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LILCO, March 18, 1985

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Before the Commission

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In the Matter of )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station,  
Unit 1) )

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

LILCO'S RESPONSE TO SUFFOLK COUNTY  
AND STATE OF NEW YORK PETITION FOR REVIEW

Pursuant to 10 CFR § 2.786(b)(3), LILCO files this response opposing the Suffolk County and State of New York Petition for Review (Intervenors' Petition) of certain portions of ALAB-800.<sup>1</sup>

Intervenors' Petition does not contend that the result reached by the Appeal Board was erroneous. Instead, Intervenors simply argue that in conducting its review of the Initial Decision, the Appeal Board should have paid no heed to the Commission's pronouncements in CLI-85-1<sup>2</sup> concerning the meaning of its regulations and the meaning of CLI-84-8.<sup>3</sup> Thus, Intervenors allege that they have been denied an opportunity for review because the Appeal Board should have been allowed to conjure its own interpretations of CLI-84-8 and 10 CFR § 50.12(a), which presumably would

<sup>1</sup> Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-800, 21 NRC \_\_\_\_ (Feb. 21, 1985).

<sup>2</sup> Long Island Lighting Company (Shoreham Nuclear Power Station), CLI-85-1, 21 NRC \_\_\_\_ (Feb. 12, 1985).

<sup>3</sup> Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154 (1984).

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differ from those of the Commission. Such a result would be illogical and nonsensical. Intervenors were not denied any opportunity for review. The Appeal Board conducted a full review of the record below. In reaching its decision, the Appeal Board merely recognized various of Intervenors' positions on appeal were contingent upon interpretations of CLI-84-8 and § 50.12(a) which the Commission had dispositively rejected. Further review at this juncture would serve absolutely no purpose since there is no reason to believe that the Commission would alter its statements of law in CLI-85-1.

Intervenors Mischaracterize  
ALAB-800 and the Proceedings Below

Contrary to Intervenors' argument, the Appeal Board did not abdicate its responsibility for review. From the Licensing Board's Initial Decision, the appeal process followed its normal course. Briefs were filed by the parties and oral argument was held on February 11, 1985. The Appeal Board's extensive questioning at oral argument clearly indicated that it had fully considered the matters briefed and was familiar with the issues presented on appeal.

Intervenors nevertheless contend that their right to review was foreclosed by the Appeal Board's deference to the legal pronouncements in CLI-85-1. Intervenors are wrong: the Appeal Board's application of the law as interpreted by the Commission did not deprive Intervenors of any right to review. The Appeal Board did not simply say the Commission had decided this matter.

Instead, it ascertained the issues, determined which issues were important,\* and further ascertained that the cognizable issues essentially involved questions of law which the Commission had determined. ALAB-800 at 2-9.

In sum, there was no shortcut in the review process and no review opportunity denied to Intervenor. Had the legal pronouncements of CLI-85-1 not been dispositive, the Appeal Board's review would have so recognized.

The Appeal Board Correctly Affirmed  
the Pertinent Portions of the Initial Decision

The Appeal Board carefully examined the issues presented on appeal by Intervenor and determined that the safety and public interest/exigent circumstances issues reduced to legal questions dependent upon the interpretation of CLI-84-8 and § 50.12(a). ALAB-800 at 2-3. For example, before the Appeal Board Intervenor challenged the Licensing Board's interpretation of the so-called

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\* The Appeal Board categorized the issues it believed important into three areas -- the "as safe as" and "public interest/exigent circumstances" criteria of CLI-84-8 and physical security -- and as to any others said:

Insofar as concerns those appellate claims of the intervenors that do not come within one of the above identified areas, none appears to require specific treatment in this opinion. More particularly, each such claim is either manifestly without merit or grounded upon licensing board error not having a crucial bearing upon whether the grant of the Section 50.12(a) exemption should be set aside.

ALAB-800 at 4 n.6. It is noteworthy that Intervenor does not complain of the Appeal Board's summary rejection of this large number of other issues.

"as safe as" test in CLI-84-8 and the Licensing Board's evidentiary rulings based upon that interpretation. Intervenors also challenged the Licensing Board's interpretation of public interest and exigent circumstances and, again, the Licensing Board's evidentiary rulings based upon that interpretation. In their appeal, Intervenors asked the Appeal Board to interpret CLI-84-8 as it impacted on both of those issues and to interpret § 50.12(a). Additionally at issue was the applicability of CLI-83-17<sup>5</sup> and CLI-84-9,<sup>6</sup> where the Commission had determined that uncertainty concerning ultimate full power licensing was not germane to low power.

The Commission answered all of these questions in CLI-85-1. First, it instructed about the meaning of "as safe as." It rejected Intervenors' argument that CLI-84-8 required a component-by-component analysis of operating characteristics. Instead, it interpreted CLI-84-8 to mean that operation of the plant must achieve a level of safety functionally equivalent to that of a plant with qualified diesels. Second, the Commission reaffirmed the applicability of CLI-83-17 and CLI-84-9 by stating that any ultimate uncertainty about full power operation is irrelevant to low power licensing and, therefore, should not have been considered in the public interest/exigent circumstances determination.

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<sup>5</sup> Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-83-17, 17 NRC 1032 (1983).

<sup>6</sup> Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC 1323 (1984).

Third, the Commission weighed the various equities and determined the public interest, a matter peculiarly within its province.

It would have been simply illogical for the Appeal Board to disregard the Commission's interpretation of its own law in CLI-84-8 and § 50.12(a) or its reaffirmation of CLI-83-17 and CLI-84-9. To the extent that the law was determined, there was no need for the Appeal Board to determine it anew. The Appeal Board properly recognized the difference between this case and one where the principal issue involved the application of the law to fact, a challenge to factual findings or even a question involving law other than the Commission's own orders and regulations. ALAB-800 at 5-8. Indeed, if the Appeal Board had exercised its own independent judgment and had interpreted the Commission's regulations differently than the Commission, the Appeal Board would have been subject to later reversal by the Commission.

Intervenors argue, in essence, that except as expressly modified by the Commission, 10 CFR § 2.764(g) compels an Appeal Board totally to ignore any Commission immediate-effectiveness review. This argument is inapplicable, as was recognized by the Appeal Board and noted above, to the types of purely legal issues determined by the Commission. It is also inapplicable given the major differences between the detailed Shoreham immediate-effectiveness review and the relatively brief review contemplated by the structure of the regulations. The normal immediate-effectiveness review is a quick and limited inquiry focusing upon whether the decision should be stayed. 10 CFR § 2.764(f)(2). It

involves the filing of only brief comments by the parties within ten days of the Board's decision. 10 CFR § 2.764(f)(2)(ii). The regulations provide for no oral argument. And, immediate-effectiveness reviews are normally not even conducted at low power under the regulations, 10 CFR § 2.764(f)(2)(i); only the Commission's own action in CLI-84-8 brought this particular action before the Commission. Thus in the ordinary case, it may be appropriate for the Commission to presume that its immediate-effectiveness comments be given no weight in the regular appeal process.

The Shoreham proceeding starkly contrasts with the normal immediate effectiveness review, however. First, as a review of a low power license decision involving an exemption application, it is not even clear that the normal constraints on immediate-effectiveness reviews ought to apply. It was only because of the Commission's special order in CLI-84-8 that it conducted such a review. Second, the inquiry here was not limited. When LILCO suggested that the Commission limit its review to the stay-type inquiry contemplated in § 2.764(f)(2)(i), Intervenor vehemently disagreed. On several occasions, they demanded that the Commission conduct a full merits review. See pp. 7-8 infra. The Commission essentially obliged them. Third, briefing to the Commission was not limited to "brief comments" filed within ten days of the Board's decision. Instead, Intervenor were afforded the opportunity to file more than sixty pages of comments over the course of a proceeding lasting from October 29, 1984 (the date of



the Initial Decision) until February 12, 1985. Intervenors attempted to exploit and expand even this opportunity by filing a number of unauthorized pleadings in the interim. Finally, contrary to the normal immediate-effectiveness review, Intervenors demanded and were granted the opportunity for full oral argument before the Commission. In short, the Commission's immediate-effectiveness review process took nearly as long as the Appeal Board's process and afforded opportunity for oral argument and briefing of approximately the same length as before the Appeal Board. Thus this proceeding, which is so much the creature of the Commission's own tailor-making, is a particularly appropriate one for recognition and following of the Commission's construction of its own law. The Commission having set this proceeding in motion by CLI-84-8, its purely legal construction of that decision demands attention.<sup>7</sup>

Intervenors' contention that the Appeal Board's reasoning deprived them of meaningful review rings especially hollow since Intervenors themselves urged the Commission to disregard its regulations calling for only a limited immediate-effectiveness review and, instead, to conduct a full merits review. Examples follow:

[T]he Commission has only one legitimate option:  
it must summarily reverse the unlawful decision  
of the Miller Board . . .

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<sup>7</sup> Surely Intervenors would not contend that if CLI-84-8 had been so construed in another case, the Appeal Board should ignore that construction; then, all the more, why should it do so where the construction has occurred in the same case?

Suffolk County and State of New York Comments Concerning Commission Review of LILCO's Exemption Request (November 29, 1984) at 6.\*

[T]his Commission must conduct a complete review of the Miller Board's decision. . . . [T]he Commission, not any licensing board, must grant or deny the exemption request. . . . [T]his Commission is now obligated to consider fully the entire record of this proceeding. Thus, LILCO's assertion that the Commission's review is limited to a cursory stay-type review is erroneous.

Id. at 9-10 (emphasis in original).

Aside from improperly attempting to convert the NRC's review into a "stay" inquiry, LILCO misstates the law. . . . The Commission, not any licensing board, must grant or deny LILCO's exemption request. [footnote omitted]. Thus, LILCO is incorrect when it asserts that "it is not the Commission's function . . . to conduct a full review of the merits of the Board's actual findings." LILCO Comments at 8. Indeed, in this exemption proceeding it is exclusively the Commission's duty to rule on the merits.

Suffolk County and State of New York Reply Comments Pursuant to Commission's January 7 Order at 5 (emphasis in original).

[The Commission] must recognize the interests of the public by thoroughly reviewing and summarily reversing the Miller Board decision.

Id. at 28. Given the extensive deliberation and full merits review demanded by Intervenor, it is disingenuous for them now to term the immediate-effectiveness review a limited inquiry and state that its product ought to be ignored by the Appeal Board. In contrast to normal appellants, Intervenor have received not

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\* Intervenor even attached to their comments copies of their proposed findings and briefs to the Licensing Board. Id. at 6 n.1.



one, but two, full opportunities for appellate review of the Initial Decision.<sup>9</sup> Importantly, Intervenors do not contend that CLI-85-1 was not dispositive or that it was applied improperly.

There Is No Reason  
to Grant the Petition for Review

LILCO strongly disagrees that there was any error in the pertinent portions of ALAB-800. Nevertheless, even if the Appeal Board technically erred by considering CLI-85-1, that error was harmless to Intervenors and there is no reason for the Commission to grant their Petition for Review. Simply, the merits of the Initial Decision received full review before this Commission and before the Appeal Board. Granting the Petition for Review here would only lead to one of two wasteful results. On one hand, the Commission could review only the procedural propriety of the Appeal Board's consideration of CLI-85-1 and, if it disagreed with the Appeal Board's reasoning, remand the case for the Appeal Board to determine without reference to CLI-85-1. In that instance, if the Appeal Board applied law inconsistent with CLI-85-1, the Commission would then have to grant a petition for review and reverse, thereby achieving the same result as in ALAB-800. If the Appeal Board applied law consistent with CLI-85-1, the same result

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<sup>9</sup> Intervenors also err in arguing that the Appeal Board's logic would apply in any immediate-effectiveness review. Intervenors' Petition at 8 n.4. To the contrary, one would seldom expect the Commission to be invited to and actually perform a full merits review under the guise of an immediate-effectiveness review. And, legal interpretations of Commission regulations and precedent may not be dispositive in every case. It cannot be gainsaid that the Shoreham proceeding has been unique.

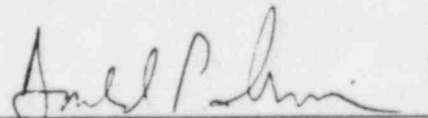
would be reached as in ALAB-800. On the other hand, the Commission could treat the Petition for Review as seeking review of the merits of the Initial Decision. In that event, the Commission would simply rehash everything it did in the immediate-effectiveness review and, presumably, reach the same decision again. And, again, the same result as in ALAB-800 would be reached. In either case, the proceedings would be time-consuming, expensive and wasteful.

The Commission's discretionary review process should not be invoked to address academic arguments with no practical significance to the result. Accordingly, the Intervenor's Petition for Review should be denied.

Respectfully submitted,

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DATED: March 18, 1985

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(Shoreham Nuclear Power Station, Unit 1)  
Docket No. 50-322-OL-4 (Low Power)

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I hereby certify that copies of LILCO'S RESPONSE TO SUFFOLK COUNTY AND STATE OF NEW YORK PETITION FOR REVIEW were served this date upon the following by U.S. mail, first-class, postage prepaid, or by hand (as indicated by one asterisk) or by Federal Express (as indicated by two asterisks).

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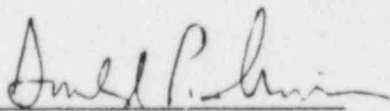
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