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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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USNRC

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Before the Commission

In the Matter of )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station,  
Unit 1) )

) Docket No. 50-322-OL  
)  
)  
)

BRIEF IN OPPOSITION TO  
SUFFOLK COUNTY'S PETITION FOR REVIEW

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I. PRELIMINARY STATEMENT<sup>1</sup>

SC's Petition for Review deserves summary rejection. It misstates the proper scope of the appeal; it misrepresents both the record and the Appeal Board's decision; and it flatly fails to meet the Commission's standard for discretionary review. See 10 C.F.R. § 2.786(b). As the Appeal Board's decision correctly observes (and as SC's Appeal Brief also reflects), the issue on appeal

concerns the exclusion by the Board of certain evidence offered by [SC] that purportedly reflects the NRC Staff's interpretation of the requirements imposed by GDC 17.

ALAB-824 at 2-3; see also SC Appeal Brief at 1, 6, 8, 14. The excluded evidence consists of a table purporting to show EDG loading conditions at selected nuclear power plants in the United States and some brief associated prefiled testimony. See SC Petition Attachments.

<sup>1</sup> For brevity, petitioners Suffolk County and the State of New York are referred to jointly as "SC." The Appeal Board's decision dated November 21, 1985 is cited as "ALAB-824," followed by the page number. The Appeal Board Oral Argument of September 26, 1985 is cited as "Oral Argument," followed by the page number. All emphasis has been added unless otherwise noted.

SC's appeal of this issue was thoroughly examined and resoundingly rejected by the Appeal Board. The excluded evidence was neither relevant nor probative. At best, it was excessively collateral. In a futile effort to avoid the force of the Appeal Board's decision, SC's Petition now seeks to broaden the scope of the appeal and diffuse its focus. In an effort to reach the Commission's review criteria, SC now erroneously claims that there are two "fundamental and far-reaching" issues meriting Commission review: (1) whether a party can be "absolutely barred" from discovering, eliciting and presenting testimony and evidence on interpretation and application of an NRC regulation and (2) whether EDGs without sufficient capacity and capability to perform their safety functions may nonetheless be approved because the single failure criterion postulates failure of only one "inadequate" EDG. SC Petition at 9-10.

Neither issue (even if fundamental or far-reaching) exists on this record. SC was not barred from any discovery at all, and it was not prevented from presenting probative and relevant direct evidence on whether the NRC Staff consistently interpreted and applied GDC 17 to require a margin.

Likewise, contrary to SC's statement, the Appeal Board did not conclude that an EDG with insufficient capacity and capability could be found acceptable through the application of the single failure criterion. Rather, the Appeal Board concluded that the Shoreham EDGs were adequate, that each had sufficient "capacity and capability" under GDC 17 and that, collectively, the EDGs satisfied the single failure criterion. ALAB-824 at 8, 12-14.

## II. COMMISSION REVIEW IS UNWARRANTED

### A. The Appeal Was Properly Decided

SC based its appeal on a claim that the proffered evidence should have been admitted because it would show

that GDC 17 has been consistently interpreted and applied to require that the Maximum Permitted Load<sup>2</sup> of emergency diesel generators must be substantially higher than their MESLs.

SC Appeal Brief at 6 & passim. The excluded evidence shows no such thing. Nor does it show, as SC claimed on appeal, that GDC 17 has been consistently construed to require margin sufficient to accommodate operator error loads. Id. at 7. The Appeal Board correctly recognized that the excluded evidence lacks any probative value on the question whether GDC 17 has been consistently interpreted and applied to require any margin. It shows nothing more than alleged differences between peak loads and diesel engine ratings at certain selected plants. Importantly, it does not show whether the Staff required any specific margin pursuant to GDC 17. See ALAB-824 at 8-10.

To be evidence of a consistent NRC Staff interpretation or application of GDC 17 requiring a margin, the excluded evidence would have to show more than the mere existence of margins; it would have to show that the NRC Staff required or imposed these operator error margins as a result of its interpretation of GDC 17. The excluded evidence does not show this.

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<sup>2</sup> The term "Maximum Permitted Load" does not appear in the regulations or the regulatory guides. Coined by SC, the term has no fixed or generally accepted meaning. In this context, it appears to be equivalent to the qualified load.

To be evidence of a consistent NRC Staff interpretation or application of GDC 17 requiring a margin, the excluded evidence would have to show that the allegedly required margin exists at all plants. It does not show this; rather, it purports to show margins only at selected plants, some of which were licensed long before the promulgation of GDC 17.

To be evidence of a consistent NRC Staff interpretation and application of GDC 17 requiring margin to accommodate operator error loads, the excluded evidence would have to show that the allegedly required margins encompass operator error loads at all plants.<sup>3</sup> Again, it does not show this either. Indeed, it contains no information at all concerning operator error loads.

Finally, to be evidence of a consistent NRC Staff interpretation or application of GDC 17 requiring a margin, the excluded evidence would have to show some consistency in the margins allegedly required. This, too, it fails to show. On the contrary, the excluded evidence reflects a wide variation in margins, ranging from 3% to 100%. On its face, therefore, even if the excluded evidence showed GDC 17 margins required by the NRC Staff, which it does not, it would plainly reflect no consistent interpretation requiring a particular margin.

In sum, the proffered evidence fails of its essential purpose: It does not show consistent NRC practice or interpretation of GDC 17. Indeed,

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<sup>3</sup> As noted by the Appeal Board, the excluded evidence lacked any information for PWR plants, and thus could not demonstrate consistency of interpretation and application. ALAB-824 at 9. SC cannot correct this infirmity by arguing that the Appeal Board selectively used data from one PWR, to the exclusion of PWRs that might support SC's position. SC Petition at 8. It is the absence of PWR data that is among the many fatal flaws of the excluded evidence.

it shows nothing at all about NRC practice or interpretation of GDC 17. It is not probative of any matter in issue. Accordingly, it was properly excluded as irrelevant and immaterial.<sup>4</sup>

B. No Important Issue of Law or Policy Presented<sup>5</sup>

Unable seriously to challenge the Appeal Board's affirmance that the excluded evidence lacks probative value and is irrelevant, and conscious that this issue does not warrant Commission review, SC now seeks to shift and broaden the focus of the appeal. It erroneously claims that the appeal presents two issues warranting Commission review: (1) whether a party can be absolutely barred from discovering, eliciting and presenting testimony and evidence on interpretation and application of an NRC regulation and (2) whether EDGs without sufficient capacity and capability to perform their safety functions may nonetheless be approved because the single failure criterion postulates the failure of only one inadequate diesel. Neither the appeal nor the record presents these issues.

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<sup>4</sup> SC takes issue with the Appeal Board's observation that the excluded evidence does not contradict the NRC Staff's statement on appeal that GDC 17 has not "been construed as requiring margin to accommodate operator error." SC incorrectly claims that this statement concerning the requirement of margin was not in evidence. SC Petition at 6-7. On the contrary, the statement was fully and properly cited to the record below. See NRC Response to Appeal at 12-13. It is astonishing that SC should claim that this issue was not fully and fairly litigated. Numerous hearing days were devoted to it with, as the Licensing and Appeal Boards agreed, the record unmistakably demonstrating that GDC 17 has not been construed as requiring margin, including margin to accommodate operator error. See, e.g., LBP-85-18, 21 N.R.C. 1637, 1698 (1985).

<sup>5</sup> Pursuant to 10 C.F.R. § 2.786(b)(4)(i), Commission review is not ordinarily granted. To win discretionary Commission review, SC must, *inter alia*, demonstrate the existence on appeal of an important question of public policy or of a matter that could significantly affect the environment or the public health and safety. See 10 C.F.R. § 2.786(b)(4)(i). Commission review of any fact issue is plainly inappropriate as the Licensing Board and the Appeal Board did not disagree on any issue of fact or law. See 10 C.F.R. § 2.786(b)(4)(ii).

1. SC Not "Absolutely Barred" from Discovering and Presenting Evidence

First, SC's claim that it was barred from pursuing discovery on the NRC's interpretation and application of GDC 17 is at best disingenuous.<sup>6</sup> The record flatly refutes this claim. SC elected to depose only two NRC Staff witnesses. It was not prevented from deposing more; it simply chose not to do so. In any event, the two witnesses deposed were apparently knowledgeable concerning NRC interpretation and application of GDC 17 and SC was not restricted from exploring this issue with them. In neither deposition did NRC Staff counsel instruct the witnesses not to answer any SC question and in neither deposition did the witnesses decline to answer any SC question. In short, SC was free in these depositions to ask direct questions concerning the NRC's interpretation and application of GDC 17. Thus, to claim now that it was "absolutely barred from discovering" evidence on the interpretation and application of GDC 17 is an impermissible and disingenuous distortion of the record.<sup>7</sup>

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<sup>6</sup> Especially misleading and inaccurate is SC's claim that this appeal includes the Licensing Board's rejection of a portion of the contention early on and that this rejection somehow served to limit SC's scope of discovery. SC Petition at 3. In the first place, the rejection of the contention was mentioned only in passing in a footnote and was not properly raised in this appeal. Indeed, the footnote does not even claim that the rejection was erroneous. SC Appeal Brief at 8 n.8. Moreover, it is surprising that SC now claims that the rejection of the contention somehow limited discovery in light of SC's counsel's representation to the Appeal Board that the excluded evidence concerning loading conditions at other plants was within the scope of the ultimately admitted contention. Oral Argument at 11, 24. Counsel did not argue orally before the Appeal Board that a rejection of the portion of the contention early on was a focus of its appeal. In light of the record below, it is ludicrous that SC would now claim that the Appeal Board "inexplicably" failed to address rejection of a portion of SC's contention. SC Petition at 6.

<sup>7</sup> This was vividly confirmed at the Appeal Board argument. There, in a colloquy between Judge Rosenthal and Staff counsel, it was established (i)

Equally without merit is SC's claim that the Licensing Board refused to permit SC to cross-examine LILCO and NRC witnesses on the interpretation and application of GDC 17. SC Petition at 4, 6. Again, the record belies this claim. In the two instances cited by SC, the Board consistently ruled only that the specific details of diesel generators not in issue were irrelevant. Examination on general industry practice and past and current interpretation and application of GDC 17 by the NRC Staff was allowed. Tr. 27239-47, 28363-67. Indeed, SC and other parties fully explored through cross-examination the interpretation and application of GDC 17. See, e.g., Tr. 27947-60, 27968-90, 28172-74, 28348-53. Cross-examination was clearly allowed to elicit directly whether the capacity and capability of EDGs must accommodate operator error loads. E.g., Tr. 27796-97, 28174, 28277-81. Furthermore, while SC claims that restriction of cross-examination was specifically raised on appeal, SC Petition at 5, it was afforded no more status than a single footnote, and then was limited to the two instances discussed above in which specific details were

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(footnote continued)

that the Staff had made available for deposition or other discovery all of its trial witnesses, including Dr. Berlinger and Mr. Knox, (ii) that SC had sought no discovery beyond these witnesses and (iii) that Dr. Berlinger and Mr. Knox were knowledgeable concerning the Staff's GDC 17 practice and that the Staff did not resist any SC discovery. The following question and answer concluded the colloquy:

JUDGE ROSENTHAL: In any case, if I understand you correctly, the Staff interposed no obstacle to [SC] reaching Staff witnesses who would have been knowledgeable on the subject of what the Staff practice was with respect to the interpretation and application of GDC 17 in this respect?

MR. GODDARD: That is correct. . . .

Oral Argument at 53.

correctly held to be irrelevant, SC Appeal Brief at 10 n.10. See also Oral Argument at 16-18.

2. GDC 17 Was Properly Construed

According to SC, the Appeal Board determined that even if the Shoreham EDGs are of insufficient capacity and capability to meet the requirements of GDC 17 because of inadequate Maximum Permitted Loads, they would nevertheless be acceptable because even if one EDG were lost, the other two would be sufficient to perform the necessary safety functions. SC Petition at 5, 9. This is a blatant misrepresentation of the Appeal Board Decision and the record. None of the Shoreham EDGs was held to have inadequate capacity and capability.\* Contrary to SC's Petition, the Appeal Board decision does not establish a dangerous interpretation of GDC 17 allowing for EDGs of insufficient capacity and capability on the basis that GDC 17 only permits the postulation that a single inadequate EDG will fail. See SC Petition at 10.

As SC admits, GDC 17 requires that the emergency power supply provide sufficient power to perform its safety functions, even in the event of a single failure. SC Petition at 9. The Licensing Board found, and the Appeal Board affirmed, that GDC 17 does not require margin to accommodate operator error. ALAB-824 at 8; LBP-85-18, 21 N.R.C. 1637, 1698 (1985). Rather, compliance with GDC 17 is shown by ensuring that the plant's design loads, defined by IEEE-387-1977 as being those necessary to perform the safety functions, do not exceed the capacity and capability of the EDGs.

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\* Significantly, SC did not appeal the Licensing Board's conclusion that the Shoreham EDGs have adequate capacity and capability to service the plant's design loads as required by GDC 17. See LBP-85-18, 21 N.R.C. 1637, 1689-1704 (1985); see also ALAB-824 at 11-14.

The design load does not include loads attributable to operator error. LBP-85-18, 21 N.R.C. 1637, 1698 (1985). Once sufficient capacity and capability is established under this criterion, it must also be shown, not as a substitute but rather in addition, that even given the failure of any one EDG due to operator error or other cause, sufficient capacity and capability are retained in the remaining EDGs to perform the required safety functions. ALAB 924 at 12. Contrary to SC's Petition, this is the interpretation of GDC 17 adopted by the Licensing Board and affirmed by the Appeal Board in its decision. It is correct and raises no issue requiring Commission review.

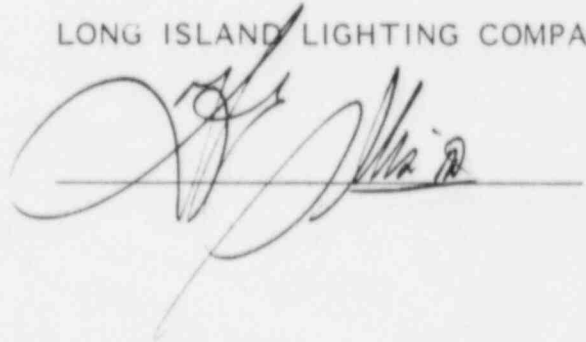
### III. CONCLUSION

SC's Petition does not and cannot present any substantial basis for Commission review. Issues relating to the Shoreham EDGs have been thoroughly and exhaustively litigated. The hearings were extensive. They consumed 42 days, involved the testimony of 32 witnesses, covered 8,127 transcript pages and included consideration of 190 admitted exhibits. On the basis of this comprehensive record and after consideration of 453 pages of proposed findings, the Licensing Board issued a 117-page decision, concluding that the Shoreham EDGs were satisfactory for the first fuel cycle. As the Appeal Board correctly noted, the SC appeal concerned only the exclusion of certain evidence purportedly reflecting EDG loading conditions at selected nuclear power plants. The Appeal Board thoroughly examined this issue and rejected SC's appeal. Indeed, the Appeal Board went on, sua sponte, to review the evidence on the adequacy of the Shoreham EDGs and concluded in common with the Licensing Board that the EDGs were satisfactory.

SC's Petition misstates and distorts both the proper scope of appeal and the Appeal Board's decision, all in a vain attempt to meet the Commission's discretionary criteria for review. Contrary to SC's claim, it was not "absolutely barred" from discovering and presenting probative evidence on the interpretation and application of GDC 17. Such evidence was adduced and presented in the record and SC's real grievance is that this evidence was contrary to its bald assertions. Likewise, contrary to SC's Petition, the Appeal Board did not decide that the Shoreham EDGs had insufficient capacity and capability but were nonetheless acceptable through the application of the single failure criterion. In light of this thorough review and in light of SC's failure to meet any of the criteria set forth in 10 C.F.R. § 2.786(b), Commission review should be denied.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

A handwritten signature in dark ink, appearing to read 'W. Taylor Reveley, III', is written over a horizontal line.

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DATED: December 23, 1985

CERTIFICATE OF SERVICE

In the Matter of  
LONG ISLAND LIGHTING COMPANY  
(Shoreham Nuclear Power Station, Unit 1)  
Docket No. 50-322-OL

I certify that copies of the Brief in Opposition to Suffolk County's Petition for Review were served this date upon the following by first-class mail, postage prepaid.

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