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)	)	

SUFFOLK COUNTY AND STATE OF NEW YORK
MOTION FOR STAY OF PHASE III AND IV LICENSE

On February 12, 1985, the Commission authorized a Phase III/IV license for Shoreham. Suffolk County and the State of New York move the Commission to stay issuance of the license pending judicial review.

I. PROBABILITY OF SUCCESS ON THE MERITS

We recognize that the Commission and Chairman Palladino have ruled against the County and State on the issues discussed below. However, prior to seeking a Court of Appeals stay, we ask the NRC to rectify its errors, or to stay license issuance pending judicial review.

A. The NRC Has Violated the National Environmental Policy Act

An agency must supplement an FEIS when events occur which cast doubt on the continued validity of a prior analysis.1/ In the Shoreham case, a dramatic

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1/ A substantial reduction in the benefits assumed to result from a major federal action is a changed circumstance which requires an FEIS supplement. See Conservation Law Foundation v. Watt, 560 F. Supp. 561, 571 (D. Mass.), aff'd, 716 F.2d 946 (1st Cir. 1983).

change of circumstances has occurred since the FEIS was prepared: Suffolk County and the State of New York have decided not to adopt or implement an offsite emergency plan; and the NRC Commissioners and FEMA have acknowledged that this circumstance means it is foreseeable that LILCO may be unable to satisfy requirements for operation beyond 5 percent power. Under these circumstances, while the plant will be operated and environmental impacts will be incurred, there never will be any offsetting benefits because electricity will never be produced. Thus, the changed circumstances pertaining to offsite emergency planning result in complete elimination of the benefits assumed to result from Shoreham's operation. This change must be analyzed in the NEPA process.

The undisputed facts are as follows:

1. Shoreham's 1977 FEIS does not analyze low power operation. Rather, the FEIS analyzes only the impacts of full power operation and weighs those impacts against the assumed benefit of electricity generation. Low power operation was not analyzed; low power operation was viewed only as an intermediate, implementing step toward full power operation, not as an alternative to full power operation.

2. Recent events demonstrate that it now is foreseeable that low power operation will be followed by abandonment of the plant.

(a) In February 1983, Suffolk County decided it would not adopt or implement any emergency plan for a Shoreham emergency. The State of New York has supported that decision and has likewise declined to adopt or implement any such plan.

(b) The NRC has issued no decision on whether LILCO's proposed compensatory plan is adequate. However, the Commissioners have stated that where both State and local governments decline to participate in offsite emergency planning, it will be extremely difficult for a utility to qualify for a license above 5 percent power. Indeed, two Commissioners have stated that it will be impossible for a utility to satisfy the NRC's regulations in those circumstances.2/

(c) FEMA has stated that a utility plan which lacks both State and local government involvement cannot satisfy the criteria for adequacy.3/

The foregoing facts are not in dispute: several Commissioners and FEMA have expressed the view that LILCO cannot satisfy 10 CFR § 50.47. These statements have never been repudiated. There is thus no basis for the unsupported assertion by three Commissioners that "uncertainty about the ultimate disposition of contested emergency planning issues is too speculative to be cognizable as a changed circumstance for the purpose of finding that a supplementary evaluation is required by NEPA." CLI-84-9, 19 NRC at 1327 (emphasis supplied). It is just as "speculative" for the NRC to premise its NEPA analysis on the assumption that Shoreham will receive a full power license. Thus, in the circumstances of this case, the likelihood of license denial represents a real possibility that triggers the NEPA process.4/

2/ See ASLB Memorandum Serving Excerpts from Commission Testimony Before Congress, April 26, 1983; Nuclear Emergency Planning: Hearing Before the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works, 98th Cong., 1st Sess. 7-12 (April 15, 1983); CLI-84-9, 19 NRC at 1328-29 (dissenting views of Commissioners Gilinsky and Asselstine); CLI-83-13, 17 NRC at 744 (separate views of Commissioner Gilinsky).

3/ Hearing, supra note 3, at 21-23.

4/ Conservation Law Foundation v. Watt, supra; accord, Essex County Preservation Ass'n v. Campbell, 536 F.2d 956, 960-61 (1st Cir. 1976); see

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B. Chairman Palladino Erred in Failing to Disqualify Himself

Chairman Palladino erred in refusing to recuse himself from participating in Commission matters related to Shoreham. The evidence establishes that the Chairman engaged in improper activities in connection with LILCO's motion for a low power license. In particular, despite the fact that the Chairman would be called upon to sit in judgment of LILCO's low power motion, the Chairman intruded into the licensing process at the Licensing Board level in a manner that strongly suggested to nonparty observers, including NRC Commissioners, that the Chairman had prejudged LILCO's entitlement to a license (or at least created that appearance), and was determined to run interference for LILCO irrespective of the impact on the fairness of the licensing process. The Chairman thus violated the Cinderella standard and must be disqualified. See Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970). See also PATCO v. FLRA, 685 F.2d 547, 592 (D.C. Cir. 1982) (Robinson, C.J. concurring).

The pertinent facts are not in dispute. On March 16, 1984, Chairman Palladino personally intervened in the licensing process to work out a way (other than through accepted appeals procedures) for getting around the Brenner Board's February 22, 1984 decision to litigate diesels before considering issuance of a low power license. To this end, he held an ex parte meeting with

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Chelsea Neighborhood Ass'ns. v. U.S. Postal Serv., 516 F.2d 378, 388-89 (2d Cir. 1975).

members of the NRC Staff who were substantively involved (as an independent party) in the licensing process and the ongoing license litigation.

Chairman Palladino has characterized the March 16 meeting as dealing with nothing but benign scheduling matters. He has sought to create the impression that matters of substance were in no way discussed, and that no matter of substance was affected. But this simply is not so. Movants now have copies of handwritten notes taken by Chairman Palladino and by Judge Cotter at the meeting. Read together, these notes confirm that matters of substance, unquestionably adverse to the interests of the County and State, were discussed at the meeting.

The Palladino notes first raise the questions: "What level of risk is acceptable for low power?"; and "Is there a need for emergency diesel generators at low power in this plant?" Not only are these matters substantive, they are controlling issues in deciding whether LILCO is entitled to a low power license. The Palladino notes next describe an extremely abbreviated schedule for some kind of low power hearing. The notes conclude: "Also look at reversing Bd. decision." This obviously refers to reversing the Brenner Board decision of February 22.

It is important to note that LILCO itself had not asked that the Brenner Board decision be reversed. It had not appealed that decision and had taken no other action to contest the Brenner Board's decision or the schedule projected by that Board for litigation of the diesel issues. While there may have been private indications made by LILCO to the Staff that some kind of new LILCO proposal for low power operation would be forthcoming, none had been

presented to the Board or to the Commission by March 16. It is apparent that Chairman Palladino decided of his own volition, and not in response to any LILCO motion made formally on the record, to run with the ball for the Company.

It is a foregone conclusion in both the Palladino and Cotter notes that the Brenner Board will be reversed. The notes thus speak not of an appeal from the Brenner Board's decision (which arguably would have been neutral), but of a reversal of that decision. If there were no element of prejudgment in these discussions, it is difficult to understand why the words "reversing Bd. decision" and "reverse Board order" were used. These comments also emphasize the substantive nature of the discussion.

In short, Chairman Palladino improperly intruded in the licensing process. Commissioner Asselstine, certainly a "disinterested observer" under the Cinderella standard, has stated that a reasonable person would believe that the Chairman had become an advocate for LILCO.5/ By nevertheless participating in the Shoreham case, the Chairman has violated the State's and County's right to due process of law. See Cinderella, supra, 425 F.2d at 591.

II. THE COUNTY AND STATE WILL SUFFER IRREPARABLE INJURY IF THE STAY IS DENIED

The irreparable injury standard is satisfied. First, a denial of due process (such as that resulting from the Chairman's actions) constitutes irreparable harm per se. No further showing of "harm" is required to support the grant

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5/ Licensing Process at Shoreham Nuclear Power Plant: Oversight Hearing Before the Subcomm. on Energy and The Environment of the H. Comm. on Interior and Insular Affairs, 98th Cong., 2d Sess. 15-16 (1984). Commissioner Gilinsky similarly questioned the Chairman's actions. See CLI-84-8, 19 NRC at 1159 (separate views of Commissioner Gilinsky).

of immediate injunctive relief. Cuomo v. NRC, Civ. No. 84-1264 (D.D.C. April 25, 1984) (slip op. at 7).6/

Second, there is a strong presumption that an injunction should issue when NEPA has been violated. See Realty Income Trust v. Eckerd, 564 F.2d 447, 456 (D.C. Cir. 1977). The need for injunctive relief is particularly compelling in this case since the NRC has been on notice since June 1983 of the need for additional NEPA analyses. The repeated NRC refusal to take the "hard look" mandated by NEPA eliminates any doubt regarding the balance of equities in this case.

Third, if the stay is not granted, the County/State appeal will be mooted by commencement, and likely completion, of Phase III/IV testing prior to a decision on the merits of the appeal. LILCO plans to begin Phase III with a day or two. LILCO's schedule provides for 6.9 days to complete Phase III, and 16.7 days to complete Phase IV.7/ Contrary to the NRC's speculation about some purported public interest in finding problems early in the testing process, LILCO stated yesterday at a Staff briefing that even allowing for problems and testing delays, its entire testing program would take no more than 42 days. Thus, Phases III and IV could be completed by early March 1985. Judicial review of these issues cannot be completed by March 1985. Therefore, any judicial decision reversing the NRC can have no effect unless a stay is granted. The potential mooting of an appeal constitutes irreparable harm justifying a stay.8/

6/ Accord, United Church v. Medical Center 689 F.2d 693 (7th Cir. 1982); Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971); Henry v. Greenville Airport Comm., 284 F.2d 631 (4th Cir. 1960); O'Conner v. Mowbray, 504 F. Supp. 139 (D. Nev. 1980). See also Elrod v. Burns, 427 U.S. 347, 373 (1976).

7/ SC LP Exhibit 2, and Tr. 767-69, 776, 780 (Gunther).

8/ Scripps-Howard, Inc. v. FCC, 316 U.S. 4 (1942); Zenith Radio Corp. v. United States, 710 F.2d 806 (Fed. Cir. 1983); Public Utilities Comm. v.

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See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB Memorandum and Order, ____ NRC ____ (May 24, 1984) (slip op. at 7-8) (FEMA would be irreparably harmed if appeal mooted by denial of stay). There certainly is no public interest in causing such mootness when even if one assumes problems may occur, the utility itself predicts no more than 42 days to complete testing.

III. THE GRANT OF A STAY WILL NOT HARM LILCO

The County and State seek a stay to permit the Court of Appeals to address the merits of the County/State appeal. We intend to ask the Court of Appeals to expedite its decision. Based upon events related to the recent Court of Appeals Diablo Canyon decision, an expedited schedule in this case may result in a judicial decision on the merits by July or August, 1985.9/ With the NRC's support in seeking expedition, there is every reason to believe that rapid judicial review can be achieved.

A stay could harm LILCO only if it impacted the timing of LILCO's full power ascension (assuming, arguendo, that a full power license eventually were issued). Such impact is not possible here: the earliest that a full power license could be issued is January 1986.10/ Thus, the grant of a stay would

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Capital Transit Co., 214 F.2d 242 (D.C. Cir. 1954); Township of Lower Alloways Creek v. NRC, 481 F. Supp. 443 (D.N.J. 1979).

9/ In Diablo, the NRC authorized a full power license on August 10, 1984 and a final Court of Appeals decision was issued December 31, 1984.

10/ The following events/decisions must occur and all must be resolved in LILCO's favor before a full power license could be issued: a decision on diesel issues; a decision on emergency planning issues litigated to date; a

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result in no delay of the plant's ultimate operation.

IV. THE PUBLIC INTEREST FAVORS ISSUANCE OF A STAY

The public interest does not favor a rush to contaminate Shoreham and moot parties' appeal rights in the face of serious legal issues. The NRC's NEPA decision was on a 3-2 vote and the Chairman's refusal to recuse himself was made in the face of strong contrary views. These are clearly serious issues which merit judicial review. Such review must be meaningful, and without a stay it would be meaningless. Since there is no need to conduct Phase III/IV testing at this time given that emergency planning issues cannot be resolved for many months, there is no countervailing interest to outweigh that of the public.11/

Second, both Suffolk County and New York have urged that the public interest requires, at a minimum, maintenance of the status quo. In considering where the public interest lies, the NRC must give great weight to the views of the State and County. Thus, in its Diablo brief before the U.S. Court of Appeals, the Commission stated:

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decision on recently reopened emergency planning relocation center issues; a decision on the State court case challenging LILCO's authority to implement LILCO's emergency plan; an emergency planning exercise must be held (the County and State oppose the conduct of an exercise, neither the NRC nor FEMA has agreed to schedule one, it normally takes 120 days for FEMA to prepare for an exercise once scheduled, and it normally takes several months to prepare and submit findings to the NRC); a hearing regarding the adequacy/outcome of the exercise, assuming an exercise is held; a decision on the exercise litigation; and a 30-day immediate effectiveness review.

11/ That the public interest favors a stay is further manifested by the fact that electric output from Shoreham is not needed for at least 10 years. Suffolk County Ex. LP-20, at 37.

> [T]he Supreme Court has noted that the debate over nuclear power is one in which the States have a vital stake. In this case the Governor of California, as representative of the people and the public interest, has indicated in hearings before the NRC Appeal Board that he does not oppose this action. The views of the chief elected representative of the people of California should be accorded great weight in fixing where the public interest lies.12/

In the Shoreham case, the chief elected representative of the people of New York and the elected government of the people of Suffolk County oppose Phase III/IV testing because such operation would be contrary to the public interest. The Commission must accord the views of the public's representatives "great weight" here just as the Commission did in pleading before the Court of Appeals. Certainly, the application of the "great weight" rule requires, at a minimum, the maintenance of the status quo for the period necessary to allow the merits of the State/County appeal to be decided.

Respectfully submitted,

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12/ Respondent U.S. Nuclear Regulatory Commission's Opposition to Emergency Motion for Stay, November 10, 1983, filed in San Luis Obispo Mothers for Peace v. NRC (Civ. Action Nos. 81-2035, 83-1073, 81-2034) (D.C. Cir.) at 34 (emphasis supplied, citations omitted).

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February 12, 1985

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the SUFFOLK COUNTY AND STATE OF NEW YORK MOTION FOR STAY OF PHASE III AND IV LICENSE, dated February 12, 1985, have been served on the following this 12th day of February 1985 by U.S. mail, first class, except as otherwise indicated.

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