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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

BEFORE THE COMMISSION

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OFFICE OF SECRETARY
DOCKETING & SERVICE

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

PETITIONERS' OPPOSITION TO
NUCLEAR REGULATORY COMMISSION STAFF
RECOMMENDATION FOR APPROVAL OF LICENSE TRANSFER

Petitioners Shoreham-Wading River Central School District ("School District") and Scientists and Engineers for Secure Energy, Inc. ("SE_2") oppose the Nuclear Regulatory Commission Staff ("Staff") recommendation for the Nuclear Regulatory Commission ("NRC" or "Commission") to approve the issuance of the Shoreham-Nuclear Power Station ("Shoreham") license transfer to the Long Island Power Authority ("LIPA") as presented in SECY-92-041, Subject: Shoreham Nuclear Power Station License Transfer (February 6, 1992) ("SECY-92-041") for reasons previously presented to the Staff, the Atomic Safety and Licensing Board and the Commission itself, and for the reasons additionally set forth herein.

Initially, Petitioners note the legal fragility of several of the Staff's premises for recommending license transfer. First, the Staff recommends transfer of nothing more than a possession only license ("POL") to LIPA. However, the

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validity of that NRC license is currently under review by the U.S. Court of Appeals for the District of Columbia Circuit where oral argument was held on February 7, 1992 (and a decision is expected shortly) and in the hearing process before this Commission. If the court should vacate that licensing action on the basis of anyone of the several Atomic Energy Act ("AEA") or National Environmental Policy Act ("NEPA") violations asserted by Petitioners or the Commission's licensing process should result in denial of the POL, the Commission would find itself with LIPA as a surely unqualified reactor operating licensee. See SECY-92-041 at 2.

Second, another necessary premise of the Staff recommendation is the adequacy of the decommissioning funding assurance provisions approved by exemption to this Commission's rules. SECY-92-041 at 3-4. However, that exemption and its accompanying environmental assessment are currently being challenged by Petitioners in the United States Court of Appeals for the Second Circuit where briefing will be completed by March 31, 1992 and oral argument is scheduled for the end of April 1992 or shortly thereafter, only a little over two months from now.

Third, the Staff recommendation is most fundamentally premised upon the availability of the Sholly Procedures. SECY-92-041 at 4 (". . . nothing in the submissions of the Petitioners affects the proposed no significant hazards consideration determination."). However, as Petitioners have previously pointed out, the Sholly Procedures are only available for

approval of (a) "amendments" to (b) "operating licenses." See 42 U.S.C. § 2239(a)(2)(A) (1988). A license transfer is not an "amendment to a license" and a "possession only license" obviously is not an "operating license." See 42 U.S.C. § 2239(a)(1) (1988) (treating "amending" and "transfer" as distinct actions). The use of the Sholly Procedures require that the action both be an amendment and that it affect an operating license. If either condition is absent, the Sholly Procedures are not available. Here both conditions are absent.

Fourth, until the Commission has made a final decision on whether to approve, modify or reject the proposed decommissioning plan (SECY-92-041 at 5-6), it would be premature to approve a transfer of Shoreham to LIPA because LIPA is allowed only to decommission Shoreham as a matter of New York State law. See New York Public Authorities Law §§ 1020-t & 1020-h subd. 9 (McKinney's 1991). Transfer prior to approval of a decommissioning plan could foreclose the Commission's discretion to reject decommissioning and, thus, would be arbitrary, capricious and an abuse of discretion under the Atomic Energy Act ("AEA") and would constitute an impermissible segmentation of the NRC's National Environmental Policy Act ("NEPA") responsibilities.

Fifth, the Staff is asking this Commission to implicitly make a finding of New York State Law that LIPA continues to exist. SECY-92-041 at 5. Such a determination is clearly beyond the competence of the Staff to advise on and the

Commission to determine, and equally as clearly is within the power and the burden of the applicant LIPA to provide the Commission at the threshold of demonstrating its suitability to become a Commission licensee. As Petitioners have previously noted, the Commission should be extraordinarily wary of LIPA's demonstrated reluctance to pursue the obvious, necessary and relatively simple action in state court to resolve this issue.1/

1/ The materials previously submitted to the Commission by LIPA demonstrate that Public Authorities Law § 2828 was intended to automatically terminate any Authority or Commission which was not a "going concern" at the end of five years after its authorization. LIPA is clearly not a "going concern."

Although LIPA referred to the appropriate section of the State Commission's report, it missed the point. Temporary State Commission on Coordination of State Activities, Staff Report on Public Authorities Under New York State, 100-09 (March 21, 1956). That report focused on the need for the Authority to have become a "going concern" by the end of five years: "Obviously there is no purpose in the State permitting the indefinite continuation of an authority merely because it owes the State or a local government for monies advanced to it. If the authority is not actually operative, it will produce no revenue and will in all likelihood have no way of repaying such advances." Id. at 105.

It is almost too obvious to state that LIPA produces "no revenue and will in all likelihood have no way of repaying such advances." The question as to LIPA's continued existence cannot be answered merely by an inquiry into whether it has some sort of liabilities but requires a broader inquiry into the issue of whether it is a "going concern." It is not.

The United States Supreme Court first acknowledged the concept of "going concern" in several utility ratemaking cases. E.g., Des Moines Gas Co. v. City of Des Moines, 238 U.S. 153, 165 (1915) (stating existence of such quality was "self-evident"). In Los Angeles Gas & Electric Corp. v. Railroad Comm'n of Cal., the Court classified this quality in an ongoing business as "going value" and distinguished it from goodwill as follows:

> [T]here is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced[;] this element of value is "a property right" which should be considered "in determining the value of the property

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> upon which the owner has a right to make a fair return". . . . The going value thus recognized is not to be confused with good will[]. . . . The concept of going value . . . does not give license to mere speculation; it calls for consideration of the history and circumstances of the particular enterprise, and attempts at precise definition have been avoided.

Los Angeles Gas & Electric Corp. v. Railroad Comm'n of Cal., 289 U.S. 287, 313 (1933) (emphasis added, citations omitted); see also 38 C.J.S. Gas § 33 (discussing going value in context of utility rate setting).

Most tax cases use the term "going concern" value to describe "the additional element of value [that] attaches to property by reason of its existence as an integral part of a going concern." See VGS Corp. v. Commissioner, 68 T.C. 563, 591 (1977) (emphasis added); accord UFE, Inc. v. Commissioner, 92 T.C. 1314, 1323 (1989); Banc One Corp. v. Commissioner, 84 T.C. 476 (1985); Black Industries v. Commissioner, 38 T.C.M. (CCH) 242, 253 (1979); see also Cross, 209-4th T.M., Purchase Price Allocations and Amortization of Intangibles, at A-19 (referring to this definition of "going concern" value as "classic definition"). "Going concern" value is the "amount of enhanced value associated with assets because those assets are combined in an on-going business." See Goodman v. United States, 81-1 USTC ¶ 9375, at 87,009, 87,012 (E.D. Mich. 1981) (citing Northern Natural Gas Co., 470 F.2d at 1109). As such, "going concern" value usually refers to "the ability of [an] acquired business to generate sales without any interruption because of [a] take-over." Winn-Dixie Montgomery, Inc. v. United States, 444 F.2d 677, 685 n.12 (5th Cir. 1971); accord UFE, Inc., 92 T.C. at 1323; Illinois Cereal Mills, Inc. v. Commissioner, 46 T.C.M. (CCH) 1001, 1023 (1983), aff'd, 789 F.2d 1234 (7th Cir. 1986), cert. denied, 107 S. Ct. 600 (1986); Computing & Software, Inc. v. Commissioner, 64 T.C. 223, 234 n.10 (1975).

The Tax Court listed six factors that one considers in determining whether "going concern" value exists. In essence, these factors address whether a business has the requisite continuity of function discussed in Winn-Dixie Montgomery, Inc. These include whether there exists (a) a network of regular customers, (b) an experienced staff, (c) an established routine for supplying a product or service, (d) a product ready for sale, (e) equipment ready for immediate use, and (f) continuation of a longstanding business under the same or similar name and in the same community. Fong v. Commissioner, 48 T.C.M. (CCH) 689, 720 (1984), cert. denied, 108 S. Ct. 159 (1987); see Concord Control,

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Given these compounded uncertainties and for the additional reasons expressed below, Petitioners suggest that it would be arbitrary, capricious and an abuse of discretion in violation of the Administrative Procedure Act as well as inconsistent with the public health and safety and the national defense and security in violation of the AEA and also violative of the requirements of NEPA for the Commission to approve the Staff recommendation in SECY-92-041 (at least at this time).

Rather than accepting the Staff's invitation to put a brick roof on this house of cards, the Commission should return the matter to the Staff to await Staff resolution of those issues within its competence, LIPA resolution of those issues within it capability and obligations, Atomic Safety and Licensing Board resolution of the pending petitions, and judicial resolution of those matters pending in the courts. There is simply no reason to rush headlong into a decision based on such uncertain premises.[2/]

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Inc. v. Commissioner, 80-1 USTC ¶ 9248 (6th Cir. 1980); Computing & Software, Inc., 64 T.C. at 235; see also Cross, 209-4th T.M., Purchase Price Allocations and Amortization of Intangibles, at A-19 (quoting Fong). LIPA possesses not a single one of the attributes of a "going concern."

2/ These five uncertainties are really "bundles" of uncertainties where anyone of a number of subsidiary issues could result in judicial voiding of the Commission's order. However, even if one treats each one of these "bundles" as a single event and considers the likelihood of each "bundle" surviving judicial review as being 75%, the likelihood of all five bundles surviving judicial review (without addressing the other issues discussed herein) is less than 25% ($0.75^5 = 0.237$). To achieve even a 50%
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THE ENVIRONMENTAL ASSESSMENT VIOLATES THE COMMISSION'S NEPA RESPONSIBILITIES.

The Staff provides an environmental assessment ("EA") of only 39 text lines as an attachment to SECY-92-041 without having sought the participation of any Federal or State agency or the public, without having provided a draft finding of no significant impact ("FONSI"), without publishing such a draft in the Federal Register, without allowing 30 days for comment upon such draft finding and without allowing the final FONSI to be made at the conclusion of the hearing process. See 10 C.F.R. §§ 51.33(b)(ii) & (c) and 51.34(b) (1991). That EA openly admits that the Staff "did not consult other agencies or persons." EA at 3.

Issuance of this EA would be a total violation of the NRC's obligations as to the content and procedure for issuance of an EA under NEPA and the CEQ and NRC regulations issued pursuant thereto. E.g., Sierra Club v. Hodel, 848 F.2d 1068, 1092-97 (10th Cir. 1988).

First, both the CEQ and NRC regulations recognize that the EA must contain a "list of agencies and persons consulted" 40 C.F.R. § 1508.9(b) (CEQ); 10 C.F.R. § 51.30(a)(2)(1991) (NRC). This is recognition of the obligation to consult which is stated clearly in the CEQ regulations: "The agency shall involve

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likelihood of judicial affirmation on all five bundles, the individual likelihood of affirmance would have exceed 87%.

environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments . . . ." 40 C.F.R. § 1501.4(b); see also 40 C.F.R. §§ 1506.2 & 1506.6; Fritiofson v. Alexander, 772 F.2d 1225, 1236 (5th Cir. 1985) ("Before preparing an EA [the agency] must consult with other federal agencies."). The NRC's own regulations also explicitly recognize this obligation at least in the context of a draft FONSI. 10 C.F.R. § 51.122 (1991); see also, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18030 (March 23, 1981) ("Forty Questions").

The NRC regulations recognize that the EA must contain a "brief discussion" of "the need for the proposed action", "alternatives as required by § 102(2)(E) of NEPA", and the "environmental impacts of the proposed action." 10 C.F.R. § 51.30(a)(1) (1991). The CEQ's regulations further describe the document as "a concise public document" which will "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). The CEQ has determined that the concept of a "brief" or "concise public document" indicates that "the length of EAs [should be] not more than approximately 10-15 pages . . . to avoid undue length, the EA may incorporate by reference background data to support its concise discussion of the proposal and relevant issues." Forty Questions, 46 Fed. Reg. at 18037, cols 1 & 2. The CEQ further recognizes that "lengthy EAs [are appropriate] in unusual cases

. . . . in most cases, however, a lengthy EA indicates that an EIS is needed." Id. None of this guidance sanctions the conclusory EA of 39 lines proffered by the Staff without reference to any environmental document except for a mere mention of the "Final Environmental Statement for the Shoreham Nuclear Power Station." EA at 3. "Simple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." Foundation on Economic Trends v. Heckler, 756 F.2d 143, 154 (D.C. Cir. 1985).

Further, in discussing the "need for the proposed action" the Staff refers only to an Agreement between New York State and LILCO. Such an agreement does not demonstrate any "need" binding on this Commission. Also, given the pendency of the proposal pursuant to 10 C.F.R. § 50.82, it is at least disingenuous to state that there "will be no physical changes to the Shoreham facility associated with this amendment . . . . " EA at 2 (emphasis added). And the fact that SECY-92-041 and its attachments are replete with references to the pending decommissioning proposal demonstrates that the scope of the NEPA review is being illegally segmented. 40 C.F.R. § 1508.25.

The EA is also inadequate in limiting its consideration to the "direct environmental impacts of LIPA activities under the license transfer." Id. (emphasis added); see 40 C.F.R. § 1508.8 (definition of "effects") adopted at 10 C.F.R. § 51.14(b) (1991).

The EA is also incorrect in concluding "that this action would result in no radiological or non-radiological

environmental impact" since LIPA is constrained by its charter to decommission Shoreham, which activity will have both radiological and non-radiological effects. Cumulative impacts must be addressed. 40 C.F.R. § 1508.7.

Even within its own terms, the EA is incorrect in concluding that there would be no "radiological . . . environmental impact" since the proposed technical specifications, among other things, would significantly reduce the degree of NRC supervision and monitoring of activities at Shoreham relegating such activities to LIPA, an organization without any prior experience in NRC activities. E.g., Proposed Safety Evaluation at ¶ 3.2.11. Such lessening of NRC supervision will cause a per se decrease in assurance of the public health and safety and a concomitant increase in the public's radiological risks from the conduct of activities at Shoreham.

Also, the conclusion that "any alternatives to the amendment will have either no environmental impact or greater environmental impact" is not only totally unsupported by any intelligible discussion or reference, but also unsupportable. Foundation on Economic Trends, 756 F.2d at 154. For example, if one accepts the fact that the only justification for the license transfer is the existence of the proposal to decommission, consideration of this amendment implicitly requires a consideration of the impacts of decommissioning Shoreham before it has reached the end of its useful life by virtue of age or accident. Those impacts are quite significant for the

socioeconomic and other environmental interests of Petitioners and those whom they represent, as well as all persons on Long Island. See, e.g., New York State Public Service Commission Cases 90-E-1185 & 91-G-0112, Opinion No. 91-25 (November 26, 1991) (Commissioner James McFarland, dissenting) (Attachment 1). Such direct and indirect impacts include impacts on air quality, traffic, transportation accidents, employment, the reliability of the LILCO electric generating system, the availability of Shoreham as a useful resource for the future if not immediately, etc.

Moreover, as to the "alternative use of resources," the mere reference to the "Final Environmental Statement" would be inadequate even if that document were current rather than 15 years old. Much has changed on Long Island, in the United States, and in the world in the last 15 years. There needs to be a fresh examination of the need for power, alternative sources of power, the issues of global warming, the greenhouse effect, and air pollution (especially due to the evolution of the Clean Air Act), as well as other matters referred to above. 40 C.F.R. § 1508.8. And the required discussion of mitigation measures is totally absent. 40 C.F.R. § 1508.20.

THE FONSI IS INADEQUATE AND ILLEGAL.

The FONSI is a final FONSI without the preparation of a draft FONSI and opportunity for comment required pursuant to the NRC and CEQ regulations in these circumstances. 10 C.F.R. §§

51.33 & 51.34; 40 C.F.R. § 1501.4(e)(2). CEQ has defined the circumstances requiring a draft FONSI as being not only when the "nature of the proposed action is one without precedent," but also where the "proposal is a borderline case" or "unusual case," "a new kind of action," or "precedent setting case" or "when their is either scientific or public controversy over the proposal." 40 Questions, 46 Fed. Reg. at 18037 col. 3. The proposal in question here meets not only one but at least six of those seven standards which require independently a draft FONSI and an opportunity for public comment, pursuant to both NRC and CEQ regulations.

And further, this is an instance where the proposed action is subject to a hearing under the regulations in subpart G of Part 2 of the Commission's regulations, thus requiring "the appropriate NRC Staff Director [to] prepare a proposed finding of no significant impact which may be subject to modification as result or review and decision as appropriate to the nature and scope of the proceeding." 10 C.F.R. § 51.34(b) (emphasis added). In other words, independent of the other NRC and CEQ regulations requiring a draft FONSI and opportunity for public comment rather than the Staff final FONSI, NRC Section 51.34 explicitly forecloses the option for a final FONSI in a proposal subject to hearing, such as this one. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-04, 33 NRC 233, 236 & n.1 (April 3, 1991); Vermont Yankee Nuclear Power Corp.

(Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440 (October 11, 1988).

LIPA IS NOT FINANCIALLY QUALIFIED.

The Staff addresses LIPA's financial qualifications briefly in the SECY Paper (SECY-92-041 at 3-4) and somewhat greater detail in the Proposed Safety Evaluation at ¶ 3.1.4. The Staff premises its assurance of LIPA's financial qualifications on the New York Public Service Commission's approval of the Site Cooperation and Reimbursement Agreement ("Reimbursement Agreement"), and an April 11, 1991 letter providing, in the Staff's characterization "the PSC's commitment . . . to allow recovery of Shoreham-related costs . . . ." SECY-92-041 at 3. However, things are not quite so simple as they may seem.

First, LIPA and LILCO have candidly admitted to the Staff that the NYPSC can revoke its approval of the Reimbursement Agreement at any time. Transcript of Meeting Between NRC and LILCO/LIPA/NYPA at 137 (February 13, 1991). Second, the Reimbursement Agreement is an 82 page contract, in which, among other things, LILCO agrees to reimburse LIPA only for those portions of LIPA's salaries devoted to Shoreham, and only for those LIPA "administrative and general costs that are directly related to Shoreham." Reimbursement Agreement at ¶ 3.9. Thus, LIPA has no source for funds to cover its salary, general and administrative expenses which are not "directly related to Shoreham." In past years the amount of LIPA salary, general and

administrative expenses "directly related to Shoreham" has ranged from 12.6% to 42.8% of total annual LIPA expenditures for salary, general and administrative costs.[3/] The Staff does not address any means of LIPA providing for the balance of 60%-90% of those costs. Of course, one method would be by a radical reduction of LIPA's staff. However, if such a reduction were to take place, it is doubtful that the Staff could maintain its position that LIPA has adequate "management qualifications."

And while the Reimbursement Agreement states that LILCO "will provide assurance (either by cash payment, letter of credit, surety bond, or other method acceptable to the NRC or other governmental entity) that sufficient funds will be or are available to fund payment of LILCO costs in connection with the Shoreham-related activities." (Reimbursement Agreement ¶ 3.12),

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3/ For example, in the year ended March 31, 1991, LIPA had $778,857 of payroll general and administrative costs ("management costs") which $445,381 were not reimbursable as directly related to Shoreham or 57.2% of its total such costs. Appendix to Joint Supplemental Petition in the License Transfer Proceeding at 70 (November 18, 1991). For that year, it also had an additional $824,370 of consulting costs which were non-reimbursable by LILCO. Id. In the year ended March 31, 1990, LIPA received reimbursement for current year management costs attributable to Shoreham of $370,061 and for "prior years" management costs attributable to Shoreham of $595,018. However, its total consultant salary and general and administrative for that year were $1,338,656. Id. at 41. Thus, only 27.6% of LIPA's management costs were recoupable from LILCO as cost directly related Shoreham in 1990. In the year ended March 31, 1989, LIPA's management costs were $1,948,693. Id. at 30. And, in the period from its conception through March 31, 1988 LIPA had management expenses of $7,153,002. Id. at 20. If one treats the reimbursement for "prior years" received in 1990 and 1991 ($595,018 and $549,544, respectively) as being for 1988 and 1989, their sum ($1,144,562) constitutes only 12.6% of the total LIPA management costs for those periods. Id. at 30.

such assurance is not offered with respect to "funds for the cost reimbursement fund and the LIPA reimbursement fund." Reimbursement Agreement at ¶ 3.11.

Also, the letter of April 11, 1991 which the Staff relied on is not a letter from the Commission itself or any Commissioner, but from the PSC General Counsel which refers to a decommissioning "current cost estimate of approximately $186 million, spread over a 27-month period." This is hardly a commitment by the NYPSC. And to the extent that it may be possible to rely on the General Counsel's assurances, which Petitioners submits is not possible, this is a very carefully circumscribed assurance, especially considering that the decommissioning plan has not yet been approved and, therefore, its cost cannot be reasonably ascertained.

Finally, in the recently concluded Public Service Commission proceeding referred to above, LIPA actually attacked aspects of LILCO's proposed recovery of decommissioning costs incurred and to be incurred, as well as a wide range of other proposals with the overall objective of reducing LILCO's income and hence its financial health and ability to pay for decommissioning.[4/] The Commission simply cannot have confidence

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4/ The Commission should also be aware that Mr. Richard M. Kessel is not only the Chairman of LIPA, but is also Executive Director of the New York State Consumer Protection Board ("NYSCPB"). Mr. Kessel has both LIPA and the NYSCPB attacking LILCO in NYSPSC ratemaking proceedings. An example of Mr. Kessel's attacks on LILCO while "wearing both hats" is the attached direct testimony (Attachment 2) which Mr. Kessel seeks

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in an arrangement were it cannot be assured of LIPA's ability to support itself and where LIPA relies on LILCO but vigorously attacks LILCO's claims in ratemaking proceedings. While LIPA is biting the hand that feeds it before the New York PSC, LIPA is assuring this Commission that it is a healthy hand.

The Commission cannot have any confidence in the assurances offered by LIPA and the Staff.

THE PROPOSED SAFETY EVALUATION IS ALSO INADEQUATE IN OTHER RESPECTS.

For example, it proffers a conclusion that the "lines of authority . . . for the maintenance of Shoreham in its present condition and for the eventual decommissioning of the plant are acceptable." Proposed Safety Evaluation at ¶ 3.1.5(2). However, it does not discuss those "lines of authority." In fact, the lines of authority are in conflict with LIPA and the New York Power Authority ("NYPA") allowed to proceed by mutual veto. Second, while the proposed safety evaluation makes many findings relating to the "eventual decommissioning of the plant," it pretends in other sections that the proposed license transfer is not related to decommissioning. E.g., Proposed Safety Evaluation at p.17. Moreover, the "discussion" of LIPA's management and technical qualifications is at most conclusory without giving the

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to have the NYSPSC reduce the rate adjustments sought by LILCO (including adjustments related to decommissioning) by $157.3 million.

Commission sufficient factual information on which to base an independent judgment.

In addition, the Staff would require the Commission to prejudge Petitioners' petition to intervene and request for hearing before that petition has been supplemented and filled out in the hearing process. See Proposed Safety Evaluation at 15-19.

Finally, the bare assertion that "the State of New York was contacted about the proposed license transfer. The State had no comments." does not allow the Commission to make an independent judgment as to whether the appropriate state institutions and agencies were in fact contacted. See Proposed Safety Evaluation at p.19.

A SIMPLIFIED ADMINISTRATIVE STAY TO ALLOW JUDICIAL CONSIDERATION OF A STAY PENDING JUDICIAL REVIEW MAY BE APPROPRIATE.

In their motion for stay, the School District and SE_2 sought a stay of license transfer pending completion of hearings before the Commission and, regardless of whether the Commission granted that stay, sought an administrative stay for a period of time after the issuance of any final order in this proceeding to allow Petitioners to seek a judicial stay pending judicial review of such final order. Motion for Stay of License Transfer Pending Final Order on Petition to Intervene and Request for Hearing and for Additional or Alternative Stay at 1-2 & n.1 (December 17, 1991). The administrative stay sought was identical to the stay

previously granted by the Commission in the possession only license proceeding, that is, a stay of ten working days after the date of publication of the final order in the Federal Register to allow for the filing of a petition of review and stay request in the appropriate court, and an additional stay of ten working days (for a total of 20 working days) in the event Petitioners did file such petition and motion within the allowed time to allow for its orderly consideration by the court. Id.

In opposing Petitioners' principal motion for stay, LIPA explicitly said that it did "not object to Petitioners' suggestion concerning timing provisions related to judicial review," referencing Petitioners' footnote 1. Opposition of the Long Island Power Authority to Motion for Stay of License Transfer and to Suggestion of Mootness, at 20 n.17 (December 30, 1991). In its opposition to Petitioners' motion, the Long Island Lighting Company ("LILCO") similarly stated that it did "not object to a reasonable administrative stay upon the license transfer amendment being issued" without any indication that the particular stay suggested by Petitioners was unreasonable or that another period of time was more reasonable. LILCO's Opposition to Petitioners' Request for Stay and Suggestion of Mootness, at 2 (December 30, 1991). And finally, the Staff represented that it did "not object to an administrative stay on transfer when issued to enable Petitioners to seek a judicial stay. Such action was taken in CLI-91-8, 33 NRC 461, 470-71 (1991), with respect to issuance of the POL." NRC Staff Response to Petitioners' Motion

for Stay and Suggestion of Mootness, at 8 n.17. Since the Staff had explicit reference to the Commission's precedent for granting the precise form and period of stay requested by Petitioners without suggestion of modification, this can only be read as consent to the stay requested.

However, this was not the end of the matter. On January 31, 1992, counsel for LILCO and LIPA presented a joint letter to the Commission which in effect tried to revoke their prior consent to the stay requested by Petitioners and suggested a stay of "no longer than a total of 12 calendar days; 5 days for SWR/SE_2 to request a stay, and the balance of time for response and decision by the Court. The goal would be to permit the license transfer to take effect, unless stayed by the Court of Appeals, by late February." LILCO/LIPA Letter to NRC Commissioners at 2-3 (January 31, 1992) (footnote omitted).

And then two weeks later on February 14, 1992, LILCO and LIPA submitted yet another joint letter to the Commissioners now urging that "the Commission's approval be granted and made effective during the month of February" regardless of what time Petitioners might have to seek a judicial stay or what time the court might have to reasonably consider such a stay. LILCO/LIPA Joint Letter to NRC Commissioners at 1 (February 14, 1992). The basis for this second urgent request is (a) an alleged interpretation of New York State law (b) by School District counsel (c) appearing in a newspaper (d) which interpretation

LILCO and LIPA avowedly reject ("LILCO and LIPA dispute this assertion"). Id. at 1-2.

The basis urged for precipitous action by this Commission by LILCO and LIPA must be rejected for four reasons. First and foremost, the Commission is forbidden to consider economics in the conduct of its responsibilities under the Atomic Energy Act. See, e.g., Power Reactor Development Co. v. International Union, 367 U.S. 396, 415, 81 S.Ct. 1529, 1538-39 (1961); Union of Concerned Scientists v. U.S.N.R.C., 824 F.2d 108 (D.C. Cir. 1987). Second, it is specious for LILCO and LIPA counsel to urge the Commission to act on the basis of a legal theory which those counsel believe to be invalid. Third, both letters indicate that the lion's share of the taxes in question are for the benefit of the County of Suffolk and the Town of Brookhaven; assuming that those jurisdictions require a fixed amount of tax income, it should be a matter of indifference to their citizens whether they pay that amount indirectly through their electric rates or directly by increased county and town tax rates. And fourth, since those jurisdictions bear the burdens of Shoreham, why shouldn't they have the normally expected benefits?

In any event, counsel for LILCO and LIPA point to no circumstance that did not exist on December 30, 1991, when they originally gave consent to the administrative stay requested by Petitioners. They should not now be allowed to change their position now.

However, LILCO and LIPA are not the only ones who have changed their position. Although the Staff originally consented to the form and length of stay requested by Petitioners, the proposed license amendment package (attached to SECY-92-041) indicates that the Staff now would prefer that the stay become effective within thirty (30) days from date of issuance. Proposed Amendment to Facility Operating License at ¶ 3. The Staff provides no rationale for this change.[5/] However, since 30 calendar days is roughly equivalent to 20 working days, Petitioners would find the Staff recommendation basically acceptable with one modification. The modification relates to assurance of notice to the public (including Petitioners) of issuance of any final order and the Commission's rationale therefore. Petitioners suggest that the 30 days should not start to run either (a) until after 5 days after mailing of the Commission's decision to all parties, similar to the normal allowance made for notice pursuant to the Commission's rules (10 C.F.R. § 2.710), or (b) until after notice of the decision is published in the Federal Register, that is, the same starting point as the precedent in the possession only license proceeding indicates. Petitioners suggest that such formal notice requirements are very important under the Administrative Procedure Act, as this Commission has been instructed by the

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5/ The SECY Paper itself does not even disclose this change of position and the relevant footnote may be somewhat misleading. SECY-92-041 at 5.

Courts of Appeals previously. E.g., Public Citizen v. U.S.N.R.C., 901 F.2d 147, 153 (1990).

CONCLUSION

WHEREFORE, Petitioners School District and SE_2 respectfully urge the Commission to reject the Staff's recommendation in SECY-92-041 and remand the matter for consideration in the normal licensing proceeding structure for the reasons stated above, and to allow a stay of 20 working days or 30 calendar days after adequate notice of any final order in this matter has been furnished to the public (including Petitioners).

Respectfully submitted

February 20, 1992

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ATTACHMENT 1

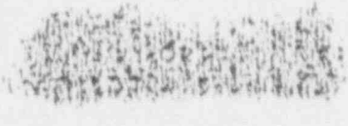
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

OPINION NO. 91- 25

CASE 90-E-1185 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Long Island Lighting Company for Electric Service.

CASE 91-G-0112 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Long Island Lighting Company for Gas Service.

OPINION AND ORDER DETERMINING
REVENUE REQUIREMENT AND RATE DESIGN



Issued and Effective: November 26, 1991

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 90-E-1185 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Long Island Lighting Company for Electric Service.

COMMISSIONER JAMES T. McFARLAND, dissenting:

I dissent from yet another in this decade-long schedule of electric rate increases developed by this Commission for the Long Island Lighting Company. This $73 million (4.15%) increase reinforces the dubious distinction LILCO ratepayers have of paying the highest electric utility rates in the continental United States. And they are gaining on the ratepayers in Alaska and Hawaii.

Sad to say, this 3 year rate increase (4.1% and 4% in the second and third years) is just the first of 4.5% to 5% "target" rate increases scheduled for the next 8 years, beginning December 1, 1991.

Part of these increases are to pay LILCO what it would have earned if Shoreham had opened. In addition, $47.3 million in earnings on the Shoreham investment were "deferred". Over the eight year period, LILCO will continue to receive the targeted rate increases with the deferred amounts kicking into rates as "silent increases" from 1994 till 1999. The pain goes on. It

will go on for 40 years - well into the next century, until the $4.038 billion Shoreham asset is fully depreciated.[1]

This was all programmed in the Settlement foisted on Long Island ratepayers through the efforts of Governor Mario M. Cuomo and Richard Kessel, his Executive Director of the Consumer Protection Board (some consumer protection...), both of whom were vigorously aided and abetted in their close-Shoreham zeal by all of this Commission, this writer excepted.

It is worth remembering that when Shoreham had finally received its license from the Nuclear Regulatory Commission, the Governor had not yet gotten LILCO to accept his settlement proposal. The plant and its personnel had been fully evaluated and tested and the operation was then ready to go full-steam ahead. An approved evacuation plan for the ten mile zone of the plant was also in place. So, LILCO was really within a hair's breadth of opening this nuclear power plant. Furthermore, its 809MW capacity was sorely needed to avert an energy crisis on the Island.

One would have thought that at this juncture, the Governor and Suffolk County and the PSC would have thrown in the towel and ceased their efforts to win approval of the Governor's

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1. $4.038 billion is the agreed-upon so-called prudent cost of constructing the Shoreham nuclear power plant. (See Footnote 4).

Settlement Agreement.[2] Instead, this Commission, determined to deliver Shoreham to the Governor at any cost, desperately kept pressuring LILCO to settle, by first delaying and then denying the modest rate increases sorely needed by the company just to keep operating.

When the Commission reached a point when it could legally delay no further, a modest bit of rate relief was finally granted. But it was accompanied by an ominous condition: "open Shoreham and this small rate increase is revoked."

Faced with the reality that it would literally be out of cash in a matter of months, too little time within which to litigate the legality of the Commission's unprecedented high handedness, LILCO meekly signed the agreement to close Shoreham. A dark day indeed for Long Island.

As a longtime observer of the governmental scene in New York State, I have never seen a more disappointing failure of responsible government at all levels than was involved in this politically inspired campaign to close Shoreham.

A completed, ready-to-go power plant whose energy was badly needed was going to be closed, not because it was unsafe,[3]

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2. An agreement the Legislature constantly refused to endorse.
3. There was never a finding or even any allegation in any of the proceedings of this Commission or in any of the reports and recommendations of the ALJ that Shoreham was not a safe facility.

not because it was expensive [4] but because it was politically expedient to do so. Its closure satisfied a Governor looking to politically cash-in on a national anti-nuclear mentality, and mollify some very vocal individuals, whose principal motivation was that they were simply vengeful and venomous toward LILCO and its management. This state of mind apparently grew out of enormous antagonism as a consequence of Hurricane Gloria, together with years of what some customers perceived to be company arrogance and incompetence.

There was also a small but very vocal minority of Long Islanders who were scared to death of nuclear power, as well as individuals and organizations, both in and out of government whose political agenda included opposition to an expansion of nuclear power.

It satisfied a PSC majority eager to do the Governor's will as well as accommodate their own views. And it satisfied LILCO and its stockholders, of course. The latter had been

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4. It has been reasonably estimated that the continued opposition by the Governor in Suffolk County to licensing of Shoreham delayed a resolution of the Company's finances for such a long period of time that it added $1.3 billion in unnecessary interest to the cost of the plant. Also, Suffolk County billed its beleaguered taxpayers at least $25 million for its legal costs in promoting opposition to Shoreham's licensing. This joint opposition, it should be noted, was only terminated when it was determined by the NRC not to be in good faith because the parties had concealed the report of an earlier satisfactory evacuation plan.

without dividends for 6 years. The settlement generously and speedily remedied that.

Unheard from, unfortunately, were the essentially unrepresented ratepayers who have to pay the price for this monumental folly. And what a price to pay!

In addition to paying the booked value of $4 billion for the plant, the ratepayers also are paying for the loss of 809MW of electric generation capacity and the cost of substitute power. This cost many more millions. In order to ensure adequate electricity supplies, LILCO contracted to purchase off-Island power at rates almost twice what it would have cost if Shoreham had come on line. They also had to pay for immediate expenditures of hundreds of millions of dollars to implement energy efficiency, conservation and energy demand control initiatives needed to avoid brownouts, blackouts and shortages. They financed the payment of almost $300 million in dividends due preferred stockholders. Additionally, instead of getting the energy from the plant for 40 years, they will be paying an estimated $200+ million for its premature decommissioning!

They also pay untold sums for the adverse effect on the Long Island economy caused by the record breaking, uncompetitive utility rates and they lost the taxes or in-lieu of taxes the plant would have generated. These are the "externalities" of the Shoreham closing.

Those who continue to take credit for the "peace" brought about by the settlement neglect to mention these and the other awesome burdens the Agreement placed on Long Islanders now and for generations to come.

The consequences of the Agreement were also to deny Long Islanders, then and now almost totally dependent on fossil fuel generation, the benefits of energy independence. With a nuclear powered Shoreham, they would have enjoyed an alternate fuel. They would have had some insurance and insulation against the effects of fluctuating oil prices, and oil politics. Shoreham also would have averted the air pollution and global warming caused by LILCO's exclusive use of fossil fuels for generating energy.

It did not have to be that way. If the Governor, this Commission, and the Legislature would have followed my repeated advice and suggestions, the New York Power Authority (NYPA) could have taken over and operated Shoreham. Long Islanders would have enjoyed the benefit of the economies afforded by NYPA ownership and operation. It was the only area of the state not to directly enjoy those advantages. The Governor controlled NYPA. He could have at least directed NYPA to update a Shoreham-takeover scenario that I understand had been developed under previous NYPA leadership. My requests were ignored.

However, with NYPA exploiting its tax-exempt financing strengths and its innovative financing techniques, Long Islanders would now be enjoying competitive electric energy rates instead

of confiscatory ones. Low priced NYPA energy could be advertised as an economic advantage for all Long Islanders. That would certainly be a help in these difficult times for that area's economy.

But no, that would have possibly derailed the single-minded objective of bringing down Shoreham and almost bringing down LILCO in the process. It was, in a word, government at its worst.

With respect to this rate proceeding itself, I object to and dissent from the payment of an up to 20 basis point financial incentive to LILCO for carrying out energy conservation and efficiency initiatives. Given the area's energy situation, the company should be pursuing these objectives without the need for expensive financial inducements. Given the record breaking rates this Settlement has spawned, the rate-payer deserves a break.

Similarly, I disagree with and dissent from the granting of a 50-50 sharing by the company with the ratepayers of any earnings in excess of the allowed rate of return. The ratepayers and the Long Island economy should not be made to endure yet another hit in the nature of a reward to the company for properly managing its operations.

I also dissent from the establishment of a "revenue decoupling mechanism".It is a financial safety net for the company if its earnings are less than projected. Such a provision removes the incentive for the company to more

efficiently manage. Furthermore, it denies the ratepayers the benefit of revenues from whatever additional sales of electricity could be expected in a declining economy, and with customers shifting from electricity to gas. This is another "externality" produced by the notion that all increased energy sales are counter productive.

I must comment on the heavy financial burden on the ratepayers of these rate proceedings. Both the Department and the utility sustained millions of dollars in expenses. I believe a review is in order to determine how costs of these proceedings can be drastically reduced and their effectiveness maintained. The three year plan might help. So would eliminating the Long Island Power Authority (LIPA) as a statutory intervenor.[5] The Consumer Protection Board (CPB) is already authorized to participate and does so with increasing competence and credibility, I might add. Why should we have the duplication, especially with Mr. Kessel heading up both the CPB and LIPA agencies? And if it isn't duplication, why should we have the obvious conflict?

Every effort should also be made to eliminate the duplicative (or triplicative) and costly participation of

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5. This would save money to Long Islanders as taxpayers as well as ratepayers because they finance LIPA's activities. LIPA could still intervene on matters in which it had a specific interest.

Attorney General (AG) staff. The CPB has direct statutory responsibility for intervening in PSC proceedings. Why the AG too? How bad does the State budget have to be before action is taken to save the taxpayers LIPA's and AG's cost of redundant intervention? Do we need three watchdogs? (Or four, counting the Trial Staff of the Department of Public Service?) Can we afford them?

It is to be remembered that utility ratepayers pay for each and every cent of the cost incurred by the utilities, the PSC Staff and the CPB, as well as this Commission in these proceedings. The taxpayers foot the bill for LIPA and the Attorney General's involvement but the ratepayers are charged for the expense of giving notice to them and other marginally necessary intervenors; for the expenses involved in mailing, receiving, reading, processing, circulating and otherwise handling all the correspondence, including briefs; to say nothing of accommodating their testimony, cross-examination, motions, appeals, etc. Perhaps the Division of the Budget or the Legislative Commission on Expenditure Review should document the cost of these proceedings. Enormous savings can be made by making them less unwieldy, while at the same time protecting and promoting more efficiently the interests of all the parties, primarily the ratepayers, the payers of last resort.

CONCLUSION

While I shall continue to vigorously participate in LILCO proceedings in the interests of contributing to the promotion and protection of the interests of the ratepayers and the parties, I feel constrained nevertheless, to voice my continued dismay, disappointment and protest against the consequences of the Shoreham Settlement. I view this as an economic tragedy for Long Island and as one of the most insidious failures of responsible government in New York I have ever seen.

11/22/91

ATTACHMENT 2

STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

In The Matter Of

Proceeding on motion of the Commission as to the rates and charges of Long Island Lighting Company for electric and gas service

TESTIMONY AND EXHIBITS OF

RICHARD M. FESSEL

EXECUTIVE DIRECTOR OF THE

NEW YORK STATE CONSUMER PROTECTION BOARD

AND

CHAIRMAN OF THE

LONG ISLAND POWER AUTHORITY

DATED Albany, New York

May 22, 1991

NYS CONSUMER PROTECTION BOARD

99 WASHINGTON AVENUE

SUITE 1020

ALBANY, NEW YORK 12210

RICHARD M. KESSEL

Q. Please state your name, title and business address.

A. My name is Richard M. Kessel. I am Executive Director of the New York State Consumer Protection Board (CPB), 99 Washington Broadway, New York, New York 10007. I am also Chairman of the Long Island Power Authority (LIPA), 200 Garden City Plaza, Garden City, New York 11530. A summary of my credentials is presented in Exhibit_____(RMK-1).

Q. What is the purpose of your testimony?

A. I am recommending (1) reduction of LILCO's proposed $114 million (5.0%) rate increase in December 1991 to $64 million (2.8%) and (2) rejection of LILCO's request for authorization to book $108 million in addition of charges in the December 1991 - November 1992 rate year that would be collected from ratepayers in future years. By eliminating new deferred charges, the two additional years of rate increases proposed by LILCO -- 1999 and 2000 -- would be averted.

Q. The Nuclear Regulatory Commission (NRC) has indicated concern that LILCO have sufficient revenues for maintaining and decommissioning Shoreham. Do the CPB and LIPA recommendations meet the NRC's concerns?

A. Yes. The reductions in LILCO's proposed rates recommended by the CPB and LIPA correct overestimates of certain costs and eliminate other non-essential items. After accounting

for our adjustment, LILCO will have adequate revenues for providing utility service, financing its operations at a reasonable cost, and satisfying its obligations to the fund to maintain and decommission Shoreham.

Q. The CPB and LIPA testimonies focus only on the December 1991 - November 1992 rate year rather than the three year period (December 1991 - November 1994) discussed in LILCO's filing. Why are you taking this approach?

A. It is premature to set rates now through November 1994. A three year plan was appropriate in 1989, when LILCO faced a financial emergency. That is no longer the case. In 1989, LILCO's bond rating was below investment grade and the company had not paid preferred or common stock dividends for five years. Since then, LILCO has regained its investment grade rating, paid both current and accrued preferred stock dividends, and resumed paying common stock dividends. Thus, the situation today is far different than in 1989.

Q. Are your recommendations consistent with the LILCO rate plan specified by the Commission in Opinion No. 89-8, issued April 13, 1989?

A. Yes. LILCO was not "guaranteed" any specific rate increase following the first three years of the settlement under the Commission's rate plan. In fact, LILCO must fully

justify any rate increase it requests. Clearly, LILCO has not justified its proposals in this case.

The adjustments presented by the CPB and LIPA cut LILCO's rate hike request from 5 percent to 2.8 percent, and demonstrate that LILCO's proposal for adding two more years of increases to the PSC's rate plan is unwarranted.

Q. Please summarize the adjustments recommended by the CPB and LIPA.

A. The CPB and LIPA adjustments total $157.3 million. They are summarized in the following table:

Reduction in projected fuel costs	$50.3 million
Reduction in proposed profit allowance from 12.2 percent to 11.1 percent	$34.0 million
Reduction in projected property taxes	$19.2 million
Removal of charges related to unbilled revenues	$16.0 million
Reduction in research and development expenses and utility organization dues	$12.2 million
Reduction in insurance costs	$ 4.6 million
Other adjustments	$21.0 million
TOTAL	$157.3 million

Q. How should these adjustments be applied?

A. The CPB and LIPA adjustments should be applied first to

offset the $[illegible] million of new deferred charges LILCO seeks to book for December 1991 - November 1992 rate years, with the remaining $49.3 million used to reduce LILCO's proposed $114 million rate hike request. Accordingly, LILCO's December 1991 rate increase would be held to $64.7 million (2.8 percent) and no new deferred ratepayer charges would be recorded in the December 1991 - November 1992 rate year.

Q. What would you propose in the event not all of the CPB and LIPA adjustment are adopted?

A. If that were to happen, I would recommend limiting the December 1991 rate increase to $69 million (3.0%) and using the remaining CPB and LIPA adjustments to offset new deferred charges projected by LILCO.

Q. Conversely, what you would propose if the total of adjustments adopted by the Commission, based on the presentations of the CPB and LIPA, the Department of Public Service Staff and the Commission's own findings, exceed the adjustments recommended by the CPB and LIPA?

A. In that event, I would recommend the same procedure I am proposing for the CPB and LIPA adjustments. Accordingly, the adjustments would be applied first to offset the new deferred charges LILCO seeks to book for the December 1991-

November 1992 rate year, with the remainder used to finance the proposed December 1991 rate increase.

Q. Does this complete your testimony?

A. Yes.

***

Exhibit ___(RMX)

Richard M. Kessel

Mr. Kessel has been the CPB's Executive Director since January 1984. He also serves as Chairman of the Long Island Power Authority.

Mr. Kessel received a B.A. from New York University in 1971 and an M.A. in Political Science from Columbia University.

Mr. Kessel has been a consumer advocate for more than a decade. He has testified in several rate cases and was instrumental in convincing the Commission to issue a policy statement regarding the introduction of economic impact testimony in rate proceedings.

As the CPB's Executive Director, Mr. Kessel has participated in negotiations which resulted in 17 rate settlement agreements with New York State electric, gas and telephone companies.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION '92 FEB 20 P4:49

OFFICE OF SECRETARY
DOCKETING & SERVICE

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the Petitioners' Opposition to Nuclear Regulatory Commission Staff Recommendation for Approval of License Transfer in the above-captioned proceeding have been served on the following by hand, telecopy, or first-class mail, postage prepaid (as indicated below) on this 20th day of February, 1992:

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