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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OLA-3 (Application for License Transfer)

SUGGESTION OF MOOTNESS DUE TO THE
LONG ISLAND POWER AUTHORITY'S IMMINENT DEMISE

The Shoreham-Wading River Central School District ("School District") and Scientists and Engineers for Secure Energy, Inc. ("SE2") draw the Commission's attention to circumstances that indicate that the applicant in the above-captioned matter, the Long Island Power Authority ("LIPA"), may have its existence terminated by operation of law as of January 15, 1992, rendering the above-captioned pending license transfer proceeding moot.

LIPA was created by New York Public Authorities Law § 1020-c, which became effective January 15, 1987 pursuant to New York L. 1986, c. 517, § 11. That section is silent on the period of LIPA's existence, stating neither a term of years nor a "perpetual" term.

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The New York Public Authorities Law also provides:

> Every authority or commission hereafter created by this chapter shall terminate at the end of five years from the date of its creation if at the end of such period it has outstanding no liabilities; provided, however, that any appropriation made to such authority or commission by the state of New York or by any political subdivision thereof shall not be deemed a liability for the purposes of this section.

N.Y. Public Authorities Law § 2828 (formerly § 2580, added L. 1957, c. 976, § 1; renumbered L. 1983 c. 838, § 16) (emphasis added). This is a classic example of a "sunset law": "Sunset laws terminate agency programs or agencies themselves unless the legislature specifically reauthorizes the program or agency." Cohen, Regulatory Reform: Assessing the California Plan, 1983 Duke L.J. 231, 236 n.17 (April 1983) (emphasis added). The School District and SE2 note that January 15, 1992 will be precisely five years after LIPA's creation.

Whether New York Public Authorities Law § 2828 will operate to automatically terminate LIPA's existence on January 15, 1992 turns on the meaning of the phrase "no liabilities" and a particularized consideration of LIPA's current financial status.

The School District and SE2 suggest that since LIPA will have no net liabilities except for the unrepaid appropriations ("advances" pursuant to Public Authorities Law §

1020-r) from the State of New York as of January 15, 1992, LIPA will become legally defunct as of that date pursuant to Public Authorities Law § 2828.

I. "NO LIABILITIES" MEANS "NO NET LIABILITIES".

As a matter of generally accepted accounting principles and by definition, no existing entity can ever present a balance sheet showing "no liabilities" as of any date. See, e.g., Sellin, Attorney's Handbook of Accounting § 102[1][a] (3rd Ed. 1991). Thus, a "plain language" interpretation of the statute would make it a nullity since no commission or authority could ever be found to have "no liabilities." This would mean that the New York State Legislature engaged in meaningless and absurd acts in enacting this law 24 years ago and reconsidering and renumbering it eight years ago. Therefore, this is an impermissible interpretation.[1/]

"An interpretation which is contrary to the dictates of reason or leads to unreasonable results is presumed to be against the legislative intent, and some other construction should be placed on the statute, if possible without violation of its language." McKinney's Statutes § 143 (1971) (footnote omitted).

1/ "When a statute, though clear as clear can be on its face, makes no sense, the Court of Appeals is not bound to mechanical subservience to its ill-chosen legislative language." Matter of Caraballo, 49 N.Y.2d 488, 426 N.Y.S.2d 974, 403 N.E.2d 958 (1980); McKinney's Statutes § 111 at n.5 (1992 Cumulative Annual Pocket Part).

Another relevant rule of construction of New York State statutes is:

> The courts will not impute to lawmakers a futile and frivolous intent, and the intention is not likely to be imputed to the legislature of solemnly enacting a statute which is ineffective. Statutes are to be interpretated workably, and a statute must not be construed in such a way that it would result in the legislature having performed a useless or vain act.
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> A construction which would render a statute ineffective must be avoided, and as between two constructions of an act, one which renders it practically nugatory and the other enables the evident purposes of the Legislature to be effectuated, the latter is preferred.

McKinney's Statutes § 144 (1971) (footnotes omitted).

McKinney's separately states that "it will be presumed that the Legislature did not intend an absurd result to ensue from the legislation enacted," that to "avoid an absurd construction of a statute, an exception may be recognized therein in a proper case, words will not be given their ordinary meaning when such a meaning involves an absurdity," and that to "prevent absurdity, the courts may supply a word which is omitted from an act through inadvertence." Kinney's Statutes § 145 (1971) (footnotes omitted).

Thus, one must look to the reasonable purpose of this qualification ("no liabilities") to determine its true meaning. The School District and SE2 suggest that the purpose of this qualification (especially in light of the "provided" clause) was

to assure that the non-governmental creditors[2/] of a New York State authority or commission would not suffer financial harm by being left without recourse due to the disappearance, by operation of law, of a N.Y. state authority or commission debtor.[3/] See, 2 McQuillin Mun Corp §§ 8.15. & 8.20. (3rd Ed. 1988 Revised Volume). Thus, the intent is that a commission or authority should not terminate if its liabilities (aside from its liability to repay appropriations) exceed its assets, that is, if it has "net liabilities."

The probable correctness of this interpretation is reinforced by LIPA Act § 1020-z which provides:

> The authority and its corporate existence shall continue until terminated by law, provided, however, that no such law shall take effect so long as the authority shall have bonds[4/], notes, or other obligations outstanding, unless adequate provision has been made for the payment thereof.

N.Y. Public Authorities Law § 1020-z (emphasis added).

2/ That is, all creditors except for those which are N.Y. state governmental creditors by virtue of having provided advances through appropriations which are subject to repayment.

3/ This is emphasized by the fact that creditors of LIPA and similar authorities are statutorily barred from relying on the credit of the State for payment of their obligations. E.g., N.Y. Public Authorities Law § 1020-l.

4/ The word "bonds" does not include "repayment bonds" issued to the State pursuant to Public Authorities Law § 1020-r since such "repayment bonds" are for the repayment of State appropriations and, therefore, are "liabilities" excluded from consideration by the "provided" clause of Public Authorities Law § 2828. See page 2 supra.

This is the LIPA Act's clear recognition of the fact that LIPA is subject to termination by operation of law as long as it does not have "bonds, notes, or other obligations outstanding" without "adequate provision . . . for the payment thereof." This leads to the inquiry whether there is currently "adequate provision" for the payment of all of LIPA's "obligations" (or "current liabilities") except for the state appropriations.

II. THERE IS "ADEQUATE PROVISION" FOR THE PAYMENT OF ALL LIPA "CURRENT LIABILITIES" OR "OTHER OBLIGATIONS".

The balance sheets of LIPA's audited financial report as of March 31, 1991 (attached) indicate that as of that date LIPA had current assets in cash and U.S. Treasury Bills of $6,140,443 and current liabilities of $3,896,486[5/] as well as "State of New York allocations"[6/] of $14,203,300, and "accumulated deficit of $11,890,273.[7/] That is, LIPA's current

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5/ The principal so-called "current liability" consists of $2,118,845 in "advances from Long Island Lighting Company" which are really not a liability, but money held in trust for LILCO to be applied to Shoreham and is available from cash and U.S. Treasury bills to be returned to LILCO upon LIPA's termination.

6/ The "State of New York allocations" are, in fact, State of New York appropriations made to LIPA and, hence, are not "liabilities" pursuant to Public Authorities Law § 2828.

7/ In a truly creative presentation, LIPA treats the expended portion of its New York State appropriations ("accumulated deficit") as an offset to its other liabilities of $18,099,786. This creative disclosure mechanism was not used in LIPA's original financial statement as of March 31, 1988.

assets t[illegible] exceeded current liabilities by $2,243,957 resulting in net assets.[8/]

Thus, it is easy to conclude that LIPA's cash and U.S. Treasury Bills on hand constitute more than "adequate provision . . . for the payment" of its "current liabilities" or "obligations", with the remaining asset balance to be repaid to New York State upon dissolution prusuant to Public Authorities Law § 1020-r.

In these circumstances, it is more than probable that the LIPA Act itself anticipated, in Section 1020-r, that LIPA would be "terminated by law" at the end of five years after its creation as long as current assets exceeded current liabilities (other than appropriation) unless the Legislature "specifically reauthorizes" LIPA.

III. THIS ISSUE REQUIRES RESOLUTION BY THE NEW YORK STATE COURTS.

The legal existence of an applicant is the most fundamental determination that this Commission must make in deciding whether to issue a license. However, since the applicant in this case, LIPA, is a creature of the State of New York its continued existence or non-existence is beyond this Commission's jurisdiction and can only be resolved by a

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8/ It is expected that the net assets margin has decreased over the last nine months, but still is positive in spite of LIPA's profligate spending in a variety of efforts to reduce LILCO's financial health and its ability to pay for the proposed decommissioning activites.

declaratory judgment or similar action in the courts of that state.

As a part of its presentation of its qualifications to become a NRC Class 103 licensee, it is incumbent upon LIPA to seek resolution of this serious question as to its continued legal existence so that this Commission may have confidence in deciding whether the application is for transfer of license to a bankrupt entity or a pure phantom. The Commission should not take action on the instant application until it has state judicial confirmation of LIPA's existence, unless the Commission determines that LIPA would not be a qualified licensee in any event.

Since there is no possibility of federal preemption or a conflict between state and federal law on this issue, it would error for the Commission to make any assumption with regard to so fundamental a question without assurance from the New York State courts. See Consolidated Edison Co. (Indian Point Station, Unit No. 2), ALAB-399, 5 NRC 1156, 1168 (1977).

Further, there is precedent in this very docket for the deferral of consideration of actions base on the resolution of uncertain state law issues to allow "the parties to resolve the issue in [state] court." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-818, 22 NRC 651, 659-60 & nn.15-20 (1985). In that case, the Commission deferred a decision for almost seven months to allow for the issuance of the initial state court decision and then took two months to issue

its decision on the pending motion. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 650 (April 17, 1985).

If the NRC were to proceed on an assumption of the continued existence of LIPA that would be only a "tentative answer which may be displaced tomorrow by a state adjudication . . . . The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision . . . ." Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 500, 61 S.Ct. 643, 645, 85 L.Ed.2d 971 (1941) (citations omitted). Since the Commission is able to stay its proceedings while awaiting a definitive ruling from the New York Courts while fully protecting the pendency of LIPA's application for license transfer, the agency "should exercise its wide discretion by staying its hands." 312 U.S. at 501, 61 S.Ct. at 645-46.

"[T]he rationale [for such forbearance] centers upon considerations of comity and the desirability of having a reliable and final determination of the state claim by state courts having more familiarity with the controlling principles and authority to render a final judgment." Hagans v. Lavine, 415 U.S. 528, 584, 94 S.Ct. 1372, 1385, 39 L.Ed.2d 577 (1974). If such forbearance is required of federal courts which do have jurisdiction but not ultimate authority to decide issues of state law, such forbearance is not an act of prudence but rather one of necessity in this case where the federal agency does not even have jurisdiction to decide a question of state law. NRC Staff

Response to Petitioners' Joint Motion to Stay at 10, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), USNRC Docket Nos. 50-322, 50-322-OLA & 50-322-OLA-2 (filed March 25, 1991) (a New York state law issue is "a matter not even subject to the Commission's jurisdiction").

This is a case where the applicant assuredly may be expected to assert its continued legal existence. However, it is not a case where the "Commission has no basis to look behind [the applicant's] statement" and is certainly not a case where the Commission may "accept [the applicant's] declaration at face value." See Long Island Lighting Co. (Shorheam Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 470 (1991). The resolution of this issue is not a "private decision" and LIPA's demise by operation of law certainly would have "an adverse impact" on the proposed licenses for LIPA. Id. It is time to pause.

CONCLUSION

While this appears to be a question of first impression under New York State law, the School District and SE2 suggest that the Nuclear Regulatory Commission should not even consider issuing any NRC licenses to an entity that is not only bankrupt, but is likely to cease to exist as a legal entity in 27 days.

The appropriate action is retain the Long Island Lighting Company as the licensee and allow the instant proceeding to become moot by operation of law within the next four weeks unless LIPA can obtain a decision from the New York State Courts

(not agencies under the sway of the Governor) that LIPA's existence will not be terminated by Public Authorities Law § 2828 on January 15, 1992.

If the Commission were to transfer the Shoreham licenses to LIPA, the NRC could find itself with a class 103 facility but without any licensee technically and financially responsible for that facility aside from the NRC itself.

Respectively submitted,

December 19, 1991

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LONG ISLAND POWER AUTHORITY

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BALANCE SHEETS
March 31, 1991 and 1990

ASSETS	1991	1990
CURRENT ASSETS		
Cash, including restricted amounts of $26,061 in 1991 and $769,330 in 1990	$ 155,875	$ 392,252
Investments in U.S. Treasury Bills, including restricted amounts of $3,361,003 in 1991 and $2,530,059 in 1990	5,984,568	5,545,238
Other current assets	8,716	1,275
Total current assets	6,149,159	5,938,765
OFFICE EQUIPMENT AND FURNITURE Net of accumulated depreciation of $19,577 in 1991 and $8,549 in 1990	53,182	31,951
OTHER ASSETS		
Security deposits	7,172	6,508
	$ 6,209,513	$ 5,977,224
LIABILITIES AND ACCUMULATED DEFICIT		
CURRENT LIABILITIES		
Attributable to Shoreham:		
Advances from Long Island Lighting Company	$ 2,118,845	$ 2,251,943
Due to New York Power Authority and LIPA Third Party Suppliers	373,452	267,825
Accrued expenses, other	883,412	400,652
Accrued consulting costs	277,624	15,378
Accrued expenses, other	98,505	56,572
Due to the State of New York, its agencies and authorities	144,648	344,937
Total current liabilities	3,896,486	3,347,307
STATE OF NEW YORK ALLOCATIONS	14,203,300	13,799,983
ACCUMULATED DEFICIT	(11,890,273)	(11,170,066)
	$ 6,209,513	$ 5,977,224

See Notes to financial statements.

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(Shoreham Nuclear Power Station, Unit 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the Petitioners' Suggestion of Mootness due to the Long Island Power Authority's Imminent Demise in the above-captioned proceeding have been served on the following by hand, telecopy and/or first-class mail, postage prepaid (as indicated) on this 19th day of December, 1991:

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