LILCO, May 24, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

LONG ISLAND LIGHTING COMPANY'S
RESPONSE TO REQUESTS FOR CLARIFICATION

I.

On May 21, 1984, Suffolk County filed a "Request for Clarification of Commission's Order of May 16, 1984." Governor Cuomo filed his clarification request the next day. The filing of these requests was of course predictable; the only question was how many days would elapse between the Commission's decision and the County's and State's first complaints that it was procedurally inadequate. Suffolk County Executive Peter Cohalan described the Commission's May 16 Order as "a victory for Suffolk County in our effort to keep that plant closed." Newsday, May 17, 1984. It is perfectly apparent that the

"clarifications" that he and the Governor now seek are simply the next steps in their "effort to keep that plant closed" by avoiding a decision on the merits -- by delaying at all costs a determination whether in fact Shoreham can be tested at low power without undue risk to the public health and safety. Thus, these "clarification" requests are the next, wholly predictable moves in the campaign to kill Shoreham by licensing attrition.

We repeat what we have said before: fundamental fairness has been denied LILCO in Shoreham's licensing process, most egregiously during the last two months of administrative confusion and conflict.1/ It is vital to future fairness, as well as to the integrity of this agency's process, that the Commission understand what is actually going on, engage pertinent issues on a timely basis and, when appropriate, lay down guidelines to govern the future conduct of the proceeding. For reasons set out below, the May 16 Order does provide such

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1/ See LILCO's Comments in Response to the Commission's Order of April 30th, at 1-17 (May 4, 1984); see also LILCO's Memorandum of Law in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim upon which Relief Can be Granted and in Opposition to Motion for Preliminary Injunction, Civ. Action No. 84-1264, U.S. District Court for the District of Columbia (April 27, 1984); LILCO's Statement before Subcommittee on Energy & Environment of House Committee on Interior & Insular Affairs (May 17, 1984).

guidelines in LILCO's judgment. If for whatever reason the Commission has second thoughts about its May 16 action, however, this is the time to say so. It would be intolerable for the low power proceeding to move a second time down procedural paths known to the Commission, only to have the Commission later abort the journey because the wrong roads had been travelled.

There is no meaningful risk to the health and safety of the public from what LILCO proposes to do. LILCO wants a chance to finish proving its case. If the pertinent procedures for doing so aren't laid out in the Commission's May 16 Order, and we believe they are, then it is crucial they be set out in another order that endures.

II.

A. Resumption of Hearings

The County contends that the hearings should be "new in all ways." This suggestion finds no basis in the Commission's May 16 Order or in common sense.

The County's suggestion is misleading in that it characterizes the April 24-25 hearings as "void ab initio." To the contrary, the Commission's Order was carefully worded to indicate the continuous nature of the proceeding and to dispel any notion that the previous effort by all parties would be wastefully and irrationally disregarded. Thus, the Commission ordered that the Licensing Board's Memorandum and Order of April 6, 1984 be vacated only "to the extent that it is inconsistent with this Order." Commission Order at 1. Similarly, the Commission advised that LILCO "should modify its application for low power operation" in seeking an exemption; it did not suggest that a new application for low power operation was necessary. Commission Order at 2. Again, the Commission ordered that the "Licensing Board shall conduct the proceeding on the modified application in accordance with the Commission's rules." Commission Order at 3. And, finally, as Suffolk County points out, the Commission provided guidance for a schedule incident to "resuming the hearing." Commission Order at 3. Clearly, the Commission intended a continuation, not a new beginning.

Nor would a new beginning be warranted here. As LILCO prospectively indicated to the Commission, it has applied for an exemption based on the same core facts as supported its

Supplemental Motion. Only the legal garb has changed.2/ Since the factual underpinnings for the Application for Exemption and request for low power license have remained the same since at least March 20, the County can rely on the same experts it has retained and can expect to face predominately the same witnesses whose affidavits and prefiled testimony it has reviewed and whom it has had the opportunity to cross-examine on April 24 and 25. If new evidence or new issues are presented, the County will obviously have an opportunity to confront that evidence. There is absolutely no point, however, in refiling the same testimony and repeating the proceedings of April 24 and 25.

2/ Admittedly, the exemption request necessitates a review of public interest considerations. Those LILCO has asserted in its Application for Exemption, however, will not require any extensive factual development. For example, the Licensing Board and Commission can probably take judicial notice of the precariousness of this country's oil supply given the instability in the Middle East. Similarly, there can be little dispute that LILCO has exerted good-faith efforts to comply with GDC 17.

B. Scheduling

The County next tries to revisit the scheduling issue that has been addressed at length by the parties and finally put to rest by the Commission on May 16. It asks for scheduling flexibility pending a determination of the issues "actually . . . in controversy." Yet, as the County knew from LILCO's earlier comments to the Commission and as it now knows from LILCO's Application for Exemption, the health and safety issues presented remain identical to those presented by LILCO's Supplemental Motion on March 20. If, as the County suggests, the complexity of new issues is the benchmark for establishing a schedule, the schedule ought to be compressed, not prolonged.

Equally important, the County has had ample time to explore LILCO's case and prepare its own affirmative case. The tale of the County's deliberate decision to proceed at a snail's pace with respect to the factual issues raised on March 20 has been repeated often, but warrants repetition again. At the very latest, the County could have begun inquiring actively into LILCO's case on March 20, the day LILCO's Supplemental Motion and affidavits were served. Notwithstanding the County's contrary desires, the Licensing Board's intention to move quickly was signaled by its telephone notice of March 30

setting an April 4 oral argument, by its remarks at the ensuing conference and by its April 6 Order. Still, LILCO did not receive any discovery requests from the County until April 12. Even at that, Suffolk County's discovery requests, though extraordinarily burdensome, were of a boilerplate variety that could have been formulated on a first reading of LILCO's March 20 motion and affidavits.

The County's pursuit of document discovery actually requested has been equally superficial. Following receipt of the County's first discovery request, LILCO had documents assembled for examination and copying on Long Island the next day, April 13, and offered to make them available around the clock. The County responded to the invitation by sending one lawyer recently assigned to the case and two paralegals; they spent between three and four hours going through some of the available documents, requested extensive copying (which was performed overnight) and departed. Documents responsive to the second request were also assembled and made available for review on Long Island by April 14. The County forewent this opportunity, too, choosing instead to have documents copied and sent its attorneys' offices in Washington, D.C. which was accomplished by April 16.

Despite having known since March 20 the identities of LILCO's potential witnesses and the gist of their proposed testimony, the County neither took nor requested depositions. Nor did the County engage in extensive cross-examination during the hearings beginning April 24. Hearings began at 9:00 a.m. on Tuesday, April 24, and by the time they were suspended at approximately 11:30 a.m. on Wednesday, April 25, all cross-examination of LILCO's witnesses had been completed. If the County had valid safety concerns or thought the record needed further development, it could and should have put the available hearing time to far better use than it did.

The County's pursuit of consultants or expert witnesses has been similarly lackadasical. Despite the clear indication as early as February, 1984, that LILCO intended to propose alternatives relying in whole or in part on the enhanced reliability of LILCO's offsite power sources, the County took no steps to secure additional consultants. Indeed, even when LILCO made a specific proposal supported by four affidavits including exhibits, the County made no effort to hire new consultants to engage in the proposal. It was not until after April 4 that the County began to move. Minor Affidavit of April 20, 1984.

Despite its sluggishness, the County has retained a number of experts according to its affidavits. It has had ample time to review LILCO's proposal and to prepare its affirmative case. To the extent the County may need additional time, it should specify now, in detail, the reasons. It should not be allowed to make vague assertions of unpreparedness and wait until the end of the allotted discovery period to seek delay.3/

3/ Before being deprived of an opportunity to hear the jurisdictional issues and merits of the County's request for a preliminary injunction, United States Judge Gesell recognized the County's motive of delay in addressing its still unspeciiied request for recusal. He said:

> I'm rather hesitant [to allow discovery before a hearing on the jurisidictional issues] unless I'm satisifed that there's some basis of your desire for delay, your primary interest, I'm very hesitant to permit a litigant before an agency in advance of the hearing to call the hearing officers and raise questions of their bona fides and their character and everything else as a way of getting off a nice easy administrative hearing.

Cuomo v. Nuclear Regulatory Commission, Civil Action No. 84-1264, Transcript p. 16 (D.D.C. April 26, 1984).

C. The Prehearing Schedule

In context, the County's complaint that LILCO's exemption request may lack sufficient information or factual support to allow the County to proceed is obviously nothing other than a try for further delay. As described above, the County has had ample time to study LILCO's technical case and ample time to prepare its own case. If the County needs additional information concerning LILCO's proposal, it will have 30 days to supplement the already extensive production of documents by LILCO. By the time hearings resume, the County will have had nearly four months to prepare its case. Even by the County's own inflated estimates of the time needed to prepare, the time afforded has been sufficient.

D. Resolution of Motions

The County's suggestion that the schedule leading to hearings should be suspended while it moves for disposition as a matter of law should similarly be disregarded. First, the County knows exactly what LILCO proposes. If the County believes that LILCO's proposal is unlawful for any reason, it should have said so before the Commission when the possibility

of an exemption request was extensively discussed or in its own request for clarification. If the County wants to raise the issue, it certainly should not be allowed to wield such a motion as a weapon for delay. There can be no other explanation for the County's failure to have made its views known previously.

Second, any argument that LILCO's exemption request is not authorized by law is spurious. Obviously, LILCO will be seeking an exemption from the application of GDC 17. Otherwise, however, low power licensing of a nuclear plant is precisely an activity contemplated by law and by the Commission's own regulations.

Third, the suggestion that the County should not have to compile a factual record while at the same time legally challenging LILCO's request for a low power license and accompanying exemption application, has no basis in practicality or in previous practice. The County's effort to investigate the facts of the case, both by discovery and through its own consultants, ought to have been well underway.4/ There can be no benefit from a suspension of the

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4/ The County's discovery has, in fact, already been resumed. On May 22 by telephone and confirmed by letter of May 23, the

(footnote cont'd)

discovery and prehearing schedule other than serving the County's own avowed purpose "to keep that plant closed" by preventing a decision on the evidentiary merits. Moreover, the Commission's own adjudicatory policies would not be served by allowing parties to stop the evidentiary process simply by raising legal challenges; rather, such challenges are heard as the evidentiary process goes forward.

E. Security Issues

Finally, the County argues that "common defense and security" and other security issues must be considered in Commission. The County misconstrues the importance of the "common defense and security" requirement. "The term 'common defense and security' means the common defense and security of the United States." 42 U.S.C. § 2014(g). There is no suggestion that LILCO's request for a low power license implicates the common defense and security of the United States.

(footnote cont'd)

County has requested that its lawyers and nine of its consultants be permitted to visit the Shoreham site and view various facilities the County perceives relevant to this proceeding. That visit will occur May 24.

Moreover, there are no pending contentions concerning security issues. As well established by precedent, filing of a request for a low power license is not an appropriate opportunity for filing new contentions. E.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 803 n.78 (1983). And, LILCO seeks no exemption from any security requirements.

III.

The State of New York's contention that the April 24 and 25 hearings have no effect because its counsel chose to leave at the lunch break on the first day is frivolous. A party cannot render a proceeding void by unilaterally deciding not to participate. Until its suspension, the April 24-25 hearing was properly convened. New York State had an opportunity and a duty to appear and participate as its interest warranted. Its choice not to participate and not to attend the full hearing was made at its own peril.5/

5/ The State of New York never even attempted any discovery in this proceeding. It, therefore, had little or no legitimate standing to complain about the schedule originally established by the Licensing Board.

Although the hearings were temporarily restrained, there has been no binding adjudication that the State was denied any due process rights. In LILCO's judgment, the federal suit underlying the TRO would have been dismissed for the reasons set out in LILCO's April 27 filings in the district court. The court lacked subject matter jurisidiction because (1) the suit was filed in the wrong court, (2) a scheduling order is not a reviewable final agency action, (3) no agency action had been taken on the disqualification issue, and (4) as a matter of law, no deprivation of due process had occurred. With respect to the disqualification issue, the complaint also failed to state sufficient facts to support the asserted claim of bias. Finally, the plaintiffs had failed to meet the standards for the issuance of a preliminary injunction. Thus, New York State's decision to rest on its legal arguments was a gamble whose consequences the State must accept.

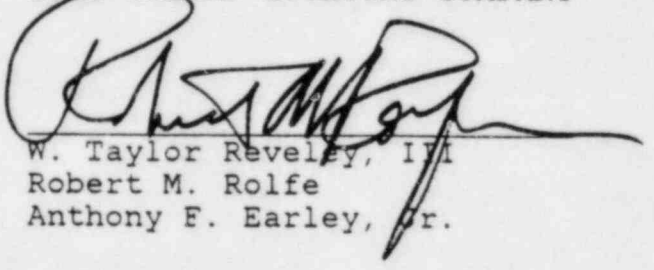
IV.

In conclusion, the pending "clarification" requests do not really seek clarification. They seek reconsideration. They want to reopen scheduling matters the Commission has considered at length. Having issued its guidance, the

Commission should adhere to its decision. Any further, subsidiary procedural matters should now be decided consistently with the Commission's guidance by the Licensing Board before whom pertinent issues are pending.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY



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DATED: May 24, 1984

LILCO, May 24, 1984

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO'S RESPONSE TO REQUESTS FOR CLARIFICATION dated May 24 were served this date upon the following by U.S. mail, first-class, postage prepaid, and in addition by hand (as indicated by one asterisk) or by Federal Express (as indicated by two asterisks).

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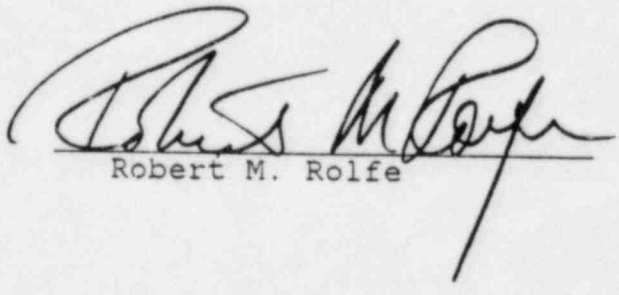

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