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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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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)	

SUFFOLK COUNTY AND STATE OF NEW YORK OPPOSITION TO LILCO "MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE"

By Motions dated June 2, 1984, LILCO has moved this Board for an order "precluding all discovery requests whose relevance is to the issue of security and for an order that any evidence whose sole materiality is a question of security is inadmissible." LILCO Motion For Protective Order and Motion in Limine, p.1. Suffolk County and New York State hereby oppose LILCO's motions on the following grounds:

(1) The Commission's Order of June 8, 1984 (served June 11, 1984) conclusively demonstrates that the security provision of Section 50.12(a) applies to LILCO's request for exemption. Thus, the Commission stated: "Finally, it is for the Licensing Board to address in the first instance the 'common defense and

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security' showing required under 10 C.F.R. 50.12(a)." (Order pp. 2-3, Emphasis added). Thus, a LILCO "showing" under the Section 50.12(a) "common defense and security" criterion is required in order for this Board even to consider LILCO's Application for Exemption. The interest of the County and State to pursue security-related issues via discovery is so that the County and State can have essential information with which to contest any LILCO "showing" if LILCO should decide to attempt to meet the Section 50.12(a) requirements.

The County and State emphasize that as of this date LILCO has not even attempted to make the "showing" required under Section 50.12(a). Instead, in its May 22 Application for Exemption, LILCO failed to proffer anything of substance related to security, choosing rather to characterize the Commission's May 16 Order as not requiring consideration of security issues. See Application for Exemption, p. 15, note 10. LILCO's characterization of the Commission's May 16 order is clearly erroneous, and the Commission's June 8 Order makes it categorically certain that a failure by LILCO to make the security "showing" expressly required by the terms of Section 50.12(a) requires rejection of LILCO's Application for Exemption.

(2) LILCO's motions are contrary to the explicit requirements of Section 50.12(a) of the NRC's regulations, which provide that an exemption may not be granted unless a finding is made that such exemption would "not endanger the common defense and security." Thus, even absent the clear direction given by the Commission, the plain words of Section 50.12(a) require denial of LILCO's Motions unless LILCO makes the requisite security showing.

(3) LILCO's motions constitute a direct challenge to Section 50.12(a) in contravention of Section 2.758, which prohibits the challenge of a regulation in an adjudicatory proceeding. Indeed, the Commission's Order of June 8 makes all the more clear that LILCO's Motions challenge not only Section 50.12(a) but the NRC's May 16 Order as well.

(4) LILCO's argument that there is no pending security contention (aside from being incorrect -- see point (6) below)) begs the question here at issue -- namely, the explicit security requirement of Section 50.12(a). The presence or absence of a security contention is irrelevant to the security standard imposed independently by Section 50.12.1/

1/ There is a puzzling statement in the Staff's "Response to Suffolk County's and the State of New York's Request for Clarification of the Commission's Order of May 6 . . . ."

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(5) LILCO's Motions ignore the company's responsibilities under Section 2.732, which places the burden of proof on LILCO. Under this regulation, LILCO must prove that the exemption it requests would not endanger the common defense and security. Since LILCO has not even attempted to make the common defense and security showing required by Section 50.12(a), it clearly has failed to sustain its burden of proof.

(6) LILCO's argument that the so-called "all encompassing Final Security Settlement Agreement" makes the security issue immaterial here (LILCO Motion, p. 4) is a mischaracterization of what that Agreement covers and a circumvention of Section 50.12. The Agreement covers the matters there addressed by the

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> There, at page 5, the Staff states, "Security issues have to date not been injected into this proceeding." The Staff's statement is incorrect. First, LILCO itself has injected security issues into this proceeding by filing its low power license request, which under Section 50.57(c) requires the finding that the grant of such license would "not be inimical to the common defense and security." See 10 C.F.R. § 50.57(a)(6). Second, the Staff's own SSER on LILCO's low power license, which discusses security issues, has injected security issues here. See SSER, Supp. 5, pp. 13-2 through 13-4. And LILCO's "Application for Exemption" again has injected security issues into this proceeding because Section 50.12(a) requires that LILCO prove and the Commission find that the grant of an exemption would "not endanger the common defense and security."

parties. Those matters included the Part 73 design basis threat with respect to the onsite emergency power system configuration then proposed by LILCO. Since then, LILCO has proposed an entirely new emergency power system. The vulnerabilities of this system must be considered under Section 50.12 and under Part 73 as well. Further, since the new AC power configuration clearly changes the bases for the prior settlement, the issues considered therein are clearly now revived and LILCO's compliance with Section 73.55 when preparing to operate in the new AC power configuration is a critical unresolved issue. (The County again reiterates its often repeated request that the NRC establish the requisite Part 73 procedures so that the necessary safeguards information can be properly addressed.)

(7) LILCO's argument that the "common defense and security" does not mean the provisions of Part 73 is contrary to law. It ignores the fact that the Commission has, throughout its history, defined the "common defense and security" by explicit regulatory standards -- those now embraced by Part 73. When Section 50.12(a) uses the phrase "common defense and security," it means just that: the standards of Part 73.2/ LILCO,

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2/ LILCO's citation of the Siegel case is misplaced. See Siegel v. Atomic Energy Comm., 400 F.2d 778 (D.C. Cir.

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nevertheless, persists in arguing that the term "common defense and security" is some sort of abstraction which is not applicable to LILCO's exemption request. See Application for Exemption at 15, note 10; Motion for Protective Order and Motion in Limine, at 3. LILCO is incorrect. First, the NRC's June 8 Order confirms that Section 50.12(a) requires a security "showing" by LILCO. Second, while in some contexts the term "common defense and security" involves national security and defense matters (particularly in contexts concerning military application of nuclear technology and exports and imports of nuclear materials), that term, with respect to nuclear power

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1968). That case has nothing whatsoever to do with the issue here at bar. Siegel involved arguments that an intervenor must be permitted to litigate the question whether the plant could defend against an enemy attack (Cuba in the Siegel case). Siegel never considered the findings required under Section 50.12(a), the Part 73 design basis threat, or the requirements of Section 73.55 (the latter was not even adopted by the NRC until nearly a decade later). Moreover, LILCO states, "There is no suggestion that LILCO's request for a low power license implicates the defense and security of the United States." (Motion, p. 3.) LILCO's statement is legally and factually incorrect. Indeed, LILCO's low power license request requires findings under Section 50.57(c). These findings include the security requirements of Part 73. The Staff's discussion of security in its SSER is further testimony to that fact. Finally, LILCO itself has put security into issue by seeking a Section 50.12(a) exemption, which explicitly requires LILCO to prove that its request would "not endanger the common defense and security."

plants, means the physical protection and security arrangements set forth in Part 73. See, e.g., 42 Fed. Reg. 10836 (1977); 39 Fed. Reg. 40038 (1974). The physical protection and security arrangements for LILCO's new emergency AC power sources are a critical issue in the instant proceeding. The AC power sources now relied upon by LILCO are essentially unprotected -- in one case being entirely outside the protected area and in another case being within the protected area but in a wholly exposed location. This Board would be unable even to consider the issues embraced by 10 C.F.R §§ 50.12(a), 50.57(a)(6), and 73.55 unless LILCO assumes its burden of attempting to prove compliance with such security requirements.

(8) Section 50.12(a) requires that, in order to grant an exemption, the Commission must find that such exemption would not endanger the common defense and security. If LILCO does not satisfy this standard and does not sustain its burden of proof under Section 2.732, this Board and the Commission could not grant LILCO the exemption it requests. In such case, LILCO would be in default and there would be a failure of proof. Indeed, the County and State submit that LILCO is already in default, and for that reason alone this Board should summarily reject LILCO's exemption request.

The reasons proffered by LILCO in support of its Motions do no more than document the company's failure to carry its burden of proof on the explicit security requirement of Section 50.12(a). There is no legal or factual basis for LILCO's Motions. Accordingly, they should be denied.

Respectfully submitted,

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June 14, 1984

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NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY AND STATE OF NEW YORK OPPOSITION TO LILCO "MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE," dated June 14, 1984, have been served on the following this 14th day of June 1984 by U.S. mail, first class; by hand when indicated by an asterisk; and by Federal Express when indicated by two asterisks.

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