

LILCO, December 31, 1984

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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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)	)	

LILCO'S PRELIMINARY RESPONSE TO  
INTERVENORS UNAUTHORIZED DECEMBER 19 MOTION

Since the Licensing Board's October 29 Initial Decision was referred to the Commission for an immediate effectiveness review, Suffolk County and the State of New York (the Intervenor) have filed 8 motions or other papers with the Commission, not including their excessively long November 29 comments.<sup>1</sup> Their December 19

<sup>1</sup> They include the Request of Suffolk County and New York State to Present Written Briefs and Oral Arguments on the Licensing Board's Low Power Decision (October 31, 1984); Motion to Strike LILCO's Unauthorized Pleading Dated November 8 and Motion for Commission Attention to the Suffolk County and New York State Request to File Written Briefs and Present Oral Arguments (November 9, 1984); Suffolk County and State of New York Motion to Exceed Page Limit (November 29, 1984); New York State and Suffolk County Request for Reconsideration of Commission Denial of Opportunity for Oral Arguments (November 29, 1984); New York State and Suffolk County Supplementary Affidavit in Support of Comments Filed November 29 and Request for Oral Argument Filed November 29 (December 5, 1984); Notice of Suffolk County Legislative Resolution Demanding Oral Arguments before the Commission on Pending Shoreham Low Power Issues (December 13, 1984); New York State and Suffolk County Motion for Leave to Reply to LILCO's Request for the Commission to Ignore State Energy Official's Sworn Statement

(footnote continued)

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"Motion for Commission Declaration That 10 CFR § 50.47(d) Does Not Apply In This Case If the Miller Board's 'As Safe As' Ruling Is Approved" (December 19 Motion) is the latest in this chain of unauthorized filings. Because it is unauthorized and grossly abusive of the Commission's administrative processes, LILCO objects to its filing and urges the Commission to strike it.

1. The low power matter is pending before the Commission solely for an immediate effectiveness review for Phases III and IV of the proposed low power testing. Parties may not supplement the record below as of right on immediate effectiveness review. Nevertheless, as an incident to that review in response to Intervenor's request, the Commission permitted written comments, limited to 15 pages, from all parties. Order, November 19, 1984. In addition to filing 31 pages of comments rather than the 15 authorized, the Intervenor has now filed six motions or other papers since the November 19 Order. See note 1 supra. This frantic stream of unwarranted, unauthorized and improper pleadings is reminiscent of the Intervenor's similar ploy following issuance of the Commission's May 16 Order, CLI-84-8, when the Intervenor

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(footnote continued)

that Shoreham's Capacity Will Not be Needed for More than Ten Years (December 14, 1984); Suffolk County and State of New York Motion for Commission Declaration that 10 CFR § 50.47(d) Does Not Apply in this Case if the Miller Board's "As Safe As" Ruling Is Approved (December 19, 1984).

bombarded the Commission with separate papers on May 21, May 22, May 24, May 30, May 31 and June 1, though there was nothing left pending before the Commission and all matters had been referred to the Licensing Board.<sup>2</sup>

2. The unauthorized December 19 Motion is nothing more than an additional brief attacking the Initial Decision. No such additional briefing is permitted by the regulations and none has been solicited by the Commission. The Intervenor's offer no explanation as to why the argument contained in their unauthorized December 19 Motion comes so late. The argument is solely a legal one. The Intervenor's have been aware of the factual predicate for LILCO's low power motion and exemption request since the March 20 filing of LILCO's Supplemental Motion for Low Power Operating License. Yet, the Intervenor's totally failed to raise this argument in their November 29 comments and have offered no explanation for that failure.

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<sup>2</sup> Those papers included Request for Clarification of Commission's Order of May 16, 1984 (May 21, 1984); Request by the State of New York for Clarification of Commission's Order of May 16, 1984 (May 22, 1984); Joint Motion of Suffolk County and the State of New York to Strike LILCO's Three Unauthorized Pleadings Entitled "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" (May 24, 1984); Joint Suffolk County and New York State Supplement to Requests for Clarification of Commission's May 16 Order (May 30, 1984); Joint Request of Suffolk County and New York State for Prompt Clarification of the Posture of this Proceeding (May 31, 1984); and Joint Motion of Suffolk County and the State of New York for the Commission's Prompt Attention to and Ruling on Pending County and State Motions and for Stay of Inconsistent ASLB Orders in the Interim (June 1, 1984).

3. The Intervenors similarly offer no explanation as to why this newly contrived argument is so urgent as to warrant a complete disregard for the Commission's orderly procedures. They have made the same argument, in one paragraph instead of ten pages, in their recently filed brief before the Appeal Board. Suffolk County and State of New York Brief in Support of Appeal of October 29, 1984 ASLB Decision on LILCO's Exemption Request, p. 37, December 11, 1984. Thus, presumably, the issue will be decided in due course. Significantly, however, the Intervenors have not timely sought a stay from the Appeal Board of the Initial Decision as provided by 10 CFR § 2.788.<sup>3</sup> Having waived their right to seek a timely stay of the Initial Decision, the Intervenors should not now be allowed to abuse the Commission's processes by filing unauthorized pleadings in an effort to delay and thwart the purpose of the immediate effectiveness review.

4. The real issue raised by the unauthorized December 19 Motion is not the substantive issue argued by the Intervenors. Instead, the real issue is whether the Commission will allow parties vigorously represented by counsel and fully aware of proper procedures to flout the Commission's orderly processes by repetitive, unauthorized filings causing distraction, delay and unwarranted effort and expense to the Commission, Staff and other

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<sup>3</sup> Section 2.764 makes clear that this immediate effectiveness review is no substitute for seeking a stay.

parties in responding to such procedural antics. See Gulf States Utilities Company (River Bend Station Units 1 and 2), ALAB-317, 3 NRC 175, 180 n.7 (1976) ("an 'interested state' is not . . . relieved of the obligation of complying with all procedural rules . . ."). LILCO urges that the Commission not tolerate such behavior and requests that the Commission dismiss and disregard the unauthorized December 19 motion.

5. If, however, the Commission intends to consider the arguments raised in the December 19 Motion, LILCO requests that the Commission advise the parties of such intent and afford them an opportunity to respond substantively. If LILCO were to respond, it would demonstrate that the Intervenor's argument has no merit because:

(a) The basic assumptions underlying 10 CFR § 50.47 have not been undermined by the Licensing Board's "as safe as" determination. See December 19 Motion at 4. First, the fission product inventory during low power operation is not affected by LILCO's proposal; it remains substantially lower than at full power. Second, there is still a reduction in the required capacity of systems designed to mitigate accidents. Those systems are simply powered by different sources to the extent they are needed at all. Third, there remains more time available to react to a low power accident. Indeed, the record establishes that absent a LOCA, AC power is not needed for at least 30 days.

(b) "As safe as" is not an established legal standard; it is the basis for LILCO's case and was proposed by LILCO as a description of its proof. The standard for granting the exemption is and has always been whether there is any danger to life or property. 10 CFR § 50.12(c).

(c) The Intervenors' semantic quibbling should not obscure the Board's finding of reasonable assurance that the plant will operate within regulatory limits. Section 50.47(d) does not specify any lower limits for low power and none can be presumed.

(d) The Board's comment about a "lesser margin of safety" (Low Power decision at 24) has been taken misleadingly out of context by Intervenors. It referred only to the difference between the § 50.46 limits and possible core temperatures under the proposed mode of low power testing and with onsite AC power. In both cases, the plant would operate well below those limits. All testimony -- including the Staff's -- was that there was no substantial difference in safety.

(e) The Board did not apply a "safe enough" rationale. It determined that the proposed testing would be as safe as at a plant with qualified onsite diesels. It simply refused to be swayed by inconsequential differences. If necessary, LILCO would show how each of the Intervenors' specific factual examples distorts the record in terms of its significance. That is a consideration properly for the Appeal Board, however.

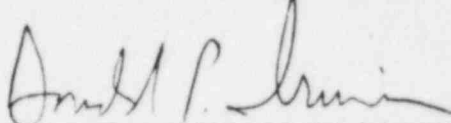


CONCLUSION

LILCO requests that the Commission disregard the unauthorized December 19 motion and notify the parties that, absent changed circumstances, further unsolicited submissions relative to its immediate effectiveness review will be struck. In the event the Commission determines to consider the December 19 motion and desires substantive comment, LILCO requests the opportunity to provide such comment expeditiously.

Respectfully submitted,

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DATED: December 31, 1984

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO'S PRELIMINARY RESPONSE TO INTERVENORS UNAUTHORIZED DECEMBER 19 MOTION 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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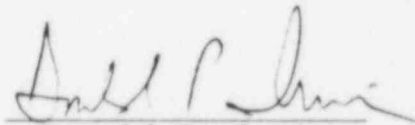
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