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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Commission

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In the Matter of	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-4 (Low Power)
(Shoreham Nuclear Power Station, Unit 1)	)	

JOINT SUBMISSION OF
SUFFOLK COUNTY AND THE STATE OF NEW YORK
SUBSEQUENT TO MAY 7 COMMISSION ORAL ARGUMENT

At the Commission's May 7 oral argument, issues were raised concerning the meaning and effect of Section 50.57(c) of the NRC's regulations, and the Commission invited the parties to submit further views that address this matter. See Tr. 147-48, 158.[1/] By this filing, Suffolk County and the State of New York submit such views.

A matter of major interest on May 7 was the proper interpretation of 10 C.F.R. Sections 50.57(a) and 50.57(c) of the regulations. This arose at least in part because LILCO and the Staff argued that Section 50.57(c) would be rendered meaningless

1/ For example, Commissioner Bernthal stated: "I would like to hear your suggestions of circumstances under which that regulation [Section 50.57(c)] was designed to apply in a non-creative reading . . . ." Tr. 148. Commissioner Asselstine stated that "all parties should be given the opportunity to provide whatever additional information they want within the next couple of days on prior instances in which there may have been departures from requirements and regulations." Tr. 158.

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if it did not permit the interpretation urged by the Staff and LILCO; namely that Section 50.57(c) was, in effect, an exemption provision under the NRC's regulations. See Tr. 9, 12, 60, 71-74, 87-89, 104, 118, 148, 158.

Suffolk County and New York State submit that the LILCO and Staff position is flatly erroneous and not supported by any NRC adjudicatory decision, and that the proper interpretation of Sections 50.57(a) and 50.57(c) is what the County and State have advanced. To interpret Section 50.57(c) properly -- to give it the straightforward reading it is intended to have -- requires the Commission to apply the following logic:

1. GDC 17 means what it says. By its own terms, GDC 17 applies to low power operation of Shoreham, and LILCO and the Staff concede that.[2/]

2. Under Section 50.57(c), the Commission must make the findings required by 50.57(a) that all regulations applicable to low power are complied with by LILCO.

3. Since GDC 17 is a regulation applicable to low power, Shoreham may receive a low power license only if there is compliance with GDC 17 and if the Commission makes the necessary Section 50.57(a) finding.

4. There is no such compliance with GDC 17 because LILCO lacks an onsite electric power system. Therefore, the Commission

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2/ E.g., Tr. 8 (LILCO); Tr. 101-03 (Staff); LILCO's Comments in Response to the Commission's Order of April 30th, May 4, 1984, at 19; NRC Staff Comments in Response to the Commission's Order of April 30, 1984, May 4, 1984, at 4.

cannot find compliance with Section 50.57(a)(2) and Shoreham may not receive a low power license.

5. Since Shoreham may not receive a low power license, LILCO's Motion for a low power license must be dismissed.

6. Following dismissal, LILCO would have to make its own business decision whether to proceed by seeking to qualify the TDI diesels now onsite, to request a waiver of GDC 17 under the explicitly required NRC procedures, or to take some other action it finds to be in its own business interest.

One question asked on May 7 was whether such an interpretation could result in Section 50.57(c) having no limits. It could not. In fact, this interpretation gives the very meaning to Section 50.57(c) that was originally intended.

In particular, Section 50.57(c) was intended, in both its original form in 1960 and as amended in 1971, to provide a means for a reactor to be tested at low power if it were found in compliance with all regulations applicable to low power. Prior to that time, since the Commission could issue only Construction Permits and Operating Licenses, a plant could not be tested at low power until the full operating license hearing was completed and findings were made on all regulations; that is, those which applied only to full power as well as those that applied to low power.[3/] Therefore, Section 50.57(c) became a means through which the Commission could permit low power testing while compliance with regulations pertinent only to full power was still out-

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3/ See 25 F.R. 8712 (1960); 34 F.R. 6541 (1969); 35 F.R. 5317, 16,686 (1970); 36 F.R. 8861 (1971).

standing. In turn, the reference in Section 50.57(c) to Subsection (a) solidified that effect: if a regulation applied at low power, then the Commission had to find compliance with that regulation; if it did not apply at low power, then no finding on it had to be made before issuing a low power license.

What is important here is that GDC 17 is a low power regulation, and, as intended by the Commission from the start, the Commission must find compliance with GDC 17 before issuing a low power license for Shoreham.[4/]

The interpretation of Section 50.57(c) which we urge above -- i.e., applying the Section according to its plain meaning -- would not render Section 50.57(c) limitless, but would give effect to its intent. In fact, under the Commission's regulations, there are many facets of plant operation as to which there might be contentions but those contentions (unlike the instant case where GDC 17 clearly is applicable to low power operation) involve

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4/ The GDC 17 matter is not the only issue already in controversy with respect to LILCO's Low Power Motion. If the Commission were not to dismiss LILCO's Low Power Motion, Suffolk County would also assert that Section 50.57(a)(6) is not satisfied because there is inadequate physical security for LILCO's electric power system. Such physical security issues are applicable to low power, particularly given the vulnerabilities suggested on the face of LILCO's proposal. The County has been unable thus far formally to enunciate the precise deficiencies in LILCO's physical security arrangements because the Board failed to establish safeguards procedures by which a party might begin to take the steps necessary to review and address such issues. LILCO's suggestion in its May 4 Comments in Response to the Commission's Order of April 30th (page 52) that security matters cannot be raised now is clearly erroneous; the former settlement agreement has no pertinence to LILCO's new electric power configuration; and the Staff (in its SSER Supp. 5 and in its April 20 testimony) has addressed security matters as being pertinent to low power operation.

matters which are not applicable to low power operation. Examples include:

-- GDC 4 requires structures, systems and components important to safety to be protected against turbine missiles. Since the turbine does not operate at less than 5 percent power, there cannot be any turbine missiles during low power operation. A contention alleging noncompliance with GDC 4 for failure to protect against turbine missiles would not be relevant to a low power motion. Thus, under Section 50.57(c), it would not be necessary to make the Section 50.57(a)(2) findings on the turbine missile matter prior to acting on the low power motion.

-- The Commission requires a BWR to have an automatic recirculation pump trip. This automatic safety device is used mainly for ATWS mitigation and results in prompt reduction of power from about 100 percent power to 30-40 percent power. This automatic trip has no pertinence to operation at less than 5 percent of rated power. Thus, a contention relating to the adequacy of a plant's automatic recirculation pump trip would not need to be resolved under Section 50.57(c) and findings would not need to be made under Section 50.57(a).

-- The rod block monitor system functions to restrict improper control rod movement. It generally operates only at above 30 percent power. Again, therefore, a contention concerning the rod block monitor system would not need to be resolved prior to rendering a decision on a low power motion.

-- The Commission's regulations (e.g., GDC 63) specify requirements for spent fuel cooling and monitoring. During low power operation, there is no spent fuel. Any contentions regarding that matter would not need to be resolved prior to a decision on the low power license. Similarly, contentions pertaining to handling of spent fuel casks would also be irrelevant in a low power proceeding.

-- A licensee is required to have test procedures for full load rejection, wherein the plant is operated at or near full power, the turbine is tripped, and controlled shutdown is demonstrated. These test procedures are only pertinent at power levels well above 5 percent power. Thus, contentions regarding the adequacy of such procedures would not be relevant to a low power operating license.

The foregoing examples show that Section 50.57(c) would not be rendered limitless if interpreted according to its own terms. Indeed, before Section 50.57(c) was adopted, the Commission had to make findings on each of the foregoing issues, even though they were not relevant to low power operation. With the adoption of Section 50.57(c), however, a low power license could be issued while hearings continued on those issues. This is precisely the sense and effect of Section 50.57(c): it took from consideration at low power issues not relevant; it left for consideration at low power issues that are relevant. GDC 17 is such a relevant issue.

What is wrong with the Staff's and LILCO's position is that they want their cake and yet want to eat it too. Therefore, they concede that GDC 17 is applicable to low power operation (and thus a finding of compliance with GDC 17 must be made under Section 50.57(a)), but they also say that GDC 17 does not mean what it says. The Staff and LILCO cannot have it both those ways: GDC 17 does apply to low power; it also means what it says.

If Section 50.57(c) is interpreted to mean what it says and is intended to say, LILCO's Low Power Motion must be dismissed. There is no need for a hearing because on the face of LILCO's Motion, it is clear that LILCO, which lacks an onsite electric power system, does not comply with GDC 17. Since there is no compliance with GDC 17, the Section 50.57(a)(2) findings cannot be made and thus no low power license can be issued on the basis of LILCO's Motion.

The Commission also inquired on May 7 whether any NRC cases support the Staff/LILCO position that Section 50.57(c) constitutes

a regulation permitting the waiver of NRC regulations. See Tr. 118-20. There is no adjudicatory precedent that supports such an interpretation. Indeed, each case relied upon by the Staff and LILCO is clearly distinguishable.

-- Beaver Valley. The ASLB expressly made the Section 50.57(a)(2) findings and thus found that "the facility will operate in conformity with the application as amended, the provisions of the Act, and the rules and regulations . . . ." Duquesne Light Co. (Beaver Valley Power Station), LBP-76-3, 3 NRC 44, 68 (1976). Thus, Beaver Valley supports the County/State position that a Board in a Section 50.57(c) proceeding must make the Section 50.57(a)(2) findings.

-- Big Rock Point. This is not a Section 50.57(c) case at all. Rather, it is a case where the applicant followed the rules, applied for an exemption under Section 50.46, and was granted the exemption because it met the "good cause" standard of Section 50.46. (Section 50.46 deals only with certain ECCS matters.) See Consumers Power Co. (Big Rock Point Nuclear Station), CLI-76-8, 3 NRC 598 (1976).

-- San Onofre. The ASLB relied upon a special emergency planning exemption provision, 10 C.F.R. § 50.47(c)(1), which has no applicability to GDC 17 or the instant case. See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-83-2, 15 NRC 61, 193 (1982).

-- Diablo Canyon. The ASLB relied upon the special emergency planning exemption provision, 10 C.F.R. § 50.47(c)(1), as well as on SECY-81-188, as its basis for finding that not all emergency planning regulations applied at low power. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-81-21, 14 NRC 107, 122 (1981). This has no applicability to GDC 17 or the instant case.

-- St. Lucie. This is not a Section 50.57(c) case at all. The case involved station blackout as a "design basis" event given the climatic conditions in Florida. The plant had both onsite and offsite power. The Board held that GDC 17 "establishes the basic criterion that both offsite and onsite electrical power systems must be available to a nuclear plant to supply the electrical needs of structures, systems, and components important to safety." Florida Power and Light Co. (St. Lucie Nuclear Plant, Unit 2), ALAB-603, 12 NRC 30, 35 (1980). St. Lucie thus supports the County/State view that GDC

> 17 means just what it says: a plant must have both an onsite and an offsite electric power system.

Therefore, there is no Section 50.57(c) precedent that would support this Commission in construing that regulation as an exemption provision.

As noted previously, following dismissal of its low power Motion, LILCO should be left to make its own business judgment as to how it wishes to proceed. If it were to decide to seek a waiver of GDC 17, there are strict requirements for the filing of an application with which LILCO must comply. A recent decision in the Shearon Harris proceeding emphasizes this:

> We conclude this general discussion with a few comments about impermissible attacks on Commission rules and petitions for waiver of a rule. The Commission adheres to the fundamental principle of administrative law that its rules are not subject to collateral attack in adjudicatory proceedings. We are rejecting (or the intervenors have withdrawn) numerous proposed contentions which amount to attacks on the rules, notably in the areas of need for power, alternative energy sources, and financial qualifications.
>
> Intervenors are authorized to file a petition for a waiver of a rule, pursuant to 10 CFR 2.758. However, the procedural requirements of that provision must be complied with. It is not enough merely to allege the existence of "special circumstances." Such circumstances must be set forth "with particularity." In addition, as we read the regulation, the petition should be supported by proof (in affidavit or other appropriate form) sufficient for the Licensing Board to determine whether the petitioning party has made a "prima facie showing" for waiver.

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982) (emphasis supplied).

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May 10, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of the JOINT SUBMISSION OF SUFFOLK COUNTY AND THE STATE OF NEW YORK SUBSEQUENT TO MAY 7 COMMISSION ORAL ARGUMENT, dated May 10, 1984, have been served to the following this 10th day of May 1984 by U.S. mail, first class, except that some are being served by hand (when indicated by one asterisk), some by Federal Express (when indicated by two asterisks), and by telecopy (when indicated by "#").

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