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LILCO, May 29, 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)	)	
	)	

LONG ISLAND LIGHTING COMPANY'S
RESPONSE TO JOINT MOTION TO STRIKE

As LILCO predicted,[1/] Suffolk County and the State of New York continue their attempts to delay engaging the merits of LILCO's request for a low power operating license. This time, the County and State seek to strike LILCO's Motion for Summary Disposition on Phase I Low Power Testing, Motion for Summary Disposition on Phase II Low Power Testing and Motion for Prompt Response to LILCO's Summary Disposition Motions. Despite the fact that LILCO's motions are now pending before the Licensing Board, the County and State have inappropriately

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1/ See LILCO's Response to Requests for Clarification, filed May 24, 1984. Indeed, the joint motion to strike was filed the same day as LILCO's response. The County's and State's strategy is clear; more such dilatory tactics can be expected to follow.

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filed their joint motion to strike with the Commission. Despite the time limitations in the Commission's regulations for responding to summary disposition motions, 10 CFR § 2.749 (a), the County and State have presumptuously announced that they will ignore § 2.749 and simply refuse to respond on the merits to LILCO's motions until the Commission has ruled.[2/]

The Commission ought to dismiss the motion to strike as having been filed in the wrong forum. Both LILCO's application for exemption and its motions for summary disposition and for prompt response are pending before the Licensing Board pursuant to the Commission's directive that the Licensing Board conduct further proceedings in this matter.[3/] Nor have the County and State asked the Licensing Board to strike or certify to the Commission LILCO's motions. The Commission should not condone the County's and State's blatant disregard of the Licensing Board.

Moreover, in dismissing the joint motion to strike, the Commission should make clear that it does not countenance the County's and State's equally arrogant disregard for the

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2/ Of course, they ignore the rules at their own peril and cannot legitimately expect any extended time for response.

3/ See Commission Order of May 16, 1984, at 2 n.2.

Commission's regulations as reflected by their announced refusal to respond on the merits to LILCO's motions until the Commission rules. There is no basis in law for this refusal. Indeed, there is no present basis for the Licensing Board to suspend or delay its consideration of LILCO's motions. As is stated in 10 CFR § 2.730(g), "[u]nless otherwise ordered, neither the filing of a motion nor the certification of a question to the Commission shall stay the proceeding or extend the time for the performance of any act." Thus, even if the joint motion were properly before the Commission -- and it is not -- the State and County would be obligated to file a timely response to LILCO's motions unless otherwise directed. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LPB-82-115, 16 NRC 1923, 1935 n.7 (1982).

If the Commission chooses to consider the joint motion despite its impropriety, the motion should, nevertheless, be denied. The claim that LILCO's motions for summary disposition run contrary to the Commission's May 16 Order is wrong. That Order specifically instructed LILCO to modify its low power request by filing an exemption application to the extent necessary to comply with the Commission's ruling concerning the applicability of GDC 17. The Order then remanded this proceeding to the Licensing Board and instructed the Board to

"conduct the proceeding on the modified application in accordance with the Commission's rules." Commission Order at 3. Those rules expressly provide for summary disposition motions. 10 CFR § 2.749. The Licensing Board must rule on the merits of those motions. In that vein, LILCO repeats that the County and State have had numerous opportunities to address the merits of LILCO's factual claims concerning Phases I and II and have not once expressed any factual disagreement.[4/] Perhaps the lack of a genuine dispute as to any material fact accounts for the County's and State's unwillingness to file any substantive response.

Further, nothing in the May 16 Order disposed of LILCO's summary disposition motions. The Commission held simply that 10 CFR § 50.57(c) could not be read to eliminate the requirement of an onsite AC power system to comply with GDC 17. The Commission vacated the Licensing Board's April 6 Memorandum and Order only to the extent inconsistent with that

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4/ They have failed to do so on those numerous occasions when they have addressed the merits of Phases III and IV of LILCO's low power request, including during oral argument before the Commission on May 7. The County and State also failed to respond to the merits of LILCO's May 4 summary disposition motions filed with the Commission. Under the NRC's rules of practice, those responses were due May 24, 1984. 10 CFR § 2.749(a).

ruling. Commission Order at 1. LILCO's motions for summary disposition are not inconsistent with that ruling in any way. LILCO has onsite diesels. The reliability of their capacity to provide sufficient power to meet the functions enumerated in GDC 17 for levels of operation beyond cold criticality testing simply has not yet been determined in licensing hearings. As LILCO proves in its motions for summary disposition, however, no AC power capacity is necessary for Phases I and II. Thus, it is not necessary to conduct hearings concerning the reliability of the onsite diesels in order to authorize the requested testing.

Finally, the County and State are wrong in their contention that the Commission has no authority to issue the requested approval. Section 50.57(c) authorizes the issuance of licenses for "low power testing" including "operation at not more than 1 percent of full power" and beyond (emphasis added). There is no minimum level of operation prescribed; nor would it be logical to impose any such arbitrary constraint on the licensing process.[5/] And, while the permission to engage in

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5/ Clearly, the activities in Phases I and II must be conducted at some time after construction and before full power operation. They must either fall within the realm of construction or operation. Surely the County and State do not contend that no license is required for these activities, or that LILCO is free to perform them pursuant to its construction permit.

fuel loading and precriticality testing granted Diablo Canyon by this Commission came in a different procedural setting, it is logically and analytically indistinguishable from the license LILCO seeks. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-83-27, 18 NRC 1146, 1149 (1983). Although the Diablo Canyon decision involved the restoration of a license during an enforcement proceeding, the reasons for allowing the activities there are factually indistinguishable from those presented by LILCO. And if there were no authority to segregate these activities for licensing purposes, there would have been no authority to do so in restoring Diablo Canyon's license. Obviously, such authority exists. Moreover, similar licenses have been authorized in initial licensing cases. In Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), LBP-77-64, 6 NRC 808, 814 (1977), the Board authorized a license to load fuel in a cold shutdown condition pursuant to 10 CFR § 50.57(a). This is identical to the license LILCO seeks for Phase I.[6/] There is no logical bar to extending the

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6/ In North Anna, the neutron multiplication factor, K eff, was limited to 0.90. By definition, the reactor is not critical until K eff equals 1. Significantly, the Board found that no forced cooling was needed to protect the core in the event of a LOCA and therefore fuel loading did not present a risk to the public health and safety. 6 NRC at 811-12. LILCO and Staff experts have reached the same conclusions in this case.

Diablo Canyon and North Anna rationale to Phase II as well since, again, there is no threat to public health and safety even without AC power.

Accordingly, LILCO requests that the Commission promptly dismiss the County's and State's motion to strike as improperly filed, or deny it as having no merit.

Respectfully submitted,

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DATED: May 29, 1984

LILCO, May 29, 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 LONG ISLAND LIGHTING COMPANY'S RESPONSE TO JOINT MOTION TO STRIKE dated May 29 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), by Federal Express (as indicated by two asterisks) or by telecopier (as indicated by three asterisks).

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