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 RESPONSE TO PETITION FOR RECONSIDERATION OF CLI-85-1

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As predicted, the Suffolk County and State of New York Petition for Reconsideration of CLI-85-1 (Intervenors' Petition) contains nothing new. See Order for Review of ALAB-800, Statement of Commissioners Roberts and Zech (April 23, 1985). Intervenors continue to minimize the importance of safety, to distort the record below and to attempt to obscure the merits of this case by spouting sophistic due process claims. For the most part, Intervenors' Petition is simply a rehash of arguments presented to and rejected by this Commission and the Appeal Board.1/

This response to Intervenors' 42-page Petition is limited to 10 pages.2/ Since the issues have been previously briefed, this

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1/ Motions for reconsideration should elaborate upon or refine arguments previously advanced and explain why issues carefully decided should be reconsidered. See Central Electric Power Cooperative Inc. (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-26, 14 NRC 787 (1981). They should not simply re-assert the same arguments in the same form.

2/ Intervenors' Affidavit of Dale G. Bridenbaugh and Gregory C. Minor in Response to Affidavit of John D. Leonard, Jr. is unauthorized and inappropriate. Intervenors may not unilaterally supplement the record developed below in support of a petition for reconsideration. Moreover, the Affidavit purports to discuss the benefits of low power testing when those benefits were described extensively in LILCO's testimony, without contradiction. Tr. 162-64, 200-26, 828-30. (Gunther). Though Bridenbaugh and Minor testified in the low power hearing, neither testified concerning the benefits or effects of low power testing and no such testimony was proffered by Intervenors. In contrast, the Leonard Affidavit was filed initially with the D.C. Circuit and later with the Commission solely to address harm to be suffered by procedural delay, not to supplement the substantive record on appeal.

Nevertheless, since the Bridenbaugh/Minor Affidavit is fraught with inaccuracy and given Intervenors' propensity to infer acquiescence from any lack of comment, LILCO attaches a responsive Affidavit of John D. Leonard, Jr.

response is in outline form, corresponding to Intervenors' Petition.[3/]

I. Intervenors' Spurious Due Process Arguments

1. Attempting to legitimate erroneous evidentiary arguments, Intervenors repeatedly cite irrelevant cases about due process guarantees.[4/] There simply are no due process issues before the Commission because the evidentiary rulings of the Licensing Board were correct. See LILCO App. Br. at 12. No relevant or material evidence was prejudicially excluded. No opportunity for hearing or briefing was denied Intervenors. And, all excluded testimony has been considered at length by the Appeal Board and by this Commission, now for the second time, as to its relevance and propriety. Each has simply found that Intervenors' arguments about exclusion of evidence have no merit or were harmless.[5/]

2. There is no denial of due process by the Commission's determination that excluded evidence would have had no effect on the ultimate outcome. The doctrine of harmless error is well

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3/ Throughout this brief LILCO will refer to its January 14, 1985 and November 29, 1984 Comments filed with the Commission and its January 14, 1985 Reply Brief (LILCO App. Br.) filed with the Appeal Board.

4/ Many of the cases are cited misleadingly, quoted out of context and fail to have any relation to the facts of this proceeding. Space simply does not permit a response to each case.

5/ Intervenors' due process arguments were made to the Appeal Board, which did not consider them substantial. ALAB-800 at 4 n.6.

established. In any event, the Commission has done as Intervenors have requested; Intervenors have argued vigorously that "the Commission, not any Licensing Board, must grant or deny LILCO's exemption request." Suffolk County and State of New York Reply Comments pursuant to Commission's January 7 Order at 5 (emphasis in original).

I.A. Public Interest Evidence

1. LILCO would have been entitled to a low power license if the TDI diesels were qualified. The question before the Licensing Board and the Commission was whether low power testing should be allowed before qualification of the TDI diesels, not whether low power testing should be allowed at all. LILCO Jan. 14 Comments at 2-3; App. Br. at 13-15. Intervenors' suggestion (Petition at 6, n.5) that timing has nothing to do with this exemption proceeding egregiously ignores 10 CFR § 50.47(d), allowing low power testing without an approved emergency plan. By seeking a limited exemption, LILCO has not opened to debate the entire fabric of the NRC's regulations.

2. Intervenors belabor their plea that the views of public officials are entitled to deference, citing not a Commission decision, but a brief filed in another proceeding. The views of public officials are entitled to weight only when supported by admissible evidence in the record. There was no such evidence here. Any consideration of public official's views absent this procedural constraint would improperly forfeit the NRC's powers delegated by Congress, render the NRC a puppet of state officials

and deprive utilities of due process. See LILCO App. Br. at 18-19.

3. Intervenors erroneously argue that the Licensing Board refused to consider evidence of alleged economic detriment if the exemption, but no full power license, were granted. The evidence was irrelevant. The Commission has repeatedly refused to speculate about granting a full power license when considering a low power license application. CLI-83-17; CLI-84-9; CLI-85-1. And, since identical arguments would apply to low power testing with qualified TDI diesels, the evidence was clearly unrelated to the exemption. See LILCO App. Br. at 13-17; Jan. 14 Comments at 1-4.

4. Richard Kessel, Chairman of the New York State Consumer Protection Board, had no expertise concerning any material matter in this proceeding. Moreover, he presented no support for any of his conclusory opinions. See LILCO Jan. 14 Comments at 6; App. Br. at 16-17. Additionally, exclusion of his opinion that low power testing produces no electricity and, therefore, results in no public benefit, was clearly harmless inasmuch as the record already reflected that no electricity would be generated during low power testing. See, e.g., Tr. 298 (Rao et al.).

5. The argument that there is no need for Shoreham's power is false and misleading. Before the Licensing Board, need for power was not an issue. Suffolk County presented no such evidence; New York State proffered but one sentence in the testimony of Richard Kessel, who, without any relevant professional qualifications or institutional authority, opined, in admitted

conflict with the State Energy Master Plan, that New York did not require Shoreham's capacity. Tr. 2886-87, 2914 (Kessel). Also, 10 CFR § 51.53(c) precludes the admission of evidence concerning the need for power in operating license proceedings. See LILCO Jan. 14 Comments at 5-6; App. Br. at 22-24.

6. Contrary to Intervenors' assertion, the Commission did make public interest findings in CLI-85-1. CLI-85-1 at 3 ¶ 2; 5 ¶ 4. The Commission emphasized that the overriding public interest consideration is safety. Id. Intervenors persistently ignore this overriding aspect of public interest.

7. Intervenors' disparagement of the Commission's reasoning as "absurd," "specious" or "baseless" is again merely an attempt to obscure the issues. The Atomic Energy Act requires only a reasonable opportunity to present views; not consideration of irrelevant, immaterial and otherwise inadmissible evidence.

I.B. Exigent Circumstances

1. Intervenors' argument about LILCO's good faith attempt to comply with GDC 17 is false and misleading.

a. The Commission in CLI-85-1 asserted that it had considered the alleged negligence of LILCO in creating the need for an exemption, but that "LILCO'S recent good faith efforts to cure the problems outweigh or balance any possible past negligence." Intervenors' Petition (page 13) falsely asserts that the testimony of Hubbard and Bridenbaugh "discussed and found fault with" LILCO'S recent efforts in 1983 and 1984. The Bridenbaugh/Hubbard testimony did not discuss or criticize in any respect LILCO's efforts to cure diesel problems subsequent to the crankshaft failure in 1983.

b. Intervenors continue to ignore the difference between negligence and good faith. Good faith involves subjective intent; negligence involves an objective standard. The Bridenbaugh/Hubbard testimony never

mentioned good faith and never attempted to judge LILCO's intent. It simply criticized a number of individual decisions. See LILCO Jan. 14 Comments at 12-13; App. Br. at 33-35.

c. Findings of the New York Public Service Commission have no bearing on LILCO's good faith. The Public Service Commission examined imprudence, not good faith.

d. Intervenors continue to ignore the overwhelming facts that LILCO has expended huge sums to purchase TDI diesels to comply with GDC 17, investigate and repair problems with those diesels, purchase a second set of Colt diesel generators designed to comply with GDC-17, and purchase and install alternate AC power equipment for low power testing.

2. It cannot be denied that these licensing proceedings have been lengthy and costly, regardless of their merit. That is certainly an equity to be considered when a plant is complete and ready to operate. See LILCO App. Br. at 36. As importantly, the length and expanse of these licensing proceedings gives added assurance of Shoreham's safety since virtually every aspect of the plant and its operation has been adversarially examined.

3. CLI-84-8 stated that any inconsistency in the regulations was an equity to be considered. The Commission properly considered the transitory state of its policies and practices on exemptions and the Board considered the inconsistent application of the Commission's regulations concerning low power testing and on-site diesel generators. The bases for these conclusions are in the public record and are subject to judicial notice. See LILCO App. Br. at 38, n.40.

4. Intervenors' argument about alleged compounding of errors simply restates the Petition's previous erroneous arguments:

a. Intervenors wrongly implore the Commission to consider the uncertainties attendant to Shoreham's full power licensing. See ¶ I.A.1 above.

b. Intervenors wrongly assert that the record reflects that there is no need for power from Shoreham. See ¶ I.A.5 above.

c. Intervenors wrongly contend that there was error in the Commission's implicit assumption that the plant will operate at full power. The Commission's regulations embody such an implicit assumption; they assume safe plants will operate in providing for a bifurcated licensing procedure (full power, low power). 10 CFR §§ 50.47(d), 50.57(c). Moreover, the Supreme Court has recognized that such policies encouraging the production of nuclear power are uniquely legislative functions of the Congress and the Commission and are not to be second-guessed by courts or, implicitly, other officials. See Baltimore Gas & Electric Co. v. National Resources Defense Council 462 U.S. 87, 97 (1983); Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983).

d. The Commission did not consider LILCO's arguments concerning the financial and oil-reduction benefits from earlier full power operation. Thus, even if the Licensing Board's exclusion of Intervenors' evidence on these points was erroneous, the error was harmless. Moreover, the Board only excluded such evidence as was contingent upon the non-operation of Shoreham. It admitted Intervenors' evidence intended to rebut LILCO's financial testimony. That evidence, however, was subjected to extensive cross-examination and shown in many respects to be mistaken and inaccurate. See LILCO Jan. 14 Comments at 4-5; App. Br. at 15 n.15.

e. Finally, it is false that none of the parties presented evidence before the Licensing Board concerning the value of low power testing. The testimony of William Gunther extensively described the testing and training to be conducted at low power and, implicitly, the benefits therefrom. See note 2 above. There was no contrary testimony from any witness.

I.C. Safety Issues

1. Section 50.12(a) requires that the exemption "not endanger life and property." "As safe as" is merely a gloss on the regulation based on LILCO's asserted mode of proof. Intervenors do not contend that low power operation would be unsafe or would endanger life and property. They continue to assert only that it would not be identical to operation with TDI diesels. See LILCO Jan. 14 Comments at 9-12; App. Br. at 45-47.

2. Intervenors' PRA argument attacks the Commission as "illogical" (Petition at 29) for recognizing that the risks cited in the excluded PRA were so small as to confirm the safety of the proposed low power testing. Intervenors continue misleadingly to recite the comparative ratio of risks without reference to the primary risk figures which are so infinitesimally small as to render insubstantial any comparative difference. The Commission did not misinterpret this evidence and was not fooled by Intervenors' ploy. Moreover, the Licensing Board properly excluded the testimony because it recognized that PRAs have not been recognized as a valid licensing tool. See LILCO Jan. 14 Comments at 7-9; App. Br. at 40-44.

3. Other alleged safety concerns, Intervenors' Petition at 26-27, are unsupported by the record. See LILCO Jan. 14 Comments at 14; App. Br. at 53-56.

4. There is nothing contradictory in the Licensing Board's finding (a) that in absolute terms, there are different margins between the 2200 degree limit for peak core temperature and the

potential peak core temperatures during a LOCA with the alternate AC power system and with TDI diesels, and (b) that the difference is insubstantial because any operation within the regulatory limit is deemed safe. See LILCO App. Br. at 49-51. This reasoning is neither "casual" nor "irrational." (Petition at 28)

I.D. Judicial Scrutiny of CLI-85-1

1. This argument adds nothing and affords no reason for reconsideration. It is identical to Intervenors' chimerical due process claims. The Licensing Board, the Appeal Board, and the Commission have all rightfully resisted Intervenors' urgings to disregard the Commission's rules, regulations, and precedent. The courts should do likewise.

II. Merits of the Exemption Request

1. Again, this section of Intervenors' Petition is nothing more than a rehash of earlier arguments. For brevity, LILCO's responses are not repeated. The Licensing Board, Appeal Board and Commission have all found the exemption request meritorious.

III. Recent Events Do Not Alter the Propriety of an Exemption

1. The recent Initial Decision on Emergency Planning had essentially two components: (a) it affirmed in virtually every factual respect and in great detail the viability of LILCO's proposed emergency plan; but (b) it held as a matter of law that LILCO by itself did not have the legal authority to implement the plan. The factual aspects of the decision are unlikely to be overturned given the deference that is usually afforded findings of fact. The legal aspects of the ruling, however, are subject

to debate and are not entitled to the same deference. It is still possible and, LILCO believes likely, that the Appeal Board or Commission will reverse.[6/] Thus, any opinion as to whether Shoreham will receive a full power license remains speculative and the Commission's repeated disdain for such speculation remains appropriate.[7/]

IV. Conclusion

For the reasons stated above, the Petition for Reconsideration should be denied.

Respectfully submitted,

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6/ Both LILCO and Intervenors have filed notices of appeal; LILCO's limited to the narrow ambit of legal-authority-related issues which it lost, and Intervenors' covering the gamut of factual issues on which they lost. Intervenors have also requested substantial extensions of the page and time limits applicable to briefs before the Appeal Board. LILCO is filing today with the Appeal Board a Response to Intervenors' Request for an Extension of Time and Page Limits; LILCO's Response includes a request for severance of the novel legal authority issues from the garden-variety factual issues, and for referral of the legal authority issues directly to the Commission.

7/ Near the conclusion of Intervenors' Petition, the issue of NEPA is again raised. NEPA was not a part of CLI-85-1 and, therefore, is not an appropriate issue for reconsideration. Nevertheless, for the same reasons that the Initial Decision on Emergency Planning is not finally dispositive of the issue, there is no reason for the Commission to change its earlier NEPA decision. CLI-84-9.