

371

# HUNTON & WILLIAMS

2000 PENNSYLVANIA AVENUE, N.W.

P.O. Box 19230

WASHINGTON, D.C. 20036

TELEPHONE 202-955-1500

707 EAST MAIN STREET P.O. BOX 1535  
RICHMOND, VIRGINIA 23212  
TELEPHONE 804-788-8200  
TWX 710-956-0061

FIRST VIRGINIA BANK TOWER  
P.O. BOX 3669  
NORFOLK, VIRGINIA 23514  
TELEPHONE 804-625-5501  
TELEX 755628

4011 CHAIN BRIDGE ROAD  
FAIRFAX, VIRGINIA 22030  
TELEPHONE 703-352-2200

299 PARK AVENUE  
NEW YORK, NEW YORK 10171  
TELEPHONE 212-980-8200  
TELEX 754708

B B & T BUILDING P.O. BOX 109  
RALEIGH, NORTH CAROLINA 27602  
TELEPHONE 919-826-9371

FIRST TENNESSEE BANK BUILDING  
P.O. BOX 951  
KNOXVILLE, TENNESSEE 37901  
TELEPHONE 615-637-4311

TELE NO.  
DIRECT DIAL NO. 202 955

DOCKETED  
USNRC

June 11, 1985

'85 JUN 11 P3:29

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

## BY HAND

The Honorable Nunzio J. Palladino, Chairman  
Commissioner Thomas M. Roberts  
Commissioner James K. Asselstine  
Commissioner Frederick M. Bernthal  
Commissioner Lando W. Zech

Long Island Lighting Company

(Shoreham Nuclear Power Station)  
Docket No. 50-322-OL

Dear Chairman Palladino and Commissioners:

LILCO understands that Herbert H. Brown, Esq., of the firm of Kirkpatrick & Lockhart and formerly counsel for Suffolk County in this proceeding, served on you a letter yesterday evening by hand, requesting postponement of today's scheduled meeting to consider a 5% low power license for the Shoreham Nuclear Power Station. LILCO also understands that Mr. Brown's letter attaches an opinion letter from another law firm purporting to place him and his firm under an ethical duty to continue to present before the Commission various positions previously espoused by them, notwithstanding their recent discharge by the Suffolk County Executive.

LILCO has not yet reviewed Mr. Brown's letter, and was given no notice of its intended issuance. On the basis of information available, LILCO submits the following brief response in the interest of placing its views, in whatever summary fashion necessary, before the Commission prior to this afternoon's meeting:

B506130140 B50611  
PDR ADDCK 05000322  
G PDR

252

## HUNTON & WILLIAMS

-2-

1. On May 30, Suffolk County Executive Peter Cohalan issued Executive Order 1985-1, authorizing and directing a review of the offsite emergency plan prepared by LILCO for the Shoreham plant, and the County's participation in an exercise of that plan. On June 6, eight Suffolk County legislators and officials of four East End towns in the County filed suit in the New York Supreme Court to enjoin the executive order and declare it null and void. On June 7 a temporary restraining order was denied by Justice Jack J. Cannavo in Hauppauge. Yesterday, another judge, Justice Robert W. Doyle sitting in Riverhead, held, on a motion for a preliminary injunction and without awaiting receipt of a responsive pleading by respondent Peter Cohalan, that Executive Order 1985-1 was null and void. He also denied LILCO's motion to intervene in the case. The County Executive filed a notice of appeal from this judgment yesterday evening. Since the judgment is against an officer of a municipal corporation, filing of the notice of appeal automatically stays the judgment pending appeal under New York law. CPLR Sec. 5519(a)1.,(e) (attached). Thus Executive Order 1985-1 remains in effect.

2. LILCO understands that the County Executive, through the County Attorney, has today reiterated the dismissal of Kirkpatrick & Lockhart originally set out in his letter of June 3 to you. LILCO, as a third party to this intramural dispute, takes no position at the present on the merits of either the County Executive's prerogative to dismiss counsel or the ethical obligations of counsel once dismissed by his client. However, whatever the outcome of these issues, their occurrence underscores the importance of the Commission's not allowing its implementation of its duties under federal law to be diverted by the vagaries of local politics. In particular, the provisions of 10 CFR Sec. 50.47(d), governing issuance of low power licenses, are simply independent of the emergency planning requirements of the Commission's regulations for a full power license. Thus LILCO, if it meets the other requirements for a low power license, is entitled to receive one regardless of the outcome of this or any succeeding attempt by members of the Suffolk County legislature to disrupt the Suffolk County Executive's performance of his duties.

For the foregoing reasons, LILCO requests that the Commission not let this latest last-minute ploy disrupt it from taking whatever action it may have previously intended to take

HUNTON & WILLIAMS

-3-

with respect to LILCO's long-pending application for a low power license for Shoreham.

Respectfully submitted,

*Donald P. Irwin* *can*  
W. Taylor Reveley, III  
Donald P. Irwin

cc: Counsel for All Parties

Courtesy Copy: Herbert H. Brown, Esq.

①

**McKINNEY'S  
CONSOLIDATED LAWS  
OF  
NEW YORK  
ANNOTATED**

**Book 7B**

**Civil Practice Law and Rules  
CPLR 5501 to 6000**

**Practice Commentaries  
By  
DAVID D. SIEGEL**

*With Annotations*

**From  
State and Federal Courts  
and  
State Agencies**

**ST. PAUL, MINN.  
WEST PUBLISHING CO.**



## APPEALS—GENERALLY

Art. 55

### Legislative Studies and Reports

ived from C.P.A.  
s of the Revisors  
th Report to the  
iat this section  
to Division the  
the status quo  
or motion for  
raining, modify-  
liminary injunc-  
estraining order

In the types of cases where the court of original instance is authorized to grant such provisional remedies.

Official Reports to Legislature for this section:

5th Report Leg.Doc. (1961) No. 15, p. 654.

6th Report Leg.Doc. (1962) No. 8, p. 524.

### Federal Rules of Civil Procedure

peal, see Rule 62, 28 U.S.C.A.

### Notes of Decisions

Where, in an action to cancel an agreement by which defendant attorney was to appear in condemnation proceedings against persons with whom plaintiff had contracts relating thereto the nature of the contracts are not shown by the injunction papers and the allegation of defendant's insolvency is denied, the appellate division will not, pending appeal, enjoin defendant from collecting any fees due plaintiff under such contracts. *Id.*

#### 2. Power of special term

Where a judgment dismissing a suit for an injunction, and vacating the temporary injunction previously granted, is affirmed by the appellate division, the special term has no power to suspend the judgment, and revive the injunction, pending an appeal to the court of appeals. *Carpenter v. Fisher*, 1897, 18 App.Div. 561, 46 N.Y.S. 5.

Regardless of ultimate decision on merits in court of appeals in action in which injunction had been granted, but which had been reversed or vacated by the appellate division, the special term had no power to review actions of the appellate division, and, if plaintiff desired to continue all or any part of the injunction, proper practice would be for him to apply for such relief either to the appellate division or to the court of appeals, to which an appeal had been taken

180

## APPEALS—GENERALLY

Art. 55

from order of the appellate division. *Ahern v. McNab*, 1966, 18 Misc.2d 899, 180 N.Y.S.2d 516.

#### 3. Burden of proof

On application for preliminary injunction pending appeal, moving party has burden of establishing a rea-

sonable probability of success on appeal and existence of irreparable injury in event an injunction does not issue. *Schwartz v. Rockefeller*, 1972, 38 A.D.2d 996, 329 N.Y.S.2d 482, appeal dismissed 30 N.Y.2d 664, 332 N.Y.S.2d 100, 282 N.E.2d 880.

### § 5519. Stay of enforcement

(a) Stay without court order. Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:

1. the appellant or moving party is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state; or

2. the judgment or order directs the payment of a sum of money, and an undertaking in that sum is given that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed; or

3. the judgment or order directs the payment of a sum of money, to be paid in fixed installments, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party shall pay each installment which becomes due pending the appeal and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay any installments or part of installments then due or the part of them as to which the judgment or order is affirmed; or

4. the judgment or order directs the assignment or delivery of personal property, and the property is placed in the custody of an officer designated by the court of original instance to abide the direction of the court to which the appeal is taken, or an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will obey the direction of the court to which the appeal is taken; or

5. the judgment or order directs the execution of any instrument, and the instrument is executed and deposited in the office where the original judgment or order is entered to abide the direction of the court to which the appeal is taken; or

181

(3)

## 5519

## APPEALS—GENERALLY

Art. 55

6. the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property; if the judgment or order directs the sale of mortgaged property and the payment of any deficiency, the undertaking shall also provide that the appellant or moving party shall pay any such deficiency; or

7. the judgment or order directs the performance of two or more of the acts specified in subparagraphs two through six and the appellant or moving party complies with each applicable subparagraph.

(b) Stay in action defended by insurer. If an appeal is taken from a judgment or order entered against an insured in an action which is defended by an insurance corporation, or other insurer, on behalf of the insured under a policy of insurance the limit of liability of which is less than the amount of said judgment or order, all proceedings to enforce the judgment or order to the extent of the policy coverage shall be stayed pending the appeal, and no action shall be commenced or maintained against the insurer for payment under the policy pending the appeal, where the insurer:

1. files with the clerk of the court in which the judgment or order was entered a sworn statement of one of its officers, describing the nature of the policy and the amount of coverage together with a written undertaking that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the insurer shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed, to the extent of the limit of liability in the policy, plus interest and costs;

2. serves a copy of such sworn statement and undertaking upon the judgment creditor or his attorney; and

3. delivers or mails to the insured at the latest address of the insured appearing upon the records of the insurer, written notice that the enforcement of such judgment or order, to the extent that the amount it directs to be paid exceeds the limit of



5519

1 **IS—GENERALLY**

Art. 55

ing party is in possession or control  
 judgment or order directs be con-  
 undertaking in a sum fixed by the  
 s given that the appellant or moving  
 offer to be committed any waste and  
 er appealed from, or any part of it, is  
 dismissed, the appellant or moving  
 f the use and occupancy of such prop-  
 o which the judgment or order is af-  
 f the appeal until the delivery of pos-  
 the judgment or order directs the sale  
 d the payment of any deficiency, the  
 vide that the appellant or moving par-  
 dency; or

der directs the performance of two or  
 in subparagraphs two through six and  
 arty complies with each applicable sub-

nded by insurer. If an appeal is taken  
 r entered against an insured in an ac-  
 / an insurance corporation, or other in-  
 nsured under a policy of insurance the  
 is less than the amount of said judg-  
 dings to enforce the judgment or order  
 y coverage shall be stayed pending the  
 ll be commenced or maintained against  
 under the policy pending the appeal,

k of the court in which the judgment or  
 orn statement of one of its officers, de-  
 ie policy and the amount of coverage to-  
 ndertaking that if the judgment or order  
 art of it, is affirmed, or the appeal is dis-  
 pay the amount directed to be paid by  
 r the part of it as to which the judgment  
 the extent of the limit of liability in the  
 costs;

such sworn statement and undertaking  
 itor or his attorney; and

to the insured at the latest address of  
 upon the records of the insurer, written  
 ment of such judgment or order, to the  
 it directs to be paid exceeds the limit of

182

Art. 55

**APPEALS—GENERALLY**

liability in the policy, is not stayed in respect to the insured. A  
 stay of enforcement of the balance of the amount of the judg-  
 ment or order may be imposed by giving an undertaking, as pro-  
 vided in paragraph two of subdivision (a), in an amount equal  
 to that balance.

(c) Stay and limitation of stay by court order. The court  
 from or to which an appeal is taken or the court of original in-  
 stance may stay all proceedings to enforce the judgment or or-  
 der appealed from pending an appeal or determination on a mo-  
 tion for permission to appeal in a case not provided for in subdi-  
 vision (a) or subdivision (b), or may grant a limited stay or  
 may vacate, limit or modify any stay imposed by subdivision  
 (a), subdivision (b) or this subdivision, except that only the  
 court to which an appeal is taken may vacate, limit or modify a  
 stay imposed by paragraph one of subdivision (a).

(d) Undertaking. On an appeal from an order affirming a  
 judgment or order, the undertaking shall secure both the order  
 and the judgment or order which is affirmed.

*See Pocket Part*  
~~(e) Continuation of stay. If the judgment or order appealed  
 from is affirmed or modified, the stay shall continue for five  
 days after service upon the appellant of notice of the entry in  
 the court to which the appeal was taken of the order determin-  
 ing the appeal. Where an appeal is taken from such an order,  
 the stay shall continue until the final determination of that ap-  
 peal. Subject to an order providing otherwise, any stay granted  
 pending the determination of a motion for leave to appeal shall,  
 in the event such motion is denied, continue for five days after  
 service upon the movant of a copy of the order denying such mo-  
 tion, together with notice of entry thereof.~~

(f) Proceedings after stay. A stay of enforcement shall not  
 prevent the court of original instance from proceeding in any  
 matter not affected by the judgment or order appealed from or  
 from directing the sale of perishable property.

L.1962, c. 308; amended L.1963, c. 532, § 37; L.1965, c. 744, § 1; L.  
 1975, c. 70, § 1.

**Historical Note**

1975 Amendment. Subd. (c). L.  
 1975, c. 70, § 1, eff. Sept. 1, 1975, pro-  
 vided that stays granted pending a  
 motion for leave to appeal shall, if  
 the motion is denied, continue for 5  
 days after service upon the movant

of a copy of the order denying such  
 motion, with notice of entry thereof.

1965 Amendment. Subd. (a), par.  
 1. L.1965, c. 744, eff. Sept. 1, 1965,  
 omitted "and the judgment or order  
 directs either the payment of a sum

183

8

# 5517

Note 1

## CIVIL PRACTICE LAW AND RULES

ry judgment order superseded that of earlier date and was appealable. *Marine Midland Bank v. Fisher*, 1981, 86 A.D.2d 906, 447 N.Y.S.2d 186.

Appeal of denial of branches of defendant's cross motion which sought to dismiss four of plaintiff's five causes of action was not superseded by unappealed order made upon reargument dismissing his fifth cause of action, and thus the appeal was viable. *Fox v. Ziesler*, 1980, 77 A.D.2d 880, 481 N.Y.S.2d 69.

Appeal from order granting summary judgment to plaintiff, dismissing counterclaims and denying defendant's motion to vacate its default would be dismissed as academic where order was superseded by subsequent order denying reargument and implicitly denying re-

newal. *Royal Business Funds Corp. v. Commercial Trading Co., Inc.*, 1977, 59 A.D.2d 864, 401 N.Y.S.2d 69.

### 2. Resettlement

Although plaintiff filed notice of appeal only from order which was superseded by resettled order, resettled order could be reviewed on appeal from original order. *Topper v. Mutual Life Ins. Co. of New York*, 1978, 82 A.D.2d 932, 403 N.Y.S.2d 742, affirmed 46 N.Y.2d 974, 415 N.Y.S.2d 829, 389 N.E.2d 142.

Appeal from prior order granting summary judgment in ejectment action was dismissed as academic where such order was superseded by subsequent resettled order. *Sujecki v. O'Briskie*, 1977, 59 A.D.2d 778, 398 N.Y.S.2d 734.

## § 5518. Preliminary injunction or temporary restraining order by appellate division

### Federal Rules of Appellate Procedure

Injunction pending appeal, see Rule 8, 28 U.S.C.A.

### West's McKinney's Forms

Affidavit in support of motion for preliminary injunction pending appeal, see CPLR Forms § 9:43.

Order granting preliminary injunction pending appeal, see CPLR Forms § 9:44.  
Order to show cause upon motion for preliminary injunction pending appeal (containing temporary restraining order), see CPLR Forms § 9:42.

## § 5519. Stay of enforcement

[See main volume for text of (a) to (d)]

(e) Continuation of stay. If the judgment or order appealed from is affirmed or modified, the stay shall continue for five days after service upon the appellant of the order of affirmance or modification with notice of its entry in the court to which the appeal was taken. If an appeal is taken, or a motion is made for permission to appeal, from such an order before the expiration of the five days, the stay shall continue until five days after service of notice of the entry of the order determining such appeal or motion. When a motion for permission to appeal is involved, the stay, or any other stay granted pending determination of the motion for permission to appeal, shall:

(i) if the motion is granted, continue until five days after the appeal is determined; or

(ii) if the motion is denied, continue until five days after the movant is served with the order of denial with notice of its entry.

(f) Proceedings after stay. A stay of enforcement shall not prevent the court of original instance from proceeding in any matter not affected by the judgment or order appealed from or from directing the sale of perishable property.

(As amended L.1979, c. 229, § 1.)

Pocket Part



## CIVIL PRACTICE LAW AND RULES

## CIVIL PRACTICE LAW AND RULES

(6) 5519

perished that of  
separable. Marine  
th 1981, 86 A.D.2d  
86

branches of de-  
lic which sought to  
nt five causes of  
ap needed by unap-  
ap n reargument dis-  
a e of action, and  
a iable. Fox v. Le-  
ld 160, 481 N.Y.S.2d

r ranting summary  
iff dismissing coun-  
in defendant's mo-  
ult would be dis-  
c where order was  
sq ent order denying  
ap ctly denying re-

sewast Royal Business Ponds Corp. v.  
Commercial Trading Co., Inc., 1977, 59  
A.D.2d 864, 401 N.Y.S.2d 69.

## 2. Resettlement

Although plaintiff filed notice of ap-  
peal only from order which was super-  
seded by resettled order, resettled order  
could be reviewed on appeal from origi-  
nal order. Topper v. Mutual Life Ins.  
Co. of New York, 1978, 62 A.D.2d 932,  
463 N.Y.S.2d 742, affirmed 46 N.Y.2d  
974, 415 N.Y.S.2d 829, 389 N.E.2d 142.

Appeal from prior order granting sum-  
mary judgment in ejectment action was  
dismissed as academic where such order  
was superseded by subsequent resettled  
order. Sujecki v. O'Briakie, 1977, 59  
A.D.2d 778, 398 N.Y.S.2d 784.

ne y injunction or temporary restraining order by ap-  
e ivision

Federal Rules of Appellate Procedure  
ap cal, see Rule 8, 28 U.S.C.A.

## West's McKinney's Forms

to motion for preliminary injunction pending appeal, see CPLR

li nary injunction pending appeal, see CPLR Forms § 9:44.

on motion for preliminary injunction pending appeal (contain-  
restraining order), see CPLR Forms § 9:42.

## er enforcement

Se: main volume for text of (a) to (d).

on of stay. If the judgment or order appealed from is  
fied, the stay shall continue for five days after service  
of the order of affirmance or modification with notice of  
ur to which the appeal was taken. If an appeal is taken,  
le for permission to appeal, from such an order before the  
f e days, the stay shall continue until five days after  
o the entry of the order determining such appeal or  
r tion for permission to appeal is involved, the stay, or  
u ed pending determination of the motion for permission

granted, continue until five days after the appeal is

is denied, continue until five days after the movant is  
r of denial with notice of its entry.

ter stay. A stay of enforcement shall not prevent the  
ntance from proceeding in any matter not affected by  
r appealed from or from directing the sale of persona-

239, § 1.)

44

1979 Amendment. Subd. (e). L.1979,  
c. 239, § 1, eff. Jan. 1, 1980, provided for  
continuation of stay after service of or-  
der of affirmance or modification, for  
continuation of stay on motion for per-  
mission to appeal from such an order  
made before expiration of 5 day period,  
omitted sentence reading: "Subject to  
an order providing otherwise, any stay

granted pending the determination of a  
motion for leave to appeal shall, in the  
event such motion is denied, continue for  
five days after service upon the movant  
of a copy of the order denying such  
motion, together with notice of entry  
thereof", and added sentence beginning  
"When a motion" together with clauses  
(i) and (ii).

## Supplementary Practice Commentary

By David D. Siegel

1979

## C5519:6. Continuing Stay Through Second Appeal.

The 1979 Amendment Clarifying Continuation of Stay When  
Permission to Appeal Required

As the original Commentary on this provision indicates, at page 189  
of the main volume, it was apparently the Legislature's intention to  
offer the automatic continuation of a first-appeal stay not only when  
the second appeal lay of right, but also when it was of kind which  
requires permission. The 1979 amendment confirms this legislative  
purpose.

It also clarifies what is to happen to the stay in the aftermath of an  
application for leave to appeal.

If the motion for leave is granted, it is now contemplated that there is  
to be another full appeal; paragraph (i) thus continues the first-level  
stay through the entire second-level appeal and until five days after  
that appeal is determined. If that appeal has reversed and annuls the  
judgment or order that was appealed, there is nothing further to stay.  
If it has affirmed it, enforcement will be stayed only for five days after  
the termination, after which the prevailing party can go about enforce-  
ing it (i.e., invoke the procedures of Article 52 of the CPLR, etc.).

If the motion for leave is denied, the stay will last only until five days  
after the party who moved for leave (the would-be appellant) has been  
served with a copy of the order denying leave, with notice of that  
order's entry. Paragraph (ii). With the lifting of that stay, the  
judgment or order becomes enforceable.

In some instances two motions for leave to appeal may be permissi-  
ble. In Court of Appeals practice, for example, there are cases in which  
a motion for leave to appeal to the Court of Appeals may first be made  
to the Appellate Division, and then, if that does not succeed, the motion  
may be repeated before the Court of Appeals itself. See CPLR 5602(a).  
The five-day extension of the stay, after the denial of leave by the  
Appellate Division, affords the movant an opportunity to make the  
motion to the Court of Appeals. As the original Commentary points  
out (page 190 of the main volume), the making of that second motion  
during the five-day period following the denial of the first one should  
enable the movant to avoid any hiatus in which, because of the absence  
of a stay, the judgment (or order) creditor can sneak in with some  
enforcement device.

These automatic continuances of the stay apply, according to the  
amendment, to "the stay, or any other stay granted pending determina-  
tion of the motion for permission to appeal". This language has a  
specific purpose. The words "the stay" could, in the complex context  
of CPLR 5619(e), be taken to refer to only such stay as automatically  
results at the conclusion of the first level of appeal. The additional  
language makes sure that the automatic continuance will apply even if  
no stay was outstanding during the first appeal. For example:

45