August 15, 1990

MEMORANDUM FOR: Seymour H. Weiss, Project Director
Non-Power Reactors, Decommissioning and
Environmental Projects Directorate

FROM Martin J. Virgilio, Chief
Policy Development and Technical Support Branch
Program Management, Policy Development
and Analysis Staff

SUBJECT: PTSB RESPONSE TO LILCO DECOMMISSIONING FUNDING
EXEMPTION REQUEST

We have prepared the enclosed proposed findings and draft response to a request from Long Island Lighting Company relating to decommissioning funding for Shoreham. Any questions on this should be directed to Robert Wood (x21255).

Martin J. Virgilio, Chief
Policy Development, and Technical Support Branch
Program Management, Policy Development
and Analysis Staff

Enclosure:
As stated

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

Mr. Victor A. Staffieri
General Counsel
Long Island Lighting Company
175 East Old Country Road
Hicksville, New York 11801

Dear Mr. Staffieri:

This respond: to your letter dated June 11, 1990, in which you requested that the NRC either find acceptable LILCO's proposed method for funding Shoreham's decommissioning or, alternatively, grant an exemption for Shoreham from the NRC decommissioning funding regulations. We have reviewed the information and arguments contained in your letter and enclosures. For the reasons stated below, we believe that the decommissioning regulations do apply to Shoreham. Additionally, we have reviewed your request for an exemption from the requirements of 10 CFR 50.33(k)(2) and 50.75(b) and find that LILCO has failed to adequately demonstrate the existence of special circumstances, the basis for granting an exemption as required by 10 CFR 50.12(a)(2). As noted in the preamble to the decommissioning rule, the Commission considered facilities that prematurely cease operation. However, because additional guidance in this area is now apparently necessary, the NRC is preparing to grant LILCO a schedular exemption from the requirement of 10 CFR 50.33(k)(2) until 30 days after the NRC provides such guidance. The following discussion addresses the specific points raised in your letter:

1. Whether the decommissioning rule contained in §§50.33(k), 50.75, and 50.82 is applicable to Shoreham

Your interpretation that the decommissioning rule does not apply to Shoreham relied on the Commission's Seabrook order, CLI-88-10. You refer to a statement in CLI-88-10 that "The hypothesized circumstances addressed in CLI-88-7--low-power testing not followed by commercial operation -- were not considered or contemplated in the decommissioning rulemaking. Thus the rule does not apply to the Commission's requirements in CLI-88-7." (28 NRC 573 (1988), at 584, your emphasis.) Based on your analysis of the Seabrook order, you conclude that "The same conclusion applies to Shoreham: the decommissioning rule, designed to take advantage of the long lead times generally available to commercially operating plants in order to accumulate the substantial decommissioning costs anticipated for them, simply does not fit the present short-notice, clean-plant circumstances." (Your letter of June 11, 1990, at p. 7)

As you note, the Commission's Seabrook order, CLI-88-10, was issued in response to contentions filed by intervenors with respect to the highly unusual financial circumstances faced by Public Service Company of New Hampshire, which led to its filing for protection under Chapter 11 of the U.S. Bankruptcy Code. The Commission's order required the applicants

to submit assurance for $72.1 million, which was derived from applicants' estimate, as modified by the Commission, of decommissioning costs that would occur if a full-power operating license was not issued after low-power testing. As you noted in your letter, the Commission stated in CLI-88-10 its belief that "it would be unduly onerous to require, for example, a totally prepaid external account beyond Applicant's control at this stage for so large a sum." However, despite the inapplicability of specific provisions of the decommissioning rule to the Seabrook case, the Commission stated, "Notwithstanding its conclusion that the rule does not apply here, the Commission recognizes and affirms that the safety concern underlying the rule that there be adequate funds available for safe and timely decommissioning is fully applicable to this case." To comply with the Commission's order applicants provided a surety bond for $72.1 million.

As part of its deliberations on the decommissioning rule, the Commission explicitly rejected use of internal funding, even for utilities such as LILCO that receive approval from their public utility commissions to collect decommissioning costs through rates (53 FR 24018, at p. 24033, June 27, 1988). Thus, even if some provisions of the rule do not apply, LILCO's use of a promise to pay decommissioning costs to LIPA would not provide adequate assurance as mandated by the rule.

Although you are correct to note that the decommissioning rule did not specifically consider prematurely shut down plants (or those that never achieved full-power operation), this observation does not lead to the conclusion that the decommissioning rule does not apply, but rather that specific provisions may be inapplicable or suspended upon issuance of an exemption. The statement on page 9 of your June 11, 1990, letter that (1) Shoreham's factual situation is indistinguishable from the "hypothesized circumstances" in Seabrook and, (2) the Commission's ruling in this case should be dispositive, is mistaken as to the scope of the Seabrook case. Each case of premature closure of plants in relation to funding for decommissioning should be examined individually. In addition, the statement that the Commission indicated that PSNH would be required to satisfy the decommissioning regulations only at the time Seabrook achieved full power commercial operation (footnote 7) is incorrect. PSNH was expected to comply with applicable provisions of the rule prior to full-power operation.

While we would agree that the certification requirements contained in §50.33(k) and §§50.75(a)-(c) were designed to apply to plants that will continue to operate for many years, other provisions such as §§50.75(e), 50.75(f) and 50.82 apply to plants near or at shutdown, regardless of how long they operated. Paragraph 50.75(f) requires a licensee to prepare a preliminary decommissioning plan based on a site-specific decommissioning cost estimate within five years of shutdown. Section 50.82(a) requires a proposed decommissioning plan to be submitted within two years following permanent cessation of operations, if such cessation occurred after July 27, 1988. For plants permanently ceasing operation prior to July 27, 1988, a proposed decommissioning plan is to be submitted but may be modified to reflect the specific situation at the plant. Paragraph 50.82(c)(1) requires that "[f]unds needed to complete decommissioning be placed into an account segregated from licensee assets and outside the licensee's administrative control during the storage or surveillance period, or a

surety method or fund statement of intent be maintained in accordance with the criteria of §50.75(e)." This segregation of decommissioning funds is equally applicable to the DECON method of decommissioning as provided in §50.75(e)(1)(ii).

Thus, although certain aspects of the decommissioning rule may not apply to prematurely decommissioned plants, LILCO is still required to provide reasonable assurance of the funds needed to decommission Shoreham by following applicable portions of the rule.

2. Whether LILCO should be granted an exemption from the decommissioning regulations

The NRC staff disagrees with two statements in your letter that are presented as support for an exemption from the decommissioning rule's funding requirements. However, until the staff receives clarification from the Commission that these views remain Commission policy for prematurely shutdown plants, you will receive a schedular exemption from these provisions as indicated above. First, your letter states that there are no health and safety considerations at Shoreham compelling adherence to the requirement that, at the time of termination of operation, all the funds necessary for decommissioning must be in place. As justification for this statement, you indicate that LILCO is obliged to pay all costs of decommissioning and the New York PSC has already agreed that LILCO may recover the costs of decommissioning directly from its ratepayers. In response, we believe that this situation is similar to that in which most other utilities would find themselves at the time of shutdown. When considering the rule, the Commission recognized that most utilities would receive approval from their PUCs for decommissioning costs or would have already accumulated sufficient funds for decommissioning. Nevertheless, the Commission declined to allow utilities generally to accumulate funds during the dismantlement or storage period. According to the rule, assurance of decommissioning funds requires that funds be in place prior to commencement of decommissioning.

Second, your letter states that the requirement that decommissioning funds be maintained in a segregated "external" fund is not applicable to Shoreham's present circumstances. Rather than being accumulated over an extended period, your letter indicates that the funds that LILCO will provide to LIPA for deposit in LIPA-controlled accounts will be continuously spent by LIPA as it undertakes Shoreham's decommissioning. Again, we believe that this scenario is not appreciably different from those of other utilities that choose to dismantle their plants immediately. The Commission considered the use of internal funds at various decommissioning stages and under different financial circumstances (including public vs. state ownership) and chose to disallow internal funding in all cases. Without an outside trustee, neither LILCO's nor LIPA's obligation to pay for decommissioning could be considered to be external funding as defined in §50.75(e). In addition, the monthly funding of decommissioning costs with a three month cushion by LILCO may be unacceptable. Such a proposal would tend to limit the flexibility needed for long-term projects like decommissioning.

At a minimum, unless the Commission decides that a special policy is warranted for prematurely decommissioned plants, the NRC staff would expect LILCO to provide the following in the funding plan portion of its decommissioning plan:

1. A detailed site-specific estimate of the cost to decommission Shoreham should be provided commensurate with §50.82. Although a statement on page 10 of your letter indicates that "the DECON method may be the most appropriate decommissioning alternative for Shoreham," no additional estimate of cost or decommissioning alternatives has been provided.

2. Funds for decommissioning Shoreham should be placed in an external trust, either by LILCO or LIPA, until such time as they are needed to perform decommissioning work. Any proposal that defers funding into the dismantlement or storage period will have to be approved by NRC pursuant to its exemption procedures in §50.12. Until you are able to provide a detailed site-specific estimate and a schedule for performing decommissioning work, and until the policy issues cited herein are resolved, we are unable to consider the request for exemption from §§50.33(k) and 50.75 contained in your June 11, 1990 letter.

3. We also believe that even if the NRC were to approve an exemption to the requirement to have all funds prior to the start of decommissioning, we would be unable to accept your proposed funding schedule, which provides only a three month "cushion" of decommission funds in advance of actual decommissioning work. As noted above, we are unable to consider your exemption request until the Commission has resolved certain policy issues. We will advise you when those issues have been resolved.

If you have any questions regarding this letter, please contact Stewart Brown on (301) 492-1427.

Sincerely,

James G. Partlow, Associate Director
for Projects
Office of Nuclear Reactor Regulation