its Low Power Order are highly unusual. For these reasons, Suffolk County and the State of New York request that the Board stay the Low Power Order and not commence the hearing pending the determination by the Commission of the certified questions.

C. If the Board fails or refuses to provide the relief requested in paragraphs A or B supra, then Suffolk County and the State of New York hereby move, pursuant to 10 C.F.R. Section 2.730(f), that the Low Power Order and any ruling by this Board against the requests herein forthwith be referred to the Commission and that the Low Power Order be stayed pending a determination by the Commission thereon, for all of the reasons stated in paragraph B supra.

D. Under 10 C.F.R. Section 2.718(i), the Commission may itself direct the certification of questions to it for determination. In order to provide the Commission with the information necessary to consider whether it should so direct certification, we are sending these Joint Objections directly to the Commission and requesting that the Commission direct the certification to it of the questions set forth in paragraph B supra forthwith and stay the Low Power Order pending Commission determination of those questions.

Respectfully submitted,

Martin Bradley Ashare
Suffolk Country Department of Law
Veterans Memorial Highway
Hauppauge, New York 11788

Alan Roy Dynner

Herbert H. Brown
Lawrence Coe Lanpher
Alan Roy Dynner
Douglas J. Scheidt
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

Attorneys for Suffolk County

Fabian G. Palomino (add)

Fabian G. Palomino
Special Counsel to the Governor
of New York State
Executive Chamber
Room 229
Capital Building
Albany, New York 12224

Attorney for Mario M. Cuomo
Governor of the State of New York

April 16, 1984

ATTACHMENT 1

# REPORT OF THE NEW YORK STATE FACT FINDING PANEL ON THE SHOREHAM NUCLEAR POWER FACILITY


Honorable Mario M. Cuomo
Governor

Dr. John H. Marburger, III
Chairman

Stony Brook, New York December 1983

QUESTION 8 - IS SHOREHAM NEEDED TO MEET THE REASONABLY FORESEEABLE NEEDS OF ELECTRICITY CONSUMERS?

(This response is based upon the Staff Economics Report, Appendix 6(a). Although the Staff Report was discussed in regular meetings of the Panel, the specific form of this response was not.)

None of the projections done by LILCO, Suffolk County or the Commission staff indicate a near term need for Shoreham to meet demand.

LILCO projects that two 400 MW coal units would be necessary, one in 1994 and another in 1996, if Shoreham is abandoned, using their load forecast of approximately 1.6 percent per year growth in peak demand.

ESRG, a consultant to Suffolk County, projects that the first replacement coal unit, presuming Shoreham is abandoned, will not be needed until 1998 using a forecasted peak load growth rate of about 0.8 percent per year.

The staff analysis, which incorporated a forecast of peak load growth rate of approximately 1.25 percent per year with Shoreham operating and 1.1 percent per year with Shoreham not operating, also projects that the first replacement coal unit, if Shoreham is abandoned, will not be required until 1998. It should be noted that the staff projections assume operation of Nine Mile Point 2 and development of alternative energy sources, such as solar, wind, refuse, cogeneration, and landfill gas, as well as resonably expected penetrations of conservation, both price-induced and regulation-induced. It should also be noted that, without Shoreham, LILCO will be more heavily dependent on oil-fired capacity during the next 15 years.

8. Although the evaluation of off-site emergency preparedness plans is the responsibility of FEMA, the Panel does wish to express reservations about LILCO's ability to implement a plan that achieves an adequate state of preparedness without the assistance of county government. The State's responsibility for emergency preparedness requries that it pay close attention to the subsequent course of the licensing process to satisfy itself that preparedness is adequate according to its own standards should a license be awarded.

9. The projections for Long Island's future electrical energy needs on which the Shoreham construction schedule was originally based were obviously overestimates. The Panel is persuaded that ample LILCO generating capacity currently exists to satisfy probable demand for at least the next decade, and probably longer. Such estimates are of course subject to the same uncertainties that cause the original projections to be so wrong. But at this time, it is difficult to see how the demand for electricity could be so great as to require a Shoreham-sized plant within a decade or more.

10. Finally, if the plant should eventually receive a license to operate, the public would be well served by an objective inspection program by an independent technical firm acceptable to federal, State and local governments, as well as the utility. Public confidence in the quality of the plant is very low, and further inspections will either reveal problems that should be addressed prior to operation or confirm the assertions of previous inspections that found little cause for concern.

## V. Views of Panel Members

The following views were prepared by individuals or groups of Panel members after the formal meetings and hearings were completed. None of the following statements is supported by every Panel member, but some are supported by more than one member, as indicated. In some cases, these statements contain phrases such as "the Panel believes" or "the Commission feels that" or "the Commission concludes that"... Such phrases should be interpreted as signifying the views only of those whose names are associated with that statement. The Panel did not operate in such a way as to generate a perceptible common viewpoint on any specific issue, except possible for the carefully worded "General Views" statements in the preceding section.

WASHINGTON, D. C. 20555

CHAIRMAN

ATTACHMENT 1

March 20, 1984

MEMORANDUM FOR: Commissioner Gilinsky
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal

FROM: Nunzio J. Palladino

SUBJECT: LICENSING DELAYS

On March 9, 1984, the EDO notified us that potential licensing delays, as of the end of February, are 9 months for Shoreham and 5 months for Limerick. On March 16, I had a status and scheduling meeting with the staff, OGC, OPE, and Tony Cotter to discuss these and other possible delays.

It turns out that, beyond Shoreham and Limerick, delays may arise for Waterford and Comanche Peak. These possible delays are in addition to the difficulties being experienced at Diablo Canyon, Byron, Midland, Palo Verde, and Grand Gulf. Briefing sheets were provided on allegations and on the problems at a number of plants, and these were distributed to your offices to assist in understanding the problem and preparing for the Bevill hearing.

I suggest that the Commission hold a special meeting to discuss the problems associated with the foregoing plants. I believe it is important that we have such a meeting in the near future so we can focus better on the issues. We can address this at agenda planning. Identified below are some thoughts that we might discuss at the meeting.

So that we can take steps to both (a) reduce the delays at Shoreham and Limerick that have been officially reported to us by the EDO, and (b) reduce the possibility that delays at other plants may arise or, if they arise, be extensive, I propose the following:

-- For Shoreham, have the Commission consider a proposal from OGC for an expedited hearing on the fiscal problem, or proposals for other possible actions so that at least a low power decision might be possible while awaiting resolution of the emergency planning issue. I have asked the OGC to provide a paper on this subject soon. In preparing this paper, the OGC should work with other offices within NRC as necessary.

-- For Limerick, have the staff determine whether the licensee will seek a low power authorization, and have OGC (again working with others as necessary) determine whether there are any other steps that might be taken to expedite the hearing.

-- For Waterford and Comanche Peak, the EDO informed us that he has placed one senior executive in charge of identifying the problems and laying out solutions and schedules for getting to a licensing decision at each plant. In addition, I would like the EDO to determine how what we are doing relates to the Board. I also want to ensure that we are taking action with the licensee to correct, either by consultation or enforcement, as appropriate, any problems having merit that come to our attention.

-- For Diablo Canyon, I suggest that we give careful consideration to the staff's proposal yesterday morning to proceed without going deeply into the other allegations unless a review shows serious problems not already dealt with.

-- For Byron, we probably need to wait to see what the Appeal Board says. However, if a hearing is reopened, OGC (again working with others as necessary), should prepare options for Commission consideration to expedite it.

-- We have a review by the Commission of the Midland plant now scheduled for April 2, 1984; I suggest that the review include options prepared by the staff for subsequent agency action.

-- For Palo Verde and Grand Gulf, the staff should keep the Commission informed of actions planned or needed. In any event, staff review of the diesel generators should be completed on an expedited basis.

For the general problem of last minute allegations that affect a number of plants, I recommend that the Commission consider developing a policy for handling last minute allegations. Such a policy might include a deadline after which the threshold for allowing allegations to hold up a licensing action is very high. For example, that threshold might be something like the following: new information, supported by signed affidavits, and presented in a

disciplined way through established channels. By copy, I would like OGC to explore this and other possible approaches in a paper for Commission review and decision.

By copy, I would also like the EDO to respond to the specific matters raised above and provide a paper to the Commission outlining the steps for dealing with potential delays. This paper would be in preparation for a Commission meeting on this general subject at the earliest possible time.

In keeping with my suggestion for a Commission meeting in the near future, I propose that papers be prepared within the next couple of weeks (at least by April 5) so that the Commission could meet about mid-April.

SECY, please track the above action items.

cc: SECY
OGC
OPE
OIA
EDO

3/26/84

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

SUFFOLK COUNTY'S PRELIMINARY VIEWS
ON SCHEDULING REGARDING LILCO'S NEW MOTION

I. Background

At a conference of counsel on February 22, 1984, this Board admitted the first three Suffolk County supplemental emergency diesel generator ("EDG") contentions. In rejecting LILCO's request for a low power license after only a limited number of EDG components are litigated, this Board stated:

> [W]e don't have any confidence that any of these diesels will operate at any power unless we have litigated Contentions 1, 2 and 3 on the merits.

Tr. 21,631 (emphasis added). However, this Board did not preclude LILCO from later filing a proposal to obtain a low power license for Shoreham without relying upon the EDGs. See Tr. 21,631-32.

Late on March 20, 1984, counsel for the County received LILCO's Supplemental Motion for Low Power Operating License (the "Motion"). The Motion is not "supplemental" at all; rather, it is

an entirely new motion for a low power license that seeks to circumvent litigation of the adequacy of the EDGs. Thus, the new Motion is apparently a proposal to avoid the impact of the Board's above-quoted comments.

On March 22, Judge Brenner's secretary, Ms. Lane, telephoned the County's counsel, explained that Judge Brenner was in out-of-town hearings, and asked whether counsel could join in a conference call with her and the other parties on Thursday or Friday to discuss when they would be in a position to respond to LILCO's Motion. Receipt of the parties' preliminary views by Monday, March 26, would facilitate issuance on Monday of any scheduling orders that might be appropriate.

Because the County's counsel and experts on EDG matters at the time were in Oakland, California, for document discovery at TDI, and because the County's counsel and experts had insufficient time to review the Motion, counsel told Ms. Lane that a conference call would be premature. Counsel offered to give preliminary views to the Board in writing early on Monday, and Ms. Lane indicated that this would meet the Board's needs.

II. The County's Preliminary Views

A. The County believes that the normal ten-day period for a response to LILCO's Motion (10 C.F.R. § 2.730(c)) is inadequate in this instance. The Motion is a voluminous, new proposal for low power operation of Shoreham, based upon complex technical factual information and novel legal arguments never before presented to the County or this Board. On its face, LILCO's Motion is the type

of proposal which this Board envisioned to require an entirely separate collateral proceeding. For the following reasons, additional time will be required for the County to analyze and respond to the Motion.

1. LILCO's proposal raises a host of new substantive factual issues,[1/] including:

a. The nature and reliability of LILCO's interties to the New York Power Pool and New England Power Grid;

b. The nature and reliability of the various gas turbines mentioned by LILCO (e.g., those at Holtsville, at Shoreham, and at other locations);

c. The nature and reliability of LILCO's transmission lines;

d. The nature and reliability of the four mobile diesels;

e. The possibility of a seismic event rendering unreliable all of the power sources relied upon by LILCO in the Motion;

f. The risks presented by low power operation and the amount of onsite power which must be reliably available in view of those risks;

g. Whether there are any substantial benefits in terms of training or other relevant factors which would justi-

---

1/ The list of new substantive factual issues herein is preliminary and merely illustrative. Until the County is able to retain appropriate experts to review the Motion, a complete list of issues cannot be compiled.

fy the sharp departure from NRC practice that LILCO proposes.

Since some of the new issues are outside the expertise of the County's current EDG consultants, the County must retain appropriate experts in order to make meaningful responses. Analysis of these new substantive issues will thus take significant additional time.

2. LILCO's Motion, while lengthy, lacks many essential details. Examples of information which the County must receive before filing meaningful answers to the factual assertions in LILCO's proposal include:

a. Specific data regarding the duration and sequence of operation at each power level sought in the Motion.

b. Copies of approved Technical Specifications for Shoreham or a copy of the most recent draft.

c. Procedures for electrical power system operation during the low power license period, including normal operation; test operations; emergency situations; installation and maintenance procedures; and procedures for startup, synchronization and load sequencing of four mobile diesels.

d. Equipment specifications for each normal and additional source of AC power cited as available to support Shoreham without reliance on TDI diesels, including manufacturer; history of operation; specification; qualification data; transmission facilities design envelope, including seismic, hurricane, and other similar

data; installation reports; and quality assurance records for the above equipment.

e. Underlying data which support the Affidavits attached to the Motion, including reports or risk analyses relied upon; detailed analyses underlying Sherwood Exhibit 4; bases for conclusions in Sherwood and Schiffmacher Affidavits; reliability analyses relied upon for structures, systems and components; and allowable time to repair unavailable power sources.

f. Description of security measures in place to assure availability and protection of offsite power sources (to the extent this involves safeguards information, data will need to be handled under procedures governing such information).

g. Description of all instrumentation and control systems which will be used to initiate operation, control, or protection of the additional power sources cited in the Motion, including instruments mounted on the specific equipment; control room mounted equipment; and other equipment for control, monitoring, and protection of the additional power sources.

h. Transmission and distribution operation procedures which will be used instead of normal load dispatching and grid integrity protection procedures.

i. List of all protection system inputs and specific set point indications which will be modified or relied upon to assure staying within the 5% power limit.

j. Additional preoperation tests and demonstration tests to verify validity and reliability of interconnected network of new equipment and existing equipment, including how the system would be tested during operation.

k. Data supporting the man-hour assertions in the Notaro Affidavit and the length of time involved at each power level.

l. Identification of system tests discussed in the Notaro Affidavit which can only be conducted during nuclear operation.

m. Identify for the additional power sources the applicable regulatory guides and applicable standards and the degree of compliance with each. For example, separation; single failure criteria; fire protection; periodic testing; independence of onsite systems; installation; maintenance; bypassed and inoperable status indication.

n. Detailed description of the tests to be performed during the proposed low power test program, including reference to items in FSAR Section 14.

This information must be obtained from LILCO through informal discovery. This process and the analysis of such data by appropriate experts will no doubt take significant time. The willingness and ability of LILCO to respond expeditiously to these data requirements will influence the length of time necessary for such informal discovery.

3. The legal issues raised by the LILCO Motion include:

a. LILCO cites GDC 17 as the pertinent regulatory standard by which its Motion is to be judged. See, e.g., LILCO Motion at 6, 11, 23. In fact, however, LILCO's compliance with many other regulatory standards also must be evaluated, including GDC 2, 4, 5, 18, and 50, and 10 C.F.R. Part 50, Appendix B. See, e.g., Standard Review Plan, § 8.3.1, which identifies all of the foregoing as pertinent to review of the adequacy of onsite AC power systems. LILCO's Motion never even mentions these other regulations.

b. Based on initial review of the LILCO Motion, it is clear that LILCO does not comply with certain regulatory requirements. For example, neither the four mobile diesels nor the gas turbine are seismically or otherwise qualified for nuclear service. Thus, LILCO is proposing operation of the plant despite failure to comply with GDCs 4, 5, 17, 18 and 50 or with Appendix B. LILCO has not filed pursuant to 10 C.F.R. § 2.758 for waiver of these applicable regulations. Absent a proper waiver petition, Section 2.758 prohibits licensing boards from considering arguments that a licensee should not be required to comply with the Commission's regulations. This Board has recognized this Commission requirement and, indeed, specifically stated on February 22 that any LILCO proposal seeking waiver or exemption would need to comply with regulatory requirements. Tr. 21,632. LILCO's Motion does not do so.

Adequate time must be allotted for the County to further research and address these and other possible legal issues.

4. The County's counsel and experts in this proceeding are already devoting full time to the issues raised by the EDG contentions. Thousands of documents were identified as relevant during their trip to TDI in Oakland last week, and when those documents are produced, their review will require all of April. Depositions have not yet been scheduled. Counsel are working under a very expedited schedule, given the extent and complexity of EDG matters. Unless that schedule is relaxed significantly,[2/] the responses to the Motion will need to be delayed even further.

In summary, the Motion represents an extremely significant (in size and complexity) new "collateral litigation" (Tr. 21,515). The County cannot at this early date provide a detailed estimate of when it can respond to the merits of the LILCO proposal.

B. There are a number of threshold issues which the Board and parties should address.

1. The LILCO Motion does not meet the particular criteria enunciated by the Board on February 22 for consideration of such a proposal. See Tr. 21,631-33. The County believes that, for example, the LILCO proposal does not specify how it meets "the applicable requirements of the regulations for backup power or point out where it does not strictly meet those requirements why [LILCO] should be entitled to some exemption or waiver under 2.758 . . . ." Tr. 21,632. If the proposal does not meet the Board's criteria, it should be summarily rejected and the parties should

---

2/ The County has indicated to the other parties that when the Board issues its order regarding its rulings at the February 22 conference, the County will seek additional time to carry out the many matters that must be accomplished. This was the County's intention even before receipt of the Motion.

not be required to devote time and resources to answering it substantively.

2. On February 22, this Board clearly expressed its concern with LILCO's reliance on any power sources which are not seismically qualified. Thus, Judge Brenner stated:

> Personally I have great doubts that a waiver from the seismic criteria would suffice when the very reason for having emergency backup power is in some instances what might happen to your offsite power in the event of an earthquake.
>
> I don't want to preclude your attempting to show things.

Tr. 21,633. The Motion outlines alternate power sources, both onsite and offsite, including gas turbines, existing transmission lines, and four mobile diesels. None of these sources meet the seismic criteria. LILCO suggests that this is not crucial because it will have a procedure at some point to start plant shutdown if an acceleration of 0.01g is recorded. See Motion at 22. Without reaching the merits of such a procedure,[3/] the threshold question is whether, as a matter of law, LILCO's proposal to use the non-seismically qualified power sources is acceptable when no Section 2.758 waiver is sought.

3. This Board clearly indicated on February 22 that any proposal which LILCO might file for a low power license must not rely upon the TDI EDGs. This Board said:

---

3/ The County has serious doubts whether it is reasonable to assume that there will necessarily be sufficient time to shut down the plant after a 0.01g acceleration is recorded and before a larger acceleration which causes significant damage. Moreover, the LILCO suggestion is not relevant to the basic issue of whether, after a seismic event, there will be sufficient power to cool down the plant.

> [W]e don't have any confidence that any of these [TDI] diesels will operate at any power unless we have litigated Contentions 1, 2 and 3 on the mertis.

Tr. 21,631 (emphasis added). Contrary to this caveat, LILCO's proposal does rely upon the TDI EDGs. The Motion argues that the TDI diesels will be fully tested, although not fully litigated, during a portion of the low power operation phase, and thus would be "available for operation." Motion at 3.

Moreover, LILCO implicitly relies upon the TDI EDGs for the lengthy period after low power testing is completed, but before the replacement Colt diesels are operational. LILCO has estimated that the Colt EDGs will not be installed and tested until August or September of 1985, and will not be connected until the first refueling outage. Until the first refueling outage, LILCO can only rely upon the TDI EDGs. Accordingly, LILCO's Motion seeks a quick and easy low power license on the dubious assumption that the TDI EDGs will necessarily be proven adequate, despite the voluminous evidence of their deficiencies, this Board's and the Staff's lack of confidence in them, and LILCO's own lack of confidence in them as evidenced by its decision to replace them with Colt diesels in any event. The County submits that the true presumption should be that the cracked and defective TDI EDGs will never be qualified, and that accordingly the LILCO Motion, which relies upon those TDI diesels contrary to this Board's caveat, should be summarily dismissed.

4. LILCO has requested that this Board refer the Motion directly to the Commission pursuant to 10 C.F.R. § 2.718. See

Motion at 4. The County preliminarily believes that such referral would be especially inappropriate in this case. This Board has extensive familiarity with the matters at issue and has set standards for an anticipated low power proposal by LILCO. LILCO's attempt to circumvent this Board ignores the plethora of factual and technical issues which the proposal raises, and which can only be adequately addressed after investigation and testimony in a separate "collateral" proceeding. Moreover, LILCO's arguments for referral or certification (see Motion at 24-26) contain numerous assertions of alleged facts which the County maintains are false and misleading. An inquiry into these assertions should be required before any determination is made to circumvent this Board and a factual hearing on the merits.

5. The LILCO Motion obviously is an entirely new and radical change from LILCO's initial application for a low power license. It is therefore a new application which, pursuant to 10 C.F.R. § 2.101, must be reviewed for completeness and acceptability by the Staff. Time for such a review of LILCO's proposal is essential, since technical analyses must be performed to assess the merits and deficiencies of the LILCO proposal. Mr. Bordenick, the Staff counsel, has informed the County that the Staff intends to prepare a technical SER review of LILCO's proposal. By assigning it "high priority," the Staff expects to have its SER complete by April 17. The County understands that this completion date is premised on the Staff promptly obtaining answers from LILCO to questions which are being formulated. As noted previously, however, the County must retain additional experts and receive

additional information from LILCO before reaching a conclusion on the technical merits. This cannot be accomplished by April 17.

In view of the foregoing, the County respectfully requests that the Board convene a conference of counsel in Bethesda to consider all of the procedural matters which affect both the ongoing EDG litigation and LILCO's Motion. In advance of such a conference, the Board could announce its tentative agenda of the matters it desires to address, so that counsel will be prepared to provide focused responses.

Respectfully submitted,

Martin Bradley Ashare
Suffolk County Department of Law
Veterans Memorial Highway
Hauppauge, New York 11788

Herbert H. Brown
Lawrence Coe Lanpher
Alan Roy Dynner
Douglas J. Scheidt
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

Attorneys for Suffolk County

March 26, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY'S PRELIMINARY VIEWS ON SCHEDULING REGARDING LILCO'S NEW MOTION, dated March 26, 1984, have been served to the following this 26th day of March 1984 by U.S. mail, first class, except as otherwise indicated.

Lawrence J. Brenner, Esq.*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. George A. Ferguson*
Administrative Judge
Atomic Safety and Licensing Board
School of Engineering
Howard University
2300 6th Street, N.W.
Washington, D.C. 20059

Dr. Peter A. Morris*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edward M. Barrett, Esq.
General Counsel
Long Island Lighting Company
250 Old Country Road
Mineola, New York 11501

Ralph Shapiro, Esq.
Cammer and Shapiro
9 East 40th Street
New York, New York 10016

Howard L. Blau, Esq.
217 Newbridge Road
Hicksville, New York 11801

## W. Taylor Reveley, III, Esq.
Hunton & Williams
P.O. Box 1535
707 East Main Street
Richmond, Virginia 23212

Mr. Jay Dunkleberger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

James B. Dougherty, Esq.
3045 Porter Street, N.W.
Washington, D.C. 20008

Robert E. Smith, Esq.
Guggenheimer & Untermyer
80 Pine Street
New York, New York 10005

Mr. Brian R. McCaffrey
Long Island Lighting Company
Shoreham Nuclear Power Station
P.O. Box 618
North Country Road
Wading River, New York 11792

Joel Blau, Esq.
New York Public Service Commission
The Governor Nelson A. Rockefeller Building
Empire State Plaza
Albany, New York 12223

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

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

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Richard J. Goddard, Esq.*
Ralph Caruso
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Stuart Diamond
Environment/Energy Writer
NEWSDAY
Long Island, New York 11747

Stephen B. Latham, Esq.
Twomey, Latham & Shea
P.O. Box 398
33 West Second Street
Riverhead, New York 11901

Mr. Marc W. Goldsmith
Energy Research Group, Inc.
400-1 Totten Pond Road
Waltham, Massachusetts 02154

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, California 95125

Hon. Peter F. Cohalan
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Fabian Palomino, Esq.##
Special Counsel to the Governor
Executive Chamber
Room 229
State Capitol
Albany, New York 12224

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

Jonathan D. Feinberg, Esq.
Staff Counsel
New York State Public Service Commission
3 Rockefeller Plaza
Albany, New York 12223

Stewart M. Glass, Esq.
Regional Counsel
Federal Emergency Management
Agency
26 Federal Plaza
New York, New York 10278

---

Douglas J. Scheidt
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

DATE: March 26, 1984

---

* By Hand Delivery
\#\# By Telecopier

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

PRELIMINARY VIEWS OF GOVERNOR CUOMO, REPRESENTING THE STATE OF NEW YORK, REGARDING LILCO'S SO CALLED "SUPPLEMENTAL MOTION FOR A LOW POWER OPERATING LICENSE

1. RESPONSE TO LILCO'S INTRODUCTION

The State of New York takes seriously its participation in this proceeding. For this reason it is constrained, in the interests of accuracy, to express it's views thereon to the extent of taking issue with the reasons set forth in LILCO's introduction as supporting this motion and for urging that only the Nuclear Regulatory Commission itself can decide it.

In support of this new motion for a low power license and to refer it promptly to the Commission for decision LILCO assigns the following reasons:

"The Shoreham Nuclear Power Station represents both a huge commitment of economic resources and Long Island's only power plant not dependent on foreign oil. Thus, there are compelling reasons for the station's early operation. Instead of being free to begin necessary and beneficial low power testing and training, however, Shoreham faces six to nine months of delay rooted in litigation concerning diesel generators. This delay is unnecessary to assure the public health and safety for the activities authorized by a low power license."

*******

"As a practical matter, LILCO believes that whether Shoreham is entitled to such a license is a question that only the Nuclear Regulatory Commission itself can decide. The intensely political environment that now envelops Shoreham makes virtually certain that the NRC's highest tribunal must act before the plant will be allowed to conduct any operations, even loading fuel."

These reasons are not accurate or valid predicates for either request. The fact that the plant is not dependent

upon foreign oil is irrelevant to the grant of a low power license. No savings on foreign oil will take place unless and until the plant goes into full power commercial operation. That could not occur for several years, if ever. Both Suffolk County and New York State, neither of which is participating in the LILCO offsite emergency evacuation plan and both of whom are opposing the licensing of Shoreham plant, have filed suits in New York State Courts to declare that the implementation of the offsite emergency evacuation plan by LILCO employees would be illegal because it requires an unlawful usurpation of powers vested solely in State and local officials. Those suits will not be definitely determined for several years. Indeed, though LILCO insistently urges expeditious determinations of all contested issues in NRC proceedings it promptly obtained an adjournment of an additional one and one-half the time allowed to interpose its answers to the complaints in those State suits.

The commitment of economic resources to the Shoreham Nuclear Power Station is not a compelling reason for that station's early operation. The electricity it will generate will not be needed for at least a decade or more (Marberger Commission Report, p. 37 ). Rather than being beneficial that electricity would wreak economic havoc at this time.*

---

*It would be the most costly electricity produced. If that cost was added to the current LILCO ratepayers rate, which is reputed to be the highest in the nation, it would drive businesses out of state, lead to great unemployment and place un undue burden upon the households it did not impoverish.

Insofar as the motion seeks a low power license for the purported purposes of training, it is unfounded. The law and the regulations do not contemplate such a license. They authorize licenses only for low power or full power operation, not for training. The open ended nature of the subject motion -- that is, without limit as to time -- makes it clear that LILCO would obtain a usual low power license and not one limited for purposes of training. As it has previously informed this Board, it would use the same backup generating system until the first fuel outage after full power operation. The issuance of the low power license sought would permit that to happen. Under those circumstances, the use of the Rube Goldberg lashup of unqualified generators and other means proposed by LILCO for emergency backup power would not provide reasonable assurance that health and safety of the public would be protected.

To issue a low power license for the training purposes proposed would be improper. The purpose of training is to educate personnel in the use of equipment they will be using in full power operation. Since LILCO personnel will be using Colt diesels for backup in full power. operation training on the hodge-podge of generators and other equipment proposed would not accomplish that objective.

Furthermore, in view of the lack of qualified LILCO personnel to operate the Shoreham plant, it is egregious to grant a low power license for testing purposes.

The bald, conclusory assertion that the "intensely political environment that now envelops Shoreham" does not provide a basis referring the subject motion to the Commission for decision, as requested by LILCO. There is no "political environment" enveloping Shoreham, intense or otherwise. The only change that has occurred in this proceeding is that the State of New York has entered these proceedings as an interested State and has refused to participate in the offsite emergency evacuation plan, has opposed the licensing of the Shoreham Nuclear Power Station on all levels and has filed a suit in State court, as aforesaid. In taking these actions, the State of New York is pursuing its full legal rights and fulfilling its responsibility protecting the health, welfare and safety of its inhabitants and in seeing that its laws are not unlawfully ursurped by LILCO. The pursuit remedies is a solemn sovereign right and responsibility under the circumstances. To imply that it is political is, to say the least, unseeming.

The reason urged for referring the motion to the Commission is factually inaccurate and legally inadequate. Accordingly, this Board should reject that request.

## II. THE MOTION SHOULD BE SUMMARILY REJECTED

Applicants and licensees must comply with the Commission's regulations (NUREG-0386, NRC Practice and Procedure Digest 15.1) or seek a waiver therefrom (10 C.F.R. s 2.758). LILCO states that its motion complies with GDC 17. However, LILCO's motion papers fail to assert that it complies with many other pertinent regulations including GDC 2, 4, 5, 18, and 10 C.F.R. Part 50, Appendix B (See e. g. Standard Review Plan s 8.3.1, which identifies all the foregoing as pertinent to the review of onsite AC power systems). As neither the four mobile diesels nor the gas turbines proposed by LILCO are seismically or otherwise qualified for nuclear service, LILCO has failed to comply with GDC's 4, 5, 17, 18 and 10 C.F.R. 50, Appendix B.

The LILCO motion fails to comply with the aforesaid pertinent regulations and does not seek a waiver therefrom. Accordingly, it is facialy insuficient to be entertained by this BOard. Therefore, neither this Board nor the parties should be compelled to devote time or resources to responding to it on the merits and it should be summarily rejected.

III. IF THE MOTION IS NOT REJECTED SUMMARILY, THE BOARD SHOULD HOLD A CONFERENCE TO CONSIDER ALL PROCEDURAL MATTERS

The State of New York fully agrees with and adopts Suffolk County's position that if the motion is not summarily rejected by this Board, the normal ten-day period for a response is inadequate and that because of the lack of detailed information in the motion, the legal issues raised, the time presently involved in the issues raised by the EDG contentions, the number of threshhold issues to be addressed and time required for Staff review, this Board shouldl convene a conference to consider all of the procedural matters involved and in advance thereof should announce a tentative agenda of matters to be addressed. The State wiwll not belabor the Board by setting forth detailed reasons therefor, but refers the Board to Suffolk County's response dated March 26, 1984.

Respectfully submitted,

Fabian G. Palomino

FABIAN G. PALOMINO
Special Counsel to the
Governor of New York State
Executive Chamber - Room 220
Capitol Building
Albany, New York 12224

Attorney for MARIO M. CUOMO
Governor of the State of New York

March 28, 1984

Robert E. Smith, Esq.
Guggenheimer & Untermyer
80 Pine Street
New York, New York 10005

Mr. Brian R. McCaffrey
Long Island Lighting Company
Shoreham Nuclear Power Station
P. O. Box 618
North Country Road
Wading River, New York 11792

Joel Blau, Esq.
New York Public Service Commission
The Governor Nelson A. Rockefeller Building
Empire State Plaza
Albany, New York 12223

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Happauge, New York 11788

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

Docketing and Service Section
Office of the Secretary
U. S. Nuclear Regulatory Commission
1717 H. Street, N. W.
Washington, D. C. 20555

Richard J. Goddard, Esq.##
Ralph Caruso
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Mr. Stuart Diamond
Environment/Energy Writer
NEWSDAY
Long Island, New York 11747

James B. Dougherty, Esq.
3045 Porter Street, N. W.
Washington, D. C. 20008

Stephen B. Latham, Esq.
Twomey, Latham & Shea
P. O. Box 398
33 West Second Street
Riverhead, New York 11901

Mr. Marc W. Goldsmith
Energy Research Group, Inc.
400-1 Totten Pond Road
Waltham, Massachusetts 02154

WHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, California 95125

Hon. Peter F. Cohalan
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Happauge, New York 11788

Douglas J. Scheidt, Esq.
Kirkpatrick, Lockhart, Hill Christopher & Phillips
1900 M Street, N.W.
Washington, D. C. 20036

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

Jonathan D. Feinberg, Esq.
Staff Counsel
New York State Public Service Commission
3 Rockefeller Plaza
Albany, New York 12223

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

## CERTIFICATE OF SERVICE

I hereby certify that copies of PRELIMINARY VIEWS OF GOVERNOR CUOMO REPRESENTING THE STATE OF NEW YORK, REGARDING LILCO'S SO CALLED "SUPPLEMENTAL MOTION FOR A LOW POWER OPERATING LICENSE, dated March 28, 1984, have been served to the following this 28th day of March 1984 by U. S. Mail, first class, except as otherwise indicated.

Lawrence J. Brenner, Esq.##
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. George A. Ferguson ##
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. Peter A. Morris ##
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Edward M. Barrett, Esq.
General Counsel
Long Island Lighting Company
250 Old Country Road
Mineola, New York 11501

Ralph Shapiro, Esq.
Cammer and Shapiro
9 East 40th Street
New York, New York 10016

Howard L. Blau, Esq.
217 Newbridge Road
Hicksville, New York 11801

##W. Taylor Reveley, III, Esq.
Hunton & Williams
P. O. Box 1535
707 East Main Street
Richmond, Virginia 23212

Mr. Jay Dunkelberger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Stewart M. Glass, Esq.
Regional Counsel
Federal Emergency Management
Agency
26 Federal Plaza
New York, New York 10278

Fabian G. Palomino bas

FABIAN G. PALOMINO
Special Counsel to the
Governor of New York State
Executive Chamber - Room 229
Capitol Building
Albany, New York 12224

Attorney for MARIO M. CUOMO
Governor of the State of New York

## By Telecopier

DATE: March 28, 1984

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

A MEETING ON TDI DIESEL GENERATORS

Phillips Building
7920 Norfolk Avenue
Room P-119
Bethesda, Maryland

Thursday, March 29, 1984

The meeting on TDI Diesel Generators was convened, pursuant to notice, at 8:30 a.m., Ralph Caruso presiding.

ATTENDEES:

Industry:

W. MUSELER
W. SCHIFFMACHER
W. GUNTHER
B. MC CAFFREY
G. DAWE
G. SHERWOOD
G. ECKERT
A. RAO

NRC Staff:

R. CARUSO
J. KNOX
W. HODGES
G. THOMAS
B. SHERON
J. KUDRICK
D. TOMLINSON
G. MAZETIS

engines are not operable. Your single failure, as you're posing it, is a 20 megawatt gas turbine, and you're posing another one on top of that one.

MR. DAWE: You're putting in several, Brian, because you're putting in a fault someplace and then giving no credit for any of the bus protection that exists all the way back to the mobile diesel.

MR. MUSELER: I think the answer is we believe it's okay the way it is, and if you transfer back that would be what you would want to have.

MR. CARUSO: Let's leave that right now.

MR. MUSELER: If that's a significant concern, we'd appreciate your letting us know that subsequent to the meeting so that we can take it into account when we write all these procedures.

MR. CARUSO: How about if I turn it over now to Brian Sheron.

MR. SHERON: Before we leave power systems, one question that came up which I guess I need to hear you address is, tell us the way you believe you either still comply with GDC-1, 2, 4 and 17 -- at least those are the ones I looked at and thought there was some question.

MR. MUSELER: Generally, the first thing to remember is that the supplemental sources of AC power to the plant are part of the off-site power system. And I think we

say that and we may have somewhat caused a little bit of ambiguity in one statement we made in one of the affidavits.

Those sources are off-site power, we look at them as enhancements to the off-site power system. In one place in the affidavit we say that they are off-site power sources, but that it's significant to remember that they are located on site.

MR. SHERON: So you're saying that your portable diesels and your gas turbines and the like that are on site are still considered to be part of the off-site sources?

MR. MUSELER: That's correct. And therefore, from the standpoint of those sources as equipment, they have the same rule and requirements as the off-site system itself, which means that those GDC's don't apply, although GDC-17 does.

And our position on GDC-17 is that the TDI diesels for Phases 3 and 4 will be available, that there is a litigation that has to conclude that has some undefined reduced reliability associated with it, and that GDC-17 is satisfied by considering the balance of the on-site sources as they exist with the litigation still be open, along with the enhanced off-site sources.

So that the balance of the normal reliable off-site system plus the supplemental off-site sources which happen to be located on site, balanced with the TDI diesels

in place operated under tech specs, meets GDC-17.

MR. HODGES: I don't understand what you just said. If I'm wrong, just tell me but it's my understanding that the ruling of the Board says assume TDIs don't exist, so no credit basically for the TDIs as to what your on-site power source for the loss of off-site power.

MR. MUSELER: No. Our view of what the Board said, and also of what has been done on previous dockets -- and one or two of them I believe have been pointed out in the brief that was filed -- our view of what the Board said is that we had to provide reasonable assurance that reliability of the on-site power sources, the TDIs, was sufficient to allow operation up to 5 percent. And we believe that the showing we've made, given the fact that the TDIs will have finished the test program and will have gone through the DRQR coupled with the enhancements of the off-site power source, provides that reasonable assurance. We believe that is consistent with the Board.

The Board requires us to demonstrate that to the extent that on-site power needs to provide that reasonable assurance for 5 percent, we think that the balancing argument that we have made does that.

MR. MC CAFFREY: In addition to that, the company recognized what Brian was saying here, on pages 6 and 7 of Mr. Museler's affidavit. We have effected the design, tech

spec type testing, surveillance testing, to give you the assurance of availability and reliability of the off-site enhancements. So we have applied rigorous reliability assurance testing to achieve that goal, to give us the balance that we think we need.

MR. KNOX: If I give you no credit for the TDI diesel generators, do you meet GDC-17?

MR. MUSELER: The answer is we believe we do. Especially we meet it for Phases 1 and 2, and we believe we also meet it for Phases 3 and 4. But I think we're getting into a legal question here, and --

MR. CARUSO: I think the question was really whether you thought you met the GDC or not, and if you think you do, then that's the answer.

MR. MUSELER: Yes, we do.

MR. SHERON: As I understand it, in order for you to say that you meed the GDC, at least through Phases 3 and 4 you must take some credit for the TDI diesels that are on site there.

MR. KNOX: Is that right?

MR. SHERON: For Phases 1 and 2 I think you said you don't need diesels because there is no decay heat, there's no fission product; therefore, you can live without diesels.

MR. MUSELER: We can live without any AC power

from anywhere for Phases 1 and 2.

MR. SHERON: Right. So for Phases 1 and 2 you could claim that you implicitly meet the criteria because you don't need the diesels. For for 3 and 4 --

MR. MUSELER: I think we've shown that if the diesels are unavailable, we think we've shown that we can still supply AC power to the plant.

MR. SHERON: I understand. But if you read the GDC, it talks about seismic design and protect against environmental missiles and the like, quality records and the whole bit.

Now obviously, the portable diesels and the gas turbine that you have on site don't meet all that good stuff, but the TDIs theoretically do.

MR. MUSELER: That's correct.

MR. SHERON: Therefore, in order to meet the letter of the GDC, you must say that the TDI diesels that provide compliance with the regulations --

MR. MUSELER: We're saying that GDC-17 covers the on-site and off-site power sources, and our position is that the balancing of the TDI engines, recognizing that there's litigation still to go but that they are there and we know what their reliability is since rebuilding -- that that has to be taken into consideration along with the enhancements to the off-site power system.

MR. SHERON: So in order to comply with the regulations, some credit for the TDI diesels must be assumed.

MR. MUSELER: Say it again?

MR. SHERON: In order to comply with the regulations, I said, just the appropriate GDC, which appeared at first blush like 1, 2, 4 and 17 -- some credit for the existence of TDI diesels on site and some proposed reliability must be assumed for those diesels. You can't assume a zero reliability for the diesels and still say, I meet the regulations.

MR. MUSELER: You can't assume that they are not there because the regulations say that you have to have an on-site power source meeting those requirements. However, if one were to describe an extremely low reliability for the TDI diesels, i.e., they do not work, we have demonstrated that we can still get AC power back.

MR. SHERON: Okay, I understand. I think there was a confusion at one time.

MR. MUSELER: We do not assume that they are not there. We assume that they are there and they have to be operational in order to meet the tech specs.

MR. SHERON: I think that is a significant understanding and I want to make sure that everyone here knows it.

MR. MC CAFFREY: But the way the Staff gets that assurance is through the company's commitment to have TDI

diesels conform to the technical specification.

MR. SHERON: I understand.

MR. MC CAFFREY: Therefore, that is the basis upon which you ascribe some level of availability and reliability to it.

MR. KNOX: But if I give you a zero reliability on those TDI diesel generators, are you still saying that you meet GDC-17?

MR. MUSELER: Yes.

MR. KNOX: How?

MR. MUSELER: Because we can still get AC power back to the plant.

MR. HODGES: GDC-17 says either with on-site sources or with off-site sources. You have got to demonstrate with both, not just that eventually one of them will come in.

MR. MUSELER: Again, I think we are getting into the legal question, but the idea of balancing the reliability of both to provide a meeting of the regulations --

MR. HODGES: You are putting us between a rock and a hard spot. You want us to make the determination but you don't want to discuss something that is in litigation until it is through litigation, and it is pertinent to what we have got to use for our evaluation.

MR. MUSELER: But there are phsyical facts that are beyond the question of litigation, i.e., that those

by3

engines are there, that they run, that they have a very good starting record since they have been rebuilt, that all three of them have gone through endurance runs without any shutdowns, and that there are only two qualification tests left on two of the engines and they will have gone through their preoperational tests.

MR. HODGES: How reliable are they?

MR. MUSELER: We think those engines as they are currently configured are very reliable.

MR. HODGES: How reliable is "very"?

(Pause)

MR. MUSELER: Phases 1 and 2, you can assume any reliability you want, it doesn't make any difference. Now, for Phase 3 and 4 your question was what is the reliability of these engines. Since rebuilding -- and this includes taking those engines apart for inspections and putting them back together again and then starting them up after they had been totally disassembled -- they have started cumulative -- they have been called on to start cumulatively 439 times. They have started 434 times. That is reliability of 98.8 or 9 percent. We think they are good, and they have all gone through a seven-day endurance run.

MR. KNOX: I want to ask one more question. I want to give you a zero reliability on these TDI diesel generators, and then I have a reliability of -- well, if I

took a normal reliability -- let's say I could give you what we would normally expect the reliability of a TDI generator to be, let's say if it was fully gauged as qualified, and we took that in connection with the off-site power system that you have, and now I take that reliability, when you compare the on-site and off-site sources, and now if I take the reliability of the zero for TDI diesels and then I take the reliability that you have for the existing grid system thatat Shoreham plus the gas turbine that you have added, four mobile diesel generators, if you take that reliability, would that reliability exceed the reliability given a zero reliability for the TDI diesel generators with the off-site system?

MR. MUSELER: If you take as the base case a plant that has TDI or Colt or whatever diesel generators that are fully litigated and qualified, and the reliability of its off-site power sources meeting the regulations, and then you compare that to Shoreham with its normally -- with its regulatorily required off-site power sources, and assume a zero for the TDI engines, and then add in the reliability of the mobile diesels, which have an excellent reliability record based on the numbers we have, and the reliability of the on-site 20 megawatt gas turbine, we believe you would get -- we think that the aggregate of that situation, Shoreham with TDI but assuming zero reliability plus the mobile

diesels plus the 20 megawatt gas turbine is a higher reliability number than a plant with three nuclear diesels and an off-site grid, and that doesn't even count the reliability that you get out of having the more black start units at Holtsville dedicated to supplying the site and other black start units around the rest of the system that we have procedurally ready to come in. We think it is better. It is significantly better than the standard situation.

And again, we are talking about 5 percent power. We are not talking about -- you know, you could apply the same argument to full power, but we don't want to do that.

MR. KNOX: Okay. Now, suppose a tornado or hurricane or design basis event out there on your grid, a seismic event. How about your reliability now? For those events -- I'm talking -- that's a design basis event. I'm not postulating a simultaneously --

MR. MUSELER: We don't assume a LOCA. The situation for that plant is that it doesn't have a problem. It's got many days to restore AC power from wherever, on-site sources, off-site sources or wherever. There is just no problem because there is so much time available, in any event, other than a loss of coolant accident.

MR. KNOX: Okay. So the reliability is just as good, right?

byé

MR. MUSELER: The reliability of getting power, of having adequate power available to maintain the plant in safe conditions is -- I guess nothing is 100 percent these days, but it is very close to that.

MR. MC CAFFREY: Don't forget, John, when you talk aggregate reliability, that you are comparing a plant with, let's say, good TDI machinesand all that, the plant that would not be taking all precautionary measures that we have opted for in Museler's affidavit. So if you add into that the concessions to put the plant in a stable protective condition advance of any challenges to the reliability of the system, then you effectively improve your reliability even further.

MR. KNOX: Okay. I have no more questions.

MR. HODGES: We had a question on ECCS analysis. In your affidavit you said that 55 minutes for the DBA LOCA at 5 percent power, that you did not violate the 50.46 criteria. In that, you did not discuss, though, fuel failure. Could you provide some information discussing fuel failures at 55 minutes and then going back and considering the loss of off-site power and failure of the gas turbine so that you have to rely upon the portable diesels as a backup power source?

What would be the peak cladding temperature in fuel failures of that type?

4/3/84

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

SUFFOLK COUNTY'S COMMENTS
ON NOTICE OF ORAL ARGUMENTS

On March 30, 1984, this Board issued a Notice of Oral Arguments, which stated that at the conference to be held on April 4, 1984, the Board will hear the views of the parties as to a schedule for "expedited consideration and determination" of issues raised by LILCO's Supplemental Motion for Low Power Operating License and the responses of the other parties.

Suffolk County questions the basis for the Board's apparent position that the LILCO Motion is entitled to such expedited treatment. LILCO has set forth no valid or legitimate reasons for expedited treatment. To the extent that LILCO's arguments for referral or certification are regarded as arguments for expedited treatment by this Board, the County must have an opportunity to respond to those arguments. See LILCO Motion at 24-26. In this regard, the County submits that there is no basis for any expedited process. The electricity which would be produced by

Shoreham will not be needed for at least 10 years, as LILCO itself has admitted in filings with Governor Cuomo's Shoreham Commission. See Attachment 1.

Further, there are numerous factual questions which must be investigated before LILCO's new motion is addressed on the merits. The investigation of such questions, consistent with satisfying the paramount need to protect public safety, will necessarily involve several steps and take commensurate time, as described in the County's Preliminary Views on Scheduling LILCO's New Motion, dated March 26, 1984. For example, the County's opportunity to conduct appropriate and necessary discovery in order to gain the facts that will enable a meaningful response to LILCO's Motion cannot be sacrificed.

The County -- and presumably the other parties as well -- desires a full and fair hearing on LILCO's Motion. Whether there is justification for expediting the Board's treatment of LILCO's Motion depends on whether there are any special circumstances here. The County knows none, but respectfully submits that the Board direct the parties to address this issue at the April 4 oral argument.

Finally, the County has no objection to setting a schedule for the prompt resolution of the threshold issues discussed in the County's Preliminary Views, at 8-12.

Respectfully submitted,

Martin Bradley Ashare
Suffolk County Department of Law
Veterans Memorial Highway
Hauppauge, New York 11788

Lawrence Coe Lanpher

Herbert H. Brown
Lawrence Coe Lanpher
Alan Roy Dynner
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

**Attorneys for Suffolk County**

April 3, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY'S COMMENT ON NOTICE OF ORAL ARGUMENTS, dated April 3, 1984, have been served to the following this 3rd day of April 1984 by U.S. mail, first class, by hand when indicated by an asterisk, and by telecopier when indicated by two asterisks.

Marshall E. Miller, Chairman *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Glenn O. Bright *
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ms. Elizabeth B. Johnson *
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edward M. Barrett, Esq.
General Counsel
Long Island Lighting Company
250 Old Country Road
Mineola, New York 11501

Ralph Shapiro, Esq.
Cammer and Shapiro
9 East 40th Street
New York, New York 10016

Bernard M. Bordenick, Esq.*
David A. Repka, Esq.
U.S. Nuclear Regulatory Com.
Washington, D.C. 20555

W. Taylor Reveley, III, Esq.**
Hunton & Williams
P.O. Box 1535
707 East Main Street
Richmond, Virginia 23212

Mr. Jay Dunkleberger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

James B. Dougherty, Esq.
3045 Porter Street, N.W.
Washington, D.C. 20008

Stewart M. Glass, Esq.
Regional Counsel
Federal Emergency Management Agency
New York, New York 10278

Mr. Brian R. McCaffrey
Long Island Lighting Company
Shoreham Nuclear Power Station
P.O. Box 618
North Country Road
Wading River, New York 11792

Joel Blau, Esq.
New York Public Service Commission
The Governor Nelson A. Rockefeller Building
Empire State Plaza
Albany, New York 12223

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

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

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Jonathan D. Feinberg, Esq.
Staff Counsel
New York State Public Service Commission
3 Rockefeller Plaza
Albany, New York 12223

Mr. Stuart Diamond
Environment/Energy Writer
NEWSDAY
Long Island, New York 11747

Stephen B. Latham, Esq.
Twomey, Latham & Shea
P.O. Box 398
33 West Second Street
Riverhead, New York 11901

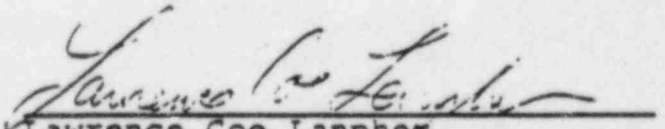
Mr. Marc W. Goldsmith
Energy Research Group, Inc.
400-1 Totten Pond Road
Waltham, Massachusetts 02154

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, California 95125

Hon. Peter F. Cohalan
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Fabian Palomino, Esq.**
Special Counsel to the Governor
Executive Chamber
Room 229
State Capitol
Albany, New York 12224

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



Lawrence Coe Lanpher
KIRKPATRICK, LOCKHART, HILL, CHRISTOPHER & PHILLIPS
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

DATE: April 3, 1984

4/3/84

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

MOTION BY GOVERNOR CUOMO TO DELETE PROVISION IN THIS BOARD'S ORDER OF MARCH 30, 1984 MANDATING EXPEDITIOUS CONSIDERATION AND DETERMINATION OF ISSUES RAISED IN LILCO'S SUPPLEMENTAL MOTION

While there may arguably be a basis in the Order of Judge Cotter for the appointment of a new Licensing Board to decide the issues raised in LILCO's Supplemental Motion for a Low Power License (filed March 20, 1984), there is no valid basis for the provision in the Order of that new Board mandating an "expedited consideration and determination" of those issues.

The people of the Sovereign State of New York are entitled to constitutional due and orderly process in these proceedings as well as to the benefit of the Administrative Procedure Act which spells them out. No exception is provided in either the Federal Constitutional Requirements of due process or the Administrative Procedure Act for NRC

proceedings. The Order of Judge Cotter does not direct that there be an expedited consideration and determination of the issues raised by LILCO's Supplemental Motion. Nor does it provide any reason warranting such expeditious consideration and determination. The State of New York may not be deprived of these substantial rights by administrative fiat or whim.

No reason has been assigned for such a radical action in the March 30, 1984 Order of this Board. Indeed, as fully set forth in papers previously filed by the State of New York in this Supplemental Proceeding, there is no valid reason assigned by LILCO which warrants expeditious consideration and determination of the issues raised by that Motion. Furthermore, the Order of this Board effectively prevents an expeditious consideration and determination of the issues raised by LILCO's Supplemental Motion. Inasmuch as LILCO is relying upon the TDI emergency diesel generators currently on site and inasmuch as the said Order of this Board precludes it from deciding issues of the operability and reliability of the TDI emergency diesels, no decision can be made by this Board until the Brenner Board determines the issues of operability and reliability of those diesel generators.

For all of the above reasons, especially the denial of due process entailed thereby, the State of New York strenuously objects to the provision in the aforesaid Order

mandating an expedited consideration and determination of the issues raised in the Supplemental Motion for a low power operating license filed by LILCO and requests that the same be deleted therefrom.

The State of New York reasserts its request for the setting of a schedule for the prompt resolution of the threshhold issues raised in the papers previously filed by Suffolk County in its Preliminary Views which was joined in and supported by the State of New York.

Respectfully submitted,

---

FABIAN G. PALOMINO
Special Counsel to the
Governor of New York State
Executive Chamber
Room 229
Capitol Building
Albany, New York 12224

Attorney for MARIO M. CUOMO
Governor of the State of New York

April 3, 1984

ATTACHMENT 7



# COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515



April 12, 1984

The Honorable Nunzio J. Palladino
Chairman
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Dear Mr. Chairman:

Thank you for your prompt response to my March 28, 1984 letter to you about perceived "licensing delays." I continue to think that your March 20, 1984 memorandum to the other Commissioners on this subject and other subsequent actions that you have taken strongly imply that you have pre-judged aspects of the Shoreham licensing proceeding.

Regardless of your initial intent, certain events have transpired which create the appearance that your statements and views have been treated as a mandate by members of the NRC's Atomic Safety and Licensing Board (ASLB). Your March 20, 1984 memorandum states that you convened a meeting with B. Paul Cotter, Jr., Chief Administrative Judge of the ASLB and members of the NRC staff (a party to the proceeding) on March 16, 1984 to discuss potential licensing delays at Shoreham and other plants. Apparently, as an outgrowth of that meeting, and your subsequent memoranda, Judge Cotter appointed a new board to consider on an expedited basis the Long Island Lighting Company's (LILCO) March 20, 1984 "Supplemental Motion for [a] Low Power Operating License."

Over the unanswered objections of Suffolk County and New York State, the newly appointed licensing panel issued an order on April 6, 1984 that states: "...the expedited schedule set forth below will not prejudice any party to this proceeding." In reaching such a decision, I am concerned that the board did not: (a) specifically resolve or even respond to the arguments of intervenors that an expedited schedule would prejudice their right to a full and fair hearing; and, (b) state why it apparently

believes an expedited hearing is necessary. I respectfully request that the Commission formally ask the board to respond to these two issues.

It would appear that in the absence of any specifically stated rationale by the licensing board, that it has declined to respond to the arguments of intervenors and decided to oblige LILCO because of the utility's perceived financial problems. Apparently, the board is in agreement with the rationale stated by LILCO in the first two sentences of its Supplemental Motion:

> The Shoreham Nuclear Power Station represents both a huge commitment of economic resources and Long Island's only power plant not dependent on foreign oil. Thus, there are compelling reasons for the station's early operation.

I am unaware of any statutes which provide the ASLB with the authority to expedite a proceeding on this basis without hearing from and resolving the views of all parties. Because of the appearance of impropriety in the board's actions, I believe the Commission should request the board to explain why it believes an expedited hearing is necessary.

With respect to your involvement in this case, I understand that on April 4, 1984 you circulated a follow-up memorandum to the other Commissioners that included a proposed order drafted by Judge Cotter and a paper written by your own staff that would have set forth an expedited schedule in which the Shoreham low power licensing proceeding would be completed in thirty to sixty days.

Your memorandum and the draft order, apparently written prior to the April 4, 1984 licensing board hearing to decide the merits of LILCO's request for an expedited proceeding, was circulated without obtaining or representing the views of all parties. As the ultimate decision-maker in this proceeding, your actions create the appearance that you have pre-judged the merits of LILCO's request and did so in an unorthodox and inappropriate fashion.

The present "licensing delay" at Shoreham is not attributable to the NRC licensing process. The delay is not a licensing delay per se, but rather, is directly attributable to the use of defective and unqualified equipment used to supply on-site power. Hence, actions taken to expedite review of this issue could impact upon the consideration of the merits and substance of the proceeding itself.

In order that public confidence can be restored, if possible, to what has become an unseemly and confused process, I think that it is essential that you explain why you believe the Shoreham proceeding should be expedited as well as your reason for circulating the draft order prepared prior to hearing from and resolving the views of all parties. In this context, I also think you should reconsider recusing yourself from voting on either the low power or full power license for Shoreham.

Additionally, I would like to be provided with all documents and memoranda on this issue that have been written or circulated subsequent to your March 20, 1984 memorandum. I would appreciate receiving these documents within five working days.

Further, please identify and provide a description of all communications that you, the other Commissioners, OGC, EDO, or members of the NRC staff have had in 1984 that related to or concerned the matter of licensing Shoreham with employees or officials of LILCO, representatives of LILCO (including but not limited to members of the firm Hunton and Williams), organizations composed of or representing the nuclear industry, the Secretary of Energy or members of the Department of Energy staff, the Director or Associate Director of the Federal Emergency Management Agency (FEMA) or members of the FEMA staff, or other Executive Branch offices or members of the White House staff. To the extent that any such communication was written, please provide all relevant documents.

Thank you for your prompt attention to this matter.

Sincerely,

Ed Markey

Edward J. Markey
Chairman
Subcommittee on Oversight
and Investigations

Enclosure 3

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission



| | |
|---|---|
| In the Matter of<br><br>LONG ISLAND LIGHTING COMPANY<br><br>(Shoreham Nuclear Power Station Unit 1) | Docket No. 50-322-OL-4<br>(Low Power) |

JOINT REQUEST OF SUFFOLK COUNTY AND NEW YORK STATE FOR COMMISSION TO DIRECT CERTIFICATION OF MATTERS ADDRESSED IN THE "JOINT OBJECTIONS OF SUFFOLK COUNTY AND THE STATE OF NEW YORK TO MEMORANDUM AND ORDER SCHEDULING HEARING ON LILCO'S SUPPLEMENTAL MOTION FOR LOW POWER OPERATING LICENSE," IF LICENSING BOARD FAILS TO VACATE SUCH MEMORANDUM AND ORDER PROMPTLY

Attached herewith are copies of the "Joint Objections of Suffolk County and the State of New York to Memorandum and Order Scheduling Hearing on LILCO's Supplemental Motion for Low Power Operating License." The Licensing Board's Order was issued on April 6, 1984, and the Joint Objections are being filed with the Board today.

The County and the State hereby jointly request that if the Licensing Board does not forthwith vacate its Order, as they have requested, the Commission should immediately direct certification of the matter and render a prompt decision in accordance with the County's and State's objections. See Part IV of the Joint Objections. We emphasize that time is of the essence. Under the arbitrary and prejudicial schedule

84/a

Enclosure 4

LILCO, April 19, 1984



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



Before the Atomic Safety and Licensing Board

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| LONG ISLAND LIGHTING COMPANY | ) | Docket No. 50-322-OL-4 |
| | ) | (Low Power) |
| (Shoreham Nuclear Power Station, Unit 1) | ) | |

LILCO'S RESPONSE TO VARIOUS SUFFOLK COUNTY/NEW YORK STATE REQUESTS DATED APRIL 16 AND RECEIVED APRIL 17, 1984

I.

One month ago, on March 20, 1984, LILCO served by hand its "Supplemental Motion for Low Power License." That motion stated in pertinent part:

> As a practical matter, LILCO believes that whether Shoreham is entitled to such a license is a question that only the Nuclear Regulatory Commission itself can decide. The intensely political environment that now envelops Shoreham makes virtually certain that the NRC's highest tribunal must act before the plant will be allowed to conduct any operations, even loading fuel. Recognition of this reality prompts LILCO to request:
>
> 1. That this Board promptly refer the present supplemental motion to the Commission for decision, pursuant to 10 CFR § 2.718;
>
> 2. That if the Board decides against immediate referral, it then consider and decide this supplemental motion in an expedited fashion and thereafter certify its decision to the

> Commission, pursuant to 10 CFR § 2.730.

Id. at 3-4.

Suffolk County (SC or County) responded six days later, vigorously rejecting any thought of referring LILCO's motion to the Commission. SC said:

> LILCO has requested that this Board [Judges Brenner, Ferguson and Morris] refer the Motion directly to the Commission pursuant to 10 C.F.R. § 2.718. . . . The County preliminarily believes that such referral would be especially inappropriate in this case. This Board has extensive familiarity with the matters at issue and has set standards for an anticipated low power proposal by LILCO. LILCO's attempt to circumvent this Board ignores the plethora of factual and technical issues which the proposal raises, and which can only be adequately addressed after investigation and testimony in a separate "collateral" proceeding. Moreover, LILCO's arguments for referral or certification . . . contain numerous assertions of alleged facts which the County maintains are false and misleading. An inquiry into these assertions should be required before any determination is made to circumvent this Board and a factual hearing on the merits.

Suffolk County's Preliminary Views on Scheduling Regarding LILCO's New Motion at 10-11 (March 26, 1984) (emphasis supplied).

Now comes the sea change. The County, having failed to get its way "on scheduling regarding LILCO's new motion," has had a complete change of heart about the value of immediate Commission action.[1]

---

[1] Perhaps SC wanted to avoid the Commission only if the Licensing Board remained the precise ASLB to whom LILCO submitted

(continued)

Thus, "the County . . . emphasize(s) that there is a pending request of the Suffolk County Executive, Peter F. Cohalan, that the present Licensing Board with jurisdiction over LILCO's low power license request be promptly disestablished by the Commission and a further Commission order be issued to assure no further Licensing Board violations of due process of law." Joint Request of SC/NYS for the Commission to Direct Certification at 1 (April 16, 1984).[2] And the County

---

(continued)

its March 20 motion. That Board was replaced upon its "advice . . . that two of its members [were] heavily committed to work on another . . . proceeding . . . ." 49 Fed. Reg. 13612 (April 5, 1984). Those members, however, sat in the massive evidentiary proceeding that led to the equally massive Partial Initial Decision on Shoreham of September 21, 1983. That decision found strikingly little substance to the County's claims and was, at times, severely critical of SC's misuse of the record. See generally Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445 (1983). In short, LILCO did not reluctantly file its March 20 motion with the Brenner Board; the motion contemplated that that Board might well choose to act on the request and, had it done so, LILCO believed then and still believes that the result would have been fair and timely.

[2] This so-called "pending request" of Mr. Cohalan is appropriately disregarded. It is nothing other than a letter from him to Chairman Palladino. As such, it was not a request filed by Mr. Cohalan's NRC counsel, who exhaustively represent his interests in the OL proceeding. Presumably that is why the letter was improperly sent only to the Commission and not also to this Licensing Board, which has active, immediate jurisdiction over the matters in question. And presumably that is why the letter was impermissibly sent as an ex parte communication. The letter went to Chairman Palladino, with copies to Governor Cuomo and the four other Commissioners, on April 11; LILCO was not copied on the letter, and it did not receive a copy from the County until April 16. The inflamed tone of Mr. Cohalan's argument, his total disregard of the jurisdiction of this

(continued)

says that

> the Board should immediately vacate the Low Power Order. If the Board fails or refuses to vacate the Low Power Order, the Board should immediately stay the Low Power Order and certify these issues to the Commission for its prompt decision. If the Board rules against the Joint Objections, such ruling and the Low Power Order should be referred forthwith to the Commission and the Low Power Order should be stayed pending a determination by the Commission. By service of these Objections on the Commission, the County and the State are requesting the Commission to direct the certification of these issues to it.

SC/NYS Joint Objections at 4 (April 16, 1984).

There are two short answers to SC's desires. First, the County offers no significant new arguments why, in SC's words, "the Board should immediately vacate the Low Power Order;" the County simply repeats arguments it made in detail to the Board prior to its decision.

Second, the County makes no meaningful attempt to explain why it meets the criteria for a stay of the order pending the extraordinary appeal it seeks; indicatively, SC does not even mention these criteria, which are set forth in the Commission's regulations at 10 CFR § 2.788(e).[3] In this

---

(continued)

Board, and his ex parte overture, all make clear that the letter was meant for political not legal purposes.

[3] The criteria for a stay pending appeal, which are applicable to any decision or action of a Licensing Board and are de-

(continued)

regard, it is well to be clear what is at issue here -- at issue is not a decision authorizing fuel load, but simply an interlocutory scheduling order setting the beginning of another phase of hearings in a proceeding that has already had over 150 days of hearings since May 1982. Scheduling -- totally independent of any request for a stay -- is a matter committed to Licensing Board discretion, 10 CFR § 2.718, with which the Appeal Board has expressed a "natural and deep seated reluctance" to interfere. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-344, 4 NRC 207, 209 (1976). Licensing Board schedules should not be interlocutorily reviewed absent a "truly exceptional situation." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-293, 2 NRC 660 (1975). See also Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-393, 5 NRC 767 (1977).* Such orders are not even subject to

---

(continued)

rived from the seminal case of Virginia Petroleum Jobbers v. FPC, 921, 925 (D.C. Cir. 1958), are as follows:

> (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
> (2) Whether the party will be irreparably injured unless a stay is granted;
> (3) Whether the granting of a stay would harm other parties; and
> (4) Where the public interest lies.

10 CFR § 2.788(e).

* In Marble Hill, the Appeal Board denied an interlocutory appeal by the Commonwealth of Kentucky, complaining that it was

(continued)

interlocutory appeal as of right, 10 CFR § 2.730(f), much less to stays pending appeal.

---

(continued)

deprived of due process by a Licensing Board schedule giving it nine days to respond to testimony that had taken two months to prepare. The Appeal Board stated:

> As we have observed on previous occasions, during the course of lengthy proceedings licensing boards must make numerous interlocutory rulings, many of which deal with the reception of evidence and the procedural framework under which it will be admitted. It simply is not our role to monitor these matters on a day-to-day basis; were we to do so, "we would have little time for anything else." Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98, 99 (1976). What we said there applies equally to this case (3 NRC at 100):
>
> > In the last analysis, the potential for an appellate reversal is always present whenever a licensing board (or any other trial body) decides significant procedural questions adversely to the claims of one of the parties. The Commission must be presumed to have been aware of that fact when it chose to proscribe interlocutory appeals (10 CFR § 2.730(f)). That proscription thus may be taken as an at least implicit Commission judgment that, all factors considered, there is warrant to assume the risks which attend a deferral to the time of initial decision of the appellate review of procedural rulings made during the course of trial. Since a like practice obtains in the Federal judicial system, that judgment can scarcely be deemed irrational.

5 NRC at 768 (footnote omitted). See also Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188-89 (1978).

As an application for a stay, Suffolk County's papers are fatally defective both procedurally and substantively. Taking the procedural defects first:

1. The Commission's rules require that applications for stays be filed within ten days after service of the decision or action sought to be stayed. 10 CFR § 2.788(a). The County's papers are dated April 16, ten days after the Licensing Board's April 6 Memorandum and Order. LILCO is informed, although it has not yet received a certificate of service from the County, that the certificate states that the April 16 papers were timely served that day on the Commission and Licensing Board by hand. LILCO, however, did not receive the April 16 papers until April 17, by Federal Express. If the Commission and Board were in fact served on April 16, then the County violated § 2.788(c), which requires that service of an application for a stay on the other parties be by the same method as that used for filing the application with the Commission.

2. The regulations require that an application for a stay be no longer than ten pages, exclusive of affidavits, and that it contain concise summaries of the decision or action requested to be stayed and of the grounds for stay, with specific reference to the four-fold substantive test for a stay (see § 2.788(e) and note 3 above). SC's papers are, of course, 49 pages long exclusive of supporting materials, not ten; and they do not contain any reference to, much less focused discussion of, the four-fold test.

Substantively, the application for a stay is equally defective. First, aside from its already rejected legal argument on General Design Criterion 17, at no point does the County attempt to make any, much less a strong, showing that it is likely to prevail on the merits -- i.e., that on the merits, LILCO will not be able to show that its proposed backup power configuration is acceptable for fuel loading and low power testing.[5] Instead, the bulk of the County's presentation consists of complaints about how it will be unprepared to present any case whatever in the time allowed.

Second, the County has not attempted any showing of irreparable injury to itself from the development of the record in hearings as scheduled. The reason may be obvious: there is no potential for such injury. Two weeks of hearings are not irreparable injury for a party such as Suffolk County, with its significant resources and voracious appetite for hearing after hearing. If Suffolk County is correct -- though LILCO firmly believes it is not -- in its conclusory assertion that LILCO's motion is hopelessly flawed, then surely two weeks of hearings will lay bare at least the outline of certain defects, thereby giving the County a factual predicate now lacking for the arguments it wants to make to the Commission and, quite possibly, the courts.[6] Two weeks of hearings, in other words, cannot

---

[5] The requirement of a strong showing on the merits was deliberately chosen when the Commission promulgated the stay regulations. 42 Fed. Reg. 22128, 22129 (cols. 2-3) (May 2, 1977).

[6] Predictably, these arguments will include claims that the hearing record established the need for further evidence on particular points.

hurt the County if it is actually interested in engaging the merits.[7]

Third, the County's papers do not discuss whether the granting of stay would harm other parties. It would, of course, be grievously harmful to LILCO and its customers. Daily debt service on Shoreham is approximately $1,300,000, and LILCO remains wholly dependent on foreign oil to fuel its existing power plants. The sooner Shoreham operates, the sooner these burdens will be lessened.

Fourth, the County's April 16 papers do not address the question of where the public interest lies. Once again, the public interest lies in developing efficiently the narrow factual issues posed by LILCO's pending low power motion. Any difficulties with the motion that require further consideration would no doubt be exposed during the two weeks of hearings now scheduled and any necessary readjustments in schedule, if

---

[7] This reality should not be obscured by the County's tactics. It has become clear that these tactics hinge on prolonging the litigation of Shoreham until no life remains in LILCO. Thus, SC seeks to avoid any consideration of the facts of specific issues for as long as possible and, along the way, reargues over and again procedural rulings with which it disagrees. These tactics often involve claims that threshold legal issues preclude reaching the facts -- e.g., SC's claims that "law" precluded conducting prehearing evidentiary depositions and that "law" precluded consideration of a utility-only emergency plan. See generally Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-107, 16 NRC 1667 (1982); LBP-82-115, 16 NRC 1923 (1982). Now, the County claims, GDC 17 precludes holding any hearings whatsoever on LILCO's current low power motion.

warranted, could be made at that time. The public interest is not served by arbitrarily delaying the beginning of these vital hearings.

In short, the County's application for a stay deserves summary rejection.

One final point bears mention. LILCO has already indicated its belief that action by the Commissioners themselves will be required, as a practical matter, before Shoreham may load fuel. If LILCO's March 20 motion had been referred directly to the Commission, as the Company requested, LILCO believes that the NRC might well have acted on at least Phases I and II of Shoreham's low power request on the basis of affidavits and argument alone.* It is also quite possible that the Commission would have directed the holding of just the sort of hearings now scheduled, in order to provide a predicate for Commission action on Phases III and IV. Accordingly, at least as to Phases I and II, LILCO believes that the present procedural arrangements give Suffolk County more than due process requires. And by any balanced view of due process, two weeks of hearings will give the County reasonable opportunity to focus the issues and sharpen the facts in its image if they

---

* Phase I entails fuel load and precriticality testing; Phase II involves cold criticality testing. See LILCO's March 20, 1984 motion at 5-11, citing Pacific Gas and Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-83-27, 18 NRC 1146 (1983).

can, in fact, be so shaped. The Commission will then have ample, prompt occasion to hear and consider the views of all parties, most vocally the County's.

In sum, SC has offered no reasons that justify suspending the scheduled hearings. To repeat, first, the County's arguments for vacating the Board's order simply reiterate claims already heard by the Board and rejected in its April 6 order. Second, even assuming immediate interlocutory review of the order by the Commission, SC has failed to make the showings necessary to stay the order (and thus the hearings it scheduled), pending Commission review; SC could not have made these showings even if it had tried, which it didn't. Third, the hearings will obviously not preclude, or materially delay, Commission consideration of all relevant matters. The hearings will simply provide a factual background against which the review can more productively be conducted.

II.

What has been said above is dispositive of the pending requests, in LILCO's judgment. In an excess of caution, however, the Company responds to certain of the County's more prominent assertions.

A. Time to Prepare

Suffolk County complains extensively that the time contemplated by the April 6 order is inadequate to permit it to prepare for litigation of low power issues. The County's complaint is groundless: it understates the time available to SC to gain knowledge concerning matters relative to this litigation; overstates the scope of the litigation and hence the breadth of matters to be inquired into; and ignores the County's own dilatoriness in using its available time.

The County attempts to depict the Board's Order of April 6, 1984 as providing the first indication that low power proceedings involving emergency power sources other than the TDI diesels would be conducted. But SC was on explicit notice of LILCO's exact proposal as of March 20, when it was served on the County. That proposal was supported by four detailed affidavits, with attachments, sponsored by LILCO's experts. Moreover, the County knew nearly a month earlier, as of the February 22, 1984 prehearing conference, that LILCO would likely be filing proposals for low power operation using backup power sources in addition to the TDI diesels, when Judge Brenner indicated that on the basis of the record then before the Board, low power operation could not be approved before litigation of the TDI diesels.[9]

---

[9] The County has repeatedly mischaracterized the Atomic Safety and Licensing Board's action at the February 22

(continued)

Further, the County has been on notice for years of the existence of virtually all of the factual issues it now portrays as being newly created. The same provision -- General Design Criterion 17 -- which the County now says prevents hearings on LILCO's power motion, also applied to Shoreham back in 1977-81, when the County was formulating its safety contentions. GCD 17 applies to the capacity of offsite as well as onsite electric power systems to support the performance of specified safety functions in the event of postulated accidents. GDC 17 also requires that provisions be made to minimize the probability of losing electric power supplies. See 10 CFR Part 50, Appendix A, Criterion 17, first and last paragraphs. In short, the same offsite power sources that Suffolk County now demands extended periods to examine were used in the Chapter 15 FSAR analyses for Shoreham and were available for litigation, with the required assumption that onsite power was lost, when Suffolk County was framing its safety contentions years ago. The only development since then concerning the reliability of offsite power sources is their enhancement by

---

(continued)

prehearing conference. The Board did not then reject any specific proposal on the merits for fuel load and low power; nor did it decide generally the concept of low power operation for Shoreham prior to litigation of the TDI diesels. All it observed was that what was then before it did not, in its view, afford a basis for a low power license.

the addition of certain new power sources, a 20 MW gas turbine and four mobile diesel generators physically located on the Shoreham site (though not deemed "onsite" for regulatory purposes). The time to have raised GDC 17 issues (with the limited exception of the new sources) was years ago, not now.

Second, the scope of issues properly before the Board is narrowly limited. Motions pursuant to 10 CFR § 50.57(c) do not provide an occasion for the litigation of new, unrelated contentions. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 77 (1983).[18] See also Southern California Edison Company (San

---

[18] There the Appeal Board stated:

> When an applicant for an operating license files a motion for authority to conduct low power testing in a proceeding where the evidentiary record is closed but the licensing board has not yet issued an initial decision finally disposing of all contested issues, the board is obligated under 10 CFR 50.57(c) to issue a decision on all outstanding issues (i.e., contentions previously admitted and litigated) relevant to low power testing before authorizing such testing. But such a motion does not automatically present an opportunity to file new contentions (i.e., contentions not previously filed in response to the Commission's original notice of opportunity for hearing) specifically aimed at low power testing or any other phase of the operating license application. A party may, of course, identify for the Board those previously filed and litigated contentions that it contends must be decided before authorization of low power testing.

17 NRC at 801 n.71.

Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-3, 15 NRC 61, 186 (1982) ("the low power motion context is not a free opportunity to bring in new contentions").

Suffolk County's papers raise at least four issues that have no place in this litigation: need for power, LILCO's financial qualifications, its technical qualifications, and security. Need for power is definitionally not an issue in operating license proceedings; it cannot be raised in the guise of a complaint about the pace of an OL proceeding. Financial qualifications, though potentially a subject on which the Staff must make a finding,[11] have not been raised in any fashion that requires expansion of this proceeding. LILCO's technical qualifications are also a matter about which the County has never filed contentions, despite its public discussion of these qualifications for years. Security issues are governed generally by an extensive settlement agreement dated November 22, 1982 among LILCO, Suffolk County and the NRC Staff, which resolved all outstanding County security contentions and which governs the relations of the parties on security prospectively.

---

[11] On February 7, 1984, the U.S. Court of Appeals for the D.C. Circuit issued its decision in New England Coalition on Nuclear Pollution v. NRC, ___ F.2d ___, No. 82-1581 (1984), remanding to the Commission its rule excluding consideration of financial qualifications in operating license proceedings. The court issued its mandate on April 16. Commission implementation of the court's order is expected soon.

Even as to issues properly before this Board, the County has not taken advantage of the time available to it. As outlined above, SC was aware of potential factual issues that would be developed well before the Board's April 6 order. At the very latest, the County could have begun inquiring actively into LILCO's exact case on March 20, the day LILCO's supplemental low power motion was served on it. The County has often seized the opportunity for formal or informal discovery with alacrity in other aspects of this proceeding; its failure to do so here must be taken as deliberate.[12]

Notwithstanding the County's contrary desires, this Board's intention to move quickly was signaled unquestionably by its telephone notice of March 30 setting an April 4 oral argument, its remarks at the ensuing conference, and its April 6 order. Still LILCO did not receive any discovery requests from Suffolk County until April 12, eight days after the conference and six after after the Board's order.[13] Even at that, the SC discovery requests, though extraordinarily burdensome, were of the boilerplate type that could have been formulated on a first reading of LILCO's March 20 motion and affidavits.

---

[12] The County did capitalize on one opportunity for free discovery during this period: its representatives attended an open meeting, convened by the NRC Staff, on March 29 to discuss LILCO's low power motion.

[13] One discovery request was dated April 11 but not received until April 12 because sent by Federal Express rather than telecopier; the request dated April 12 was telecopied and received that evening.

The County's pursuit of the document discovery actually requested has been equally desultory. LILCO, following receipt of the County's first discovery request, had documents assembled for examination and copying on Long Island the next day, April 13, and offered to make them available around the clock. Suffolk County responded to the invitation by sending one lawyer and two paralegals; they spent between three and four hours going through some of the available documents, requested extensive copying (which was performed overnight), and departed, not to return.[14] Further, despite knowledge since March 20 of LILCO's potential witnesses' identities and of the gist of their proposed testimony, Suffolk County neither took nor requested depositions.[15] And while proclaiming an intent to retain expert witnesses, the County has not yet indicated to LILCO that such consultants have been retained, despite LILCO's repeated requests that SC inform the Company of their identity. The County, of course, has had at least since March 20 to engage its consultants.

---

[14] Documents responsive to the second request were also assembled and made available for review on Long Island by April 14; Suffolk County forwent this opportunity, choosing instead to have them copied and sent to its attorneys' offices in Washington, which was accomplished by April 16.

[15] The County's diffidence about taking depositions here is in marked contrast to its conduct in other phases of the case, where the County, according to LILCO records, has taken depositions of at least 51 of LILCO's and other parties' experts and noticed (but not taken, for one reason or another) many more.

The inescapable conclusion is that the County's professed unpreparedness to proceed at this point is substantially if not entirely of its own making. SC has deliberately chosen not to bestir itself.

B. Waiver

Suffolk County argues at length that, under its construction of GDC 17, LILCO was required to seek a waiver of that regulation pursuant to 10 CFR § 2.758. This argument, of course, merely reclamors an issue that the County raised, and lost, on April 6. For the reasons outlined in this Board's April 6 Memorandum and Order at 4-7, GDC 17 cannot be read in isolation, but rather must be harmonized with other applicable regulations including 10 CFR § 50.57(c), which requires a Licensing Board to make findings on any contested issues with respect to the contested activity sought to be authorized. Ignoring relevant differences between requirements for operation at full power and at, e.g., 5% power, as the County urges, would, as the Board recognized, read § 50.57(c) out of the regulations. Thus the County's argument is both untimely and incorrect.

Even if a waiver or exception as to GDC 17 were thought to be required, however, § 2.758 is not the sole vehicle; the provisions of § 50.12(a), permitting the granting of exceptions from the requirements of the regulations in Part 50, are also applicable.[16] Further, under the full adjudicatory procedure

---

[16] If, hypothetically, a § 50.12 exception were necessary, the required testimony on the factual issues posed by

now contemplated, including evidentiary hearings and the high likelihood of referral to the Commission, any procedural requirements of §§ 2.758 and 50.12 can, as a practical matter, be more than satisfied.[17]

C. Expedition

Shoreham's operating license proceeding is now eight years old; it has been underway since April 1976. With few interruptions, these eight years have involved constant, complex licensing activity. Hundreds of issues have been raised by a large array of intervenors. Immense informal and formal discovery has taken place -- e.g., hundreds of thousands of pages of documents have been formally produced or made available for inspection; the depositions of over 100 people have been taken in places from New York to California; scores of issues have been settled after the informal exchange of great amounts of

---

(continued)

§ 50.12(a) would closely match the affidavits filed by LILCO on March 20 and the testimony to be filed by it on April 20.

[17] Section 2.758 contemplates initial examination of proposals for waivers by a Licensing Board on the basis of pleadings and affidavits, and certification of any prima facie showing to the Commission, which makes the ultimate determination. Section 50.12 contemplates decision by the "Commission," which in the context of Part 50, applies both to the Commission itself and "its duly authorized representatives," 10 CFR § 50.2(h), i.e., Licensing Boards in the case of licensing proceedings. No direct involvement by the Commission is necessarily contemplated by § 50.12.

information and extended discussion and negotiation. Since the beginning of formal evidentiary sessions two years ago, over 10,000 pages of prefiled direct testimony have been served; over 150 days of hearings have been held; and the transcript has passed 28,000 pages. Since 1976, rulings by the various Licensing and Appeal Boards involved in the proceeding, as well as by the Commission itself, have exceeded 2,700 pages.

As suggested by the vast amount of time consumed and verbiage generated, the licensing process has often moved at a glacial pace. Along the way, due process pressed down and overflowing has been provided to those who wished to question and challenge the Shoreham application.[18]

Confronted by this situation, LILCO has been driven to ask for expedition on numerous occasions. The request accompanying the Company's March 20, 1984 motion is only the latest in a long series of attempts by the Company to obtain rudimentary fairness for the applicant, including an end ultimately to the licensing proceeding.

While LILCO does ask for expedition now, as often in the past, by no stretch of imagination has this operating license proceeding involved a rush to judgment. The proceeding's

---

[18] With rare exception, and none pertinent to low power operation, all questions and challenges to date -- once tested during sworn adjudicatory hearings -- have been systematically and persuasively answered or refuted.

place in history is secure as one of the most protracted, intense adjudications in American administrative practice. Expedition now to bring one phase of the proceeding to a conclusion will not offend due process. The obverse would; it has long since ceased to be either fair as a matter of law or desirable as a matter of public policy to compel LILCO to devote tremendous human and financial resources to service litigation that has already gone beyond the outer bounds of that which would be deemed tolerable in virtually any other judicial or administrative setting.

Expedition is also appropriate because low power testing of Shoreham's systems and operators ought to begin as soon as is feasible in the interests of rational energy policy.[19] LILCO's current generating plants are wholly fired by foreign oil. Common sense dictates that Shoreham, a large baseload unit not dependent on foreign oil, be available to generate electricity as soon as it can be brought on line. If foreign oil supplies to Long Island were interrupted -- a risk far more likely than any of the nuclear accidents analyzed for

---

[19] Contrary to SC's suggestion, counsel for LILCO did not futilely "attempt" to discuss the need for Shoreham during the April 4, 1984 oral argument before the Board. Counsel for LILCO, having sat through the County's erroneous litany of anti-need arguments, offered to respond if the Board believed the litany was relevant to pending issues. The Board correctly did not; nor did LILCO. Brief discussion here of need occurs lest continued silence be mistaken as support for SC's claims.

NRC licensing purposes -- a new sort of political uproar would arise concerning Shoreham, replacing the species currently fashionable. The new uproar would focus on how it could possibly be that steps were not taken to have Shoreham available for use during a clearly foreseeable oil crisis.[20]

One final point: SC implies that a meeting between LILCO's new chairman, Dr. Catacosinos, and Chairman Palladino has some bearing on present matters. The implication is false. When Dr. Catacosinos briefly introduced himself to the Chairman, there was no discussion whatsoever pertinent to Shoreham litigation.

III.

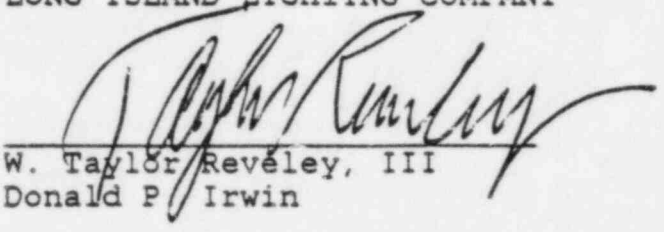
For the reasons stated, the present requests should be denied.

---

[20] It also bears mention that by 1985 LILCO will begin to experience a deficit in its reserve capacity unless Shoreham is on line. Thus it is flatly wrong to claim, as SC does, that Shoreham will not be needed to meet load growth for another decade or so. Beyond load growth, Shoreham is also needed well before the mid-1990s to permit the retirement of aging units on LILCO's system. And, of course, given the extreme difficulty of finding sites in southeastern New York State that might be licensable for power plants, the existence of a completed baseload plant on a licensable site at Shoreham provides southeastern New York with a rare addition to its indigenous energy resources. To provide another such addition in the future, if in fact a large new baseload power plant can ever again be built in Consolidated Edison's and LILCO's service territories, would take years, plus political and legal machinations of sweeping dimensions.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY



W. Taylor Reveley, III
Donald P. Irwin

Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

DATED: April 19, 1984

LILCO, April 19, 1984

CERTIFICATE OF SERVICE

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL-4 (Low Power)

I hereby certify that copies of LILCO'S RESPONSE TO VARIOUS SUFFOLK COUNTY/NEW YORK STATE REQUESTS DATED APRIL 16 AND RECEIVED APRIL 17, 1984 (Before the Commission and Before the Atomic Safety and Licensing Board) were served this date upon the following by U.S. mail, first-class, postage prepaid, and in addition by hand (as indicated by one asterisk) or by Federal Express (as indicated by two asterisks).

Judge Marshall E. Miller*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Glenn O. Bright*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Elizabeth B. Johnson**
Oak Ridge National Laboratory
P.O. Box X, Building 3500
Oak Ridge, Tennessee 37830

Eleanor L. Frucci, Esq.*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edwin J. Reis, Esq.*
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Honorable Peter Cohalan
Suffolk County Executive
County Executive/ Legislative Building
Veteran's Memorial Highway
Hauppauge, New York 11788

Fabian G. Palomino, Esq.**
Special Counsel to the Governor
Executive Chamber, Room 229
State Capitol
Albany, New York 12224

Alan R. Dynner, Esq.*
Herbert H. Brown, Esq.
Lawrence Coe Lanpher, Esq.
Kirkpatrick, Lockhart, Hill, Christopher & Phillips
1900 M Street, N.W., 8th Floor
Washington, D.C. 20036

Mr. Martin Suubert
c/o Congressman William Carney
113 Longworth House Office Bldg.
Washington, D.C. 20515

James Dougherty, Esq.*
3045 Porter Street, N.W.
Washington, D.C. 20008

Enclosure 5

LILCO, April 19, 1984



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



Before the Commission



| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| LONG ISLAND LIGHTING COMPANY | ) | Docket No. 50-322-OL-4 |
| | ) | (Low Power) |
| (Shoreham Nuclear Power Station, Unit 1) | ) | |
| | ) | |

LILCO'S RESPONSE TO VARIOUS SUFFOLK COUNTY/NEW YORK STATE REQUESTS DATED APRIL 16 AND RECEIVED APRIL 17, 1984

For the reasons stated in the attached paper, LILCO believes that no grounds presently exist for "the Commission [to] immediately direct certification of the matter and render a prompt decision in accordance with the County's and State's objections." Joint Request of SC/NYS for the Commission to Direct Certification at 1 (April 16, 1984). Accordingly, LILCO opposes the request.



Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

W. Taylor Reveley, III
Donald P. Irwin

Hunton & Williams
707 East Main Street
P. O. Box 1535
Richmond, Virginia 23212

DATED: April 19, 1984

Enclosure 6



April 19, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | |
|---|---|
| In the Matter of<br><br>LONG ISLAND LIGHTING COMPANY<br><br>(Shoreham Nuclear Power Station, Unit 1) | Docket No. 50-322-OL-4<br>(Low Power License Motion) |

NRC STAFF RESPONSE TO "JOINT OBJECTION OF SUFFOLK COUNTY AND THE STATE OF NEW YORK TO MEMORANDUM AND ORDER SCHEDULING HEARING ON LILCO'S SUPPLEMENTAL MOTION FOR LOW POWER OPERATING LICENSE"

## I. INTRODUCTION

By filing dated April 16, 1984, Suffolk County and the State of New York jointly moved the Licensing Board to vacate its April 6, 1984 Memorandum and Order scheduling a hearing on LILCO's Motion for a low power operating license. Intervenors' lengthy motion can be reduced to two discrete complaints: Suffolk County and New York argue that LILCO's Motion constitutes an impermissible attack on Commission regulations (specifically GDC 17) in violation of 10 C.F.R. § 2.758 and that the schedule for hearing established by the Board deprives the Intervenors of due process of law. For the reasons that follow, the Staff submits that the Board's Order of April 6 was legally correct and proper and that Intervenors' Motion to Vacate should be denied.

## II. DISCUSSION

### A. Requirements of GDC 17

In its "Response to LILCO's Supplemental Motion for Low Power Operating License" dated March 30, 1984 (a copy of which is attached) and at the oral argument on April 4, 1984 the Staff provided the Board with its view on the relationship of GDC 17 to 10 C.F.R. § 50.57(c). The Staff continues to believe that the two regulations must be read together and that the Board's Order correctly harmonized the two. While Suffolk County and the State have provided no legal argument in their Motion to Vacate that they had not previously made in their "Preliminary Views" on LILCO's Supplemental Motion and in extensive oral argument, they have unveiled a theory that seems to contain the following postulates:

(1) Chairman Palladino has injected himself into the proceeding in order to assure that a low power license be expedited;

(2) To get a low power license, LILCO requires an exemption from the requirements of GDC 17 pursuant to 10 C.F.R. § 2.758; and

(3) The procedures for an exemption pursuant to 10 C.F.R § 2.758 are time-consuming and LILCO could not meet that Section's requirement of "special circumstances".

See Intervenors' Motion at pp. 6-30. The implicit conclusion to this somewhat conspiratorial theory is that because of Postulates 1 and 3, pressure has been brought to bear upon the Staff (and possibly the Licensing Board) to adopt an incorrect position on the threshold legal issue of whether a Section 2.758 exemption is necessary. If (as they appear to be) Intervenors are advancing such a theory, the Staff categorically rejects it. Chairman Palladino is properly concerned with potential delays caused by NRC licensing proceedings, but the

Intervenors have pointed to nothing that would suggest that the Chairman has prejudged the ultimate issue or is impermissibly promoting the issuance of a low power license for the Shoreham facility. The Staff stands by its legal argument as to the proper interpretation of GDC 17 and Section 50.57(c); although failing to grasp the legal significance of the assertion, the Staff denies that it has taken a "complete reversal" of its position on this issue.[1/]

Ignoring the conjecture and innuendo that seem to permeate Intervenors' Motion, the Staff stands on its legal arguments presented to the Board on March 30 and April 4. After hearing from all the parties, the Board correctly addressed this issue in its April 6, 1984 order (at pp. 6-10), and Suffolk County and the State have presented no new legal arguments not previously considered. That part of the Motion to Vacate the Board's ruling on the legal threshold issue should therefore be denied.

B. Denial of Due Process

As to the alleged denial of their due process rights, Intervenors argue that they have been denied the ability to meaningfully participate in the low-power hearing because of the schedule set by the Board (Motion to Vacate at 30-45). For the most part, Intervenors repeat the same arguments they advanced at the prehearing conformance: the need to

---

1/ See Motion to Vacate at pp. 16-17. In fact, the Staff in pleadings and at oral argument on contentions involving the diesels made plain that an application for a low power license properly supported by a technical analysis would be considered. See "NRC Staff's Response to Suffolk County's Motion to Admit Supplemental Diesel Generator Contentions," February 14, 1984, at 12, n. 7; Conference of Parties, February 22, 1984, at Tr. 21,513; see also id., Tr. 21,616.

hire special consultants and the need to conduct extensive discovery. LILCO's Supplemental Motion was filed on March 20, 1984 with extensive supporting affidavits. The parties had been explictly alerted to the possibility of such a motion earlier. See n. 1, supra. Neither Intervenor has provided factual details (in the Motion to Vacate or elsewhere) disclosing the steps it has taken since at least March 20th to retain expert assistance and why such assistance was not available for the Board-ordered discovery period (discovery commenced on April 6, 1984). Moreover, Intervenors' complaints about the length of the discovery period and the time within which to file testimony all overlook the limited nature of this proceeding. The sole issues before the low power Board are the AC power needs of the facility at low power and whether there is reasonable assurance that those needs will be satisfied. The Intervenors allude to the need to analyze thousands of documents, but they never address the limited nature of the proceeding. The Staff submits that the Intervenors in their Motion to Vacate have provided no specific information upon which to conclude that the Board-ordered schedule deprives either Intervenor of its right to effectively prepare for a limited hearing of the type called for here. This portion of the Motion to Vacate must also be denied.

## III. CONCLUSION

For the reasons given above, the Staff submits that the Licensing Board's Order of April 6, 1984 was legally correct and did not deprive any party of its right to a fair hearing. Intervenors' Motion to Vacate

should therefore be denied. Inasmuch as the motion to Vacate is without merit, the request to certify the motion to the Commission should be denied as well.

Respectfully submitted,

Robert G. Perlis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 19th day of April, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | |
|---|---|
| In the Matter of | |
| LONG ISLAND LIGHTING COMPANY | Docket No. 50-322-OL-4 (Low Power) |
| (Shoreham Nuclear Power Station, Unit 1) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO 'JOINT OBJECTION OF SUFFOLK COUNTY AND THE STATE OF NEW YORK TO MEMORANDUM AND ORDER SCHEDULING HEARING ON LILCO'S SUPPLEMENTAL MOTION FOR LOW POWER OPERATING LICENSE'" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 19th day of April, 1984.

Judge Marshall E. Miller, Chairman*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Judge Glenn O. Bright*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Elizabeth B. Johnson
Oak Ridge National Laboratory
P. O. Box X, Building 3500
Oak Ridge, Tennessee 37830

Eleanor L. Frucci, Esq.*
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Docketing and Service Section*
Office of the Secretary
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Edward M. Barrett, Esq.
Long Island Lighting Co.
250 Old County Road
Mineola, New York 11501

Honorable Peter Cohalan
Suffolk County Executive
County Executive/
Legislative Building
Veteran's Memorial Highway
Hauppauge, New York 11788

Fabian Palomino, Esq.
Special Counsel to the
Governor
Executive Chamber, Room 229
State Capitol
Albany, New York 12224

Alan R. Dynner, Esq.
Herbert H. Brown, Esq.
Lawrence Coe Lanpher, Esq.
Kirkpatrick, Lockhart, Hill,
Christopher and Phillips
1900 M Street, N. W.
8th Floor
Washington, D. C. 20036

W. Taylor Reveley, III, Esq.
Anthony F. Earley, Esq.
Robert M. Rolfe, Esq.
Hunton and Williams
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

Mr. Martin Suubert
c/o Congressman William Carney
1113 Longworth House Office Building
Washington, D. C. 20515

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

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

James Dougherty, Esq.
3045 Porter Street, N. W.
Washington, D. C. 20008

Mr. Brian McCaffrey
Long Island Lighting Company
Shoreham Nuclear Power Station
P.O. Box 618
North Country Road
Wading River, New York 11792

Jay Dunkleberger, Esq.
New York State Energy Off.
Agency Building 2
Empire State Plaza
Albany, New York 12223

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

Robert G. Perlis
Counsel for NRC Staff

Enclosure 7



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
Marshall E. Miller, Chairman
Glenn O. Bright
Elizabeth B. Johnson

| | |
|---|---|
| In the Matter of<br>LONG ISLAND LIGHTING COMPANY<br>(Shoreham Nuclear Generating Plant, Unit 1) | Docket No. 50-322-OL-4 (Low-Power)<br>April 20, 1984 |

## ORDER DENYING INTERVENORS' MOTION TO VACATE ORDER

On April 16, 1984, Intervenors filed in this proceeding a paper denominated "Joint Objections of Suffolk County and the State of New York to Memorandum and Order Scheduling Hearing on LILCO's Supplemental Motion for Low-Power Operating License." This 48-page document asked the Licensing Board to vacate its April 6, 1984 Order scheduling a limited evidentiary hearing on LILCO's Motion, entered after extensive arguments of all counsel on the Motion and the various responses filed thereto. This Motion to vacate argued that LILCO's Motion regarding low-power operation constituted an attack on Commission

regulations, and that the trial schedule adopted by the Board deprived the Intervenors of due process of law.

The Staff filed a response to this Motion to vacate on April 19, 1984, stating that the Board correctly harmonized the two relevant regulations (GDC 17 and 10 CFR § 50.57(c)), and that there is no specific information to support the due process complaints.

LILCO also filed its response to the various requests of the Intervenors on April 19. It argued that Suffolk County offered no significant new arguments regarding its Motion to vacate, merely repeating previous arguments that had been considered and denied. LILCO also analyzed the criteria required for a stay of proceedings (10 CFR § 2.788(e)) and urged that such criteria were not met or even discussed in the Motion to vacate. It pointed out that Suffolk County had prior knowledge of the substance of the low-power Motion, that it had been dilatory in seeking discovery, and that it overstated its discovery requirements.

Although the Motion to vacate states that it is filed pursuant to 10 CFR § 2.751a(d), such characterization of the Board's April 6 Memorandum and Order is erroneous. The cited section refers to special prehearing conferences. This Order was not issued pursuant to any special prehearing conference. Rather, it was issued following a "Notice of Oral Arguments" duly given to all counsel, stating that the Board would hear oral arguments on LILCO's low-power Motion. Such hearing of arguments of counsel was noticed and held pursuant to the provisions of 10 CFR § 50.57(c), which allows the filing in pending

proceedings of written motions for low-power operations, and provides for "the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized." Following the opportunity to be heard afforded to the parties on April 4, the Board concluded that there was "a sufficient preliminary showing to justify holding a Section 50.57(c) limited hearing" (Order at page 5). This is a wholly different matter from a special prehearing conference, which is held to consider petitions for intervention, identify key issues properly pleaded, rule on the admission of intervening parties, and the like.

It is not necessary to make a strained interpretation of NRC procedural regulations in order for the Board to consider the Intervenors' instant Motion. It will be construed to be and treated as a Motion to vacate upon reconsideration of our prior Order.

The Board has carefully considered all of the arguments advanced by the Intervenors in support of their joint Motion to vacate, and it finds that they have not shown any new or different grounds other than those raised in the past which were denied. No significant new arguments or facts are addressed to support their conclusionary complaints and no useful purpose would be served by rehashing dilatory objections. Accordingly, reconsideration of our April 6 Order will be denied.

The expedited schedule established by our Order is within the discretion of licensing boards "to take appropriate action to avoid delay" under the provisions of 10 CFR § 2.718. The Intervenors had ample advance warning of the likelihood of motions regarding low-power

operations.[1] Their discovery requests and activities have apparently been rather desultory and pro forma.[2] No showing has been made of any real prejudice to the Intervenors by the expedited schedule, other than generalized apprehensions and complaints.

The parties must keep in mind the limited nature of these evidentiary hearings on the Section 50.57(c) low-power Motion. The Board will consider evidence showing whether or not the protection afforded to the public at low-power levels without the diesel generators required for full-power operations, is equivalent to or greater than the protection afforded at full-power operations with approved generators. In another aspect of this proceeding, the Commission stated:

> ...it seems apparent that the Licensing Board's preliminary doubt about whether there is reasonable assurance that a sufficient offsite emergency plan can and will be developed is no different from preliminary doubt about whether a safety issue can be adequately resolved which has significance for full-power operation but not for low-power activities. Interjection of such doubts into the low-power proceeding could create a limited full-power hearing, before authorization of the low-power license. Such a procedure would have little to commend it.

There is a continuing refrain in the voluminous papers filed in this proceeding about "due process of law", but little analysis of that principle itself. The due process clauses of the United States Constitution provide as follows:

---

1 See Staff's Response, etc. at p. 3, fn. 1; LILCO's Response, etc. at pp. 13, 16.

2 LILCO's Response at pp. 16-18.

5th Amendment:

> No person shall...be deprived of life, liberty, or property, without due process of law..."

14th Amendment:

> No State shall make or enforce any law which shall...deprive any person of life, liberty, or property, without due process of law...

The 5th amendment applies only to the federal government, and the 14th amendment applies to the States.

If (and only if) the evidence shows that under the applicable NRC regulations and based upon substantial evidence, LILCO is entitled to low-power testing or operations, then to refuse or delay such low-power license could itself amount to a deprivation of property without due process of law. In other words, all parties are entitled to due process; none has a monopoly on that principle.

Finally, we note that the Intervenors' Motion to vacate contains ad hominem insinuations and pejorative innuendoes concerning the NRC that border on the scurrilous. Most of these smear-type utterances are based on papers or letters outside the record and irrelevant to this proceeding. The Staff properly "categorically rejects" such insinuations, which do no honor to the attorneys who propagate them.

For the foregoing reasons, the Intervenors' Motion filed April 16, 1984, is denied; our April 6 Order will not be vacated or reconsidered; and none of these matters will be certified to the Commission.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Marshall E. Miller

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 20th day of April, 1984