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RELATIONSHIP RESPONSE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

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In the Matter of)
)
LONG ISLAND LIGHTING COMPANY)
)
(Shoreham Nuclear Power Station,)
Unit 1))

Docket No. 50-322-OL-4
(Low Power)

SUFFOLK COUNTY MOTION IN LIMINE
ON THE ADMISSIBILITY OF EVIDENCE
RELATING TO PUBLIC INTEREST

In light of this Board's June 27, 1984 Order Regarding Discovery Rulings (the "June 27 Order"), Suffolk County hereby moves the Board for an in limine determination as to the admissibility of evidence, relating to the current financial condition of Long Island Lighting Company ("LILCO"), that is probative on the issue whether the granting of LILCO's pending Application for Exemption and the issuance of an operating license to LILCO in the near future, is in the public interest. See 10 CFR §50.12(a) which specifies expressly that an exemption from a Part 50 requirement, to be granted, must be "otherwise in the public interest."

If, in ruling on this Motion, the Board determines that evidence relating to LILCO's current financial condition may be

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*add: J. Horn
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relevant to the public interest issue presented by LILCO's Application for Exemption, Suffolk County further moves that the Board vacate the pertinent portion of its June 27 Order and require LILCO to respond to Suffolk County's discovery requests relating to its financial condition. If, in ruling on this Motion, the Board determines that evidence relating to LILCO's current financial condition is not admissible in this proceeding, even if such evidence may be probative of and material to whether the granting of the request exemption is in the public interest, Suffolk County moves that the Board refer its ruling to the Commission pursuant to 10 CFR §2.730(f).

The grounds for this Motion are set forth below.

A. Background

On June 11, 1984 Suffolk County filed and served upon LILCO a discovery request titled "Second Discovery Request to LILCO Relating to LILCO's Application for Exemption" (the "Second Discovery Request"), a copy of which is annexed hereto as Exhibit I. The Second Discovery Request seeks discovery concerning, among other matters, the current financial condition of LILCO, including information relating to the costs of preparing for and conducting the low power test program proposed by LILCO, and LILCO's source of funds to pay such costs.

During the discovery conference on June 22, in response to LILCO's Motion for a Protective Order concerning such discovery, counsel for the County explained that the discovery was sought as part of the process of developing evidence, to be presented at the hearing by County witnesses, concerning whether it is in the public interest to grant LILCO's exemption request, which could result in an insolvent or bankrupt company operating a nuclear power plant that does not comply with the NRC's safety regulations. See Transcript of Proceedings, June 22, 1984, 606.

On June 22, and confirmed in the June 27 Order, the Board ruled that discovery into matters relating to the financial condition of LILCO "is not relevant to this inquiry." (June 27 Order at 2). Thus, the Board denied Suffolk County's ability to obtain the discovery sought in the Second Discovery Request. For the reasons set forth below, Suffolk County submits that evidence which is probative of whether it would be in the public interest to grant a company which is in precarious financial condition an exemption from otherwise applicable NRC regulations, thereby permitting such a company to operate a nuclear facility is relevant, material, and admissible in this proceeding. In light of the June 27 Order, however, Suffolk County seeks an in limine determination of the admissibility of such

evidence in order to avoid the potentially unnecessary burden and expense of preparing and submitting testimony on this subject.

At the outset, Suffolk County stresses that the instant motion is separate and distinct from the question whether the NRC should waive its financial qualifications rule. That is addressed in the separate motion filed July 3, 1984. See Motion of Suffolk County and the State of New York for Leave to File Contention on LILCO's Financial Qualifications to Operate Shoreham, for an Exception to Commission Rules, and for Certification. Rather, the instant motion seeks a Board ruling regarding financial issues impacting on the Section 50.12(a) "public interest" requirement.

B. The Section 50.12(a) Requirement of a "Public Interest" Determination in this Proceeding

The standards governing the granting of the exemption being sought by LILCO are set forth in 10 C.F.R. § 50.12(a). Section 50.12(a) specifically provides that the Commission may "grant such exemptions from the requirements of the regulations . . . as it determines . . . are otherwise in the public interest." (emphasis added). In view of that explicit regulatory standard, there can be no legitimate dispute that

evidence pertaining to whether the granting of the exemption being sought by LILCO would be "in the public interest" is admissible; it must be because the "public interest" is one of the issues which must be addressed in this proceeding on LILCO's pending Application for Exemption. An exemption may not be granted by the Commission absent an express determination that the public interest favors the granting of the exemption.

Furthermore, LILCO has asserted in its Application for Exemption (at 15-16), that the granting of the requested exemption would be in the public interest; Suffolk County and the State of New York believe, and seek to submit evidence to prove, that the granting of the exemption is not in the public interest. Thus, the question of where the public interest lies with respect to the exemption sought by LILCO is a matter in controversy, which can only be decided based upon an evidentiary record. The question before this Board is whether evidence relating to LILCO's current financial condition is relevant and admissible if it is probative of the public interest determination which this Board and the Commission are required to make under Section 50.12(a).

C. LILCO's Financial Condition is Relevant to the Public Interest Determination Required by Section 50.12(a)

Relevant evidence has been defined to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Fed. R. Ev., Rule 401 (emphasis added). One of the facts "of consequence" in this proceeding on LILCO's Application for Exemption is whether granting the exemption requested by LILCO is "in the public interest." 10 C.F.R. § 50.12(a). Thus, evidence which has "any tendency" to make the existence of such a fact either "more probable" or "less probable," is relevant and should be admitted. For the reasons detailed in the following discussion of the testimony which the County seeks to submit, Suffolk County contends that LILCO's current financial crisis makes it not only "less probable" that the granting of the requested exemption is in the public interest, but also makes the granting of the exemption contrary to the public interest.

Suffolk County has engaged economic and financial experts who are prepared to testify that LILCO is on the brink of financial collapse. The County proposes to submit evidence that will show that the Company is projected to run out of cash on or before August 31, 1984, that LILCO has \$90 million of bonds

maturing on September 1, 1984, and that unless LILCO locates a new source of external financing prior to that date, the Company has said it will be unable to make the required payment.

In addition, LILCO has already defaulted on obligations it undertook as a participant in the construction of Nine Mile Point Unit 2, a nuclear generating unit under construction near Oswego, New York. The evidence to be submitted by the County will show that as a result of that default, banks holding in excess of one-third of the \$500 million LILCO borrowed for its share of Nine Mile Point construction are entitled to accelerate the entire loan with only thirty days notice to LILCO. The County's evidence will also show that, due to cross-default provisions in LILCO's debt instruments, a call on the Nine Mile Point loan could accelerate all or most of LILCO's \$1.2 billion of outstanding debt.

Suffolk County witnesses are prepared to testify further that LILCO's current financial condition has already closed off LILCO's access to the capital markets. Indeed, they will testify that at present, none of LILCO's securities are of investment grade, the Company has been forced to suspend dividends on its common stock, and the Company has stated publicly that

external financing is unavailable to it under present circumstances. Furthermore, the County's witnesses will testify that virtually all avenues to the Company's financial rehabilitation have turned into dead ends. The County's evidence will show that neither rate relief nor further belt-tightening by LILCO (assuming either were predictably forthcoming) would be likely to stave off a financial collapse.

Suffolk County's witnesses are also prepared to testify that the New York Public Service Commission ("PSC") is conducting an investigation into the prudence of the costs which LILCO has incurred in connection with the Shoreham plant (currently estimated to reach \$1 billion). The County's evidence will show that the Staff of the PSC has concluded that there has been "serious mismanagement and inefficiency throughout" the Shoreham project, and that, accordingly, the PSC staff has recommended that no more than approximately \$2.3 billion of the \$4.1 billion expected to be spent on Shoreham should be allowed into LILCO's rate base. Other intervenors in the PSC prudence investigation are contending that only approximately \$2 billion of Shoreham-related costs should be so allowed. The County's witnesses are prepared to testify that the difference, currently estimated to be between \$1.8 billion and \$2.2 billion, would have to be absorbed somehow by LILCO itself, which, at this point would be impossible.

The County's evidence will also show that rate relief with respect to other LILCO activities which are not related to Shoreham, even assuming such relief were to be granted in the future, would not alleviate the Company's deepening financial crisis. Indeed, the County's evidence will show that even if 100 percent of LILCO's pending non-Shoreham related rate relief requests were granted, LILCO would still have a cash deficit of \$43.3 million in September 1984, and a deficit of about \$61 million in December 1984.

Suffolk County's witnesses are also prepared to testify that further budgetary cutbacks by LILCO cannot stave off LILCO's impending financial demise. The County's evidence will show that LILCO has already instituted drastic austerity measures, intended to save \$100 million during 1984, and that those measures, by LILCO's own admission, have already adversely affected service to LILCO's customers. The County's witnesses will demonstrate that further cutbacks necessitated by the need to pay for the activities for which LILCO seeks an exemption, would only further aggravate the problem and increase the harmful impact on the public resulting from LILCO's financial condition.

Suffolk County's evidence will also establish that LILCO itself is predicting bankruptcy unless two measures, both of which are beyond LILCO's ability to effectuate, are taken. First, in order to stem off a bankruptcy, LILCO will have to be relieved of its past and future obligations for Nine Mile Point, which amount to almost one billion (\$918 million) dollars. LILCO has proposed that such a billion-dollar-bailout be undertaken by the New York Power Authority. In addition to such a billion-dollar bailout, LILCO has also stated that in order to avoid bankruptcy the pending PSC prudency investigation must be settled on terms which are extremely favorable to LILCO: namely, instead of LILCO's absorbing between \$1.8 and \$2.2 billion -- as proposed by the PSC staff and other intervenors -- the Company would absorb only \$250 million. The County's evidence will show that the Governor of New York has already rejected both the foregoing means of averting a LILCO bankruptcy. In short, Suffolk County's evidence will be that LILCO is not likely to be able to avoid a bankruptcy or some other form of formal reorganization in the near future.

Evidence on these matters will demonstrate that as a direct result of LILCO's current financial condition, the public interest would be harméd if the requested exemption were granted. The County's witnesses are also prepared to testify

as to how the public would be adversely affected by the granting of the requested exemption.

The evidence which the County proposes to submit concerning LILCO's existing financial crisis makes an affirmative public interest determination "less probable" and therefore the evidence is relevant. The public interest will not and, in the County's view, cannot be served by the issuance of a license now, to a company which is currently on the brink of insolvency and bankruptcy, authorizing that company to engage in the inherently hazardous activity of operating a nuclear power plant that admittedly is unable to comply with the NRC's regulations. Such an action by the NRC is not in the public interest for numerous reasons, including the following, as to which the County's witnesses would testify: the Company lacks resources to assure that the activities for which the exemption is sought can be conducted safely and in conformance with the Commission's regulations; the increased risk of inadequate maintenance and/or inadequate security as a result of lack of funds; the Company's inability to cope with any unexpected events or circumstances (whether nuclear related or otherwise) because it lacks the financial wherewithal and flexibility to deal with unpredicted exigencies; and the lack of assurance that the Company would have the resources necessary to fund the

activities it proposes, or to shut down and safely decontaminate the plant, if necessary. Additionally, LILCO's presently existing financial condition has already adversely affected service to its customers because to remain solvent LILCO has had to cut back on many service-related aspects of its business. The granting of an exemption and the resulting attempt by LILCO to begin operating the Shoreham plant, in light of LILCO's current lack of financial resources, could only result in additional deterioration in its service to the public.

D. The Need for an In Limine Determination

Suffolk County seeks an in limine determination of the admissibility of the proffered evidence in order to avoid the burden and expense attendant to the preparation of extensive testimony on how, due to LILCO's precarious financial condition, the public interest would not be served by granting LILCO the exemption it seeks. Such a determination is warranted in light of this Board's ruling that discovery sought by Suffolk County, which involved information concerning LILCO's current financial condition, including matters such as anticipated costs and the projected source of funds for conducting the activities for which the exemption is being

sought by LILCO, "is not relevant to this proceeding." June 27 Order at 2. Similarly, counsel for LILCO has recently questioned whether the testimony being prepared by Suffolk County's witnesses is "within the ambit" of the June 27 Order. See letter of Robert M. Rolfe to Lawrence Coe Lanpher and Cherif Sedky, July 3, 1984, attached hereto as Exhibit II.

Given the foregoing, Suffolk County has reason to be uncertain whether the evidence it proposes to submit (as outlined above) will be admitted by the Board. If the Board has, as LILCO appears to believe, effectively ruled that such evidence is irrelevant and inadmissible, there would be no point in the County's incurring the substantial burden and expense involved in preparing and submitting such testimony. On the other hand, if, as a result of this motion, the Board determines that Suffolk County's evidence is relevant and admissible, the June 27 Order should be vacated to the extent it sustained LILCO's objections to Suffolk County's Second Discovery Request. Such action on the part of the Board would afford Suffolk County the opportunity to develop a meaningful record on how the granting of the exemption sought by LILCO would not serve the public interest.

E. Referral to the Commission

If the Board determines that evidence of the sort discussed herein is not admissible with respect to the public interest determination mandated by 10 CFR Section 50.12(a), the County requests the Board to refer that ruling to the Commission pursuant to 10 CFR Section 2.730(f). Such referral is necessary to prevent detriment to the public interest and to prevent the unnecessary delay and expense that would be involved in obtaining a Commission ruling after the hearing on LILCO's exemption application has taken place.

In the County's view, a ruling that the evidence described in this Motion is irrelevant and not admissible in this proceeding would be contrary to the provisions in 10 CFR Section 50.12(a) and the Commission's May 16 Order in this case, which require that this Board make a determination that the requested exemption is in the public interest. If the Board nonetheless decides that the evidence proposed by the County is irrelevant and inadmissible, a review by the Commission is necessary to resolve the conflict which would then exist between the Board's rulings and the Commission's Orders and Section 50.12(a). Clearly, a prompt resolution of whether the public's interest in the granting of the exemption requested by LILCO is or is

not a proper subject of consideration in this proceeding, is necessary.

Respectfully submitted,

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