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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)

BRIEF OF THE STATE OF NEW YORK IN OPPOSITION TO LILCO'S APPLICATION FOR A LOW POWER OPERATING LICENSE ON THE BASIS OF AN EXEMPTION FROM THE REGULATIONS PURSUANT TO 10 C.F.R. 50.12(a)

Preliminary Statement

The State of New York joins in and adopts the facts and arguments presented in the Brief submitted by Suffolk County in the subject proceeding.

There are a few points which the State of New York wishes to emphasize, and they are set forth hereinafter.

POINT I

LILCO HAS FAILED TO PROVE THAT ITS AC POWER SOURCES IN LOW POWER OPERATION WOULD BE AS SAFE UNDER THE CONDITIONS PROPOSED BY IT, AS OPERATION WOULD HAVE BEEN WITH A FULLY QUALIFIED ONSITE AC POWER SOURCE. THE APPLICATION MUST BE DENIED.

The Commission's Order (CLI-84-8) issued May 16, 1984, clearly and unequivocally set forth the standard of safety in low power operation that LILCO's proposed power source would have to meet to be entitled to an exemption which would entitle it, in

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this respect, to a low power license under 10 C.F.R. 50.12(a). The standard the Commission set was that LILCO must demonstrate:

> "that, all the power levels for which it seeks authorization to operate, operation would be as safe under the conditions proposed by it, as operation would have been with a fully qualified onsite AC power source."

By this standard the Commission stated to all concerned that the low power AC configuration proposed by LILCO would not have to meet the requirements of GDC 17, but under the conditions proposed for its low power operation by LILCO it would have to be as safe as "operation would have been with a fully qualified onsite AC power source." By this standard the Commission made it clear in order for the proposed configuration not to endanger life or property, as required by 10 C.F.R. 50.12(a) and to qualify for a low power license, it would have to be as safe on low power operation under the conditions proposed "as operation would have been with a fully qualified onsite AC power source." The Commission made no provision for any other or lesser standard of safety. The State and the County prepared their case, submitted prefiled testimony and tried the proceeding in light of this clear standard of safety.

Without repeating the details here, the evidence overwhelmingly established that the LILCO proposed configuration would not be as safe in low power operation as operation would have been with a fully qualified onsite power source. Accordingly, LILCO's application for an exemption from the regulations and for a low power license must be denied.

Since the proceeding was prepared and tried in light of this safety standard, neither this Board nor the Commission may grant LILCO an exemption from the regulations and a low power license at this juncture on the basis of another or lesser safety standard. Such a change at this time would contravene the State's and County's right to procedural due process of law as guaranteed by the Federal Constitution.

POINT II

AS LILCO FAILED TO ESTABLISH THAT GRANTING OF THE EXEMPTION FOR LOW POWER TESTING WOULD BE IN THE PUBLIC'S INTEREST, THE APPLICATION MUST BE DENIED.

To qualify for the low power license it was incumbent on LILCO to establish that the granting of the low power license was in the public's interest (10 C.F.R. 50.12(a)). LILCO abjectly failed to meet this requirement. Indeed, LILCO failed to adduce any evidence that low power operation for the period proposed would be in the public's interest. The witnesses it proffered with resepct to this issue only testified to purported benefits which might accrue to the public as a result of full power commercial operation of the plant. However, none of them even sought to establish that the grant of a low power license would necessarily lead to full power commercial operation, much less sooner full power commercial operation. None of them could so testify. The only evidence bearing on this issue is to the contrary. It is the fact that the plant cannot go to full power operation until there is an approved offsite emergency plan.

Such a plan cannot be approved until, among other things, LILCO establishes that it has the legal power to implement that plan, which is to be carried out without the assistance of the County of Suffolk or the State. The State of New York and the County of Suffolk have pending in the State Court a suit challenging LILCO's legal authority to implement that offsite emergency plan. To urge that the granting of a low power license in this situation could lead to an acceleration of full power commercial operation would be fatuous.

The relevant evidence adduced by the State of New York on this issue clearly established that it was not in the public's interest to grant the exemption and the low power license. LILCO, in its closing argument, sought to eliminate this devastating testimony of Richard Kessel by claiming that it was unsupported. Such contention is of no avail. Mr. Kessel is a qualified expert. Under the Federal Rules of Evidence he could testify as to such opinions (Rule 702). If LILCO desired to challenge him, it could have done so by way of cross-examination. Apparently prudence dictated that it not do so. His testimony, therefore, remains uncontradicted.

POINT III

THE STATE OF NEW YORK CONTENDS THAT A LOW POWER LICENSE MAY NOT BE GRANTED IN VIEW OF THE FUNDAMENTAL UNCERTAINTIES EXISTING AS TO WHETHER THE SHOREHAM NUCLEAR FACILITY WILL EVER HAVE A WORKABLE OFFSITE EMERGENCY PLAN.

The Governor and the State repeatedly and consistently have contended that a low power license may not be granted in view of

the fundamental uncertainties existing as to whether the Shoreham nuclear facility will ever have an adequate and implementable offsite emergency plan. Such uncertainties clearly flow, in part, from the pending State and County lawsuits challenging LILCO's legal authority to implement its proposed offsite emergency plan. For the NRC to rest on the notion that such a plan is unnecessary for a low power license is misplaced and beside the central point in controversy.

Indeed, the central point is that it is unlikely that Shoreham will ever achieve full power authorization, and that in light of this, contamination of the reactor at low power is contrary to the public interest. This standard -- "the public interest" -- we remind the Board is an explicit and uncompromising factor in Section 50.12(a).

Finally, the Board must take full cognizance that the representatives of the affected people -- i.e., the governments of New York State and Suffolk County -- oppose LILCO's exemption. There is no basis on which the Board can give more weight to LILCO's personal self-interest than to the representative voices of the very people whose interests here comprise "the public interest." In short, LILCO's exemption request must be denied.

Respectfully submitted,

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Governor of the State of New York

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of the State of New York

Dated: August 31, 1984

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NUCLEAR REGULATORY COMMISSION

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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 the BRIEF OF THE STATE OF NEW YORK IN OPPOSITION TO LILCO'S APPLICATION FOR A LOW POWER OPERATING LICENSE ON THE BASIS OF AN EXEMPTION FROM THE REGULATIONS PURSUANT TO 10 C.F.R. 50.12(a), dated August 31, 1984, have been served to the following this 31st day of August, 1984 by U.S. mail, first class, by hand when indicated by one asterisk and by Federal Express when indicated by two asterisks.

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