

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))

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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. Intervenor's 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 Intervenor 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. Intervenor's 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.

Intervenors' argument with respect to Chairman Palladino's refusal to recuse himself is similarly 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 suppress 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

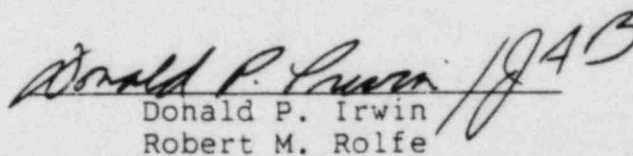
knowledge rather than waiting until after they had lost the low power decision and their request lost any practical value. Their failure to timely pursue their remedies requires that their request for a stay be summarily denied.

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,

LONG ISLAND LIGHTING COMPANY

 1943
Donald P. Irwin
Robert M. Rolfe

Hunton & Williams
P.O. Box 1535
Richmond, Virginia 23212

DATED: February 13, 1985

CERTIFICATE OF SERVICE

In the Matter of
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).

Chairman Nunzio J. Palladino*
United States Nuclear
Regulatory Commission
1717 H Street
Washington, DC 20555

Commissioner James K. Asselstine*
United States Nuclear
Regulatory Commission
1717 H Street, N.W.
Washington, DC 20555

Commissioner Frederick M. Bernthal*
United States Nuclear
Regulatory Commission
1717 H Street, N.W.
Washington, DC 20555

Commissioner Thomas M. Roberts*
United States Nuclear
Regulatory Commission
1717 H Street, N.W.
Washington, DC 20555

Commissioner Lando W. Zech, Jr.*
United States Nuclear
Regulatory Commission
1717 H Street, N.W.
Washington, DC 20555

Alan S. Rosenthal, Chairman**
Atomic Safety and Licensing
Appeal Board, United States
Nuclear Regulatory Commission
Fifth Floor (North Tower)
East West Towers
4350 East-West Highway
Bethesda, Maryland 20814

Gary J. Edles**
Atomic Safety and Licensing
Appeal Board, United States
Nuclear Regulatory Commission
Fifth Floor (North Tower)
East West Towers
4350 East-West Highway
Bethesda, Maryland 20814

Howard A. Wilber**
Atomic Safety and Licensing
Appeal Board, United States
Nuclear Regulatory Commission
Fifth Floor (North Tower)
East West Towers
4350 East-West Highway
Bethesda, Maryland 20814

Judge Marshall E. Miller,**
Chairman, Atomic Safety
and Licensing Board
United States Nuclear
Regulatory Commission
Fourth Floor
East-West Towers (West Tower)
4350 East-West Highway
Bethesda, Maryland 20814

Judge Glenn O. Bright**
Atomic Safety and Licensing
Board, United States
Nuclear Regulatory Commission
Fourth Floor
East-West Towers (West Tower)
4350 East-West Highway
Bethesda, Maryland 20814

Judge Elizabeth B. Johnson**
Oak Ridge National Laboratory
Building 3500
P.O. Box X
Oak Ridge, TN 37830

Edwin J. Reis, Esq.*
Bernard M. Bordenick, Esq.
Office of the Executive
Legal Director
United States Nuclear
Regulatory Commission
Maryland National Bank Building
7735 Old Georgetown Road
Bethesda, MD 20814

Herbert H. Brown, Esq.*
Alan R. Dynner, Esq.
Lawrence Coe Lanpher, Esq.
Kirkpatrick & Lockhart
8th Floor
1900 M Street, N.W.
Washington, DC 20036

Fabian Palomino, Esq.**
Special Counsel to the Governor
Executive Chamber, Room 229
State Capitol
Albany, NY 12224

James B. Dougherty, Esq.**
3045 Porter Street
Washington, DC 20008

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, NY 11788

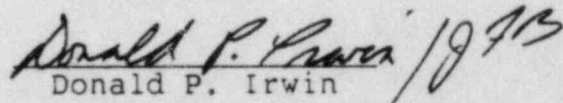
Stephen B. Lathar Esq.**
John F. Shea, Esq.
Twomey, Latham & Shea
33 West Second Street
Riverhead, NY 11901

The Honorable Peter Cohalan
Suffolk County Executive
County Executive/
Legislative Building
Veterans Memorial Highway
Hauppauge, NY 11788

Jay Dunkleberger, Esq.
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, NY 12223

Mr. Martin Suubert
c/o Congressman William Carney
1113 Longworth House Office
Building
Washington, DC 20515

Docketing and Service
Branch (3)
Office of the Secretary
United States Nuclear
Regulatory Commission
Washington, DC 20555


Donald P. Irwin

Hunton & Williams
Post Office Box 1535
Richmond, Virginia 23212

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