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)	)	

SUGGESTION FOR EXPUNGEMENT
OF ORDER TO SHOW CAUSE AGAINST DOUGLAS J. SCHEIDT

On April 13, 1984, this Board Ordered Douglas J. Scheidt, counsel for Suffolk County, to show cause why disciplinary action should not be imposed against him.*/

The sole complaint raised concerning Mr. Scheidt's conduct in this proceeding regards a statement, made in a cover letter signed by Mr. Scheidt and attached to two discovery requests, that

> "Suffolk County believes that the Board's April 6 Memorandum and Order is illegal, for reasons which include the fact that the schedule denies the County due process of law."

*/ The Board originally set a hearing on the Order to Show Cause for April 18, 1984. Upon a Motion To Stay filed by Mr. Scheidt on April 16, the Board, by Order issued that same day, continued the hearing to a date subsequent to May 5, 1984.

It is plain that the use of the term "illegal" in its proper context was intended to mean that the expedited schedule set by the Board's Memorandum and Order is contrary to governing sources of law including the due process clause of the United States Constitution.

It was, of course, not intended to suggest as the Order to Show Cause stated that the Board's conduct in setting the schedule asserted to be in violation of the Supreme law of the land was a deliberately felonious act or involved criminal conduct by the Board.

It is equally plain that Mr. Scheidt's position and that of his client, Suffolk County, was reasonable, not frivolous and very well may have been completely correct. This is conclusively established by the fact that on April 25, United States District Court Judge Norma Holloway Johnson issued a temporary restraining order enjoining the Board from continuing with the proceeding on Lilco's Motion on the same grounds set forth by Mr. Scheidt in the letter called into question by the Board. Judge Johnson found that:

> "The expedited hearing schedule threatens to make plaintiffs' participation in the administrative proceeding meaningless because of the lack of time for effective preparation. Plaintiffs have presented serious allegations of constitutional violations and have sufficiently demonstrated that their allegations may support the Court's jurisdiction . . . . It appears that the discovery period permitted by the Board has precluded plaintiffs from

> preparing for the hearing on LILCO's unique and technically complex issue. When parties to an action are not permitted to prepare their case, the fundamental fairness of the administrative process is called into question. Mario M. Cuomo v. United States Nuclear Regulatory Commission, (D.D.C. April 25, 1984) Memorandum Opinion at 5."*/

The temporary restraining order will be dissolved as a result of the Nuclear Regulatory Commission's Order of April 30, 1984, vacating the expedited schedule set by the Board. Nonetheless, Judge Johnson's opinion forcefully demonstrates the substantial nature of Suffolk County's concerns as voiced by Mr. Scheidt and emphasizes his duty to raise the issue to protect his client's rights.

In light of the passage of time and Judge Johnson's opinion, we hope that the Board will recognize that Mr. Scheidt's reference to the Board's April 6 Memorandum and Order as illegal was an exemplary type of advocacy required by the Code of Professional Responsibility and the Constitution of the United States and not, as it first erroneously supposed, a personal attack on the Board and its members.

Mr. Scheidt is 30 years of age, he received his undergraduate degree from Northwestern University and has his law degree from Drake University. Following law

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*/ A copy of Judge Johnson's Memorandum and Order is attached to this motion for the convenience of the Board.

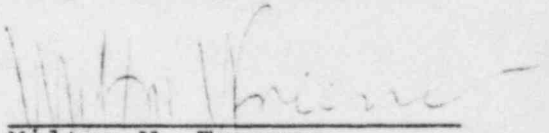
school, Mr. Scheidt was law clerk to Judge Martin D. Van Oosterhout of the United States Court of Appeals for the Eighth Circuit. In 1979, he joined the General Counsel's office of the Securities Exchange Commision as a staff attorney and was promoted to the position of special counsel in October, 1981. In December, 1983, Mr. Scheidt joined the respected law firm of Kirkpatrick, Lockhart, Hill, Christopher and Phillips as an associate. He is a member of the bar of the State of Iowa and is applying to the District of Columbia bar. He has a promising future ahead of him. The very issuance of the Order to Show Cause is a blot upon the otherwise unblemished career of Mr. Scheidt and threatens serious harm to his reputation and professional career. For example, it must be listed as a pending disciplinary proceeding on his application to the District of Columbia Bar.

We are sure that on mature reflection and in light of the result of subsequent legal proceedings, the Board will not desire to attempt to impose undeserved punishment on a young lawyer for carrying out his responsibilities under the Code of Professional Responsibility as he sincerely understood them. This is particularly so since the letters Mr. Scheidt filed were not intended and cannot properly be considered as a personal attack on the members of the Board.

Accordingly, we suggest that the Board sua sponte withdraw, expunge and strike from the record the Order to Show Cause issued against Mr. Scheidt on April 13.

If the Board should not take the action requested, it will be necessary for us to proceed in an adversarial manner by filing a motion for dismissal of the charges against Mr. Scheidt on the grounds that the Order To Show Cause is unwarranted and unprecedented and that the Board is entirely without authority to discipline Mr. Scheidt for the statement in question.

Respectfully submitted,



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Counsel for Douglas P. Scheidt

CERTIFICATE OF SERVICE

In accordance with our position of serving only those parties directly involved with the Order To Show Cause issued to Douglas J. Scheidt, I hereby certify that copies of the attached "Motion For Reconsideration of Order to Show Cause" has been served upon the following persons by deposit in the U.S. Mail, first class, postage prepaid, this 1st day of May 1984, unless service by other means is indicated:

By Hand Delivery To:

Judge Marshall E. Miller
Chairman
Judge Glenn O. Bright
Eleanor L. Frucci, Esq.

At the following Address:

Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
4350 East-West Highway; 4th Floor
Bethesda, Maryland 20814

By U.S. Mail To:

Judge Elizabeth B. Johnson
Oak Ridge Nat'l Laboratory
P.O. Box X; Building 3500
Oak Ridge, Tennessee 37830

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

By U.S. Mail to:

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

Docketing & Service Branch (3)
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

David P. Gersch

Dated: May 1, 1984

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

APR 25 1984

JAMES F. DAVEY, Clerk

MARIO M. CUOMO, Governor of the State of New York, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 84-1264
UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.,	:	
Defendants.	:	

MEMORANDUM OPINION

Plaintiffs, the Governor of the State of New York and the County of Suffolk, bring this action to enjoin the commencement of hearings before an Atomic Safety and Licensing Board (Licensing Board) of defendant, the U.S. Nuclear Regulatory Commission (NRC or the Commission), concerning the proposed low power operation of the Shoreham Nuclear Power Station. The owner of the Shoreham facility, the Long Island Lighting Company (LILCO), intervened as a defendant. The hearing, scheduled to begin on April 24, 1984, is to evaluate LILCO's proposal to operate Shoreham without an onsite emergency electric power system.

On March 20, 1984, LILCO submitted to the NRC its proposal to operate the Shoreham plant at low power without

an onsite electric power system. The NRC's Chief Administrative Law Judge created a new Licensing Board on March 30, 1984, to hear and decide LILCO's request. After oral argument, the Licensing Board established on April 6, 1984, an expedited procedural schedule for the low power license hearings. The schedule provided for discovery from April 6 to April 16, 1984; issuance of an evaluation of the proposal by NRC staff on April 19, 1984; filing of plaintiffs' testimony on April 20, 1984; and the hearing on April 24, 1984. Further, the Licensing Board mandated that the hearing be concluded by May 5, 1984. In response to plaintiffs' request for reconsideration of its expedited hearing schedule, the Licensing Board, on April 20, 1984, refused to alter or vacate its order. Plaintiffs then appealed to the Commission to overturn the expedited schedule, but the Commission, on April 23, 1984, refused to alter the scheduling order. On the same day, plaintiffs filed this action, and the Court heard argument from all parties on plaintiffs' application for temporary relief.

Plaintiffs maintain that the Licensing Board and the Commission have violated procedural due process by establishing an expedited schedule under which it is impossible for plaintiffs to prepare their case. Specifically, plaintiffs assert that seventeen days is insufficient time in which to complete discovery, retain experts, and prepare expert testimony with respect to a

proposal that has neither been suggested by a license applicant nor evaluated in a licensing proceeding in the history of civilian nuclear power generation. Further, plaintiffs argue that the expedited hearing would not have been scheduled but for improper actions of the Chairman of the Commission and the financial condition of LILCO.

Defendants assert that the Court does not have jurisdiction to issue temporary equitable relief in this case because the agency action is not final and plaintiffs' objections can be reviewed following the decision of the Licensing Board. In the alternative, defendants maintain that if a court has jurisdiction, this action would properly be before the Court of Appeals pursuant to 42 U.S.C. § 2239(a) (1976). In addition, defendants assert that the schedule does not deprive plaintiffs of due process, and irreparable harm would not result from a denial of the requested relief.

It is well established that "judicial intervention in uncompleted administrative proceedings, as distinguished from judicial checking by statutorily-established method of review, must remain very much the exception rather than the rule." Nader v. Volpe, 466 F.2d 261, 268 (D.C. Cir. 1972). See Gulf Oil Corp, v. U.S. Department of Energy, 663 F.2d 296, 312 (D.C. Cir. 1981); Association of National Advertisers, Inc. v. Federal Trade Commission, 617 F.2d 611, 621-22 (D.C. Cir. 1979). The narrow exception to that rule

is that "a party may bypass established avenues for review within the agency only where the issue in question cannot be raised from a later order of the agency, . . . or where the agency has very clearly violated an important constitutional or statutory right." Sterling Drug Inc. v. Federal Trade Commission, 450 F.2d 698, 710 (D.C. Cir. 1971) (citations omitted). See Fitzgerald v. Hampton, 467 F.2d 755, 768 (D.C. Cir. 1972); Amos Treat & Co. v. Securities and Exchange Commission, 306 F.2d 260, 267 (D.C. Cir. 1962). Contrary to defendants' principal argument that Federal Trade Commission v. Standard Oil Co., 449 U.S. 232 (1980), deprives this Court of jurisdiction, that case does not preclude a finding of jurisdiction if a constitutional right has been violated. In contrast to the instant case, plaintiff in Standard Oil did not allege any constitutional violations but only statutory violations. 449 U.S. at 235. Standard Oil can also be distinguished from this case on the same grounds that it was distinguished in Gulf Oil, 663 F.2d at 311. As in Gulf Oil, plaintiffs herein do not seek an order requiring withdrawal of LILCO's proposal or challenging the necessity of a hearing on the proposal, but they seek judicial assistance "in getting the proceeding tried fairly." Id.

To come within the purview of Amos Treat, plaintiffs must demonstrate something more than a mere procedural irregularity, subject to review upon the whole record at the conclusion of the proceeding; the asserted infirmity must be

fundamental. 306 F.2d at 265; Fitzgerald, 467 F.2d at 769. Although the exact boundaries of due process are fluid and defy a bright-line test, procedural due process at the very least requires that quasi-judicial proceedings provide a fair hearing. Amos Treat, 306 F.2d at 263. With respect to agency adjudiciations, due process could be said to mandate "fair play." Id. at 264.

The expedited hearing schedule threatens to make plaintiffs' participation in the administrative proceeding meaningless because of the lack of time for effective preparation. Plaintiffs have presented serious allegations of constitutional violations and have sufficiently demonstrated that their allegations may support the Court's jurisdiction under the Amos Treat exception. It appears that the discovery period permitted by the Board has precluded plaintiffs from preparing for the hearing on LILCO's unique and technically complex issue. When parties to an action are not permitted to prepare their case, the fundamental fairness of the administrative process is called into question. As did the Court in Amos Treat, the Court in this case finds that

> [e]nough has been said to demonstrate the basis for our conclusion that an administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirements of due process.

306 F.2d at 267.

For relief to issue, the Court must determine that plaintiffs have satisfied the four-fold test for injunctive relief articulated in Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958). See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) [hereinafter cited as WMATC]. The Court must find either that plaintiffs demonstrated probable success on the merits or presented a "serious legal question" and the balance of the equities favors granting relief. National Association of Farmworkers Organizations v. Marshal, 628 F.2d 604, 616 (D.C. Cir. 1980); WMATC, 559 F.2d at 843-44. The Court in WMATC emphasized that the preventive nature of the requested relief permitted the court some discretion in finding that plaintiff would succeed on the merits:

> An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

559 F.2d at 844. In this case, plaintiffs have raised serious questions concerning the propriety of the decision to expedite the hearing on LILCO's proposal to such an extent

that interested parties cannot be fairly heard. The underlying reasoning of the Licensing Board has been sufficiently called into question by plaintiffs to sustain temporary relief if warranted by the other criteria.

As previously discussed, meaningful participation in the administrative proceeding by plaintiffs has been precluded by the limited discovery period. From the evidence available at this early stage of the case, it appears that the procedural due process rights of plaintiffs have been compromised by the expedited schedule. If so, such a denial of due process constitutes irreparable harm. Amos Treat, 306 F.2d at 267; Heublein, Inc. v. Federal Trade Commission, 539 F. Supp. 123, 128 (D. Conn. 1982). Granting relief in this case will not harm defendants or any other interested party. No party to this action alleged that any harm would result from staying the commencement of the hearing pending a hearing on the motion of plaintiffs for preliminary injunction.

The public interest is furthered by a careful and full adjudication of LILCO's proposal for a low power license; no benefit can result from an unfair hearing on this proposal. With the potential consequences of the administrative decision being so great, the public will be served if defendants are permitted to adequately prepare their positions concerning LILCO's proposal. Further, the public

interest will benefit if the administrative proceeding is conducted fairly.

Since plaintiffs have raised a substantial legal question regarding the propriety of the hearing schedule, and have demonstrated irreparable injury, and since the balance of the equities favors preserving the status quo pending a determination on the preliminary injunction, the Court will grant the motion of plaintiffs for a temporary restraining order.

An Order consistent with this Memorandum Opinion will issue.

Norma Holloway Johnson

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

DATED: April 25, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

APR 25 1984

JAMES F. DAVEY, Clerk

MARIO M. CUOMO, Governor of the State of New York, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 84-1264
UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.,	:	
Defendants.	:	

O R D E R

Upon consideration of the Application of plaintiffs for a temporary restraining order, and upon consideration of all matters in support and opposition thereto, including oral argument before the Court, it is this 25th day of April, 1984,

ORDERED that defendant the United States Nuclear Regulatory Commission and defendants Nunzio J. Palladino, Marshall E. Miller, Glenn O. Davis, and Elizabeth B. Johnson be, and they hereby are, jointly and severally restrained and enjoined from further convening, participating in, proceeding with, or authorizing any hearings before the Atomic Safety and Licensing Board pertaining to the supplemental motion of Long Island Lighting Company for a Low Power Operating

License in the proceeding styled In the Matter of Long Island Lighting Company, Docket No. 50-322-)L-4 (Low Power), or otherwise for a period of ten (10) days from the date of this Order or pending the hearing on the motion of plaintiff for a preliminary injunction, whichever first occurs.

Entered this 25th day of April, 1984, at 10:30 a.m.

Norma Holloway Johnson

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE