UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

AFFIDAVIT OF

HERBERT H. BROWN, LAWRENCE COE LANPHER, FABIAN G. PALOMINO

Herbert H. Brown, Lawrence Coe Lanpher, and Fabian G. Palomino, being duly sworn, do state under oath the following:

1. The undersigned are attorneys in the Shoreham low power proceeding, Messrs. Brown and Lanpher representing Suffolk County and Mr. Palomino representing the State of New York. The purpose of this Affidavit is to furnish source data for the Suffolk County and State of New York Motion for Disqualification of Judges Miller, Bright, and Johnson.

2. The factual statements set forth in paragraphs 3-41 below are derived from publicly available documents, except for certain instances (paragraphs 11, 12, 24, 34) which pertain primarily to the Affiants' personal recollections of Chairman

Palladino's oral testimony on May 17, 1984, before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs. As to each factual statement set forth below, the Affiants provide the basis or bases for the Statement, i.e., identification of the publicly available document or any other source of the data.

3. On February 22, 1984, the NRC Licensing Board chaired by Administrative Judge Lawrence Brenner (the "Brenner Board") ruled that there was no basis for granting LILCO a low power license for Shoreham "in advance of complete litigation" of the emergency diesel issues. Source: Transcript of ASLB Hearing, Feb. 22, 1984, at 21,615. The Brenner Board set a schedule for litigation of those issues that, after a discovery period of approximately two months, provided for a conference of the parties after May 10, to determine subsequent procedures. Source: Id. at 21,634. In issuing that schedule the Brenner Board concluded:

> Based on what we have before us now, there is no basis to proceed towards litigation that could possibly lead to a low power license in advance of a complete litigation of Contentions 1, 2 and 3 [the outstanding diesel issues].

Source: Id. at 21,615.

4. Under the Brenner Board schedule, it was estimated by the NRC Staff that an initial decision on emergency diesel generator contentions would be issued in December 1984. Source: Attachment to Memorandum from William J. Dircks to Commissioners, March 9, 1984, available as part of FOIA-84-250.

5. As of February 22, the NRC Staff opposed LILCO's arguments that "enhanced" offsite power could substitute for deficient onsite power. The Staff would give no credit to LILCO's offsite power system, including the gas turbine physically located at Shoreham, because "General Design Criteria 17 requires an independent, redundant and reliable source of on-site power." Source: NRC Staff's Response to Suffolk County's Motion to Admit Supplemental Diesel Generator Contentions, February 14, 1984, at 12, footnote 7. The Staff took "no position upon whether applicant, upon a proper technical analysis, could or could not support an application for an exemption to allow it to go to low-power absent reliable safety-grade diesels." Source: Id.

6. At an open meeting between the NRC Staff and the TDI Owners Group on January 26, 1984, Mr. Harold Denton of the Staff stated:

> [W]e are not prepared to go forth and recommend the issuance of new licenses on any plant that has Delaval diesels until the issues that are raised here today are adequately addressed.

Source: Jan. 26 Meeting transcript at 8. Mr. Darrel Eisenhut of the Staff stated at the same meeting that "prior to licensing, even a low power license," the Staff must have confidence that the TDI diesel problems have been solved. Source: Id. at 95-96.

7. The Brenner Board's February 22 decision was followed two days later by a published report that LILCO's Chairman, William J. Catacosinos, had met with the NRC Commissioners. Source: Newsday, Feb. 24, 1984.

8. In a March 9, 1984, letter to LILCO shareholders, Dr. Catacosinos noted:

> Our inability to open Shoreham has created a serious cash shortfall for LILCO. Accordingly, since January 30, I have made government officials aware of our critical situation, and I believe there now seems to be a greater understanding among federal, state and county officials of the crisis the company faces . . . . A timely resolution of the Shoreham situation and a resolution of the Company's critical cash shortage are essential to the continued viability of LILCO.

Source: LILCO 1983 Annual Report.

9. On March 9, the NRC Staff notified the Commissioners of potential licensing delays of 9 months for Shoreham. The 9 month delay was estimated by LILCO and passed on to the Commissioners by the Staff. Source: Attachment to Memorandum

from William J. Dircks to Commissioners, March 9, 1984, available as part of FOIA-84-250.

10. Chairman Palladino met on March 15 with personnel from the Offices of Policy Evaluation and General Counsel concerning the potential licensing delays. It was then decided to hold a meeting on March 16. Source: Individual Statement of Nunzio J. Palladino Before the Subcomm. on Energy and the Environment, H. Comm. on Interior and Insular Affairs, May 17, 1984, pp. 8-9 (hereafter, "Palladino Statement").

11. On March 16, Chairman Palladino met with members of commission offices, "Tony Cotter" (B. Paul Cotter, Jr., the NRC's Chief Administrative Judge), and top level Staff personnel, including the Executive Director for Operations, the Director of the Office of Nuclear Reactor Regulation, the Executive Legal Director and their subordinates to discuss the alleged delay in the licensing of Shoreham and other plants. Source: Palladino Memo to Commissioners, March 20, 1984 (hereafter, "Palladino 3/20 Memo"); Palladino Statement at 8-10; Affiants' recollection of Chairman Palladino's May 17 Congressional testimony (as to fact that Directors of NRR and OELD were present).

12. The other Commissioners were not advised of the March 16 meeting in advance. Source: Affiants' recollection of

Chairman Palladino's May 17 Congressional testimony. Neither the County nor State was advised of this meeting, and no transcript was made. Sources: No prior notice of meeting was given to County or State, and there has never been any indication that a transcript was made; NRC Commissioners' April 23 Meeting Transcript, p.10.

13. Commissioner Asselstine criticized Chairman Palladino for meeting with one party -- the Staff -- "without the opportunity for the others to have any notice of the meeting or be provided an opportunity to comment . . . ." Source: NRC Commissioner's April 23 Meeting Transcript, p. 10.

14. Commissioner Gilinsky questioned whether it was proper for the Staff to meet with Chairman Palladino at the March 16 meeting:

> The Staff is a party in the hearing; the Chairman is one of the ultimate judges. The Staff Directors should have told the Chairman politely that it is not their job to carry the ball for the Company. It is understandable that they did not say this under the circumstances. The Chairman is, by law, the Staff's direct supervisor. He controls annual bonuses worth many thousands of dollars to senior Staff members. What we have is a situation in which one member of the ultimate NRC adjudicatory tribunal appears to be directing the actions of a key party in the case.

Source: CLI-84-8, Separate Views of Commissioner Gilinsky, May 16, 1984.

15. Chairman Palladino's March 16 meeting was held even though LILCO had not filed a new motion for low power operation of Shoreham. NRC April 23 Meeting Transcript, p. 7.

16. Judge Cotter's notes of the Chairman's March 16 meeting reveal that the following matters were discussed pertaining to Shoreham: "Says will go bankrupt if 12/84 I.D.;" "Alternative solution for low power;" "LILCO file proposal to get around diesel issue and hold hearing on operation at low power;" "Based on LILCO proposal, Staff issue report in 30 days as to whether safe at 5% without diesels;" "Commission ordered hearing would a) define 'contention' and set time frames for expedited procedure b) Reverse Board Order of 2/22;" "Note: Concern re same Board Chaiman." Source: Judge Cotter's Notes, available as part of FOIA-84-267 (emphasis in original).

17. Chairman Palladino later told the other Commissioners that at the March 16 meeting "some preliminary ideas regarding expediting the Shoreham hearing were discussed." Source: Palladino Memo to Commissioners, April 4, 1984 (hereafter, "Palladino 4/4 Memo"), available as part of FOIA-84-267. Commissioner Asselstine stated:

> I understand from Tony Cotter that there was discussion at the March 16th meeting of the scope and type of issues that would be considered in a low-power licensing proceeding with the Staff.

Source: NRC Transcript of April 23 meeting, at 9-10.

18. On May 17, Chairman Palladino stated:

> At that meeting, held on March 16, I was briefed as to the status of a number of cases, including the Shoreham proceeding. While the briefing included identification by the Staff of the issues of the Shoreham proceeding, I do not recall the Staff in any way stating or intimating how those issues should be resolved. I am confident that if the Staff had done that, or if any other impropriety had been committed, one or more of the several top agency lawyers present would have raised a warning flag. Likewise, I recall the staff advising that they understood that LILCO planned to appeal the denial of its low power request. But again, there was no discussion, to the best of my recollection, of the merits of that request.

Source: Palladino Statement at 10.

19. One reason that Chairman Palladino met with the Staff and others on March 16 "was the possibility that if NRC didn't do something Shoreham would go under because of NRC's inability to make timely licensing decisions, and I felt that, whatever happened to Shoreham, I did not want inaction by NRC to be the cause." Source: Palladino Statement at 4-5; see id. at 11. Judge Cotter's notes of the March 16 meeting underscore the concern for LILCO's financial condition: the March 16 meeting included discussion that LILCO would "go bankrupt" if it had to await a Licensing Board decision in December 1984. Source: Judge Cotter's notes, supra, ¶ 16.

20. On March 20, Chairman Palladino circulated a memorandum to the other Commissioners. The memorandum reported on the March 16 meeting and proposed that in order to "reduce the delays at Shoreham," the Commission should "consider a proposal from OGC for an expedited hearing on the diesel problem, or proposals for other possible actions so that at least a low power decision might be possible while awaiting resolution of the emergency planning issue. I have asked the OGC to provide a paper on this subject soon." Source: Palladino 3/20 Memo. Chairman Palladino did not then report, as he later did in his April 4 Memorandum, that some preliminary ideas for expediting the Shoreham proceeding had been discussed with the Staff and others who were present at that meeting. Sources: Palladino 3/20 Memo; Palladino 4/4 Memo.

21. The Chairman's March 20 Memorandum was circulated to "SECY, OGC, OPE, OIA, EDO." Thus, the Staff's Executive Director for Operations was further advised of the Chairman's view that the Shoreham proceeding needed to be speeded up. The March 20 Memorandum also specifically requested the EDO to respond to the March 20 Memorandum and to prepare a paper outlining steps to deal with the "potential delays". Source: Palladino 3/20 Memo.

22. On March 20 -- the same day that the Chairman circulated his Memorandum (see ¶¶ 20-21) -- LILCO filed a new proposal for a low power license, styled as a Supplemental Motion for Low Power Operating License. LILCO made essentially the same arguments for a low power license that the Brenner Board had previously rejected, except that LILCO provided greater detail and added that it also intended to install at Shoreham four mobile diesel generators to enhance the offsite AC electric power system. LILCO served copies of the Motion on the NRC Commissioners. LILCO did not apply for a waiver of or an exemption from GDC 17. Sources: LILCO's March 20 Supplemental Motion for Low Power Operating License; LILCO's Response to Suffolk County's Motion to Admit Supplemental Diesel Generator Contentions, Feb. 7, 1984, at 5-7.

23. After March 16, Chairman Palladino had further discussions with his staff and apparently "with EDO as well, searching for options," to deal with the alleged delay. Source: Palladino Statement at 11.

24. Chairman Palladino's legal assistant discussed with Judge Cotter the following "working paper" prepared by the Chairman's office (the paper was sent to Judge Cotter on March 22), which relates to the Chairman's desire to expedite the Shoreham proceeding:

> The EDO has recently provided the Commission an assessment for Shoreham that projects a nine-month licensing delay due to, I am told, the Shoreham Licensing Board's requirement to litigate the diesel-generator questions before allowing operation at low power.
>
> The Commission would like this matter litigated on an expedited basis with a target date of receiving the Board's decision on this matter by May 9, 1984. Would you please look into what steps are required to meet such a date and inform the Commission on these steps as soon as possible, but not later than March 30, 1984.
>
> For planning purposes, you could assume the following steps:
>
> -- A two week staff review of the proposal by LILCO;
>
> -- A one week discovery period;
>
> -- A two week period for filing testimony and holding a hearing;
>
> -- A two week period to issue the Board's decision.
>
> Final Commission guidance on the expedited hearing on this matter would be based on your submittal and follow-up discussions. If you have any questions, please let me know.

Sources: Palladino Statement at 11-12; Palladino 4/4 Memo and Attachments. The time estimates in the "working paper" apparently were derived by Chairman Palladino from "OGC's rough estimates of the time that an expedited hearing such as suggested by OGC might take . . . ." Source: Palladino Statment at 12. Chairman Palladino had not discussed this

"working paper" with the other Commissioners. Thus, the reference to "The Commission" in the second paragraph was not accurate. The other Commissioners were not informed of Chairman Palladino's "working paper" or his request to Judge Cotter until April 4 when the working paper was distributed to the other Commissioners. Source: Affiants' recollection of Chairman Palladino's May 17 oral Congressional testimony; Palladino Statement at 12; Palladino 4/4 Memo.

25. Judge Cotter responded to Chairman Palladino's "working paper" on March 23. Source: Palladino Statement at 13. His March 23 response, in the form of a 9 page proposed order for adoption by the Commission, contained, inter alia, the following elements:

(a) A proposed decision that consideration of LILCO's low power proposal be expedited and that it be decided on the merits, with specific issues to be decided spelled out.

(b) A proposed decision that a new Licensing Board be appointed to replace the Brenner Board.

(c) A proposed decision that LILCO's March 20 Motion be litigated on a schedule described as "brutally tight" and "[d]efinitely not recommended but possibly achievable." The Cotter schedule called for a decision on the LILCO Motion

within 60 days. To achieve such expedition, Judge Cotter suggested that there be 16 days for discovery, 5 days between close of discovery and filing testimony, 5 days until the start of hearing, and 10 days for the hearing.

(d) One reason cited by Judge Cotter for adoption of the proposed order was "the enormous financial investment" of LILCO.

Source: Cotter draft order, attached to Palladino 4/4 Memo.

26. On March 26, Suffolk County submitted preliminary views to the Brenner Board regarding LILCO's March 20 Motion. These views were submitted in response to a specific March 22 oral request of the Brenner Board that parties provide preliminary views on how the new LILCO Motion should be handled. In these views the County stated:

(a) The County required more than the normal ten-day period to respond to LILCO's Low Power Motion, because it raised many new and complex factual issues and the County needed to retain appropriate experts to analyze those issues.

(b) Analysis of the factual issues would first require the County to obtain substantial information through discovery.

(c) Additional time was required to address legal issues raised by LILCO's Motion.

(d) A number of threshold issues should be addressed before the merits of LILCO's Low Power Motion were considered, including: (i) the Motion did not meet the criteria enunciated by the Brenner Board on February 22 for a new low power proposal, because it did not state how it met regulatory requirements or why a waiver therefrom should be granted; (ii) the Motion relied upon power sources located at the Shoreham site which were not seismically qualified, as required, but LILCO had sought no waiver of the NRC's seismic requirements; and (iii) contrary to the Board's February 22 order, the Motion appeared to rely upon the TDI diesels.

(e) The County requested a conference with the Brenner Board to discuss the procedural matters affecting the diesel litigation and LILCO's Low Power Motion.

Source: Suffolk County's Preliminary Views on Scheduling Regarding LILCO's New Motion, March 23, 1984.

27. On March 28, the State of New York filed preliminary views which supported those submitted by the County. Source: Preliminary View of Governor Cuomo, Representing the State of New York, Regarding LILCO's So Called "Supplemental Motion for

a Low Power Operating License," March 28, 1984. The County supplemented its views on March 30, urging that the LILCO Motion be summarily dismissed for failing to comply with GDC 17. Source: Supplement to Suffolk County's Preliminary Views on Scheduling Regarding LILCO's New Motion, March 30, 1984.

28. On March 27, Chairman Palladino gave Judge Cotter's draft order to the Office of General Counsel. Source: Palladino Statement at 13. Chairman Palladino did not give the draft order to the other Commissioners until April 4. Source: Palladino 4/4 Memo.

29. On Morch 27, Judges Brenner and Morris wrote Judge Cotter that "[d]epending on the schedule established (by us or the Commission), the Shoreham Licensing Board on which we sit may have to be reconstituted by you due to our heavy schedule for the Limerick evidentiary hearing in April and May." Source: Brenner and Morris Memo to Cotter, May 27, 1984, available as part of FOIA-84-267.

30. On March 30, the NRC Staff responded to LILCO's Low Power Motion. In reversal of its prior position that no low power license could be issued for Shoreham until the TDI diesel problems were solved (absent a waiver or exemption regarding which the Staff had taken no position), see, ¶ 5, supra, the Staff stated that operation of Shoreham could be permitted in

the complete absence of any nuclear qualified onsite electric power system.

> If the protection afforded to the public at low-power levels without diesel generators is found to be equivalent to (or greater than) the protection afforded to the public at full-power with approved diesel generators, the Staff submits that LILCO's motion should be granted.

Source: NRC Staff Response to LILCO's Supplemental Motion for Low Power Operating License, March 30, 1984. Without addressing the County's and State's concerns regarding the time required to respond to LILCO's Low Power Motion and without revealing the Staff's March 16 meeting with Chairman Palladino, the Staff called for an expedited hearing on the Motion, with all testimony to be filed by April 23. Source: Id.

31. Commissionser Gilinsky criticized the Staff's position before the Licensing Board.

> I must say that this confirms me even further in my view that the staff ought not be in these hearings. Here is the staff concocting arguments on how all this [GDC17 and Section 50.57(c)] can be rationalized and I must say that even though you didn't tell them anything about the hearings, this is after your meeting with them on the speeding up the process so the effect of it is inevitable. You have them go back and think, 'Well, how can we speed up this process?' I am not suggesting that you did anything proper [sic] mind you but that is intrinsic in the way the system works.

Source: NRC April 23 Meeting Transcript, p. 59. See also CLI-84-8, Separate Views of Commissioner Gilinsky ("the Staff had been trying to run legal interference for the Company"), and Commissioner Asselstine, May 16, 1984.

32. On March 30, Chief Administrative Judge Cotter issued an order removing the Brenner Board and establishing a new licensing board "to hear and decide" LILCO's Low Power Motion. The order noted the "advice" of the Brenner Board that "two of its members are heavily committed to work on another operating license proceeding." Source: Order, "Establishment of Atomic Safety and Licensing Board to Preside in Proceeding," March 30, 1984. According to a report in Nucleonics Week, April 5, 1984:

> Appointment of a board to hear Lilco's motion for a low-power license at Shoreham . . . [was] his idea, Cotter said through an agency spokesman. However, he said, Palladino's staff was "aware" of his decision.

Source: Nucleonics Week, April 5, 1984, at 10. Chairman Palladino recalls that Judge Cotter informed the Chairman's office of the appointment before it was made. Source: Palladino Statement at 14.

33. The NRC's Office of General Counsel spoke with Judge Cotter several times between March 27 and March 30 regarding Judge Cotter's proposal to appoint a new board and questioned whether the action did not appear to presume that LILCO's Motion would be granted. Source: NRC April 23, 1984 Meeting Transcript, pp. 8-9. Mr. Malsch of the Office of General Counsel described these conversations as follows:

> [Malsh]: After the meeting between the Chairman, ourselves, EDO and so forth, there appeared on my desk a draft notice from Tony Cotter announcing a reconstitution of the Licensing Board. I called Tony and asked him -- I told him that I was sort of bothered by it on its face since it wasn't clear to me that there was a scheduling conflict unless it was presumed that the LILCO low-power motion is granted. At that time the motion had been filed.
>
> I didn't think that he, Tony Cotter, had the authority to grant a low-power motion and then refer the motion to another Licensing Board.
>
> I also raised reservations about how the whole thing would appear. He said, "Oh, no," that he had been advised by Larry Brenner who was the Chairman of the other Licensing Board that he, Larry Brenner, couldn't really give the low-power motion any consideration at all either granting it or denying it because he was so involved in the Limerick case and therefore, Tony didn't feel that his appointment of a new Board in effect prejudged action on the low-power motion.
>
> He said that he would think about my problem about appearances and call me back. He then called me back the next day and said that they were going forward with it.
>
> CHAIRMAN PALLADINO: With what?

MR. MALSH: And that they were going forward with the reappointment of the new Licensing Board.

34. On March 30, the parties were notified by telephone that the new Licensing Board (the "Miller Board") would hear oral arguments on April 4, 1984, on LILCO's Low Power Motion and the response thereto. The telephone notice indicated that "a schedule for their expedited decision" would be considered on April 4. Sources: Statement of Oral Notice, available as part of FOIA-84-267; Mr. Lanpher's recollection of the phone call. This oral notice was confirmed in writing by the Miller Board on March 30, 1984. The Board stated that at the oral argument the Board would hear the issues raised by the parties "in their filings, as well as a schedule for their expedited consideration and determination." Source: ASLB Notice of Oral Arguments, March 30, 1984.

35. On April 2, the NRC's General Counsel circulated a Memorandum to all the Commissioners. The purpose of this Memorandum was to respond "to the Chairman's March 20, 1984 request that OGC develop proposals for expedited hearings on the Shoreham diesel problem." The OGC noted that the "issues [raised by LILCO's Motion] are extremely complex . . . ." OGC suggested a number of alternatives, including an expedited hearing schedule, which allowed a total of 80 days between a Commission Order starting the proceeding and a Licensing Board

decision on the LILCO Motion. Under this OGC schedule, there would have been 15 days for discovery, 10 days between close of discovery and the start of hearings, and 15 days for hearings. Source: Memorandum from Herzel Plaine to NRC Commissioners, April 2, 1984.

36. On April 3, the County filed Comments on the Miller Board's March 30 Notice of Oral Arguments, pointing out that "there is no basis for any expedited process," and that this issue should be addressed by the parties at the oral argument. The County repeated its view that LILCO's Low Power Motion should not be argued on the merits until the County had an opportunity to retain experts and conduct adequate discovery, as discussed in the County's March 26 Preliminary Views. Source: Suffolk County's Comments on Notice or Oral Arguments, April 3, 1984.

37. On April 3, the State of New York filed a motion in opposition to the Miller Board's ruling that LILCO's Low Power Motion would be given expedited consideration. The State argued that expediting LILCO's Low Power Motion was arbitrary and would deny the State due process of law. Source: Motion by Governor Cuomo to Delete Provision in this Board's Order of March 30, 1984 Mandating Expeditious Consideration and Determination of Issues Raised in LILCO's Supplemental Motion, April 3, 1984.

38. On April 4, Chairman Palladino distributed a Memorandum to the other Commissioners, attached to which was Chairman Palladino's March 22 "working paper" (see ¶ 24, supra) and Judge Cotter's March 23 draft order (see ¶ 25, supra). The Chairman's April 4 Memorandum was also distributed to the Atomic Safety and Licensing Board Panel. Source: Palladino 4/4 Memo.

39. On April 4, the Miller Board heard oral argument on the LILCO Motion. Source: ASLB Transcript, April 4, 1984.

40. On April 6, the Miller Board issued its Memorandum and Order Scheduling Hearing on LILCO's Supplemental Motion for Low-Power Operating License (the "Low Power Order"). The Low Power Order stated that LILCO could operate Shoreham at low power with no onsite electric power system, provided that public health and safety findings similar to those suggested by the NRC Staff were made. Source: ASLB Low Power Order.

The time-frames established by the Miller Board for consideration of LILCO's Motion were as follows:

Time for discovery	10 days
Time between close of discovery and filing of testimony	4 days
Time between filing of testimony and start of hearing	4 days

Elapsed time set aside for hearing	11 days

Source: Low Power Order.

The time-frames ordered that the hearing would end by May 5. Source: Low Power Order.

41. Suffolk County and the State of New York objected to the Miller Board's April 6 Order as denying them due process of law and as being contrary to GDC 17 and other NRC regulations. Source: Joint Objections of Suffolk County and the State of New York to Memorandum and Order Scheduling Hearing on LILCO's Supplemental Motion for Low Power Operating License, April 16, 1984. The County submitted affidavits of expert consultants indicating that the April 6 Order denied the County a chance to prepare for and participate meaningfully in the hearing. Source: Letter from Lawrence Coe Lanpher to ASLB, April 23, 1984, transmitting affidavits. The Miller Board and, subsequently, the Commission refused to alter the April 6 Order. Source: ASLB Order Denying Intervenors' Motion to Vacate Order, April 20, 1984; NRC April 23, 1984 transcript, at 122-25. The County and State sought a temporary restraining order in federal court that was granted on April 25. Source: Memorandum Opinion, U.S. District Court Docket 84-1264, April 25, 1984.

Herbert H. Brown

Lawrence Coe Lanpher

Fabian G. Palomino

Sworn to this 21st day of June, 1984.

My Commission expires:

My Commission Expires January 31, 1[illegible]

Patricia A. Hopkins
Notary Public

6/5/84

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

SUFFOLK COUNTY AND STATE OF NEW YORK
REQUEST FOR RECUSAL AND, ALTERNATIVELY,
MOTION FOR DISQUALIFICATION OF
CHAIRMAN PALLADINO

Suffolk County and the State of New York hereby request that Chairman Nunzio J. Palladino recuse himself from participating in any matters concerning the Long Island Lighting Company's ("LILCO") Shoreham Nuclear Power Station ("Shoreham"). In the event the Chairman decides not to recuse himself, the County and State move the Commission to take cognizance of this issue and vote whether Chairman Palladino should be disqualified from participating in Shoreham-related matters.

The legal standard which applies to the issue of whether Chairman Palladino should be disqualified is whether "a disinterested observer may conclude that [the Chairman] has in some measure adjudged the facts as well as the law of a particular

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case in advance of hearing it." Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) quoting with approval from Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896 (1959) (Emphasis added). The documents referred to hereinafter show that Chairman Palladino's actions on Shoreham-related matters are clearly within the proscription of this legal standard. From at least March 16, 1984, the Chairman personally intervened in adjudicatory matters pending before the Licensing Board. His intervention caused the Staff, the Chief Administrative Judge of the Licensing Board Panel, and ultimately the Licensing Board Judges to take actions of factual and legal consequence that prejudiced the interests of the County and State. The Chairman did this in advance of hearing the positions of the County and State.

In short, Chairman Palladino's intervention in the Shoreham proceeding "may cause a disinterested observer to conclude" the following:

(1) The Chairman, without consulting the other members of the Commission, took the initiative with the Staff and Chief Administrative Judge to engage in substantive discussions and to formulate a strategy for the Staff and Licensing Board that would serve LILCO's interests without regard to those of the County and State;

(2) The Chairman's initiative caused the Staff to change its previous position and to support the licensing of Shoreham with no emergency onsite power system, contrary to the interests of the County and State;

(3) The Chairman's initiative caused the Chief Administrative Judge to formulate an adjudicatory proposal to permit the licensing of Shoreham with no emergency onsite power system, contrary to the express provisions of the NRC's regulations and contrary to the interests of the County and State. The Chairman circulated this proposal to the Licensing Board panel, including presumably the Shoreham Judges, thus demonstrating his approval of the proposal;

(4) The Chairman's initiative caused the Staff and Licensing Board to work in parallel for the establishment of an unconstitutional hearing format and schedule which benefitted LILCO, contrary to the rights and interests of the County and State;

(5) The Chairman commenced his initiative for the purpose of giving aid to LILCO before the Licensing Board and in the financial marketplace, a consideration which is outside the scope of interests protected by the Atomic Energy Act. He commenced his initiative in advance of hearing from the County and State and without giving them notice of what he planned to

do, and, indeed, without even consulting with other members of the Commission. The actions of the Staff and Licensing Board gave effect to his initiative, in contravention of the regulations, and prejudiced the County's and State's rights to due process of law.

The Chairman's initiative required that prejudgments be made on two issues then central to the licensing of Shoreham: (1) the schedule on which LILCO would receive a low power licensing decision; and (2) the need for an onsite emergency power source. These were issues which had been settled on February 22 by an Order of the Board chaired by Judge Brenner. On March 16, the Chairman met with the Chief Administrative Judge, B. Paul Cotter, Jr., and the Staff's Executive Director and other top-level Staff personnel, including the Director of Nuclear Reactor Regulation and the Executive Legal Director and members of their offices. The Chairman discussed with these persons the impact of the Licensing Board's February 22 Order on LILCO's financial health and formulated means to aid LILCO. In the words of the personal notes handwritten by Judge Cotter at the March 16 meeting, an "alternative solution for low power" operation of Shoreham was discussed. This "solution" involved LILCO filing a "proposal to get around [the] diesel [onsite emergency power source] issue and hold hearing on operation at low power." (Final emphasis in original.) The

do, and, indeed, without even consulting with other members of the Commission. The actions of the Staff and Licensing Board gave effect to his initiative, in contravention of the regulations, and prejudiced the County's and State's rights to due process of law.

The Chairman's initiative required that prejudgments be made on two issues then central to the licensing of Shoreham: (1) the schedule on which LILCO would receive a low power licensing decision; and (2) the need for an onsite emergency power source. These were issues which had been settled on February 22 by an Order of the Board chaired by Judge Brenner. On March 16, the Chairman met with the Chief Administrative Judge, B. Paul Cotter, Jr., and the Staff's Executive Director and other top-level Staff personnel, including the Director of Nuclear Reactor Regulation and the Executive Legal Director and members of their offices. The Chairman discussed with these persons the impact of the Licensing Board's February 22 Order on LILCO's financial health and formulated means to aid LILCO. In the words of the personal notes handwritten by Judge Cotter at the March 16 meeting, an "alternative solution for low power" operation of Shoreham was discussed. This "solution" involved LILCO filing a "proposal to <u>get around</u> [the] diesel [onsite emergency power source] issue <u>and</u> hold hearing on <u>operation at low power</u>." (Final emphasis in original.) The

meeting also involved the formulation of an "expedited" hearing format and schedule. Again, in Judge Cotter's words, a hearing ordered by the Commission "would define 'contention' and set time frames for expedited procedure." It would also "review Board order of February 22." Significantly, Judge Cotter noted that LILCO's financial health was discussed. He wrote, "[LILCO] Says [it] will go bankrupt if [it has to wait for] 12/84 I.D. [Initial Decision of the Licensing Board]." (It was then anticipated that the Brenner Board would issue its decision on low power operation of Shoreham in December 1984.) A reasonable observer may conclude that the only prompt decision which could avert a LILCO bankruptcy was a favorable one to LILCO.

Thus, on March 16, Chairman Palladino planned and set in motion with the NRC's top judicial and Staff personnel changes in the course of the Shoreham proceeding. In short order, the following occurred:

(1) New Licensing Board Judges were appointed to hear the proposal for low power operation that LILCO filed with the Brenner Board four days after the Chairman's March 16 meeting. (Judge Cotter's notes state: "NOTE: Concern re Same Board Chairman." Also, the notes, written four days before LILCO filed its proposal to operate Shoreham at low power without

diesels, state: "LILCO file proposal to get around diesel issue and hold hearing on operation at low power");

(2) The Staff abruptly reversed its previous position and supported the licensing of Shoreham with no onsite emergency power source. (Judge Cotter's notes state: "Based on LILCO proposal, staff can issue report in 30 days as to whether plant safe at 5% w/o diesels");

(3) The new Licensing Board issued an Order defining the issues to be heard under expedited hearing procedures. (Judge Cotter's notes state: "Define 'contention' and set time frames for expedited procedure").

These actions were planned at the Chairman's initiative without regard for the interests of the County and State and in advance of the Chairman hearing from those parties. Given the legal standard set forth in the Cinderella case, supra, there is no lawful basis on which the Chairman should participate in any matters related to the Shoreham plant. Surely, the facts described above, and as set forth at length below, may cause "a disinterested observer [to] conclude that [the Chairman] has in some measure adjudged the facts as well as the law of [this] case in advance of hearing it."

The legal standard quoted above is not prosecutorial, and it does not bring into controversy the question of "guilt." The issue, rather, is one of the integrity, and the appearance of integrity, of the Shoreham proceeding. The events of record which began at the Chairman's initiative on March 16 have undermined public confidence in the impartiality of Chairman Palladino and other NRC personnel. The only way to restore public confidence in the Shoreham proceeding is for the individuals who have demonstrated, or have appeared to demonstrate, partiality toward LILCO to disqualify themselves and for scrupulously fair procedures and reasoned decisions to be followed. The starting point for this is the recusal of the Chairman.

I. The Chairman's Personal Intervention In The Shoreham Proceeding Requires Disqualification.

According to public documents, Chairman Palladino's personal intervention in the Shoreham licensing proceeding began with an ex parte meeting with the Chief Administrative Judge and the Staff on March 16, 1984. To put this intervention into perspective, we will briefly describe the posture of the Shoreham proceeding prior to March 16.

A. Events Prior to March 16, 1984

On February 22, 1984, the Licensing Board chaired by Administrative Judge Lawrence Brenner (the "Brenner Board") ruled that there was no basis for granting LILCO a low power license for Shoreham "in advance of complete litigation" of the emergency diesel issues. The Brenner Board set a schedule for litigation of those issues that, after a discovery period of approximately two months, provided for a conference of the parties on May 10, to determine subsequent procedures. In issuing that schedule the Brenner Board concluded:

> Based on what we have before us now, there is no basis to proceed towards litigation that could possibly lead to a low power license in advance of a complete litigation of Contentions 1, 2 and 3 [the outstanding diesel issues].

See Transcript of ASLB Hearing, February 22, 1984, at 21,615. Hence, as conceived by the Brenner Board, the hearing on the diesel issues would be unlikely to start before June, and a decision in all probability would not be expected before December 1984.

Significantly, as of February 22, the NRC Staff had taken the unequivocal position that under the NRC's regulations no low power license could be issued for Shoreham unless the diesel issues were first resolved. Thus, as of February 22, the

Staff position was that there could be no low power license until LILCO had an onsite electric power system which met NRC requirements or had received a proper exemption from those NRC requirements.

At the February 22 conference before the Brenner Board, the NRC Staff opposed LILCO's arguments that "enhanced" offsite power could substitute for deficient onsite power. Thus, the Staff would give no credit to LILCO's offsite power system, including the gas turbine physically located at Shoreham, because "General Design Criteria 17 requires an independent, redundant and reliable source of on-site power." See NRC Staff's Response to Suffolk County's Motion to Admit Supplemental Diesel Generator Contentions (February 14, 1984) footnote 7 (Emphasis added). The Staff took "no position upon whether applicant, upon a proper technical analysis, could or could not support an application for an exemption to allow it to go to low-power absent reliable safety-grade diesels." Id. (Emphasis added).1/

1/ The Staff's position that no license could be issued for Shoreham without an adequate onsite AC power system was publicly stated by Messrs. Harold Denton and Darrell Eisenhut at an open meeting between the Staff and the TDI Owners Group on January 26, 1984. Mr. Denton stated:

> [W]e are not prepared to go forth and recommend the issuance of new licenses on any plant that has Delaval diesels until the issues that are raised here today are

(Footnote cont'd next page)

The Brenner Board's February 22 decision to litigate the diesel issues before considering a low power license for Shoreham was a serious setback for LILCO, and one which threatened to put LILCO into bankruptcy. The Brenner Board's decision was followed two days later by a published report (Newsday, February 24, 1984) that LILCO's Chairman, William J. Catacosinos, had met with the NRC Commissioners. Moreover, in a March 9, 1984, letter to shareholders published in LILCO's 1983 Annual Report, Dr. Catacosinos noted:

> Our inability to open Shoreham has created a serious cash shortfall for LILCO. Accordingly, since January 30, I have made government officials aware of our critical situation, and I believe there now seems to be a greater understanding among federal, state and county officials of the crisis the company faces . . . . A timely resolution of the Shoreham situation and a resolution of the Company's critical cash shortage are essential to the continued viability of LILCO.

(Emphasis added). Significantly, Judge Cotter's notes of the Chairman's March 16 meeting state: "Says will go bankrupt if 12/84 I.D. [Initial Decision of the Licensing Board]." The

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adequately addressed.

Meeting transcript at 8. Mr. Eisenhut added that "prior to licensing, even a low power license," the Staff must have confidence that the TDI diesel problems have been solved. Meeting transcript at 95-96 (Emphasis added).

"greater understanding" of federal officials to which Dr. Catacosinos referred thus made itself felt in and through Chairman Palladino's office.

B. Chairman Palladino's Personal Intervention Beginning March 16

Between to February 22 and March 20 there was no pending LILCO proposal for low power operation of Shoreham. LILCO's original low power motion which relied upon the TDI diesels had been rejected on February 22 by the Brenner Board, and there was thus no prospect for an early low power decision for Shoreham. LILCO had not appealed from or sought reconsideration of the Brenner Board's February 22 ruling. In this context, the following events occurred:

1. On March 9, the NRC Staff notified the Commissioners of "potential licensing delays" of 9 months for Shoreham. The 9 month "delay" was estimated by LILCO itself and passed on to the Commissioners by the Staff. However, it has been revealed that the NRC Staff disagreed with this estimate, because the Staff did not consider LILCO's construction to be complete and thus the delay could not be attributed to the licensing process. See April 24 Memorandum from J.A. Rehm, Assistant for Operations, to the Commission. In fact, it should have been clear to all persons in March 1984 that there was no Shoreham

"delay" attributable to the licensing process; rather, the only delay was due solely to the repeated failure of LILCO's TDI diesels. Thus, the plant was not ready for licensing because the diesels would not work.

2. On March 16, in what turned out to be an improper ex parte meeting, Chairman Palladino met with members of the NRC Staff -- a party in the Shoreham Licensing Board proceeding -- "Tony Cotter" (B. Paul Cotter, Jr., the NRC's Chief Administrative Judge), and top level Staff personnel, including the Executive Director for Operations, the Director of the Office of Nuclear Reactor Regulation, the Executive Legal Director and their subordinates to discuss the alleged "delay" in the licensing of Shoreham.2/

The other Commissioners were not advised of the March 16 meeting in advance. Neither the County nor State was advised of this meeting, and no transcript was made.3/ Further, this

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2/ Chairman Palladino had met on March 15 with personnel from the Offices of Policy Evaluation and General Counsel concerning the potential delays. It was then decided to hold the March 16 meeting. See Individual Statement of Nunzio J. Palladino Before the Subcomm. on Energy and the Environment, H. Comm. on Interior and Insular Affairs, May 17, 1984, pp. 8-9 (hereafter, "Palladino Statement").

3/ Commissioner Asselstine has criticized Chairman Palladino for meeting with one party -- the Staff -- "without the opportunity for the others to have any notice of the meeting or be provided an opportunity to comment . . . ." NRC April 23 Meeting Transcript, p. 10. Similarly,

(Footnote cont'd next page)

meeting was held even though there was no new LILCO proposal for low power operation of Shoreham, and even though, as noted above, LILCO had taken no appeal of or any other action to disagree with the Brenner Board's February 22 rulings concerning low power operation, the TDI diesels, or the schedule for litigation. Nevertheless, Judge Cotter's notes of the Chairman's March 16 meeting reveal: "LILCO file proposal to get around diesel issue and hold hearing on operation at low power." While Chairman Palladino has stated that "some preliminary ideas regarding expediting the Shoreham hearing were discussed," see Palladino Memo to Commissioners, April 4, 1984, Judge Cotter's notes in fact indicate that these discussions

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Commissioner Gilinsky stated:

> The Staff is a party in the hearing; the Chairman is one of the ultimate judges. The Staff Directors should have told the Chairman politely that it is not their job to carry the ball for the Company. It is understandable that they did not say this under the circumstances. The Chairman is, by law, the Staff's direct supervisor. He controls annual bonuses worth many thousands of dollars to senior Staff members. What we have is a situation in which one member of the ultimate NRC adjudicatory tribunal appears to be directing the actions of a key party in the case.

CLI-84-8, Separate Views of Commissioner Gilinsky, May 16, 1984.

included "concern" with Judge Brenner, a "Commission ordered hearing" that would "define contention and set time frames for expedited procedure," and discussion of a LILCO "proposal to get around diesel issue and hold hearing on operation at low power."4/ Significantly, the LILCO "proposal" mentioned in Judge Cotter's March 16 notes was not filed until March 20, four days later. Nothing in the public record suggested that LILCO would file such a proposal "to get around [the] diesel issue."

4/ These documented statements sharply contradict the testimony of Chairman Palladino before the House Subcommittee on Energy and Environment on May 17. Chairman Palladino there stated:

> At that meeting, held on March 16, I was briefed as to the status of a number of cases, including the Shoreham proceeding. While the briefing included identification by the Staff of the issues of the Shoreham proceeding, I do not recall the Staff in any way stating or intimating how those issues should be resolved. I am confident that if the Staff had done that, or if any other impropriety had been committed, one or more of the several top agency lawyers present would have raised a warning flag. Likewise, I recall the staff advising that they understood that LILCO planned to appeal the denial of its low power request. But again, there was no discussion, to the best of my recollection, of the merits of that request.

Palladino Statement at 10.

One reason that Chairman Palladino met with the Staff and others on March 16 "was the possibility that if NRC didn't do something Shoreham would go under because of NRC's inability to make timely licensing decisions, and I felt that, whatever happened to Shoreham, I did not want inaction by NRC to be the cause." Palladino Statement at 4-5; see id. at 11. Thus, the Chairman clearly was acting at least in part out of concern for LILCO's financial condition. Judge Cotter's notes underscore that point: the March 16 meeting included discussion that LILCO would "go bankrupt" if it had to await a Licensing Board decision -- even assuming such a decision were favorable -- in December 1984.

3. On March 20, Chairman Palladino circulated a memorandum to the other Commissioners. The memorandum purported to report on the March 16 meeting and proposed that in order to "reduce the delays at Shoreham," the Commission should "consider a proposal from OGC [Office of General Counsel] for an expedited hearing on the diesel problem, or proposals for other possible actions so that at least a low power decision might be possible while awaiting resolution of the emergency planning issue. I have asked the OGC to provide a paper on this subject soon." Chairman Palladino did not then report, as he later did in his April 4 Memorandum, that ideas for expediting the Shoreham proceeding had been discussed at his

March 16 meeting with the Staff and others who were present at that meeting. The Chairman also did not report that the "delay" estimate for Shoreham was based on LILCO's estimate, not the NRC s, and that the Staff disagreed with LILCO's estimate.

The Chairman's March 20 Memorandum was circulated to "SECY, OGC, OPE, OIA, EDO." Thus, at a minimum, the NRC Staff, through the Executive Director of Operations, was further advised of Chairman's view that the Shoreham proceeding needed to be speeded up so that a low power decision could be reached earlier than the schedule adopted by the Brenner Board. Indeed, the March 20 Memorandum specifically requested the EDO -- i.e., the Staff, a party in the Shoreham proceeding -- to respond to the March 20 Memorandum and to prepare a paper outlining steps to deal with the "delays".

4. On March 20 -- the same day that the Chairman circulated his above-described Memorandum -- LILCO filed its unprecedented proposal for a low power license, styled as a Supplemental Motion for Low Power Operating License. LILCO made essentially the same arguments for a low power license that the Brenner Board had previously rejected, except that LILCO added that it also intended to install at Shoreham four mobile diesel generators, not qualified for nuclear service, to "enhance" the

offsite AC electric power system. LILCO served copies of the Motion on the NRC Commissioners. Even though LILCO's March 20 proposal for Shoreham's operation did not comply with GDC 17 -- there would be no onsite electric power system -- LILCO did not apply for a waiver or an exemption of that regulation.

5. After March 16, Chairman Palladino had further discussions with his staff and "with EDO as well, searching for options," to deal with the alleged delay. Palladino Statement at 11. On March 22, Chairman Palladino's legal assistant read to Judge Cotter by telephone the following "working paper" prepared by the Chairman's office (this paper later was sent to Judge Cotter), which relates to LILCO's March 20 proposal:

> The EDO has recently provided the Commission an assessment for Shoreham that projects a nine-month licensing delay due to, I am told, the Shoreham Licensing Board's requirement to litigate the diesel-generator questions before allowing operation at low power.
>
> The Commission would like this matter litigated on an expedited basis with a target date of receiving the Board's decision on this matter by May 9, 1984. Would you please look into what steps are required to meet such a date and inform the Commission on these steps as soon as possible, but not later than March 30, 1984.
>
> For planning purposes, you could assume the following steps:
>
> -- A two week staff review of the proposal by LILCO;

-- A one week discovery period;

-- A two week period for filing testimony and holding a hearing;

-- A two week period to issue the Board's decision.

Final Commission guidance on the expedited hearing on this matter would be based on your submittal and follow-up discussions. If you have any questions, please let me know.5/

Chairman Palladino had not discussed this "working paper" with the other Commissioners and, thus, the reference to "The Commission" in the second paragraph was not accurate. The other Commissioners were not informed of Chairman Palladino's "working paper" or his request to Judge Cotter until April 4.

6. Judge Cotter responded to Chairman Palladino's "working paper" the next day. His March 23 response, in the form of a detailed 9 page proposed order for adoption by the Commission, contained the following elements:

5/ The time estimates in the "working paper" apparently were derived by Chairman Palladino from "OGC's rough estimates of the time that an expedited hearing such as suggested by OGC might take . . . ." Palladino Statment at 12. The estimate of a two week period for Staff review of the LILCO proposal -- a reduction from the 30-day review period discussed on March 16 and reported in Judge Cotter's notes -- presumably reflects further conversation with the Staff either by the Chairman, his stff, or the OGC.

(a) A proposed decision that consideration of LILCO's low power proposal be expedited and that it be decided on the merits. This, of course, prejudged the very question at issue: whether LILCO's proposal was a challenge to GDC 17 that had to be rejected outright. It thus had the effect of deciding that the GDC 17 requirement of an onsite electric power system could be eliminated without even requiring LILCO to seek an exemption or waiver under 10 C.F.R. § 2.758 or § 50.12(a).

(b) A proposed decision that a new Licensing Board be appointed to replace the Brenner Board, which on February 22, 1984, had dealt LILCO a setback. This proposal to appoint a new Licensing Board came four days before the Brenner Board advised Judge Cotter that it had a potential schedule conflict due to the judges' involvement in the Limerick proceeding. Significantly, Judge Cotter's notes of the Chairman's March 16 meeting state: "NOTE: Concern re Same Board Chairman" [i.e., Judge Brenner].

(c) A proposed decision that LILCO's March 20 Motion be litigated on a schedule that Judge Cotter described as "brutally tight" and "[d]efinitely not recommended but possibly achievable." The Cotter schedule called for a decision on the LILCO Motion within 60 days. To achieve such "expedition,"

Judge Cotter suggested that there be 16 days for discovery, 5 days between close of discovery and filing testimony, 5 days until the start of hearing, and 10 days for the hearing. This schedule is clearly responsive to and consistent with the Chairman's "working paper" directive that Judge Cotter devise an expedited schedule for Shoreham. Further, one reason cited by Judge Cotter for adoption of this "brutally tight" schedule was "the enormous financial investment" of LILCO. See Cotter draft order, p. 4. This was the same reason cited by Chairman Palladino for his personal intervention in the first place. See ¶2, supra. Significantly, Judge Cotter's notes of the March 16 meeting with the Chairman state: "Says will go bankrupt if 12/84 I.D. [Initial Decision of the Licensing Board]." As noted previously, the only decision that could avert a LILCO bankruptcy was an early one favorable to LILCO.

7. On March 26, Suffolk County submitted preliminary views to the Brenner Board regarding LILCO's March 20 Motion. These views were submitted in response to a specific March 22 request of the Brenner Board that parties provide preliminary views on how the new LILCO Motion should be handled. In these views the County stated:

(a) The County required more than the normal ten-day period to respond to LILCO's Low Power Motion, because it raised many new and complex factual issues[6/] and the County

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6/ The NRC's Office of General Counsel has agreed that the issues raised by LILCO's Motion are "extremely complex." See ¶12, infra.

needed to retain appropriate experts to analyze those issues.

(b) Analysis of the factual issues would first require the County to obtain substantial information through discovery.

(c) Additional time was required to address legal issues raised by LILCO's Motion.

(d) A number of threshold issues should be addressed before the merits of LILCO's Low Power Motion were considered, including: (i) the Motion did not meet the criteria enunciated by the Brenner Board on February 22 for a new low power proposal, because it did not state how it met regulatory requirements or why a waiver therefrom should be granted; (ii) the Motion relied upon power sources located at the Shoreham site which were not seismically qualified, as required, but LILCO had sought no waiver of the NRC's seismic requirements; and (iii) contrary to the Board's February 22 order, the Motion appeared to rely upon the TDI diesels.

The County requested a conference with the Brenner Board to discuss the procedural matters affecting the diesel litigation and LILCO's Low Power Motion.

On March 28, the State of New York filed preliminary views which supported those submitted by the County. The County

supplemented its views on March 30, urging that the LILCO Motion be summarily dismissed for failing to comply with GDC 17.

8. On March 27, Chairman Palladino gave Judge Cotter's draft order to the Office of General Counsel. Chairman Palladino did not give the draft order to the other Commissioners until April 4.

9. On March 30, the NRC Staff responded to LILCO's Low Power Motion. In an abrupt and complete reversal of its prior position that no low power license could be issued for Shoreham until the TDI diesel problems were solved, the Staff stated instead that operation of Shoreham could be permitted in the complete absence of any onsite electric power system.

> If the protection afforded to the public at low-power levels without diesel generators is found to be equivalent to (or greater than) the protection afforded to the public at full-power with approved diesel generators, the Staff submits that LILCO's motion should be granted.

This sudden change in Staff position led a Commissioner to conclude that Chairman Palladino's intervention had been influential:

> COMMISIONER GILINSKY: I must say that this confirms me even further in my view that the staff ought not be in these hearings. Here is the staff concocting arguments on

> how all this can be rationalized and I must say that even though you didn't tell them anything about the hearings, this is after your meeting with them on the speeding up the process so the effect of it is inevitable. You have them go back and think, 'Well, how can we speed up this process?' I am not suggesting that you did anything proper [sic] mind you but that is intrinsic in the way the system works.

NRC April 23 Meeting Transcript, p. 59 (Emphasis added).7/

Further, without addressing any of the County's and State's concerns regarding the time required to respond to LILCO's Low Power Motion and without revealing the Staff's meeting with Chairman Palladino, the Staff called for an expedited hearing on the Motion with all testimony to be filed by April 23. This Staff schedule was consistent with the guidelines set forth in Chairman Palladino's "working paper" and with Judge Cotter's proposed order.

10. On March 30, Chief Administrative Judge Cotter issued an order removing the Brenner Board and establishing a new licensing board "to hear and decide" LILCO's Low Power Motion. The order noted the "advice" of the Brenner Board that "two of its members are heavily committed to work on another operating license proceeding." According to a report in Nucleonics Week, April 5, 1984:

7/ See also CLI-84-8, Separate Views of Commissioner Gilinsky, May 16, 1984 ("the Staff had been trying to run legal interference for the Company").

> Appointment of a board to hear Lilco's motion for a low-power license at Shoreham . . . [was] his idea, Cotter said through an agency spokesman. However, he said, Palladino's staff was "aware" of his decision.

Indeed, Judge Cotter informed the Chairman of the actual appointment before it was made. Palladino Statement at 14.8/ Moreover, Judge Cotter's notes of the March 16 meeting reveal that there was "concern" with Judge Brenner. In any event, Chairman Palladino was aware of Judge Cotter's decision because Judge Cotter had proposed appointment of a new Board in his March 23 draft order which was prepared at Chairman Palladino's request. Further, even if the appointment of a new Board was Judge Cotter's "idea", this idea was one of the proposals developed by Judge Cotter at the request of Chairman Palladino and, thus, the "idea" clearly was the product of the Chairman's intervention.

11. On the same day, March 30, the parties were notified by telephone that the new Licensing Board (the "Miller Board") would hear oral arguments on April 4, 1984, on LILCO's Low

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8/ The Office of General Counsel spoke with Judge Cotter several times between March 27 and March 30 regarding Judge Cotter's proposal to appoint a new board and specifically questioned whether the action did not appear to presume that LILCO's Motion would be granted. See NRC April 23, 1984 Meeting Transcript, pp. 8-9.

Power Motion. The telephonic notice stated that this Board was "established to hear and decide the motion on an expedited basis." This oral notice was confirmed by the Miller Board's Notice of Oral Arguments (March 30, 1984), which stated that at the oral argument the Board would hear the issues raised by the parties "in their filings, as well as a schedule for their expedited consideration and determination." (Emphasis added).

In light of the known facts, it would not be reasonable to conclude that the Miller Board's March 30 decision to expedite the proceeding was independent of the chain of events that began with the Chairman's March 16 intervention. It must be borne in mind that the Miller Board was appointed on March 30. To make a reasoned and independent judgment to expedite the proceeding, the Board would have had to review and consider LILCO's inch-thick March 20 Motion and the responsive pleadings of the County, State, and the Staff, become familiar with the extensive record compiled by the Brenner Board, particularly the February 22 conference, and hear from the parties regarding the many issues raised by LILCO's motion. Nevertheless, the Miller Board decided to expedite the proceeding the very same day it was appointed -- March 30.

12. On April 2, the NRC's General Counsel circulated a Memorandum to all the Commissioners. The purpose of this

Memorandum was to respond "to the Chairman's March 20, request that OGC develop proposals for expedited hearings on the Shoreham diesel problem." The OGC noted that the "issues [raised by LILCO's Motion] are extremely complex . . . ." OGC suggested a number of alternatives, including an expedited hearing schedule, which allowed a total of 80 days between a Commission Order starting the proceeding and a Licensing Board decision on the LILCO Motion. Under this OGC "expedited" schedule, there would have been 15 days for discovery, 10 days between close of discovery and the start of hearings,9/ and 15 days for hearings.

13. On April 3, the County filed Comments on the Miller Board's March 30 Notice of Oral Arguments, pointing out that "there is no basis for any expedited process," and that this issue should be addressed by the parties at the oral argument. The County repeated its view that LILCO's Low Power Motion should not be argued on the merits until the County had an opportunity to retain experts and conduct adequate discovery, as discussed in the County's March 26 Preliminary Views. Also, on April 3, the State of New York filed a motion in opposition to the Miller Board's ruling that LILCO's Low Power Motion would be given expedited consideration. The State argued that

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9/ Prefiled testimony was omitted.

expediting LILCO's Low Power Motion was arbitrary and would deny the State due process of law.

14. On April 4, Chairman Palladino distributed a Memorandum to the other Commissioners, attached to which was Chairman Palladino's March 22 "working paper" and Judge Cotter's March 23 draft order. The Chairman's April 4 Memorandum was also distributed to the Atomic Safety and Licensing Board Panel, of which Chief Judge Cotter and Judges Miller, Bright, and Johnson (the Miller Board) are members.

15. On April 4, the newly appointed Miller Board heard oral argument on the LILCO Motion, including whether GDC 17 was being impermissibly challenged by LILCO and whether there was any basis to expedite the proceeding.

16. On April 6, the Miller Board issued its Memorandum and Order Scheduling Hearing on LILCO's Supplemental Motion for Low-Power Operating License (the "Low Power Order"). The Low Power Order stated first that LILCO could operate Shoreham at low power with no onsite electric power system, provided that the public health and safety findings suggested by the NRC Staff were made. The Board thus adopted the position urged by the Staff in its March 30 filing and by Judge Cotter in his March 23 draft order. It provided the final link in the chain which began at the Chairman's March 16 meeting with the

formulation of an "alternative solution for low power." This was, as Judge Cotter's notes reflected, the means for LILCO "to get around [the] diesal issue."

Second, despite the "extremely complex" issues presented, the Board decided to expedite consideration of LILCO's Motion. Again, this decision was consistent with the Chairman's "working paper," the position of the Staff, and with Judge Cotter's draft order. The Board's Order defined the issues and established expedited procedures. Judge Cotter's notes of the Chairman's March 16 meeting reveal a discussion to "define 'contention' and set time frames for expedited procedures." Significantly, the time frames established by the Miller Board have a striking similarity to those proposed by Judge Cotter in his March 23 draft Order for the Chairman.

	Judge Cotter	Miller Board
Time for discovery	16 days	10 days
Time between close of discovery and filing of testimony	5 days	4 days
Time between filing of testimony and start of hearing	5 days	4 days
Elapsed time set aside for hearing	10 days	11 days

17. Suffolk County and the State of New York protested the Miller Board's April 6 Order as denying them due process of law and as being contrary to GDC 17 and other NRC regulations. The County even submitted detailed affidavits of expert consultants documenting that the April 6 Order denied the County a chance to prepare for and participate meaningfully in the hearing. The Miller Board and, subsequently, the Commission refused to alter the April 6 Order, forcing the County and the State to seek a temporary restraining order in federal court. The TRO was granted on April 25.

II. Chairman Palladino Must Recuse Himself Or Otherwise Be Disqualified By The Commission

The standard for determining whether Chairman Palladino must recuse himself or otherwise be disqualified is whether "a "a disinterested observer" may conclude that Chairman Palladino "has in some measure adjudged the facts as well as the law" in the Shoreham case "in advance of hearing it." Cinderella, supra, 425 F.2d at 591 (emphasis supplied).10/ Under the Cinderella standard and the facts described above, a disinterested observer certainly may conclude that Chairman Palladino

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10/ Chairman Palladino has contended that he has not prejudged the Shoreham proceeding. See e.g., Palladino Statement at 20-21; Palladino Letter to Congressman Markey, April 6, 1984; CLI-84-8, Separate Views of Chairman Palladino, May 16, 1984. His position, however, does not address the legal standard set forth in the Cinderella case.

has at least in some measure adjudged the facts and law in this case before hearing it. Certainly, as noted previously, a disinterested observer could conclude that the only decision which could avert a LILCO bankruptcy was an expedited one favorable to LILCO.

The Chairman's March 16 meeting with top-level Staff personnel -- an ex parte meeting prohibited by Section 2.780 of the regulations -- and his meeting with Judge Cotter, the NRC's Chief Administrative Judge, dealt with establishing a strategy and an action plan to help LILCO without any regard for the effects on the rights and interests of the County and State. This strategy and plan were based on the concern that the substantive rulings and hearing procedures adopted by the Brenner Board might permit LILCO to go bankrupt before a low power license decision could be issued. Therefore, to get around those rulings and procedures, the strategy and actions following the intervention of Chairman Palladino produced a new Licensing Board, a new legal standard which would permit the low power operation of Shoreham with no onsite power and without waiver of GDC 17, and a new expedited hearing schedule which effectively barred the County and State from preparing for and participating meaningfuly in the hearing. The County and State submit that these results would not have been produced but for the personal intervention of Chairman Palladino.11/

11/ Chairman Palladino on May 16, 1984 disputed the assertion of Commissioner Gilinsky that Chairman Palladino had

(Footnote cont'd next page)

Significantly, Judge Cotter's notes reveal that the discussion at the Chairman's March 16 meeting focused on how to change what was then the law of the case. The discussion thus focused on an "alternative solution for low power" -- that is, an alternative to what had been decided on the record by the Brenner Board with the participation of the parties under the provisions of the NRC's regulations. The March 16 meeting was an entirely different setting: It dealt with a "LILCO proposal" which had not even been submitted and of which the County and State had no knowledge; it was a secret meeting of which there was no public notice; the discussion was not on the record; the parties (except for the Staff) were not present; it focused on a means of obtaining a favorable decision in time to avert a LILCO bankruptcy; and the NRC's ex parte rules were violated.

(Footnote cont'd from previous page)

directed the Staff's ideas on any issue in the Shoreham case. The Chairman suggested, in fact, that the Staff had taken positions in February 1984 before the Brenner Board which were consistent with those taken by the Staff on March 30, 1984. See CLI-84-8, Separate Views of Chairman Palladino, May 16, 1984. However, before the Brenner Board, the Staff had insisted that for a low power license, LILCO needed to fix the diesels or seek an exemption or waiver. See Section I.A, supra. On March 30, the Staff took the entirely new position (after meetings with the Chairman) that: (a) the diesels did not need to be fixed; (b) LILCO could operate at low power with no onsite power system at all; and (c) LILCO did not need to seek a waiver or exemption. We submit that Commissioner Gilinsky was clearly correct: the Staff got its marching orders from the Chairman and carried them out.

In essence, the March 16 meeting was a planning session to figure out how to get around the lawful rulings of the Brenner Board. Its purpose was improper; its discussion was improper; and the actions of NRC personnel that followed it were improper. Each of these personnel acted as a link in a chain of impropriety that commenced in the Chairman's office on March 16.

Under the Atomic Energy Act, the zone of interests to be protected by the NRC is the public's health and safety. See Power Reactor Development Corp. v. International Union of Electrical, Radio, and Machine Workers, 367 U.S. 409, 415 (1961); cf. Portland General Electric Co., (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 N.R.C. 610 (1976). In the present case, however, there is every indication that Chairman Palladino used the power and prestige of his office to set in motion actions which prejudiced the rights and interests of the County and State, but aided LILCO's efforts to secure an operating license in time to avoid bankruptcy. (Judge Cotter's notes of the Chairman's March 16 meeting underscore this concern for LILCO.) Under the circumstances set forth herein, a disinterested observer may surely conclude that Chairman Palladino has in some measure prejudged the facts as well as the law in the Shoreham proceeding in advance of the hearing. The final evidence of the Chairman's prejudgment can be seen in the actions of the Chief Administrative Judge, the Staff, and

the Licensing Board personnel who along the way gave effect to his wishes.

The Shoreham proceeding has been pervasively tainted by the Chairman and others who worked in parallel with him to aid LILCO at the expense of Suffolk County and New York State. The only way to begin the process of restoring institutional integrity in this proceeding is by the disqualification of those whose actions have created the taint. The place to start is with the Chairman's recusal. If he does not recuse himself, the County and State move the Commission to take cognizance of this matter and vote on whether to disqualify the Chairman.

Respectfully submitted,

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June 5, 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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY AND THE STATE OF NEW YORK REQUEST FOR RECUSAL AND, ALTERNATIVELY, MOTION FOR DISQUALIFICATION OF CHAIRMAN PALLADINO, dated June 5, 1984, have been served to the following this 6th day of June 1984 by U.S. mail, first class, except that some are being served by hand (when indicated by one asterisk), and some by Federal Express (when indicated by two asterisks).

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY AND STATE OF NEW YORK MOTION FOR DISQUALIFICATION OF JUDGES MILLER, BRIGHT, AND JOHNSON, dated June 21, 1984, have been served on the following this 21st day of June 1984 by U.S. mail, first class; by hand when indicated by one asterisk; and by Federal Express when indicated by two asterisks.

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