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LILCO, February 13, 1985

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)	)	
	)	

LILCO'S OPPOSITION TO SUFFOLK COUNTY AND NEW YORK STATE MOTION FOR STAY OF PHASE III AND IV LICENSE

Yesterday following the Commission's decision on immediate effectiveness of Phases III and IV of LILCO's low power license application, Suffolk County and New York State filed a motion for a stay of the Commission's decision based on alleged violations of the National Environmental Policy Act and on Chairman Palladino's refusal to recuse himself in this matter. The Commission should summarily deny this motion.

Suffolk County and New York State argue that the Commission's authorization of a Phase III/IV license must be stayed because the Commission has assertedly violated the National Environmental Policy Act (NEPA) by not preparing a supplemental environmental impact statement (EIS) dealing with low power operation. Intervenors' assertion is premised on legal arguments that have already

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been considered and rejected by the Commission over 8 months ago in CLI-84-9. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC 1323 (1984). The Commission's decision not to supplement the Shoreham EIS was a final agency order that Intervenors could have appealed. See Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP), 422 U.S. 289, 319 (1975);[1/] cf. People Against Nuclear Energy v. NRC, 678 F.2d 222 (D.C.Cir. 1982), rev'd, 460 U.S. 766 (1983) (judicial review of Commission decision not to admit contentions on alleged environmental effects during TMI-1 restart proceeding). They did not do so. Nor did they take any steps to seek timely reconsideration from the Commission itself. None of the operative facts on this issue have changed since the Commission's decision in CLI-84-9. Intervenors' request for a stay should be summarily denied.

1/ In SCRAP, the Supreme Court clearly stated:

> NEPA does create a discrete procedural obligation on Government agencies to give written consideration of environmental issues in connection with certain major federal actions and a right of action in adversely affected parties to enforce that obligation. When agency or departmental consideration of environmental factors in connection with that "federal action" is complete, notions of finality and exhaustion do not stand in the way of judicial review of the adequacy of such consideration, even though other aspects of the [proceeding] are not ripe for review.

422 U.S. at 319.

Intervenors' argument with respect to Chairman Palladino's refusal to recuse himself is similiarly untimely. The Chairman issued his decision on this issue on September 24, 1984, nearly five months ago. Intervenors did not seek any reconsideration of that decision at the time, nor did they do so at any point in the ensuing half-year prior to the Commission's reaching its final decision on this matter. Parties cannot sit on disqualification claims until the posture of a case makes it tactically advantageous, but must do so promptly. As the D.C. Circuit stated in Marcus v. Director, Office of Workers Compensation Programs,:

> The general rule governing disqualification, normally applicable to the federal judiciary and administrative agencies alike, requires that such a claim be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exists. It will not do for a claimant to surpress his misgivings while waiting anxiously to see whether the decision goes in his favor. A contrary rule would only countenance and encourage unacceptable inefficiency in the administrative process. The APA-mandated procedures afford every party ample opportunity to enforce and preserve its due process rights. Under the present circumstances, however, petitioner must be deemed to have waived his claim.

548 F.2d 1044, 1051 (D.C. Cir. 1976) (citations omitted). Accord, Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 NRC 21, 32 note 33. Petitioners knew of Chairman Palladino's refusal to disqualify himself nearly five months ago. Had they wished to protect their claim without totally disrupting the Commission's process, they should have acted promptly on that

knowledge rather than waiting until after they had lost the low power decision and their request lost any practical value. Their failure to timely pursue their remedies requires that their request for a stay be summarily denied.

CONCLUSION

For the foregoing reasons, the joint motion of Suffolk County and New York State for a stay of the Phase III and IV license should be summarily denied.

Respectfully submitted,

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DATED: February 13, 1985

CERTIFICATE OF SERVICE

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

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

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