

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)

LONG ISLAND LIGHTING COMPANY)

(Shoreham Nuclear Power Station,)
Unit 1))

Docket No. 50-322-OL-4
(Low Power)

AFFIDAVIT OF

HERBERT H. BROWN, LAWRENCE COE LANPHER, FABIAN G. PALOMINO

Herbert H. Brown, Lawrence Coe Lanpher, and Fabian G. Palomino, being duly sworn, do state under oath the following:

1. The undersigned are attorneys in the Shoreham low power proceeding, Messrs. Brown and Lanpher representing Suffolk County and Mr. Palomino representing the State of New York. The purpose of this Affidavit is to furnish source data for the Suffolk County and State of New York Motion for Disqualification of Judges Miller, Bright, and Johnson.

2. The factual statements set forth in paragraphs 3-41 below are derived from publicly available documents, except for certain instances (paragraphs 11, 12, 24, 34) which pertain primarily to the Affiants' personal recollections of Chairman

Palladino's oral testimony on May 17, 1984, before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs. As to each factual statement set forth below, the Affiants provide the basis or bases for the Statement, i.e., identification of the publicly available document or any other source of the data.

3. On February 22, 1984, the NRC Licensing Board chaired by Administrative Judge Lawrence Brenner (the "Brenner Board") ruled that there was no basis for granting LILCO a low power license for Shoreham "in advance of complete litigation" of the emergency diesel issues. Source: Transcript of ASLB Hearing, Feb. 22, 1984, at 21,615. The Brenner Board set a schedule for litigation of those issues that, after a discovery period of approximately two months, provided for a conference of the parties after May 10, to determine subsequent procedures. Source: Id. at 21,634. In issuing that schedule the Brenner Board concluded:

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 [the outstanding diesel issues].

Source: Id. at 21,615.

4. Under the Brenner Board schedule, it was estimated by the NRC Staff that an initial decision on emergency diesel generator contentions would be issued in December 1984. Source: Attachment to Memorandum from William J. Dircks to Commissioners, March 9, 1984, available as part of FOIA-84-250.

5. As of February 22, the NRC Staff opposed LILCO's arguments that "enhanced" offsite power could substitute for deficient onsite power. The Staff would give no credit to LILCO's offsite power system, including the gas turbine physically located at Shoreham, because "General Design Criteria 17 requires an independent, redundant and reliable source of on-site power." Source: NRC Staff's Response to Suffolk County's Motion to Admit Supplemental Diesel Generator Contentions, February 14, 1984, at 12, footnote 7. The Staff took "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." Source: Id.

6. At an open meeting between the NRC Staff and the TDI Owners Group on January 26, 1984, Mr. Harold Denton of the Staff 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.

Source: Jan. 26 Meeting transcript at 8. Mr. Darrel Eisenhut of the Staff stated at the same meeting that "prior to licensing, even a low power license," the Staff must have confidence that the TDI diesel problems have been solved. Source: Id. at 95-96.

7. The Brenner Board's February 22 decision was followed two days later by a published report that LILCO's Chairman, William J. Catacosinos, had met with the NRC Commissioners. Source: Newsday, Feb. 24, 1984.

8. In a March 9, 1984, letter to LILCO shareholders, Dr. Catacosinos noted:

Our inability to open Shoreham has created a serious cash shortfall for LILCO. Accordingly, since January 30, I have made government officials aware of our critical situation, and I believe there now seems to be a greater understanding among federal, state and county officials of the crisis the company faces A timely resolution of the Shoreham situation and a resolution of the Company's critical cash shortage are essential to the continued viability of LILCO.

Source: LILCO 1983 Annual Report.

9. On March 9, the NRC Staff notified the Commissioners of potential licensing delays of 9 months for Shoreham. The 9 month delay was estimated by LILCO and passed on to the Commissioners by the Staff. Source: Attachment to Memorandum

from William J. Dircks to Commissioners, March 9, 1984, available as part of FOIA-84-250.

10. Chairman Palladino met on March 15 with personnel from the Offices of Policy Evaluation and General Counsel concerning the potential licensing delays. It was then decided to hold a meeting on March 16. Source: Individual Statement of Nunzio J. Palladino Before the Subcomm. on Energy and the Environment, H. Comm. on Interior and Insular Affairs, May 17, 1984, pp. 8-9 (hereafter, "Palladino Statement").

11. On March 16, Chairman Palladino met with members of commission offices, "Tony Cotter" (B. Paul Cotter, Jr., the NRC's Chief Administrative Judge), and top level Staff personnel, including the Executive Director for Operations, the Director of the Office of Nuclear Reactor Regulation, the Executive Legal Director and their subordinates to discuss the alleged delay in the licensing of Shoreham and other plants. Source: Palladino Memo to Commissioners, March 20, 1984 (hereafter, "Palladino 3/20 Memo"); Palladino Statement at 8-10; Affiants' recollection of Chairman Palladino's May 17 Congressional testimony (as to fact that Directors of NRR and OELD were present).

12. The other Commissioners were not advised of the March 16 meeting in advance. Source: Affiants' recollection of

Chairman Palladino's May 17 Congressional testimony. Neither the County nor State was advised of this meeting, and no transcript was made. Sources: No prior notice of meeting was given to County or State, and there has never been any indication that a transcript was made; NRC Commissioners' April 23 Meeting Transcript, p. 10.

13. Commissioner Asselstine criticized Chairman Palladino for meeting with one party -- the Staff -- "without the opportunity for the others to have any notice of the meeting or be provided an opportunity to comment" Source: NRC Commissioner's April 23 Meeting Transcript, p. 10.

14. Commissioner Gilinsky questioned whether it was proper for the Staff to meet with Chairman Palladino at the March 16 meeting:

The Staff is a party in the hearing; the Chairman is one of the ultimate judges. The Staff Directors should have told the Chairman politely that it is not their job to carry the ball for the Company. It is understandable that they did not say this under the circumstances. The Chairman is, by law, the Staff's direct supervisor. He controls annual bonuses worth many thousands of dollars to senior Staff members. What we have is a situation in which one member of the ultimate NRC adjudicatory tribunal appears to be directing the actions of a key party in the case.

Source: CLI-84-8, Separate Views of Commissioner Gilinsky, May 16, 1984.

15. Chairman Palladino's March 16 meeting was held even though LILCO had not filed a new motion for low power operation of Shoreham. NRC April 23 Meeting Transcript, p. 7.

16. Judge Cotter's notes of the Chairman's March 16 meeting reveal that the following matters were discussed pertaining to Shoreham: "Says will go bankrupt if 12/84 I.D.;" "Alternative solution for low power;" "LILCO file proposal to get around diesel issue and hold hearing on operation at low power;" "Based on LILCO proposal, Staff issue report in 30 days as to whether safe at 5% without diesels;" "Commission ordered hearing would a) define 'contention' and set time frames for expedited procedure b) Reverse Board Order of 2/22;" "Note: Concern re same Board Chairman." Source: Judge Cotter's Notes, available as part of FOIA-84-267 (emphasis in original).

17. Chairman Palladino later told the other Commissioners that at the March 16 meeting "some preliminary ideas regarding expediting the Shoreham hearing were discussed." Source: Palladino Memo to Commissioners, April 4, 1984 (hereafter, "Palladino 4/4 Memo"), available as part of FOIA-84-267. Commissioner Asselstine stated:

I understand from Tony Cotter that there was discussion at the March 16th meeting of the scope and type of issues that would be considered in a low-power licensing proceeding with the Staff.

Source: NRC Transcript of April 23 meeting, at 9-10.

18. On May 17, Chairman Palladino stated:

At that meeting, held on March 16, I was briefed as to the status of a number of cases, including the Shoreham proceeding. While the Briefing included identification by the Staff of the issues of the Shoreham proceeding, I do not recall the Staff in any way stating or intimating how those issues should be resolved. I am confident that if the Staff had done that, or if any other impropriety had been committed, one or more of the several top agency lawyers present would have raised a warning flag. Likewise, I recall the staff advising that they understood that LILCO planned to appeal the denial of its low power request. But again, there was no discussion, to the best of my recollection, of the merits of that request.

Source: Palladino Statement at 10.

19. One reason that Chairman Palladino met with the Staff and others on March 16 "was the possibility that if NRC didn't do something Shoreham would go under because of NRC's inability to make timely licensing decisions, and I felt that, whatever happened to Shoreham, I did not want inaction by NRC to be the cause." Source: Palladino Statement at 4-5; see id. at 11. Judge Cotter's notes of the March 16 meeting underscore the concern for LILCO's financial condition: the March 16 meeting included discussion that LILCO would "go bankrupt" if it had to await a Licensing Board decision in December 1984. Source: Judge Cotter's notes, supra, ¶ 16.

20. On March 20, Chairman Palladino circulated a memorandum to the other Commissioners. The memorandum reported on the March 16 meeting and proposed that in order to "reduce the delays at Shoreham," the Commission should "consider a proposal from OGC 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." Source: Palladino 3/20 Memo. Chairman Palladino did not then report, as he later did in his April 4 Memorandum, that some preliminary ideas for expediting the Shoreham proceeding had been discussed with the Staff and others who were present at that meeting. Sources: Palladino 3/20 Memo; Palladino 4/4 Memo.

21. The Chairman's March 20 Memorandum was circulated to "SECY, OGC, OPE, OIA, EDO." Thus, the Staff's Executive Director for Operations was further advised of the Chairman's view that the Shoreham proceeding needed to be speeded up. The March 20 Memorandum also specifically requested the EDO to respond to the March 20 Memorandum a: 1 to prepare a paper outlining steps to deal with the "potential delays". Source: Palladino 3/20 Memo.

22. On March 20 -- the same day that the Chairman circulated his Memorandum (see ¶¶ 20-21) -- LILCO filed a new proposal for a low power license, styled as a Supplemental Motion for Low Power Operating License. LILCO made essentially the same arguments for a low power license that the Brenner Board had previously rejected, except that LILCO provided greater detail and added that it also intended to install at Shoreham four mobile diesel generators to enhance the offsite AC electric power system. LILCO served copies of the Motion on the NRC Commissioners. LILCO did not apply for a waiver of or an exemption from GDC 17. Sources: LILCO's March 20 Supplemental Motion for Low Power Operating License; LILCO's Response to Suffolk County's Motion to Admit Supplemental Diesel Generator Contentions, Feb. 7, 1984, at 5-7.

23. After March 16, Chairman Palladino had further discussions with his staff and apparently "with EDO as well, searching for options," to deal with the alleged delay. Source: Palladino Statement at 11.

24. Chairman Palladino's legal assistant discussed with Judge Cotter the following "working paper" prepared by the Chairman's office (the paper was sent to Judge Cotter on March 22), which relates to the Chairman's desire to expedite the Shoreham proceeding:

The EDO has recently provided the Commission an assessment for Shoreham that projects a nine-month licensing delay due to, I am told, the Shoreham Licensing Board's requirement to litigate the diesel-generator questions before allowing operation at low power.

The Commission would like this matter litigated on an expedited basis with a target date of receiving the Board's decision on this matter by May 9, 1984. Would you please look into what steps are required to meet such a date and inform the Commission on these steps as soon as possible, but not later than March 30, 1984.

For planning purposes, you could assume the following steps:

- A two week staff review of the proposal by LILCO;
- A one week discovery period;
- A two week period for filing testimony and holding a hearing;
- A two week period to issue the Board's decision.

Final Commission guidance on the expedited hearing on this matter would be based on your submittal and follow-up discussions. If you have any questions, please let me know.

Sources: Palladino Statement at 11-12; Palladino 4/4 Memo and Attachments. The time estimates in the "working paper" apparently were derived by Chairman Palladino from "OGC's rough estimates of the time that an expedited hearing such as suggested by OGC might take" Source: Palladino Statment at 12. Chairman Palladino had not discussed this

"working paper" with the other Commissioners. Thus, the reference to "The Commission" in the second paragraph was not accurate. The other Commissioners were not informed of Chairman Palladino's "working paper" or his request to Judge Cotter until April 4 when the working paper was distributed to the other Commissioners. Source: Affiants' recollection of Chairman Palladino's May 17 oral Congressional testimony; Palladino Statement at 12; Palladino 4/4 Memo.

25. Judge Cotter responded to Chairman Palladino's "working paper" on March 23. Source: Palladino Statement at 13. His March 23 response, in the form of a 9 page proposed order for adoption by the Commission, contained, inter alia, the following elements:

(a) A proposed decision that consideration of LILCO's low power proposal be expedited and that it be decided on the merits, with specific issues to be decided spelled out.

(b) A proposed decision that a new Licensing Board be appointed to replace the Brenner Board.

(c) A proposed decision that LILCO's March 20 Motion be litigated on a schedule described as "brutally tight" and "[d]efinitely not recommended but possibly achievable." The Cotter schedule called for a decision on the LILCO Motion

within 60 days. To achieve such expedition, Judge Cotter suggested that there be 16 days for discovery, 5 days between close of discovery and filing testimony, 5 days until the start of hearing, and 10 days for the hearing.

(d) One reason cited by Judge Cotter for adoption of the proposed order was "the enormous financial investment" of LILCO.

Source: Cotter draft order, attached to Palladino 4/4 Memo.

26. On March 26, Suffolk County submitted preliminary views to the Brenner Board regarding LILCO's March 20 Motion. These views were submitted in response to a specific March 22 oral request of the Brenner Board that parties provide preliminary views on how the new LILCO Motion should be handled. In these views the County stated:

(a) The County required more than the normal ten-day period to respond to LILCO's Low Power Motion, because it raised many new and complex factual issues and the County needed to retain appropriate experts to analyze those issues.

(b) Analysis of the factual issues would first require the County to obtain substantial information through discovery.

(c) Additional time was required to address legal issues raised by LILCO's Motion.

(d) A number of threshold issues should be addressed before the merits of LILCO's Low Power Motion were considered, including: (i) the Motion did not meet the criteria enunciated by the Brenner Board on February 22 for a new low power proposal, because it did not state how it met regulatory requirements or why a waiver therefrom should be granted; (ii) the Motion relied upon power sources located at the Shoreham site which were not seismically qualified, as required, but LILCO had sought no waiver of the NRC's seismic requirements; and (iii) contrary to the Board's February 22 order, the Motion appeared to rely upon the TDI diesels.

(e) The County requested a conference with the Brenner Board to discuss the procedural matters affecting the diesel litigation and LILCO's Low Power Motion.

Source: Suffolk County's Preliminary Views on Scheduling Regarding LILCO's New Motion, March 23, 1984.

27. On March 28, the State of New York filed preliminary views which supported those submitted by the County. Source: Preliminary View of Governor Cuomo, Representing the State of New York, Regarding LILCO's So Called "Supplemental Motion for

a Low Power Operating License," March 28, 1984. The County supplemented its views on March 30, urging that the LILCO Motion be summarily dismissed for failing to comply with GDC 17. Source: Supplement to Suffolk County's Preliminary Views on Scheduling Regarding LILCO's New Motion, March 30, 1984.

28. On March 27, Chairman Palladino gave Judge Cotter's draft order to the Office of General Counsel. Source: Palladino Statement at 13. Chairman Palladino did not give the draft order to the other Commissioners until April 4. Source: Palladino 4/4 Memo.

29. On March 27, Judges Brenner and Morris wrote Judge Cotter that "[d]epending on the schedule established (by us or the Commission), the Shoreham Licensing Board on which we sit may have to be reconstituted by you due to our heavy schedule for the Limerick evidentiary hearing in April and May." Source: Brenner and Morris Memo to Cotter, May 27, 1984, available as part of FOIA-84-267.

30. On March 30, the NRC Staff responded to LILCO's Low Power Motion. In reversal of its prior position that no low power license could be issued for Shoreham until the TDI diesel problems were solved (absent a waiver or exemption regarding which the Staff had taken no position), see, ¶ 5, supra, the Staff stated that operation of Shoreham could be permitted in

the complete absence of any nuclear qualified onsite electric power system.

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.

Source: NRC Staff Response to LILCO's Supplemental Motion for Low Power Operating License, March 30, 1984. Without addressing the County's and State's concerns regarding the time required to respond to LILCO's Low Power Motion and without revealing the Staff's March 16 meeting with Chairman Palladino, the Staff called for an expedited hearing on the Motion, with all testimony to be filed by April 23. Source: Id.

31. Commissioner Gilinsky criticized the Staff's position before the Licensing Board.

I must say that this confirms me even further in my view that the staff ought not be in these hearings. Here is the staff concocting arguments on how all this [GDC17 and Section 50.57(c)] can be rationalized and I must say that even though you didn't tell them anything about the hearings, this is after your meeting with them on the speeding up the process so the effect of it is inevitable. You have them go back and think, 'Well, how can we speed up this process?' I am not suggesting that you did anything proper [sic] mind you but that is intrinsic in the way the system works.

Source: NRC April 23 Meeting Transcript, p. 59. See also CLI-84-8, Separate Views of Commissioner Gilinsky ("the Staff had been trying to run legal interference for the Company"), and Commissioner Asselstine, May 16, 1984.

32. On March 30, Chief Administrative Judge Cotter issued an order removing the Brenner Board and establishing a new licensing board "to hear and decide" LILCO's Low Power Motion. The order noted the "advice" of the Brenner Board that "two of its members are heavily committed to work on another operating license proceeding." Source: Order, "Establishment of Atomic Safety and Licensing Board to Preside in Proceeding," March 30, 1984. 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.

Source: Nucleonics Week, April 5, 1984, at 10. Chairman Palladino recalls that Judge Cotter informed the Chairman's office of the appointment before it was made. Source: Palladino Statement at 14.

33. The NRC's Office of General Counsel spoke with Judge Cotter several times between March 27 and March 30 regarding Judge Cotter's proposal to appoint a new board and questioned whether the action did not appear to presume that LILCO's Motion would be granted. Source: NRC April 23, 1984 Meeting Transcript, pp. 8-9. Mr. Malsch of the Office of General Counsel described these conversations as follows:

[Malsh]: After the meeting between the Chairman, ourselves, EDO and so forth, there appeared on my desk a draft notice from Tony Cotter announcing a reconstitution of the Licensing Board. I called Tony and asked him -- I told him that I was sort of bothered by it on its face since it wasn't clear to me that there was a scheduling conflict unless it was presumed that the LILCO low-power motion is granted. At that time the motion had been filed.

I didn't think that he, Tony Cotter, had the authority to grant a low-power motion and then refer the motion to another Licensing Board.

I also raised reservations about how the whole thing would appear. He said, "Oh, no," that he had been advised by Larry Brenner who was the Chairman of the other Licensing Board that he, Larry Brenner, couldn't really give the low-power motion any consideration at all either granting it or denying it because he was so involved in the Limerick case and therefore, Tony didn't feel that his appointment of a new Board in effect prejudged action on the low-power motion.

He said that he would think about my problem about appearances and call me back. He then called me back the next day and said that they were going forward with it.

CHAIRMAN PALLADINO: With what?

MR. MALSH: And that they were going forward with the reappointment of the new Licensing Board.

34. On March 30, the parties were notified by telephone that the new Licensing Board (the "Miller Board") would hear oral arguments on April 4, 1984, on LILCO's Low Power Motion and the response thereto. The telephone notice indicated that "a schedule for their expedited decision" would be considered on April 4. Sources: Statement of Oral Notice, available as part of FOIA-84-267; Mr. Lanpher's recollection of the phone call. This oral notice was confirmed in writing by the Miller Board on March 30, 1984. The Board stated that at the oral argument the Board would hear the issues raised by the parties "in their filings, as well as a schedule for their expedited consideration and determination." Source: ASLB Notice of Oral Arguments, March 30, 1984.

35. On April 2, the NRC's General Counsel circulated a Memorandum to all the Commissioners. The purpose of this Memorandum was to respond "to the Chairman's March 20, 1984 request that OGC develop proposals for expedited hearings on the Shoreham diesel problem." The OGC noted that the "issues [raised by LILCO's Motion] are extremely complex" OGC suggested a number of alternatives, including an expedited hearing schedule, which allowed a total of 80 days between a Commission Order starting the proceeding and a Licensing Board

decision on the LILCO Motion. Under this OGC schedule, there would have been 15 days for discovery, 10 days between close of discovery and the start of hearings, and 15 days for hearings. Source: Memorandum from Herzel Plaine to NRC Commissioners, April 2, 1984.

36. On April 3, the County filed Comments on the Miller Board's March 30 Notice of Oral Arguments, 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 had an opportunity to retain experts and conduct adequate discovery, as discussed in the County's March 26 Preliminary Views. Source: Suffolk County's Comments on Notice of Oral Arguments, April 3, 1984.

37. On April 3, the State of New York filed a motion in opposition to the Miller Board's ruling that LILCO's Low Power Motion would be given expedited consideration. The State argued that expediting LILCO's Low Power Motion was arbitrary and would deny the State due process of law. Source: 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, April 3, 1984.

38. On April 4, Chairman Palladino distributed a Memorandum to the other Commissioners, attached to which was Chairman Palladino's March 22 "working paper" (see ¶ 24, supra) and Judge Cotter's March 23 draft order (see ¶ 25, supra). The Chairman's April 4 Memorandum was also distributed to the Atomic Safety and Licensing Board Panel. Source: Palladino 4/4 Memo.

39. On April 4, the Miller Board heard oral argument on the LILCO Motion. Source: ASLB Transcript, April 4, 1984.

40. On April 6, the Miller 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 stated that LILCO could operate Shoreham at low power with no onsite electric power system, provided that public health and safety findings similar to those suggested by the NRC Staff were made. Source: ASLB Low Power Order.

The time-frames established by the Miller Board for consideration of LILCO's Motion were as follows:

Time for discovery	10 days
Time between close of discovery and filing of testimony	4 days
Time between filing of testimony and start of hearing	4 days

Elapsed time set aside
for hearing

11 days

Source: Low Power Order.

The time-frames ordered that the hearing would end by May 5. Source: Low Power Order.

41. Suffolk County and the State of New York objected to the Miller Board's April 6 Order as denying them due process of law and as being contrary to GDC 17 and other NRC regulations. Source: 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, April 16, 1984. The County submitted affidavits of expert consultants indicating that the April 6 Order denied the County a chance to prepare for and participate meaningfully in the hearing.

Source: Letter from Lawrence Coe Lanpher to ASLB, April 23, 1984, transmitting affidavits. The Miller Board and, subsequently, the Commission refused to alter the April 6 Order.

Source: ASLB Order Denying Intervenor's Motion to Vacate Order, April 20, 1984; NRC April 23, 1984 transcript, at 122-25. The County and State sought a temporary restraining order in federal court that was granted on April 25. Source: Memorandum Opinion, U.S. District Court Docket 84-1264, April 25, 1984.

Herbert H. Brown
Herbert H. Brown

Lawrence Coe Lanpher
Lawrence Coe Lanpher

Fabian G. Palomino
Fabian G. Palomino

Sworn to this 21st day of June, 1984.

My Commission expires:

Patricia A. Hopkins
Notary Public

My Commission Expires January 31, 1985