437

LILCO, June 4, 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 THIRD AND FOURTH REQUESTS FOR CLARIFICATION, MOTION FOR PROMPT ATTENTION AND MOTION FOR STAY

I. INTRODUCTION

The Joint Suffolk County and New York State Supplement to Requests for Clarification of Commission's May 16 Order (May 30, 1984), the Joint Request of Suffolk County and New York State for Prompt Clarification of the Posture of this Proceeding (May 31, 1984), and the Joint Motion of Suffolk County and New York State for the Commission's Prompt Attention to and Ruling on Pending County and State Motions and for Stay of Inconsistent ASLB Orders in the Interim (June 1, 1984) are the fourth, fifth and sixth attempts in twelve days by Suffolk County and New York State to delay or avoid engaging the merits

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of LILCO's request for a low power operating license.[1/] Predictably, like their three predecessors, the latest gambits are filed here rather than before the Licensing Board where LILCO's request for a low power operating license is pending.[2/] Not surprisingly, the County and State have yet to respond to LILCO's Application for Exemption before the proper adjudicatory body, except in their June 1 filing to request a stay.

1/ Unless the County and State are deliberately attempting to swell the record, impose additional costs on LILCO and delay the proceedings, it is difficult to imagine the reason for such a procession of redundant motions and requests in such a short time. On May 21, the County requested clarification of the Commission's May 16 Order. On May 22, the State requested clarification of the same order raising no new issues. On May 24, the County and State moved the Commission to strike LILCO's motions for summary disposition pending before the Licensing Board. They attacked LILCO's motions as being inconsistent with the Commission's May 16 Order -- in essence, another request for clarification of that order. On May 30, they "requested clarification" again, this time by attacking LILCO's Application for Exemption in the wrong forum. Then, on May 31, they filed yet another request for "prompt clarification" making no pretense of raising any new issues, but simply rehashing the old. And, on June 1, they filed Joint Motion of Suffolk County and State of New York for the Commission's Prompt Attention to and Ruling on Pending County and State Motions and for Stay of Inconsistent ASLB Orders in the Interim.

2/ The June 1 Joint Motion was filed before the Licensing Board as well as the Commission. The Licensing Board has, however, set a schedule and indicated that the "recommended schedule will not be suspended or delayed by the mere act of filing a new motion" before it or the Commission. Order Denying LILCO's Motion for Expedited Responses to Summary Disposition Motions at 2 (May 31, 1984).

This disregard of the Licensing Board again clearly signifies the County's strategy of delay and avoidance. Indeed, these latest "requests for clarification" and motion for prompt attention to those requests and for a stay are merely inappropriate attacks on LILCO's Application for Exemption.[3/] Yet, LILCO's Application for Exemption is not legally deficient; it addresses the issues set out in the Commission's May 16 Order. The Application and the request for low power license that it modifies thoroughly outline LILCO's basis for receiving a low power license. If the County or State dispute the factual underpinnings of LILCO's request or believe it is otherwise deficient, the dispute should be adjudicated as provided by the Commission, not avoided by procedural shenanigans.

Accordingly, the "requests for clarification" and the motions for prompt attention and for a stay ought to be denied because they are (1) procedurally improper in that they seek

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3/ The County and State tellingly have failed to file any motion to dismiss that application with the Licensing Board. Although they promise that such a motion to dismiss will be forthcoming, LILCO is reminded of their repeated requests for disqualification of the current Licensing Board, requests which were never timely raised by appropriate motions. Given the delay in filing any proper motion, the County's and State's arguments ring hollow -- like their unsubstantiated attacks on the Licensing Board.

no clarification; (2) filed in the wrong forum insofar as they constitute criticism of LILCO's request for low power license and accompanying Application for Exemption; and (3) substantively without merit. Nevertheless, in an attempt to clear the air of the County's and State's rhetoric, LILCO below addresses the arguments raised in the Supplement to Requests for Clarification and the motion for a stay.[4/]

II. SUFFICIENCY OF LILCO'S APPLICATION FOR EXEMPTION

A. There Is No Factual Issue Concerning Common Defense and Security

Ignoring the statutory language of 42 U.S.C. § 20.14(g), the County and State argue that LILCO fails properly to address that portion of § 50.12(a) requiring that an exemption not endanger the common defense and security. Yet, as LILCO has asserted in its Application for Exemption and Response to Request for Clarification, the statute defines

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4/ The Joint Request of Suffolk County and New York State for Prompt Clarification of the Posture of this Proceeding and the Joint Motion of Suffolk County and the State of New York for the Commission's Prompt Attention to and Ruling on Pending County and State Motions raise no new issues and, therefore, need not be addressed separately.

common defense and security as "common defense and security of the United States." 42 U.S.C. § 20.14(g). Unless there is a threat to national defense or security, § 50.12(a) does not require consideration of the security arrangements of 10 CFR Part 73 as the County and State misleadingly assert.

Here no threat to the common defense and security of the United States exists. There are simply no facts to address on this score. If security is an issue at all, and LILCO denies that it is,[5/] it is pertinent only to the public health and safety. The only security issue which the County has mentioned in these proceedings concerns the physical security

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5/ General security concerns such as are addressed in Part 73 are not an issue here. There are no pending contentions concerning security issues. As well established by precedent, the filing of a request for a low power license does not create 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). Nor does LILCO's application for an exemption provide an opportunity to raise security issues because LILCO seeks no exemption from any security requirement.

Moreover, general security is addressed by an all-encompassing agreement between LILCO and the County dated Nov. 22, 1982. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), Memorandum and Order Canceling Hearing, Approving Final Security Settlement Agreement, and Terminating Proceeding (Dec. 3, 1982). Any security concerns about the operation of the plant should be addressed within the framework of that agreement. Certainly, the County cannot seek to raise new issues, thereby delaying ultimate operation of the plant, by reneging on its obligations under that security agreement.

of the supplemental power sources on which LILCO will rely to supply AC power to the plant, if needed.[6/] LILCO's Application for Exemption raises no issue about the security of the plant itself or of the sabotage or theft of special nuclear materials.

Despite the County's and State's protests to the contrary, it is instructive that the Commission's May 16 Order did not direct that the security aspects of § 50.12(a) be addressed. LILCO's Application for Exemption was not filed in a vacuum. It followed nearly two months of proceedings concerning LILCO's request for a low power license which included specification of pertinent issues by the ASLB, LILCO's and the Staff's filing of direct testimony and affidavits, a public meeting with the NRC Staff, discovery by the County of thousands of documents, two days of hearings, lengthy filings with the Commission and argument before the Commission. Throughout these extensive proceedings, LILCO's plans for conducting low power testing have been detailed, discussed and clarified at length. The legal and factual sufficiency of LILCO's proposal has been vigorously attacked by the County and

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6/ Even assuming that these sources could be sabotaged, the result would be a loss of offsite power event. This event has been dealt with in LILCO's and the NRC Staff's submittals.

State. Upon consideration of all of this, the Commission provided an opportunity for LILCO to seek an exemption and specified those areas of concern to it. That it did not specifically address the security issue is an indication that the Commission properly viewed the question of "common defense and security" in this context to be insignificant.

B. LILCO's Application Sufficiently Outlines the Public Health and Safety Aspects of its Case

The County and State next wrongly contend that LILCO has failed to specify its basis for concluding that "at power levels for which it seeks authorization to operate, operation would be as safe under the conditions proposed by it, as operation would have been with a fully qualified onsite AC power source." Their argument flatly ignores the record already compiled concerning LILCO's proposed mode of operation. Nevertheless, so that there will be no confusion, LILCO again briefly outlines the basis for the comparison mandated by the Commission.7/

7/ Of course, this entire discussion has no bearing on LILCO's request for a license for Phases I and II where onsite diesel generators need have no reliability in order to meet the functions presented in GDC 17. That issue is currently pending before the Licensing Board in LILCO's motions for summary disposition. Perhaps the County's and State's inability to refute the material facts supporting these motions accounts for their almost daily filing of dilatory motions.

As LILCO explained in its Application for Exemption, it has used the deterministic analysis traditionally followed in nuclear licensing to show that the consequences of operation as proposed by LILCO will be no different than if qualified onsite diesel generators were present. Thus, LILCO reviews, with and without diesel generators, the consequences of each of the 38 accident and transients prescribed for analysis in Chapter 15 of Shoreham's FSAR. If the analysis of a particular accident or transient is independent of the onsite diesel generators, no further inquiry is necessary; the consequences of the event will be the same as those for a plant operating at power levels up to 5% with approved diesel generators. Where an accident or transient does rely on the use of onsite diesel generators, LILCO must demonstrate that, under the circumstances present at Shoreham, the event will not result in consequences to public health and safety different than those resulting from the same accident at a plant that has approved diesel generators.

As explained repeatedly in previous filings, the levels of protection for these events are comparable. First, for those accident and transient events requiring that a loss of offsite power be postulated, LILCO shows, by analyzing peak fuel cladding temperatures, the time available to restore AC power before there are any adverse consequences in terms of

core cooling or radiological releases. LILCO then demonstrates its ability to provide adequate core cooling within the time available through reliance on the numerous sources of AC power described in its Supplemental Motion and Application for Exemption. The reliability of those power sources is shown through (1) operating history of the facilities; (2) commitments to shut down the plant in the event of various natural phenomena posing a threat to the operability of the facilities; (3) procedures in effect to minimize the time necessary to restore power through use of these facilities; and (4) commitments to test periodically the operability of these facilities. As importantly, the reliability of these facilities when compared with a plant with onsite diesel generators is demonstrated by the sheer redundancy of the facilities themselves and the features of LILCO's offsite power system in excess of those required by GDC 17 (e.g., multiple rights-of-way, multiple switchyards).

C. LILCO's Application Is Well Supported by the Record

The County's and State's third unfounded argument is that LILCO's Application is "a conclusory statement of unsupported assertions." By this argument, the County and

State again ignore the record preceding the filing of LILCO's Application, the Application itself and the Commission's regulations. First, § 50.12(a) does not require that an application for an exemption be supported by affidavits. The need for supporting affidavits is especially absent here where hearings on the Application for Exemption have already been ordered. Thus, the purpose of the Application is like a complaint in a lawsuit -- to set forth the matters LILCO expects to prove. The County's familiarity with the substance of LILCO's exemption application is well evidenced by its 90-paragraph discovery request, received by LILCO on May 31, 1984.

Though not necessary, the Application is in fact supported by evidence. That evidence consists of affidavits filed with the Supplemental Motion for Low Power Operating License, which were expressly incorporated into LILCO's Application, and the direct testimony filed prior to the April 24 and 25 hearings. Those affidavits and prefiled testimony set forth in large measure the bases for LILCO's Chapter 15 analysis, the description of the AC power sources upon which LILCO will depend, their reliability, the applicable operating procedures, and the commitments for shutdown in the event of threatening natural phenomena. It is, therefore, wrong to call

the Application "a conclusory statement of unsupported assertions."

The County and State specifically complain that the "public interest" criterion of 50.12(a) is not addressed.[8/] In fact, the Application for Exemption discusses the public interest criterion at length. In that discussion, LILCO followed the suggestions in footnote 3 of the Commission's May 16 Order and addressed each of the pertinent factors. LILCO did not stop there, but further addressed other benefits arising from the granting of the exemption.

The County's and State's examples of alleged inadequacies in LILCO's discussion of the public interest are without merit. The question of "rational regulation" is one of law and policy. Its factual underpinnings are apparent from the record of which the Board and the Commission can take judicial notice. Similarly, LILCO's good faith in attempting to comply with GDC 17 through providing TDI diesels and Colt diesels is for the most part already documented in the record in these licensing proceedings. The question of foreign oil

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8/ They misleadingly characterize this as a requirement that there be "affirmative public benefit." In fact, § 50.12(a) requires only that the requested exemption be "otherwise in the public interest."

dependence is within the sphere of public knowledge, although, if necessary, LILCO may present additional evidence concerning it. Finally, the training benefits to be achieved through the low power testing program have been addressed in the affidavits of Messrs. Gunther and Notaro filed on March 20, 1984.

III. SCHEDULING

The County and State repeatedly beg that the Commission's guidance with respect to scheduling of additional proceedings be set aside.[9/] LILCO repeats what it has said before. This matter is now pending before the Licensing Board. Except to seek additional delay, there can be no reason why the County refuses to engage these issues before the Licensing Board rather than inappropriately before this Commission. Again, the County and State vigorously seek to avoid engaging the merits. They want LILCO's request for a low power license judged on anything but the evidence. LILCO's papers are legally sufficient. They clearly outline LILCO's case and give notice of the issues involved. And, as the Commission

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9/ The Licensing Board has now implemented that guidance -- though it allowed the County an extra week for discovery and two extra weeks before hearings resume. Order Establishing Schedule for Resumed Hearing May 31, 1984.

directed, the Licensing Board has set a schedule affording LILCO the opportunity to prove the case it has outlined.

The County and State assert that the breadth of LILCO's deposition requests "will affect the length of time needed for discovery" and make the time available for discovery inadequate. Unlike the County and State, LILCO needs discovery. The County has identified more than ten consultants who supposedly are helping the County and State to prepare their evidence. Though LILCO's Supplemental Motion has been a matter of public record since March 20, the County and State have yet to divulge what their consultants will say, the documents that may be in their possession or any other information pertinent to LILCO's preparation for hearings.10/ Indeed, though given numerous opportunities, the County has yet even to respond to LILCO's motions for summary disposition.

In contrast, LILCO has filed extensive substantative affidavits for most of its witnesses and prefiled testimony. Additionally, the County and State have had an opportunity to cross examine most of the witnesses LILCO will present when

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10/ LILCO requested such information in letters dated April 10, 12, 16 and 18 and in a letter and request for production of documents dated May 23.

hearings resume. LILCO has also produced thousands of documents to the County, which the County has now had in its possession for nearly six weeks. Thus, there is little need for the County and State to engage in extensive additional discovery. Despite the lack of need, the County has already begun such discovery. Three County lawyers and eight consultants toured LILCO's AC power facilities on May 24. Additionally, the County has propounded a 90-paragraph discovery request. Although the County has been unwilling to cooperate in scheduling discovery,[11/] LILCO sees no reason why it should not be completed within the thirty-seven days permitted by the Board.

Nor can the County reasonably contend that LILCO's desire to take 10 depositions within the time allowed by the Board for additional discovery inhibits the County's ability to complete its own discovery. Given the number of County lawyers who have appeared in these licensing proceedings, the size of the law firm representing the County and the previous ignored

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11/ On May 23 and May 31, LILCO asked the County for cooperation in scheduling depositions. On May 31, the County responded that "there is no pending proceeding" and that it was unable then to provide the available dates of its witnesses. Letter of Lawrence Lanpher to Anthony Earley, May 31, 1984. This lack of cooperation again manifests the County's primary strategy -- delay.

opportunity for depositions by the County, there is no unfairness from this schedule.12/

IV. MOTION FOR STAY

For a variety of reasons, the County's and State's motion for a stay pending the Commission's response to their repetitious and improper requests for clarification should be summarily denied. First, there is no properly pending motion by the County and State whose resolution will significantly impact these proceedings. The Licensing Board, pursuant to the Commission's direction, has set a schedule affording the County and State more time than the Commission suggested. And, despite the intervenors' plea to suspend the schedule pending resolution of the legal sufficiency of LILCO's request for low power license as modified by its Application for Exemption, nearly two weeks have elapsed since the May 22 filing of the Application for Exemption and no motion raising such issues has been filed before the Licensing Board. The almost daily so-called requests for clarification and motions attack LILCO's

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12/ For example, the County took and defended numerous concurrent depositions in the diesel licensing proceedings during April and May, 1984.

application in the wrong forum and repeat the same scheduling arguments. In short, only the County's failure to file a motion for summary disposition has prevented the timely maturation of any legal issues and their possible resolution well within the schedule set by the Board.

Second, the mere promise of unfiled motions is no basis for delaying proceedings. Even the filing of such motions is no basis for a stay. 10 CFR § 2.730(g). Litigants routinely conduct discovery and proceed to trial or hearings while legal issues are being heard by courts or agencies. To operate otherwise would permit the County and State to extend these proceedings unilaterally by filing repetitive legal challenges.

Third, there is no practical reason for a stay. Despite the County's refusal to cooperate in responding to LILCO's discovery requests, the County has engaged in two extensive discovery efforts of its own already. On May 24, three County lawyers and eight consultants toured LILCO's AC power facilities at Shoreham for nearly 4 1/2 hours and took numerous photographs. On May 30, the County served on LILCO a discovery request consisting of 90 primary requests, many with numerous subparts. Moreover, according to affidavits filed with the Licensing Board on April 24, the County has had

numerous consultants under contract, all of whom should have completed their work within the established schedule. In its memorandum of April 27, 1984 to all parties in Cuomo v. NRC, which included the Licensing Board, the County suggested a schedule calling for completion of discovery on July 9, submission of testimony on July 19 and resumption of hearings[13/] on August 7. The schedule set by the Licensing Board ends discovery only ten days earlier, calls for filing testimony only three days earlier and sets the resumption of hearings only eight days earlier than proposed by the County. Given the pendency of the bulk of the factual issues now before the Licensing Board since March 20, 1984, the County and State have had ample time to prepare.

Finally, the County has failed to address the standard for a stay set out in Virginia Petroleum Jobbers v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), which is incorporated in the NRC's regulations. 10 CFR § 2.788(e). The reason is obvious; SC cannot meet the test.

13/ The memorandum actually spoke of a "commencement of hearings." That the hearings are to be resumed, not begun over, has now been established by the Commission's May 16 Order and the Licensing Board's May 31 Orders.

The motion for a stay is but another manifestation of the tactic of delay, which has been evidenced by the County's and State's refusal to address their legal arguments to the Licensing Board, their refusal to cooperate in discovery and their vexatious and unreasonable parade of pleadings -- six in twelve days -- before the Commission. Rather than being rewarded, this behavior deserves punitive sanctions.

IV. CONCLUSION

The time is running on the schedule established by the Licensing Board as the Commission suggested. Discovery is in progress. The only "clarification" needed from the Commission is a prompt and firm indication that it will not tolerate dilatory tactics. Accordingly, the Commission should dismiss the initial two requests for clarification, the joint supplemental request for clarification, the joint motion for prompt clarification, the joint motion for prompt attention to the earlier requests and motions and the motion for stay as improperly filed and as substantively lacking merit.

Respectfully submitted,

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DATED: June 4, 1984

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LONG ISLAND LIGHTING COMPANY'S RESPONSE TO THIRD AND FOURTH REQUESTS FOR CLARIFICATION, MOTION FOR PROMPT ATTENTION AND MOTION FOR STAY dated June 4 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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