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
PETITION FOR RECONSIDERATION
OF CLI-85-1

Pursuant to the Commission's April 23, 1985 Order for Review of ALAB-800, Suffolk County and the State of New York hereby petition the Commission to reconsider, and to reverse, its decision in CLI-85-1, which made effective the October 29, 1984 ruling of the Miller Licensing Board (LBP-84-45, 20 NRC 1343) that LILCO satisfied the requirements for an exemption from compliance with the NRC's regulations under 10 CFR § 50.12(a). The Commission's decision is erroneous for three reasons: (1) the Miller Board and in CLI-85-1 the Commission, denied the State and County their right to a fair hearing guaranteed by the U.S. Constitution, the Administrative Procedure Act and the Atomic Energy Act; (2) a full and fair consideration of the merits of the County's and State's evidence and the applicable law makes it impossible to find in LILCO's favor on the public interest, exigent circumstances, and "as safe as" issues; and (3) events subsequent to the issuance of CLI-85-1 provide additional and irrefutable bases for reversing that decision.1/

1/ In accordance with past practice in this proceeding (see e.g., Commission Order dated January 7, 1985), the State and County have

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I. The Miller Board Proceeding, and the Commission's Approval Thereof in CLI-85-1, Violated the State's and County's Constitutional and Statutory Rights

It has long been a principle of administrative and constitutional law that the right to a hearing, which is guaranteed to the State and County by Section 189a of the Atomic Energy Act (42 U.S.C. § 2239(a)), necessarily includes the right to introduce relevant evidence on material issues and the right to have those issues decided on the basis of the evidence submitted. As the Supreme Court observed more than half a century ago,

> The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action.

The Chicago Junction Case, 264 U.S. 258, 265 (1924); see Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1444 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 815 (1985) ("When a statute requires a 'hearing' in an adjudicatory matter, such as licensing, the agency must generally provide an opportunity for

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> filed a joint Petition. Thus, the applicable page limitation of 25 pages per party is combined herein. Nevertheless, even this 50 page combined limit is not enough to permit us to portray the wholesale inequities of the Miller Board's decision that require its reversal. The bases of the State's and County's appeal on the merits are set forth in detail in the Brief in Support of Appeal of October 29, 1984 ASLB Decision on LILCO's Exemption Request (Dec. 11, 1984) filed with the Appeal Board, and pages 6-49, 109-21 of the transcript of the February 11, 1985 oral argument before the Appeal Board. We refer the Commission to those documents.

submission and challenge of evidence as to any and all issues of material fact.").2/

Above all, the right to a hearing includes the right of the parties to be treated equally in their opportunities to present relevant evidence to the trier of fact. It is wholly unacceptable, and a violation of statutory and constitutional guarantees, for a decision-maker systematically to permit one party to introduce evidence on material issues, and then to deny other parties the right to present opposing evidence on those same issues. "[M]anifestly there is no hearing when [a] party . . . is not given an opportunity to test, explain or refute." ICC v. Louisville & N. Ry. Co., 227 U.S.f 88, 93_ (1913).3/ This is

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2/ See also, e.g., Northern Pacific Ry. v. Dep't of Public Works, 268 U.S. 39, 44-45 (1925) ("An order based upon a finding made without evidence . . . is an arbitrary act . . . [and] a denial of due process"); Golden Grain Macaroni Co. v. FTC, 472 F.2d 882, 886 (9th Cir. 1972) ("[I]f an issue was not litigated, and the party proceeded against was not given an opportunity to defend himself, an adverse finding on that issue by the agency does violate due process"), cert. denied, 412 U.S. 918 (1973); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 620 (2d Cir. 1965) ("The Commission has an affirmative duty to inquire into and consider all relevant facts"), cert. denied, 384 U.S. 941 (1966). In the last case cited, an FPC licensing decision was set aside because, as was true in this case, the Commission had improperly failed to compile a record sufficient to support its decision, and ignored certain factors and evidence on matters which, under the controlling statute and its own interpretations of that statute, it was required to consider.

3/ See also, e.g., Miller v. Poretsky, 595 F.2d 780, 785 (D.C. Cir. 1978) ("admission of appellees' witnesses testifying to their freedom from discrimination and the exclusion of appellant's witness testifying to the contrary was . . . an abuse of discretion"); Bowden v. McKenna, 600 F.2d 282, 284-85 (1st Cir. 1979) (once plaintiff was allowed to testify on a relevant matter, "defendants were plainly entitled to rebut"), cert. denied, 444 U.S. 899 (1979); United States v. 478.34 Acres of Land, 578 F.2d 156 (6th Cir. 1978).

particularly true where, as here, the parties who are denied the opportunity to present evidence on material issues are representatives of the public, and one of the dispositive issues actually is the public's interest. As the U.S. Court of Appeals for the District of Columbia Circuit observed only last year, the NRC's "discretion to limit public participation in resolving the matters it deems relevant is more circumscribed as a result of section 189(a)'s hearing requirements." Union of Concerned Scientists v. NRC, 735 F.2d at 1437. See also 10 CFR § 2.715(c).

In this case, as detailed in our brief to the Appeal Board and summarized below, the Miller Board ignored these fundamental principles by denying the County and the State the right to present clearly relevant and probative evidence on every one of the critical issues in the exemption proceeding, and then relied solely on the evidence presented by LILCO on these issues or relied on no evidence at all. The Commission itself then participated in and compounded these violations of statutory and constitutional rights by issuing CLI-85-1, in which it sidestepped the pervasive Miller Board errors and permitted them to stand.4/ Thus:

4/ The Commission's attempt to "excuse" or "remedy" the Miller Board errors by saying that the Commission would not consider LILCO's evidence on particular issues, is no "solution" (see, e.g., CLI-85-1, at 3-4). This Commission tactic simply ignores the fact that the compelling evidence of Suffolk County and the State of New York was never permitted to be introduced at all and thus the "record" upon which CLI-85-1 purports to be based was compiled in violation of law and can support no lawful decision in LILCO's favor. The point is that the County's and State's evidence affirmatively requires denial of an exemption. There is no excuse for the Commission to block this relevant evidence from the proceeding. Furthermore, as

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-- Although the County and State are by law the representatives of the public, virtually all the testimony they sought to introduce to show the exemption was not in the public's interest was excluded while the Miller Board instead relied upon the "public interest" evidence submitted by two LILCO employees. The Commission effectively ignored this error in CLI-85-1.

-- Although LILCO was permitted to introduce evidence that its efforts to comply with GDC 17 were exceptional enough to justify an exemption, the County was denied the opportunity to rebut that evidence, or to show why the balance of equities weighed against a finding of exigent circumstances sufficient to justify an exemption. Again the Commission effectively ignored this error in CLI-85-1. How could LILCO's purported "recent good faith efforts" properly be considered (CLI-85-1, at 3-4) when the County was barred from proving that even LILCO's recent efforts were seriously deficient?

-- Finally, the Miller Board excluded highly relevant evidence submitted by the County on the "as safe as" issue, and then proceeded to resolve that issue solely in accordance with the evidence submitted by LILCO. The Commission dismissed this error with no reasoned explanation at all. See CLI-85-1, at 2-3.

In short, the Miller Board simply ignored the constitutional and statutory rights of the County and State to a fair hearing, and for this reason its decision arising from those proceedings must be reversed. Furthermore, as we

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discussed in more detail below, this Commission tactic also results in so-called "findings" and conclusions based on no evidence at all.

demonstrate below, the Commission's conclusions in CLI-85-1 following its limited effectiveness review are just as erroneous.

A. The Miller Board Systematically Excluded the State and County Evidence on the "Public Interest" Issue, While Simultaneously Admitting and Relying on LILCO's Evidence on the Same Issue

Section 50.12(a) expressly requires a finding that an exemption is "in the public interest."[5/] In late 1983, the Commission represented to the U.S. Court of Appeals that in determining where the public interest lies, the Commission will give "great weight" to the views of the state government which represents the affected population.[6/] In that case, the Governor of California had supported the result desired by the NRC. In contrast, here the Miller Board not only gave no weight to the views of the State and County governments that it was

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5/ LILCO has argued that the public interest finding required by Section 50.12(a) is limited to one of timing only. It has asserted that the only proper public interest consideration in the LILCO exemption proceeding was whether it is in the public interest to issue a low power license to LILCO now (i.e., pursuant to an exemption), rather than later (i.e., at a time when LILCO allegedly could achieve compliance with all NRC regulations). Clearly, there is no basis for such a limitation; Section 50.12 does not limit or define the public interest considerations that the Commission may address in ruling on an exemption request. Indeed, LILCO's suggested definition is premised on a presumption that LILCO is entitled to a low power license, which assumes away the very issue presented by LILCO's exemption application. In essence, the issue here is not whether LILCO is "entitled" to an exemption, but whether it is qualified for one under the Commissions's own regulations. Clearly, it is not so qualified.

6/ See NRC Opposition to Emergency Motion for Stay (November 10, 1983), at 34 filed in San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984). See also 10 CFR § 2.715(c).

not in the public interest to grant an exemption to LILCO, but also systematically excluded as "irrelevant" virtually all the evidence that the County and State attempted to introduce on that issue. Simultaneously, however, the Board admitted, and relied in its decision upon, the evidence submitted by LILCO on that issue. In CLI-85-1, the Commission effectively did the same.

For example, the Miller Board refused to consider the County's testimony that there would be an economic penalty to the public of approximately $100 million if the exemption were granted and Shoreham were contaminated by low power testing, and then full power authorization did not follow. The Miller Board also excluded as "irrelevant" testimony by the Chairman of the New York State Consumer Protection Board and the County's expert witnesses: (1) that granting the exemption could have an adverse impact on LILCO's ability to service its customers; (2) that low power testing produces no electricity and therefore granting the exemption results in no public benefit; and, (3) that since the electrical power from Shoreham is not needed for at least 10 years, there is no public benefit to be gained by granting the exemption, even if full power operation were to be authorized eventually.7/

7/ The excluded testimony of Messrs. Madan and Dirmeier on behalf of the County was Attachment 5 to the Suffolk County and State of New York Comments Concerning Commission Review of LILCO's Exemption Request (November 29, 1984) (hereafter, "Nov. 29 Comments"). The Miller Board's ruling excluding it is at Tr. 2145-48. The testimony of Mr. Kessel on behalf of New York, marked to reflect the Board's rulings, was Attachment 6 to the Nov. 29 Comments. The Board's ruling is at Tr. 2893-2905.

At the same time, the Miller Board admitted, over the objection of the State and County, testimony by two LILCO employees that granting the exemption was in the public interest because they believe it could reduce dependence on foreign oil and could result in an $8 million benefit to be realized by LILCO's ratepayers in 1997. Significantly, however, they testified that neither of these benefits would ever be achieved unless Shoreham began full power operation. Tr. 1235-36, 1249-50, 1330, 1372, 1405-10. This was the only testimony offered by LILCO on the public interest issue, and it, along with the underlying presumption that full power operation would occur, provided the sole basis for the Miller Board's finding that the public interest requirement of Section 50.12(a) was met. 20 NRC at 1378. The Miller Board's arbitrary refusal to consider the evidence submitted by the County and State, which demonstrated that the public interest requires denial of the exemption, constitutes a clear denial of due process and a violation of Section 189(a).

The Commission's treatment of the dispositive public interest issue in CLI-85-1 was as arbitrary, and as lacking in legal and logical justification, as the Miller Board's. First, in CLI-85-1, the Commission in fact never made the required public interest finding at all. Indeed, it expressly "gave no weight" in its review to the only so-called public interest "benefits" relied upon by the Miller Board to find that granting the exemption was in the public interest (i.e., the predicted economic benefits to ratepayers from earlier full power operation testified to by LILCO's witnesses). CLI-85-1, at 4. Thus, that Order is on its face deficient, because (a) it fails to make the affirmative public

interest finding that under Section 50.12(a) is a prerequisite to the grant of an exemption, and (b) it fails to justify why it failed to make the required public interest finding. See Guard v. NRC, 753 F.2d 1144, 1148-49 (D.C. Cir. 1985) (deference to agency interpretation of its own regulation "is appropriate only so long as the agency's interpretation does no violence to the plain meaning of the provision at issue," quoting San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1310 (D.C. Cir. 1984)); Natural Resources Defense Council, Inc. v. NRC, 695 F.2d 623 (D.C. Cir. 1982) (NRC Order granting Section 50.12 exemption reversed where NRC failed to make findings it had held were necessary to grant of Section 50.12 exemption and provided no explanation for deviation).

Second, in CLI-85-1 (at 4), the Commission expressly "gave no weight" to the State's and County's public interest evidence that granting the exemption would harm the public if full power operation did not occur. And, as did the Miller Board, the Commission simply ignored the proffered evidence that granting the exemption would adversely affect LILCO's ability to service its customers. Thus, the State's and County's public interest evidence, which the Miller Board excluded, was treated exactly the same way by the Commission in CLI-85-1. Had the Commission considered the State's and County's proferred evidence, the Commission would have been required to find that the public interest compels denial of the exemption.

Finally, the Commission's evasive explanation of why the State's and County's public interest evidence was denied any consideration (id. at 4, n.2) is absurd. First, contrary to the Commission's assertion, the State and County do

not suggest that their views on the public interest should be treated as "conclusive." We have merely cited the Commission's own words in the Diablo Canyon Court of Appeals case in arguing that the views of the public's elected representatives concerning where the public's interest lies should be accorded "great weight."

Second, it is specious to suggest that permitting the State and County to submit evidence on the public interest issue -- as they are entitled to do under law — and according that evidence great weight as to that issue -- as the Commission did in the Diablo Canyon case -- constitutes an improper "delegation" of NRC responsibility. The point at issue here has nothing to do with the Commission delegating anything, but only with whether the Commission is exercising its duties responsibly.

Third, the assertions that the "equitable considerations supporting the Commission's decision in this case are within the special knowledge and expertise of the Commission since they arise directly from the conduct of the NRC's own licensing process" and that those considerations "bear directly on the national interest in effective and efficient nuclear safety regulation" are absolutely baseless. The "public's interest," and all the equities relating to the requested exemption, are clearly not uniquely "within the core of the Commission's expertise." See Guard v. NRC, 753 F.2d at 1149-50. Further, whether all the considerations the Commission decided to rely upon do or not do derive from the NRC's licensing process is irrelevant; the fact is that all other equitable considerations that could have weighed against granting the exemption were

not considered at all. And, even if the considerations chosen by the Commission relate to "efficient" nuclear safety regulation, that does not justify the Commission's actions, under the guise of "efficient regulation," that in fact violate the plain words of its own regulations and precedents and other applicable law. Self-styled "efficiency" is not a label with which to paper over the denial of the State's and County's constitutional rights.

Finally, in ignoring the evidence proffered by the State and County, the Commission is effectively repudiating Congress. In Section 274(l) of the Atomic Energy Act, Congress mandated that the Commission "shall afford reasonable opportunity for State representatives to offer evidence . . . and advise the Commission" as to license applications. In this proceeding, the State, as well as the County, have been barred by the Commission from exercising these statutory rights.

B. The Miller Board Systematically Excluded the State and County Evidence on the "Exigent Circumstances" Issue, While Simultaneously Admitting and Relying on LILCO's Evidence on the Same Issue

In CLI-84-8, the Commission stated that "a finding of exceptional circumstances . . . governs the availability of an exemption," and that such relief is "extraordinary." 19 NRC at 1156 n.3. See also Natural Resources Defense Council, Inc. v. NRC, 695 F.2d at 625, n.5 (NRC's stated "policy regarding granting of exemptions . . . pursuant to 50.12(a) [is] one of granting such exemptions sparingly and only in cases of undue hardship"). As with the public interest determination, however, the Miller Board based its finding that LILCO had demonstrated sufficient exigent circumstances to justify the grant of an

exemption on LILCO's evidence, much of which was irrelevant, but refused to admit the evidence submitted by the County and State discussing facts and equities that weighed against granting the exemption. See 20 NRC at 1377-82, 1401; Tr. 2385-89. And in CLI-85-1, the Commission was content to ignore that unlawful conduct.

1. One-Sided Evidence on Equities Relating to LILCO's Efforts to Comply With GDC 17

The Miller Board excluded as "irrelevant" the County's and State's testimony that: LILCO had failed to take reasonable and appropriate actions to ensure that the TDI diesels complied with GDC 17; LILCO's failures continued throughout the early 1980's and involved the very quality assurance and pre-operational testing efforts which were discussed in LILCO's testimony; and since the need for the exemption was the result of LILCO's own failures (rather than fortuitous events beyond LILCO's control), the public's interest in compliance with safety regulations weighed against rewarding LILCO's failures by granting an exemption.8/

At the same time, the Miller Board admitted, over the objections of the County and State, testimony by a LILCO employee that among LILCO's "good faith" efforts which constituted exceptional circumstances justifying the grant of an exemption were: LILCO's quality assurance efforts relating to the procurement, design and installation of the TDI diesels; its pre-operational testing program;

8/ The referenced County testimony by Messrs. Bridenbaugh and Hubbard was Attachment 4 to the Nov. 29 Comments. The Miller Board's ruling excluding that testimony is at Tr. 2385-89.

and its efforts following the catastrophic failure of one of the TDI diesels. Tr. 1703-15. There can be no basis for permitting one party to present testimony on an issue and to deprive an adverse party the right to submit evidence on the same subject. See cases discussed at pages 2 - 4 above.

The prejudicial impact of the Miller Board's inconsistent rulings on the admissibility of evidence is clearly manifest in its decision. The Miller Board relied heavily on LILCO's purported quality assurance program and pre-operational test program -- as to which the County's opposing testimony was excluded -- in finding that "LILCO's efforts as described in detail constitute the good faith to be considered in evaluating the equities, and support the grant of an exemption." 20 NRC at 1381, 1398-1400. Clearly, no "reasoned" weighing of the pertinent equities could have occurred in the presence of only LILCO's one-sided evidence: the Board had refused to have before it any evidence which could have weighed on any but LILCO's side of the scales.

The Commission's assertion in CLI-85-1 (at 3) that it "considered what Suffolk asserts to be LILCO's negligence in bringing on itself the need for the exemption," does nothing to "remedy" or render harmless the Miller Board's error. Indeed, the Commission's assertion that "LILCO's recent good faith efforts to cure the problems outweigh or balance any possible past negligence" (id. at 4) is directly contradicted by the State's and County's evidence which was denied admission. That evidence discussed and found fault with LILCO's "recent" efforts in 1983 and 1984 as well as those in the past. See, e.g., Hubbard and Bridenbaugh testimony at 19-30.9/ Thus, the Commission did exactly what the

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9/ The Commission's "finding" also directly contradicts the finding of two Administrative Law Judges of the New York Public Service Commis-

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Miller Board did -- it ignored evidence submitted by the County and State on a dispositive issue, and relied in its decision only on that submitted by LILCO. Furthermore, the Commission's statement that LILCO's recent efforts "outweigh or balance" the fact that its need for the exemption was the result of LILCO's own failures, is contrary to the Commission's ultimate finding that LILCO's good faith efforts favor granting the exemption. CLI-85-1, at 3, 4.10/

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sion who ruled on March 13, 1985 that LILCO has "mismanaged" the Shoreham project in the amount of $1.2 billion, with specific reference to LILCO's conduct concerning the TDI diesels and their replacement. See Recommended Decision, PSC Case No. 27563, Long Island Lighting Company, Shoreham Prudency Investigation, March 13, 1985.

10/ Any attempt to rationalize the Miller Board's exclusion or the Commission's blithe dismissal of the State's and County's evidence relating to LILCO's efforts to comply with GDC 17, based on an alleged distinction between a "good faith" issue and the legal definition of "negligence," is baseless. In ruling on LILCO's exemption request, the Miller Board and the Commission were required to make a finding of fact. After a reasoned weighing of all equities, including those related to LILCO's efforts to comply with GDC 17, they had to determine whether LILCO had shown the existence of sufficiently exceptional circumstances to justify the grant of an exemption. However, findings of fact and legal conclusions that LILCO's efforts were made in good faith, that they outweighed equitable considerations in favor of requiring full compliance with the regulations, or that they constituted sufficiently exceptional circumstances to justify an exemption, cannot be made in a factual vacuum. Regardless of the particular adjectives used by technical expert witnesses in testimony, and the legal definitions and conclusions that lawyers may ascribe to those words, the Board and the Commission can only make the required exceptional circumstances finding based on factual evidence in the record before it. There is no rational or reasonable justification, nor has one ever been offered, for the Miller Board's or the Commission's determinations that: (1) it need consider only LILCO's one-sided and clearly incomplete description and interpretation of facts relating to its ef-

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2. Improper Reliance Upon Evidence Concerning the Length and Costs to LILCO of the Shoreham Licensing Proceeding

The Miller Board also relied on irrelevant LILCO testimony concerning the length and costs of the NRC licensing proceeding in finding that exigent circumstances existed to justify an exemption.11/ In its testimony, LILCO: (a) complained that the Shoreham proceeding has lasted for several years; (b) alleged that the Staff has imposed extra and technically unjustified burdens on LILCO; and, (c) complained that LILCO has had to expend a great deal of resources in pursuing its quest for a license. See Tr. 1680-92.12/

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forts to comply with GDC 17; or (2) it could simply ignore the additional facts and interpretations on the same subject proffered by the State and County to show that the equities weigh against a finding that LILCO's efforts justified the extraordinary step of permitting a nuclear plant to operate without compliance with an important safety regulation.

11/ The State and County moved to strike this testimony as irrelevant (Tr. 1715-31) and the NRC Staff supported the motion to strike. Tr. 1693.

12/ One major component of this LILCO complaint concerns the County's and the State's decision not to adopt or implement an emergency plan for Shoreham and their opposition to LILCO's substitute plan. However, the U.S. District Court for the Eastern District of New York ruled on March 18, 1985 that the County's decision not to adopt a plan for Shoreham was rational, the New York Supreme Court ruled on February 20, 1985 that LILCO's plan is illegal under state law, and on April 17, 1985 the NRC's Licensing Board ruled that the state's laws which prevent LILCO from implementing its plan are not preempted. See also Section III below. Thus, the length of this case boils down to something of LILCO's own doing -- its continued pursuit of an unlawful objective.

There is no indication in any Commission precedent that such "evidence" (even if believed) would support the extraordinary relief of an exemption. The LILCO testimony amounted to nothing but an assertion of LILCO's apparent belief that it has a right to receive a license -- and here an exemption -- from the NRC. In fact, however, it is clear that all persons who apply for NRC licenses do so at their own risk and subject themselves to the NRC's rules and regulations, to the rulings of Licensing Boards and the Commission, and to the technical judgments and requirements of the NRC Staff. LILCO's complaints about the NRC licensing process, actions of the NRC Staff, and the length of, or costs incurred by LILCO during, the licensing proceeding are absolutely irrelevant. Further, there is no basis for LILCO's audacious non sequitur that because it has been involved in a contested NRC licensing proceeding convened to test LILCO's compliance with NRC safety requirements, "fairness requires" that it should now be granted an exemption from complying with those very NRC safety requirements.

Nonetheless, the Miller Board relied heavily upon this LILCO testimony in its Decision.13/ There is no legal, factual, or logical basis for the Board's

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13/ The Board held:

> The costs of unusually heavy and protracted litigation may also properly be considered in evaluating financial or economic hardship as an equity in this exemption proceeding . . . .
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> The unusually heavy financial and economic hardships associated with the very protracted Shoreham licensing proceedings constitute a significant equity, which we hold can reasonably be held to amount to

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conclusion that LILCO's litigation costs constitute exigent circumstances which justify an exemption from compliance with important safety regulations.14/ The Board's reliance upon LILCO's irrelevant testimony, as well as its consideration only of the alleged financial and economic hardships borne by LILCO and its refusal even to consider those put forth by the State and the County which would be borne by the public, constitute clear error.

Once again, in CLI-85-1 the Commission committed exactly the same error as the Miller Board -- it too found that "the unusual length and cost of this whole licensing proceeding" was entitled to "special weight" as an "equity" in favor of granting the exemption. CLI-85-1 at 3, 4. This Commission finding is just as illegal and illogical as the Miller Board's, and it cannot withstand judicial

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> exceptional circumstances in the context of granting a low power exemption.

20 NRC at 1378-79 (emphasis added). See also id. at 1377.

14/ The Staff and the Commission's Licensing Boards are required to make specific findings concerning the safety of a nuclear plant, and they undertake whatever reviews are necessary to enable them to make the requisite findings. The fact that for Shoreham extensive Staff review and hearings on contentions admitted by Licensing Boards have been necessary to enable the Staff and Boards to make the findings required under the regulations, does not constitute the kind of "exigent circumstances" which justify the grant of an exemption or the issuance of a license. The fact is that Shoreham has been a deeply troubled plant because of LILCO's own doing. Indeed, as noted above, a recent New York Public Service Commission ruling confirmed this fact by ruling that over 25% of the cost of the plant cannot go into LILCO's rate base because it is a result of LILCO mismanagement. See note 9.

scrutiny. Indeed, the Commission itself is playing a part in the "unusual length and cost" of the proceeding by failing to terminate this proceeding sua sponte, even though two courts and the NRC's own licensing board have made it clear that Shoreham can never be licensed to operate. See note 12 above and Section III below.

3. Improper Consideration of Prior Staff Practices as Basis for Finding Exigent Circumstances to Support Exemption

In purportedly "weighing the equities" and determining that exigent circumstances exist, the Miller Board also relied upon alleged prior Staff practices in permitting the issuance of licenses despite noncompliance with safety regulations. See 20 NRC at 1379-80. The information apparently relied upon by the the Miller Board concerning such prior Staff practices, however, was not in the evidentiary record and was never available to be cross-examined. The State and County had no opportunity to challenge the relevance, similarity or applicability to the facts at issue in this proceeding of whatever information formed the basis of the Miller Board finding. Basing a decision upon such extra-record information is clear error, and a blatant abuse of due process.

Further, the Miller Board's suggestion that the Staff's behavior in situations involving other utilities or regulations somehow justifies the issuance of a license in the face of LILCO's non-compliance which is at issue in this proceeding is patently absurd. Whatever the Staff may have done prior, or even subsequent, to the Commission's Shoreham rulings with respect to other plants, and whether such actions were right or wrong, cannot change the Commission's

ruling that in the face of LILCO's noncompliance with GDC 17, LILCO must meet the Section 50.12 standards as enunciated in the May 16 Order. The Board's unexplained and unsupported "finding" that allegedly "inconsistent" Staff practices constitute an exigent circumstance that justifies granting LILCO's exemption request is without any legal or factual basis and is clearly erroneous.

In CLI-85-1, the Commission repeated this clear error by once again assigning "special weight" to irrelevant and clearly improper considerations: "that LILCO's request for low power authorization came while NRC practice and policy in the granting of exemptions was in a period of transition, and LILCO was confronted with some uncertainty regarding how non-compliance with GDC-17 were to be reviewed and resolved." CLI-85-1 at 3. First, these Commission assertions are factually incorrect. The so-called "period of transition" for NRC practice and policy regarding exemptions did not begin until after LILCO announced its desire to do something unprecedented in NRC history — i.e., operate a plant without an on-site source of AC power as required by GDC 17. Indeed, it seems clear that LILCO's proposal to operate Shoreham in non-compliance with such a significant safety regulation actually caused the NRC to begin its "transition" of exemption policies and practices, as it became more and more obvious that under longstanding NRC precedent, policy and practice, LILCO's request could not legally be granted. Thus, there was no "uncertainty" as to how LILCO's non-compliance with GDC 17 could lawfully be resolved; the only uncertainty was how the Miller Board could get around the plain facts, realities, and legal rules and regulations that mandated the denial of LILCO's request.

Clearly, the only way to reach the result desired by LILCO was to deny the County and State their right to a hearing and to ignore the realities and facts involved in this case.

Second, the Commission's apparent belief that LILCO's inability to comply with the regulations should be either rewarded or excused because of NRC actions, its past or future practices, or some nebulous "uncertainty," is contrary to basic principles of law and logic, and violates the Commission's obligation to enforce its regulations and to protect the public's safety.

4. Errors on the Public Interest Issue Compound the Prejudice from Errors on the Exigent Circumstances Issue

The Miller Board's refusal to consider the State's and County's evidence that the public's interest requires denial of the exemption, magnifies the prejudice to the State and County from the Board's refusal to consider any equities relating to the grant of an exemption other than those self-serving and largely irrelevant ones asserted by LILCO. The evidence that the State and County unsuccessfully sought to introduce went not only to the public interest requirement of Section 50.12(a), but also demonstrated that the balance of equities underlying the "exigent circumstances" requirement weighed heavily — if not totally — against the grant of an exemption to LILCO. Thus, the potential $100 million economic detriment to LILCO's ratepayers, the fact that given the stage of the plant's construction granting the exemption would result in contaminating a plant that will never produce any public benefit, the adverse impact of the exemption on LILCO's ability to service its customers, the fact that electric

power from Shoreham is not needed for at least 10 years, and the public's interest in having safety regulations uniformly and impartially applied by the NRC, clearly are equities which must be weighed in any reasoned judgment concerning the grant of the extraordinary relief represented by an exemption. The Miller Board's rulings, however, kept such facts out of the record altogether.

The Commission's purported "balancing of the equities" in CLI-85-1 was no more justifiable than the Miller Board's. Indeed, in some respects, the Commission's ruling on this issue was perhaps even more arbitrary and capricious than the Board's. For example, the Commission asserted that in balancing equities to find they favored an exemption it "gave no weight to any asserted economic advantages or disadvantages . . . associated with grant (sic) of the exemption, where these assertions were premised on assumptions that full power licensing would or would not be authorized in the future." CLI-85-1, at 4. In fact, CLI-85-1 clearly is based on an assumption that full power operation will occur. Commissioner Bernthal said so expressly:

> [T]he Commission has a responsibility to proceed in good faith under the assumption -- and we said this in the order -- that a plant will eventually operate. For us to do otherwise, I think is simply not a good faith procedure for this Commission to operate under, and therefore we should not seek reasons that a plant should not operate -- whether it's the assumption that it eventually may or may not reach full power or for some other reason.

Transcript of February 12 Commission meeting, at 14-15 (emphasis supplied). And, even a cursory review of the "equitable considerations" purportedly relied upon by the Commission reveals that implicitly they all are based on the assumption that Shoreham will operate at full power.15/ Therefore, the

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15/ For example, there can be no value, "intrinsic" or otherwise, to "early discovery of problems during lower power testing" (CLI-85-1

(Footnote cont'd next page)

suggestion in CLI-85-1 that no assumptions one way or the other were made about full power operation is contradicted by the Commission's own words. That Order cannot be sustained as rational decision-making.16/

Moreover, even if accepted at face value, the Commission's assertion that its balancing of "equitable considerations" ignored assumptions one way or the other about full power operation, is itself without rational basis or justification. It is undisputed that low power testing has no purpose, and results in no benefit to the public or to anyone standing alone. Rather, the only purpose of such testing is "to ready the reactor for future operation."17/ Thus, the justification for, and the public's purported interest in, permitting low power testing pursuant to an exemption can rationally only be looked at in connection with what will follow that testing. How can exigent circumstances be found to

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at 3) unless the plant is eventually going to operate. Similarly, the finding that "the GDC-17 compliance issue arose late in the review process when the plant was almost complete" weighs in favor of granting the exemption, clearly has as its premise that plant completion means ultimate operation. Id.

16/ In light of the acknowledged presumption that full power operation will occur, the Commission's refusal to consider the adverse economic, environmental, and customer service impacts of granting the exemption if Shoreham does not receive a full power license, regardless of its purported disregard of LILCO's evidence on the opposite premise, is a repetition of the Miller Board's denial of the State's and County's right to a fair hearing on the public interest and exigent circumstances determinations.

17/ NRC Staff Response to Suffolk County and State of New York Brief in Support of Appeal of October 29, 1984 ASLB Decision on LILCO's Exemption Request at 35 (Jan. 22, 1985).

justify the extraordinary relief of an exemption if the testing to be permitted, which serves no purpose by itself, is looked at in isolation -- that is, without considering whether or when full power operation will occur? Thus, the Commission's refusal to consider any facts relating to Shoreham's full power operation in purporting to apply Section 50.12(a) -- if taken at face value -- completely invalidates its decision in CLI-85-1. See Guard v. NRC, 753 F.2d at 1146 (NRC may not interpret its regulation "as meaning something other than what those words, in the context of a nuclear power plant [regulation], may rationally convey"); Obremski v. OPM, 699 F.2d 1263, 1269 (D.C. Cir. 1983) (OPM interpreted statute "in a manner that is plainly at odds with the statute's meaning. And it did so conclusorily, without giving any consideration to the contrary view . . . . This at once vitiates whatever deference would otherwise be due the administrative interpretation . . . .").

Finally, the Commission purported to "place special weight" on "the intrinsic value to early discovery of problems during low power testing." CLI-85-1 at 3. None of the parties even discussed, much less presented evidence on that matter during the Miller Board proceeding, and the Commission has absolutely no evidentiary or other basis for "finding" such a "value," giving it "special weight," or finding that it weighs in favor of granting an exemption.18/ And,

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18/ Indeed, in discussing a draft of the February 12 Order with the Commission, Mr. Malsch characterized this portion of the Order as follows:

> In the middle of the page we took account of an equity which we had not specifically taken into account of before, that is the value to early discovery of problems during low power testing.

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had the State and County been given an opportunity, they would have demonstrated that any such so-called "value" is inconsequential. See Affidavit of Dale G. Bridenbaugh and Gregory C. Minor in Response to Affidavit of John D. Leonard, Jr., attached hereto. This Commission action was just as improper as all the Miller Board's violations of the County's and State's right to a fair hearing.19/

C. The Miller Board Excluded the County's Evidence on the "As Safe As" Issue, While Simultaneously Admitting and Relying on LILCO's Evidence on the Same Issue

The Miller Board found that LILCO satisfied the Commission's "as safe as" requirement only by arbitrarily excluding evidence on this issue submitted by the County, ignoring evidence in the record that contradicted its conclusion, and then also ignoring the fact that its own findings were on their face inconsistent with the Commission's "as safe as" standard.

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Feb. 12, 1985 Tr. at 11 (emphasis added).

19/ This Commission action in CLI-85-1 also violates the NRC's own case law, which requires that "where a party prosecutes its case on one theory, a trial board cannot decide it on another without having given the opponents a fair opportunity to rebut the new theory with argument and evidence." Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), 7 NRC 179, 186 (1978), citing Niagara Mohawk Power Corp., 1 NRC 347, 353-55 (1975). Accord, Pennsylvania Power and Light Co., (Susquehanna Steam Electric Station, Units 1 and 2), 15 NRC 771, 781-82 (1982).

The Miller Board excluded as "irrelevant" evidence submitted by the County which documented that LILCO's proposed low power operation would be quantifiably less safe than with a qualified on-site power source. The excluded evidence established that a loss of off-site power event during low power operation of Shoreham is seven times more likely to lead to a core vulnerable condition with the proposed alternate configuration than with a fully qualified source of on-site AC power; and, that the likelihood that Shoreham would experience an event leading to core vulnerability during low power operation is two and a half times greater under the alternate configuration than it would be under a qualified configuration.20/

The excluded County testimony discussed precisely the safety comparison mandated by the Commission for the exemption proceeding. It was based on data derived through accepted probabilistic analytical techniques, and there was absolutely no basis for the Board's refusal to admit it into evidence.21/

20/ The referenced testimony of Messrs. Weatherwax and Minor on behalf of the County was Attachment 7 to the Nov. 29 Comments. The Board's ruling excluding it is at Tr. 2857-59.

21/ In denying the admissibility of this evidence, the Miller Board stated that a probabilistic risk assessment ("PRA") is not a "proper method to be used in this proceeding." Tr. 2858. This is incorrect. PRAs have been required by the NRC Staff in licensing proceedings, and a PRA performed by LILCO has been reviewed by the Staff and was considered at length in litigation before an NRC Licensing Board and Appeal Board (see ALAB-788, 20 NRC 1102, 1128-32 (1984)). Indeed, the NRC itself uses data obtained through probabilistic techniques in the specific context of reviewing exemption requests. See e.g., 50 Fed. Reg. 16,507 (1985) (Proposed Rule on Exemptions) ("In recent years when probabilistic quantitative assessment techniques have been available, these techniques, along with engineering judgment, have been used to ensure that the exemption involved was acceptable from a safety standpoint.").

The Miller Board also ignored uncontradicted evidence in the record which proved that LILCO's proposed low power operation would not be as safe as operation with a qualified on-site power source because operating safety margins, and the defense in depth protection inherent in the NRC's regulatory requirements, would be substantially reduced.22/ Thus, the evidence showed that:

- the alternate configuration provides less backup and less redundance because it includes only two potential power sources, whereas the qualified configuration includes three (Tr. 1869);

- the alternate system is vulnerable to events and failures that would incapacitate the entire alternate configuration, and some sources of failure of the normal offsite power system would also incapacitate the alternate system, whereas each of the three qualified diesel generators is independent, physically isolated from the other two, and fully independent of the offsite power system (Tr. 359, 1868, 1886, 2354-55, 2437, 2582);

- operation of the proposed alternate configuration requires many manual operations in several different locations, giving rise to many opportunities for time delays and human error, whereas a qualified system is fully automatic (Tr. 1830, 2534, 2605-609);

22/ The Commission's requirement (19 NRC 1154, 1156) that the safety of operation under each configuration be the same is reasonable, and is particularly critical in the context of low power operation, which is at issue here. The Commission's regulations permitting low power operation without an approved off-site emergency plan (10 CFR § 50.47(d)) are premised on there being a margin of safety during low power operation that is greater than that present during full power operation. See 47 Fed. Reg. 30,234 (July 13, 1982). Clearly, any reduction in safety margins during low power operation due to the use of the alternate AC power configuration would undercut completely the rationale underlying 10 CFR §50.47(d), and thus render it illegal for the NRC to authorize a low power license for Shoreham, particularly since the NRC has found that LILCO does not have an adequate implementable offsite emergency plan.

- the alternate configuration is more vulnerable to fire and explosions but has substantially less fire detection and fire mitigation equipment than does a qualified system (Tr. 1183, 2492, 2591-96);

- the alarms which signal abnormal conditions in the alternate configuration are less comprehensive than those associated with qualified equipment, and are not annunciated to control room operators in the control room as are those associated with qualified equipment (Tr. 2498-2500, 2600-604, 2615).23/

Apart from the fact that it excluded highly probative evidence submitted by the County on the "as safe as" issue and ignored other evidence that documented that operation under the exemption would be less safe, the Miller Board decision is also fatally flawed because it reached flatly contradictory conclusions. On the one hand, it concluded that the "as safe as" standard was met. 20 NRC at 1400. On the other, it concluded that "there is unquestionably a lesser margin of safety provided by LILCO's alternative power system" Id. at 1359. There is simply no explanation for these flatly contradictory conclusions. See Guard v. NRC, 753 F.2d 1144 (D.C. Cir. 1985) (agency interpretation cannot be upheld when it does violence to the plain meaning of the provision at issue).24/

23/ The evidence also established, but the Miller Board found "irrelevant," that a qualified system could provide emergency power within 15 seconds, whereas the alternate configuration could require up to 30 minutes to supply power. 20 NRC at 1359-60. There are 55 minutes to restore power before reactor core damage occurs during low power operation. Id. at 1360. Since the non-safety grade equipment in the alternate configuration, by definition, is less reliable (and therefore more subject to failure) than safety-grade equipment, the need to use 30 minutes, as opposed to 15 seconds, of only 55 available minutes to restore power or even to know whether power will be available, clearly evidences a reduced margin of safety.

24/ The State and County never suggested in the exemption proceeding that to be "as safe," the alternate equipment needed to be identical in every respect

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The Commission reached the same contradictory and unsupportable conclusions in CLI-85-1. Thus, despite its acknowledgement that "the Board identified certain areas of specific comparison where components of LILCO's alternate AC system may have lesser safety margins than corresponding components of the permanent system," it also asserted that the Miller Board's finding that operation with the alternate system would be as safe as operation would have been with a fully qualified system "appeared" to be "correct." CLI-85-1 at 2. Clearly, operation cannot at the same time be both "as safe" and "less safe." The Commission's casual "affirmance" of the Miller Board's contradictory findings -- particularly by means of endorsing a superficial "appearance" -- cannot qualify as rational decision-making.

Further, the Commission's summary dismissal of the acknowledged safety reduction inherent in LILCO's proposed Shoreham operation is also irrational. The "as safe as" standard of protection for the public cannot be reduced to a question of what the Miller Board arbitrarily, and in blatant disregard of facts in evidence, termed "sufficient redundancy, capacity, testability and reliability," as the Commission did in CLI-85-1

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to qualified equipment. Some equipment differences would not impact safety. If differences between the alternate and the qualified systems have an impact upon the reliability, vulnerability to failure, or safety margins of operation, however, those differences are significant and cannot be ignored, as the Miller Board did, under the Commission's "as safe as" standard.

(at 2). The fact that LILCO cannot comply with the NRC's safety regulations, and instead has come up with ever-changing Rube Goldberg substitutes for qualified nuclear grade equipment, cannot rationally be used to justify any reduction whatsoever in the level of safety provided to the public around the Shoreham plant.

Finally, the Commission's attempt to "correct" the Miller Board's clear error in denying admission to the County's evidence on the safety issue, by a one sentence dismissal of that evidence, is contrary to the requirement for reasoned decision-making. First, the Commission's statement on its face is illogical: "Suffolk County's probabilistic risk analysis tends to confirm rather than contradict the essential safety equivalence of LILCO's alternate AC system." Id. at 3. Had the Commission chosen to consider fairly the proffered evidence, it would know that it states precisely the opposite -- operation under the alternate configuration would be seven times less safe than operation with a qualified system. Second, the Commission's "re-interpretation" of the plain facts set forth in the proferred testimony, clearly has no basis in the evidentiary record. That evidence was excluded by the Miller Board and there are no facts properly before the Commission that could be used to reinterpret or contradict the facts set forth in the County's evidence. Third, the Commission's misinterpretation or revision of the County's proferred testimony, by concluding that it means precisely the opposite of what it says, is a further denial of the County's due process right to

present evidence on material issues. The County's witnesses were never even given an opportunity to present, much less explain, the facts set forth in their pre-filed testimony. Clearly, the County and its witnesses are entitled to explain for themselves what their own testimony means, without having the Commission bar the County's explanation, and instead adopt the Commission's unilateral misinterpretation as the basis of an exemption decision.

D. The Reasoning and Rulings in CLI-85-1 Would Not Withstand Judicial Scrutiny

For all the reasons discussed in this Section I, the State and County submit that a Court would not accept or defer to CLI-85-1 or its reasoning as rectifying or rendering harmless the Miller Board's errors. A Court must "ensure 'both that [the agency] has adequately considered all relevant factors . . . and that it has demonstrated "a rational connection between the facts found and the choices made."'" Independent U.S. Tanker Owners Committee v. Lewis, 690 F.2d 908, 922 (D.C. Cir. 1982) (citations omitted). Thus, despite the normal rule that an agency is entitled to a certain amount of deference, "a reviewing court does not serve as a mere rubber stamp for agency decisions." Lead Industries Ass'n Inc. v. EPA, 647 F.2d 1130, 1145 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980). Accord, American Paper Institute v. Train, 543 F.2d 328, 338 (D.C. Cir.), cert. dismissed, 429 U.S. 967 (1976). Clearly, in this case, as in Guard v. NRC, the reasoning in CLI-85-1 cannot be accorded any deference and would be reversed upon Court review. See Federal

Election Comm. v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981) ("the thoroughness, validity, and consistency of an agency's reasoning are factors that bear on the amount of deference to be given an agency's ruling"); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167-68 (1962) (agency order reversed because there were "no findings and no analysis . . . to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion . . . . The agency must make findings that support its decision, and those findings must be supported by substantial evidence."); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) (agency action "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order . . . . There must be such a responsible finding"); Obremski v. OPM, 699 F.2d at 1269 (the rule of judicial deference "assumes an adequately articulated administrative decision interpreting the relevant statutory law within a range of reasonableness . . . . The judicial role is not so limited where . . . the agency interpretation under review is poorly reasoned and eminently out of accord.").

II. A Full Review of the Merits of the County's and State's Evidence and Arguments Can Only Result in a Denial of LILCO's Exemption Request

We demonstrate below that if the County's and State's evidence that was excluded by the Miller Board were fairly considered by the Commission, it would be impossible to make the findings necessary to grant an exemption under §50.12(a).

A. It Is Impossible to Find that Granting the Exemption Would Be In the Public Interest

As noted, the only evidence relied upon by the Miller Board in finding that granting the exemption would be in the public interest was LILCO's testimony about two alleged economic benefits to ratepayers, both premised on earlier full power operation of Shoreham. The County and State evidence that was excluded, however, established not only that economic harm to ratepayers would result if the exemption were granted and full power operation did not occur, but also that economic and non-economic harm to the public would result regardless whether full power operation occurs. Thus, even if the Commission were to ignore all the public interest-related evidence that was premised on either the occurrence or non-occurrence of full power operation (as it did, improperly, in its review preceding CLI-85-1), an affirmative finding that granting the exemption would benefit the public could not be made. The evidence which would remain, if that relating to the occurrence of full power operation were ignored, shows only the opposite: granting the exemption would be contrary to the public's interest.

Moreover, if all the evidence were considered, the affirmative public interest finding required by Section 50.12(a) could not be made either. LILCO's so-called public benefits, even assuming arguendo that full power operation would occur, are wholly speculative; whether they would materialize at all, and their magnitude if they did, is entirely dependent on the economy, ratemaking decisions, international politics,

and oil production and availability. On the other hand, the County and State evidence demonstrates several definite harms which would result directly and immediately from the low power operation that would be permitted by the grant of the exemption. Those harms are not speculative. Some would materialize only if it were assumed arguendo that full power operation would not occur (e.g., decontamination expenses); however, given that assumption, there is no question that they will occur. Others will occur immediately (e.g., adverse impact on customer service) whether or not full power operation is ever authorized. The non-speculative harm to the public identified by the County and State, whose views on the public's interest are, by the NRC's own prior admission, entitled to "great weight," prohibits a finding that granting the exemption would be in the public interest.

B. It Is Impossible to Find That There are Exigent Circumstances That Justify the Extraordinary Relief of an Exemption in this Case

Again, a fair consideration of all the submitted evidence concerning the weighing of equities to determine whether exigent circumstances exist, requires a denial of the exemption request in this case.

First, the fact that granting an exemption would result in contamination of a plant that is likely never to produce any public benefit because it cannot be authorized to operate at power levels higher that 5 percent, can only weigh against a finding that an exemption should be granted. The fact that Shoreham will produce no public benefit, which

was in the County and State evidence excluded by the Miller Board, was recently confirmed in the April 17, 1985 ASLB decision on emergency planning, which found that LILCO does not have an effective or implementable offsite emergency plan. See Section III below. That finding is an absolute bar to the issuance of a full power license, and thus precludes the possibility that Shoreham will ever produce electricity, the only conceivable public benefit that could weigh against the adverse impact of the contamination and costs of low power operation. The Commission cannot ignore this fact, the implications of which clearly outweigh any private gain LILCO might posit in favor of granting the exemption.

Second, the fact that electric power from Shoreham is not needed for at least ten years, which is uncontroverted in the evidentiary record, can only be found to weigh heavily against a finding that exigent circumstances exist to justify the grant of an exemption. What conceivable "benefit" or "exigent circumstances" could possibly justify the rush to contaminate an unneeded plant which does not comply with the safety regulations applicable to low power (GDC 17), and which cannot satisfy full power emergency planning requirements? There is none, nor has any ever been suggested.

Third, the County and State evidence that granting the exemption would have a serious adverse impact on LILCO's ability to service its customers also can only weigh against a finding that exigent circumstances exist to justify the grant of an exemption.

None of these three "equities" which weigh against the grant of an exemption is countered anywhere in the evidentiary record. In light of them, there is no basis for finding the existence of exigent circumstances to justify the extraordinary relief request by LILCO.

Furthermore, the evidence concerning LILCO's alleged good faith efforts to comply with GDC 17 cannot be cited to justify an exemption. Clearly, the County and State believe, and their excluded evidence established, that because the need for the exemption is solely a result of LILCO's own failures, there is no basis to reward the utility by granting it extraordinary relief. It is just as clear that LILCO believes that its efforts do merit relief. Even giving LILCO the benefit of every doubt, however, a review of both the LILCO evidence and that of the County and State on this subject cannot support an affirmative finding that LILCO's efforts are so extraordinary that they justify an exemption. Thus, even if gratuitously viewed in the light most favorable to LILCO, which is not the proper standard since LILCO has the burden of proof, the testimony on this "equity" at best is a "wash." It cannot be used to tip the scales in favor of an exemption.

None of the other so-called "equities" which the Miller Board and the Commission in CLI-85-1 found to justify the grant of an exemption constitutes a proper or legitimate consideration in an exemption context. A fair decision-maker could not find that they justify the grant of an exemption even standing alone; when "balanced" against all the equities

which mandate the denial of an exemption, there is no question that an exigent circumstance finding in favor of LILCO is impossible.

Thus, the fact that despite big expenditures of money and lengthy adjudicatory proceedings LILCO still is unable to comply with the NRC's safety regulations cannot be said to justify a decision excusing LILCO from such compliance. The Miller Board's and the Commission's improper reliance upon LILCO's complaints about the length and cost of the Shoreham proceeding clearly cannot support an exigent circumstances finding. The NRC Staff agreed that consideration of such matters by the Miller Board was improper.

Similarly, the Miller Board's and the Commission's improper consideration of alleged prior Staff practices, "transitions" or "uncertainties" in permitting the issuance of licenses despite noncompliance with NRC regulations, cannot support a fair or rational finding of exigent circumstances to justify an exemption in this case. Whatever "facts" the Miller Board relied upon were never in the evidentiary record and were never subject to the adjudicatory process. Moreover, the treatment of other license applicants, even if different from that afforded to LILCO, has absolutely no relevance to this proceeding where the safety of the citizens of Suffolk County is at stake. Prior Staff mistakes or failures to enforce Commission regulations or undefined "uncertainties" relating to other plants cannot be used to excuse LILCO's failure to comply with an important safety regulation.

The Miller Board's finding that "the granting of a low power exemption would send a positive signal to the capital markets" constituted "an equity" weighing in favor of the exemption is absolutely prohibited by law. See Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers, 367 U.S. 396, 415 (1961). The Commission's assertion in CLI-85-1 that it did not rely on this plainly improper consideration (at 4) is belied by its ultimate conclusion. There is no legitimate basis for granting LILCO an exemption, so the only reason for the Commission's decision appears to be sympathy with LILCO's search for a "signal" to Wall Street.

Finally, any suggestion that early discovery of problems during low power testing constitutes an "equity" which weighs in favor of granting an exemption -- even though the Miller Board did not rely upon such an equity in its decision -- must also be rejected for the reasons discussed in Section I.B.4 above. There is no evidentiary or other basis for finding that such an "equity" exists or that it weighs in favor of granting an exemption. Indeed, as demonstrated in the attached Affidavit of Dale G. Bridenbaugh and Gregory C. Minor, the opposite is true.

C. It Is Impossible to Find That Operation With LILCO's Alternate AC Power Configuration Would Be As Safe As Operation With a Fully Qualifed AC Power Source

Even based upon the evidence it admitted into the record, the Miller Board was constrained to find that LILCO's proposed mode of operating Shoreham would provide a "lesser margin of safety" than operation with a fully qualified AC power source. In light of the Commission's May 16 Order establishing the "as safe as" standard, this Miller Board finding alone requires the reversal of the exemption decision. Moreover, if the excluded evidence submitted by the County concerning the relative safety of operation were considered, it would clearly be impossible for the Commission to find that the "as safe as" standard is satisfied in this case. The excluded evidence demonstrates that operation with the proposed alternate configuration would be quantifiably less safe than operation with a qualified system. A fair review of all the submitted evidence on the "as safe as" issue could result only in a finding that the exemption request must be denied.

III. Recent Events Underscore the Necessity for Denying LILCO's Exemption Request

On April 22, 1985, the NRC Licensing Board charged with review of LILCO's proposed offsite emergency plan for Shoreham rendered a partial initial decision.25/ The Board held that "the LILCO Plan cannot and will

25/ Partial Initial Decision on Emergency Planning, LBP-85-12, dated April 17, 1985.

not be implemented as required by regulation."26/ This ruling constitutes an absolute bar to the issuance of a full power license for operation of Shoreham, and confirms the similar rulings by the New York State Supreme Court and the U.S. District Court for the Eastern District of New York concerning the illegality of LILCO's proposed emergency plan and the propriety of Suffolk County's position that an emergency plan cannot be implemented to protect adequately the health and safety of its citizens.27/

The significance of these consistent findings, which have now been rendered in every available forum, is clear: there is no basis or justification for authorizing low power operation of Shoreham, with its attendant irradiation and contamination of the reactor and its fuel, when the Shoreham plant cannot be authorized to operate at any higher power levels and will not produce electricity. See attached Affidavit of Dale G. Bridenbaugh and Gregory C. Minor.

There is no conceivable basis for the Commission at this point to persist in its view that the denial of a full power license for Shoreham is "too speculative" to merit consideration. See e.g., CLI-83-17, 17 NRC

26/ Id. at 426.

27/ See Cuomo v. LILCO, Civ. No. 84-4616, slip op. (N.Y. Sup. Ct. Feb. 20, 1985); Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, No. CV-83-4966, slip op. (E.D.N.Y. March 18, 1985). The New York Supreme Court's opinion was attached to the Suffolk County and State of New York Renewal of Request for NRC Supplementation of the Shoreham FEIS as Required by NEPA, which was filed with the Commission on March 4, 1985.

1032, 1033-34 (1983); CLI-84-9, 19 NRC 1323, 1327 (1984); CLI-85-1 at 4-5; Order dated February 14, 1985 (unpublished); letter dated April 18, 1985 to Herbert H. Brown from Samuel Chilk. The Commission must recognize reality: every legal avenue for full power operation of Shoreham under the NRC's regulations — i.e., an implementable State, County, or utility offsite emergency plan — has now been eliminated. The only conceivable "speculation" on the subject is whether LILCO can devise a way to have the New York law, federal law, the U.S. Constitution, and the NRC's regulations changed to permit LILCO to get around the fact that what it desires is illegal.

Thus, in ruling on LILCO's exemption request this Commission cannot ignore the findings of its own licensing board and the courts. In the face of those findings, the Commission cannot find that low power operation of the Shoreham plant would be in the public interest, or that there exist any "exigent circumstances" other than those that weigh against the grant of an exemption to authorize low power operation. The Licensing Board's emergency planning decision confirms and makes even more compelling the public interest and exigent circumstances evidence submitted by the County and State to the Miller Board, all of which can only support the denial of the exemption. It is time for the Commission finally to acknowledge that the assertions and "reasoning" contained in paragraph 4 of CLI-85-1 are contrary to fact.

Moreover, in light of the recent emergency planning decision, and those of the state and federal courts, this Commission cannot fashion any argument to sidestep the mandate of the National Environmental Policy Act (NEPA). To grant an exemption in the face of the NRC's clear violation of NEPA would be contrary to the Section 50.12(a) requirement that an exemption must be "authorized by law." Therefore, before low power operation can lawfully even be considered, the NRC must supplement the Shoreham EIS to analyze the environmental costs of such an action and to weigh those costs against the complete lack of benefit resulting from such operation. Accordingly, the County and State reiterate their demand that the Commission take a hard look at the realities of the situation at Shoreham, deny the exemption, and, if the Shoreham license proceeding is to continue, supplement the Shoreham EIS.

IV. Conclusion

For the foregoing reasons, the Commission should reconsider CLI-85-1 and reverse the Miller Board's decision which found that LILCO had satisfied the requirements for an exemption under Section 50.12(a).

Respectfully submitted,

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