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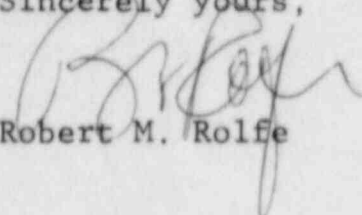
Mr. Ralph Caruso
Shoreham Project Manager
U.S. Nuclear Regulatory
Commission Staff
7920 Norfolk Avenue
Bethesda, Maryland 20014

Long Island Lighting Company v.
Transamerica Delaval, Inc.

Dear Ralph:

As you requested, enclosed is a copy of Ira
Millstein's affidavit.

Sincerely yours,


Robert M. Rolfe

177/6071
Enclosures

Docket 50-322

Boo!
1/1

ADD: B. HAYS, OI 1cy
G. ZeeA, VPB 1cy

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PDR ADDCK 05000322
S PDR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
LONG ISLAND LIGHTING COMPANY, : 85 Civ. 6892 (GLG)
Plaintiff, :
-against- :
TRANSAMERICA DELAVAL INC., : AFFIDAVIT
Defendant. :
-----x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

IRA M. MILLSTEIN, being duly sworn, deposes and
says:

1. I am a member of the bar of this Court and of
the firm of Weil, Gotshal & Manges, co-counsel for defendant
Transamerica Delaval Inc. ("Delaval"). I submit this affi-
davit in order to provide the Court with relevant background
information and materials which support Delaval's motion to
dismiss the complaint filed by plaintiff Long Island Lighting
Company ("LILCO") and to stay discovery.

2. As shown below and in the accompanying Memo-
randum of Law, each of LILCO's claims is barred by applicable
statutes of limitations and plaintiff is collaterally
estopped from alleging fraudulent concealment as a toll of

those statutes. Moreover, in sworn statements made by LILCO during proceedings before the New York Public Service Commission ("PSC"), LILCO flatly asserted that the diesel generators supplied by Delaval did not cause any delay in the commercial operation of LILCO's Shoreham Nuclear Power Station ("Shoreham"). Now, in this lawsuit, LILCO seeks to pass the blame on to Delaval for the delay in the operation of LILCO's multi-billion dollar nightmare. LILCO is legally barred by the doctrine of judicial estoppel from seeking delay damages from Delaval relating to the commercial operation of Shoreham which may never occur.

LILCO's Purchase of the Delaval Diesel Generators

3. The records of Delaval disclose the following facts, not open to dispute, which are pertinent to the statutes of limitations issue. In December 1973, LILCO invited Delaval to submit a proposal for the manufacture and supply of three emergency diesel generators for use at Shoreham. Delaval responded to LILCO's invitation with a formal proposal in January 1974.

4. On May 20, 1974, LILCO issued Purchase Order No. 310552 for the purchase of the diesel generators from Delaval for the total purchase price of \$2.11 million.

5. Delaval delivered the diesel generators to LILCO in 1976. LILCO had paid for the diesel generators by 1977.

The LILCO-Delaval Contract

6. The contract between LILCO and Delaval contains various warranty provisions and disclaimers of liability for consequential damages that were negotiated between the parties and which govern this dispute. The relevant contract documents are submitted herewith as Appendix A.

The Public Service Commission Findings
and Other Relevant Administrative Proceedings

7. The construction of Shoreham has been the focus of extensive proceedings before the PSC and other administrative bodies. The results of these proceedings demonstrate four facts of significance here: (1) that LILCO knew or should have known about the defects in the diesel generators no later than mid-1977; (2) that LILCO has consistently maintained that the Delaval diesel generators did not delay the commercial operation of Shoreham; (3) that the Delaval diesel generators have been approved by the Nuclear Regulatory Commission (the "NRC") for operation at Shoreham -- indeed, the Delaval diesel generators were in use during recent low power operation at Shoreham in accordance with NRC procedures; and (4) that LILCO has been denied an operating license for

Shoreham because of the lack of an approved emergency evacuation plan.

8. In May 1979, the PSC commenced a proceeding to adjudicate whether the extraordinary costs and delays in the construction of Shoreham were caused by LILCO's mismanagement.

9. At the conclusion of this five-year adversarial proceeding -- involving the examination and cross-examination of a total of 79 witnesses, a record of 11,654 pages and 2,775 exhibits, a physical inspection of the Shoreham plant, and the filing of voluminous briefs by all parties -- the PSC's Administrative Law Judges ("ALJs") rendered their opinion on March 13, 1985 (the "ALJ Decision"). See ALJ Decision at 5-6. A copy of the ALJ Decision together with other relevant administrative decisions referred to below are submitted herewith as Appendix B.

10. For the reasons set forth in our accompanying Memorandum of Law, the ALJ Decision is significant in two particular respects. First, the ALJs found unequivocally that by no later than mid-1977 "reasonable management oversight and review would have revealed the crankshaft design error and that the failure to do so constitutes imprudence chargeable to LILCO." ALJ Decision at 122. That finding

collaterally estops LILCO from alleging fraudulent concealment, as discussed in Point II A. of our Memorandum.

11. Second, LILCO steadfastly maintained in sworn testimony, briefs, proposed findings and oral argument in the adjudicatory proceedings before the PSC that the alleged defects in the diesel generators did not delay the commercial operation of Shoreham. Submitted herewith as Appendix C are the relevant excerpts from LILCO's admissions on the issue of delay damages which are discussed in detail in Point I of our Memorandum of Law.¹ The ALJ Decision also states LILCO's position, asserted from the beginning, that "... the failure of the diesel generators has not delayed commercial operation." ALJ Decision at 115. But, notwithstanding its five year effort of litigating these issues before the PSC, LILCO now seeks to change course and claim delay damages from Delaval. That plainly inconsistent posturing is the basis of Delaval's claim of judicial estoppel discussed at length in Point I of our Memorandum.

12. It is a matter of public record that the lack of an approved emergency plan and vigorous state and local governmental opposition has significantly delayed Shoreham from opening. Indeed, the lack of an emergency plan and the

1. Appendix C also contains the additional excerpts from LILCO's PSC submissions cited in our Memorandum.

plant's inability to operate as a result has been the subject of extensive litigation in which every court has rejected LILCO's attempt to implement evacuation plans. See Cuomo v. Long Island Lighting Co., 589 F. Supp. 1387 (E.D.N.Y. 1984); Cuomo v. Long Island Lighting Co., NYLJ, April 19, 1985, p. 16, Col. 3 (annexed hereto as Exhibit 1); In the Matter of Prospect v. Cohalan, 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209 (1985).

13. On August 26, 1985 -- just days before LILCO filed its complaint -- an NRC Atomic Safety and Licensing Board ("ASLB") denied LILCO's application for an operating license for Shoreham because of the lack of an appropriate emergency plan. The ASLB found:

From the evidence of record the Board finds that no operating license shall be issued. We make this finding because the LILCO Plan does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at Shoreham, as required by 10 CFR 50.47(a)(1).

* * *

Even if we had found that LILCO had the necessary legal authority to implement the proposed Plan, the Plan remains inadequate because of the ramifications of the refusal of the State and County to participate. To achieve an effective emergency response, the Commission's emergency planning regulations and guidance provide for a cooperative, comprehensive, preplanned, and implementable effort on the part of the utility, the

State, and the local government. The Shoreham emergency plan lacks such an integrated approach. Here each entity is free to go its own way during an emergency. This is the antithesis of what the regulatory scheme calls for to achieve a satisfactory emergency response.

In the Matter of Long Island Lighting Company, No. 50-322-OL-3 at 26, 29 (ASLB August 26, 1985).

14. On October 18, 1985, an Atomic Safety and Licensing Appeal Board, affirming a portion of an earlier ASLB decision that LILCO lacks the legal authority under New York law to implement its proposed emergency evacuation plan, concluded that federal law does not preempt the New York laws which prevent LILCO from presenting a viable emergency plan.

15. The Court should be aware of another ASLB decision. On June 14, 1985, an ASLB approved the Delaval diesel generators for use at Shoreham. And, as noted, on October 8, 1985, low power testing was completed with use of the Delaval diesel generators during testing. See N.Y. Times, Oct. 10, 1985 at B1, Col. 4, annexed hereto as Exhibit 2. Notwithstanding the availability of the Delaval diesel generators, to this day Shoreham remains idle and it is uncertain when or if it will ever open. Just within the past week, Suffolk County Executive Peter F. Cohalan stated: "As long as the Federal Government adheres to the rule of law and

its own rules, I think the Shoreham nuclear power plant is dead." See N.Y. Times, Nov. 10, 1985 at 53 Col. 1, annexed hereto as Exhibit 3.

Discovery Should Be Stayed

16. Because each of the claims set forth in the Complaint is legally deficient, discovery in this action should be stayed until the determination of Delaval's motion to dismiss. If discovery is permitted now, Delaval will be immediately compelled to defend against LILCO's claim for delay damages by establishing through discovery where responsibility for the delays in commercial operation really lies -- with LILCO, Stone & Webster Engineering Corporation ("Stone & Webster"), LILCO's architect-engineer for Shoreham, and one or more of the scores of contractors and other suppliers involved in the construction of Shoreham and the regulatory, local and various governmental bodies that have been involved in licensing and other proceedings for more than a decade.

17. Shoreham's cost overruns and delays have been well publicized. Indeed, they have been the subject of scrutiny and of reports prepared by plaintiff, outside consultants retained by plaintiff, outside consultants retained by New York State, by the staff of the PSC and investigations conducted by the media. The investigations show millions of

wasted hours expended by engineers and workmen, mismanagement at every level, inoperable equipment ignored by LILCO in every area of the plant, and scores of other problems which caused massive cost overruns and delays. The cost overruns and extensive delays in the construction of Shoreham began long before the diesel generators were purchased and delivered and continue to this day. See Shoreham: What Went Wrong, Newsday, November 15, 1981, annexed hereto as Exhibit 4.

18. LILCO's mismanagement and rampant waste at Shoreham were confirmed by the PSC. The ALJ Decision states that "[LILCO], almost from the outset of construction in 1969, lost effective control over project costs and schedules and did not regain control until at least early 1984.... This continuing failure, and the steep escalation in project cost estimates and schedule delays are reflected in the increase in cost estimates from \$70 million in 1965 to a current estimate of \$4.2 billion and a commercial operating date slippage of about 10 years." ALJ Decision at 70.

19. The ALJs found that LILCO continually mismanaged the Shoreham project in seven major areas: project planning, project management, construction management, engineering, design, quality control programs, license proceedings and equipment purchases. LILCO's mismanagement in each of

these areas contributed to delays in the commercial operation of Shoreham. ALJ Decision at 71. In this litigation, discovery into each of these areas will have to be conducted by Delaval to show how LILCO and others caused the delays in Shoreham's commercial operation.

20. Although LILCO has previously sworn that Delaval is not responsible for any delay in the commercial operation of Shoreham, it has now instituted suit against Delaval as a transparent attempt to escape from the consequences of its own mismanagement and thrust upon Delaval and this Court the massive task of unravelling the multi-billion dollar Shoreham fiasco.

Discovery of LILCO Will Be Massive

21. Some possible indication of the massive quantum of materials and information that would be involved in the discovery in this action may be gleaned from the PSC's prudence investigation. The PSC staff and an outside consulting firm reviewed the files of 66 LILCO departments and offices, scrutinized the personal files of 58 LILCO managerial officials and examined some 1.5 million pages of information reproduced on 950 rolls of microfilm as well as the company's computerized cost accounting system. In addition, forty-nine individuals were interviewed and the testimony of

approximately 79 fact or expert witnesses was taken. See ALJ Decision at 4-5.

22. A typical example of the mire of discovery created by litigation over nuclear power plant construction delays is provided by Houston Lighting & Power Co. v. Brown & Root, Inc. No. 81-H-0686-C, District Court of Matagorda County, Texas, 130th Judicial District ("South Texas Project Litigation"). In that case, the plaintiff-utilities charged the defendant-architect/engineer with mismanagement, resulting in delays in commercial operation. The defendant maintained that the delay was the fault of the utility project manager, various contractors and changes in nuclear regulation. Over a period of nearly five years, according to published reports, discovery produced over 30 million documents, four million pages of interrogatory answers and more than 275 depositions. Litigation costs were estimated at over \$100 million. See The National Law Journal, June 17, 1985 at 3, annexed hereto as Exhibit 5. Discovery into the cost overruns and delays at Shoreham will likely be as extensive. The Court, Delaval and countless third-parties should not be put to this burden when LILCO has already repudiated the very claim which will necessitate this mammoth discovery effort.

Discovery of Third-Parties Will Be Massive

23. In addition to taking extensive discovery of plaintiff, Delaval will have to conduct discovery of Stone & Webster, as well as numerous contractors and suppliers of equipment and services to the Shoreham project. Such discovery will be needed to adduce evidence relating to the causes of delay at Shoreham. Indeed, every problem that has resulted in a Shoreham shut-down, delay or cost overrun will necessitate discovery. Discovery as to the extent each such delay will be unavoidable.

24. Additional discovery will also be necessary to support one or more third party complaints against other contractors and suppliers of equipment who may have been responsible, at least in part, for the excessive costs and delays in the construction of Shoreham. Clearly, document and deposition discovery directed to present non-parties who, together with plaintiff, share most, if not all of the responsibility for Shoreham's massive cost overruns and delays will be voluminous, complex and very time-consuming.

Discovery Regarding the Cost of Constructing Other Nuclear Power Plants

25. Moreover, discovery will have to be taken of other utilities and other entities involved in the construction of other nuclear power generating plants in order to

adduce evidence to demonstrate the extent of excessive and wasteful costs incurred at Shoreham due to the mismanagement of LILCO and Stone & Webster. Other utilities which started construction of nuclear power plants at approximately the same time as Shoreham have been in operation for years and were constructed at a fraction of the cost of Shoreham. As found by the ALJs, of the 31 reactors ordered in 1967, Shoreham is the only one still under active construction and the cost of the plant has risen to almost \$5,100 per kilowatt of capacity, the highest level for a nuclear plant in the United States. ALJ Decision at 13. Delaval will have no choice but to conduct discovery to show that the failure of diesel generators worth \$2.1 million -- diesel generators which have been approved by the NRC and are ready for use in a plant that may never open -- did not cause, and indeed could not have caused, any delay damages.

The Impact of Regulatory
Procedures Upon the Cost of Shoreham

26. Since its inception, Shoreham has aroused the heightened scrutiny of federal regulators spurred in great part by concerted, influential local opposition. Ten years prior to the alleged 1983 problem with the Delaval diesel generators, LILCO had already endured the longest Construction Permit hearing process in the history of the nuclear

industry.² Today it remains involved in the longest Operating License hearings in history.³ Taken as benchmarks, these two facts highlight the extraordinarily costly and time-consuming regulatory labyrinth from which LILCO has yet to and indeed may never emerge. ALJ Decision at 103 n.2. As the ALJs determined, LILCO's regulatory experience must also be considered as another critical element in the cost and delay of Shoreham for which Delaval bears no responsibility. This is yet another area of extensive discovery.

LILCO's Waste of Hundreds of Millions on Other
Projects Added to the Excessive Costs of Shoreham

27. Another area that Delaval would be compelled to probe in discovery concerns the ever increasing interest rates which plaintiff paid for borrowed funds and the amount which it was required to raise by borrowings and stock issu-

2. At the time the Construction Permit was issued on April 14, 1973 (39 months later than originally estimated), six prehearing conferences and more than 70 days of testimony had been held. Seven ASLB Board Orders had been issued, 116 witnesses had testified, thousands of interrogatories were answered and 15,000 pages of transcript resulted. An additional 6,000 pages of transcript resulted from environmental hearings. LILCO PSC Proceeding, Transcript at 5953 (annexed hereto as Exhibit 6).

3. As of April 1985 the Operating License Proceedings have resulted in more than 30,000 transcript pages, the deposition of at least 190 individuals, 21,166 pages of direct testimony, at least 255 days of hearings and in excess of 3,650 pages of rulings. In the Matter of Long Island Lighting Company, PSC Case No. 27653, Brief Opposing Exceptions of the Long Island Lighting Company at 13 n.5 (April 26, 1985) (annexed hereto as Exhibit 7).

ances which were related, in part, to a series of wasteful expenditures involving hundreds of millions of dollars on other projects at the same time as the Shoreham disaster.

For example, in the midst of its Shoreham quagmire, plaintiff:

(i) wasted in excess of \$123 million in a uranium mining scam -- Bokum Resources Corp. -- which produced a non-functioning uranium mine and mill and claims in Bokum's bankruptcy proceedings; See LILCO Form 10Q (quarter ending June 30, 1985) at 11, annexed hereto as Exhibit 8.

(ii) expended \$96 million on a prospective second nuclear plant at Jamesport which the State refused to allow plaintiff to build because the plant was unnecessary; Id.

(iii) expended over \$62 million for another proposed upstate plant which it abandoned; LILCO 1984 Annual Report at 24, annexed hereto as Exhibit 9.

(iv) expended over \$786 million in another nuclear power plant -- Nine Mile Island -- whose cost overruns and delays are approaching the dimensions of Shoreham. Exhibit 8 at 11.

28. The funding of those wasteful projects at the same time LILCO was funding Shoreham drained it of its cash and diminished its financial standing. These other wasteful projects thereby caused plaintiff to increase its borrowing

and stock issuances and to pay higher interest rates on loans and bond issues. These factors, in turn, contributed enormously to the cost of funds component of Shoreham.

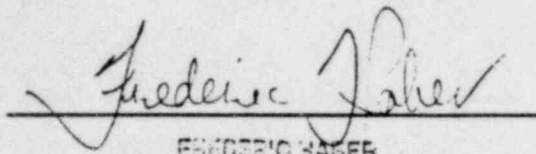
29. The facts necessary to establish the interrelationship between plaintiff's waste of hundreds of millions of dollars on other projects and the increased cost of Shoreham will require substantial discovery and will be another time consuming and very complex issue for the jury.

30. As can be seen from the foregoing, the discovery that would be required with respect to the calculation of delay damages, the quantum of such damages, if any, that might be assessed against Delaval, the quantum of such damages that should be borne by plaintiff or other entities is enormous. In summary, LILCO's delay damage claim will be the preponderant and most expensive and time-consuming issue before this Court and will permeate every other aspect of the case. Delaval believes that this delay damage claim is barred as a matter of law and as a result of LILCO's prior sworn statements before the PSC. Under these circumstances, a terrible waste of the resources of both the litigants and the Court may occur if the kind of discovery contemplated by both sides begins prematurely.

Therefore, discovery should be stayed until
Delaval's motion to dismiss is determined.


IRA M. MILLSTEIN

Sworn to before me this
15th day of November 1985.


FREDERIC HADER
NOTARY PUBLIC, State of New York
No. 4524050
Qualified in New York County
Commission Expires March 30, 1986