LILCO, July 6, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

LILCO'S BRIEF IN SUPPORT OF THE ORDER OF JUDGES MILLER, BRIGHT AND JOHNSON DENYING THE SUFFOLK COUNTY/NEW YORK STATE MOTION TO DISQUALIFY THEM

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LILCO files this brief in support of the June 25, 1984 Order of the Atomic Safety and Licensing Board Denying Intervenors' Motion for Disqualification of Judges Miller, Bright and Johnson. That Order, which was referred to the Appeal Board automatically under 10 C.F.R. § 2.704(c) of the Commission's regulations, denied a June 21, 1984 motion1/ filed on behalf of Suffolk County and New York State urging disqualification of the entire Atomic Safety and Licensing Board in this proceeding (hereinafter, the "Licensing Board").

While the referral of the Miller Board motion is the only recusal/disqualification matter now pending before this Appeal

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1/ That motion had been filed earlier, on June 18, and had been rejected by the Licensing Board for failure to include the affidavit required by 10 C.F.R. § 2.704(c). The same day, June 19, the Appeal Board sum arily affirmed the Licensing Board's rejection of the June 18 filing. The current motion, accompanied by an affidavit, was filed June 21.

Board, it is part of a broader attack by Suffolk County and New York State, seeking also to effect the recusal of Chairman Palladino (Motion for Recusal or Disqualification filed June 6, 1984) and Chief Judge Cotter of the Atomic Safety and Licensing Board (Motion for Disqualification, with attachments, filed June 22, 1984).2/

The attack inherent in the Miller Board disqualification motion and in the other motions, is based on a series of procedural steps initiated by Chairman Palladino and other officials of the Commission with respect to the pace of litigation of LILCO's motion to load fuel and conduct low power testing at Shoreham. The purpose of these steps was to avert the prospect that the pace of that proceeding would itself predetermine the outcome -- i.e., that the proceeding would take so long that LILCO would literally be bankrupted during the process. The Suffolk County/New York State attack on those actions has come nearly three full months after them, and approximately two months after Suffolk County and New York State first raised accusations about them, albeit by improper means and in forums lacking jurisdiction.

2/ The motion to disqualify Chief Judge Cotter attaches copies of the motion to recuse Chairman Palladino and of an affidavit of Messrs. Brown, et al., which is also appended to the motion to disqualify Judges Miller, Bright and Johnson. On June 27, Mr. Lanpher, counsel for Suffolk County, sent a letter to Chairman Palladino, attaching the Brown, et al. affidavit and suggesting that the Staff decline Chairman Palladino's invitation to comment on the motion to disqualify him, because of the Staff's alleged involvement in the acts on whose basis the County and State sought his disqualification.

The June 25, 1984 Order by Judges Miller, et al. denying the motion to disqualify them should be affirmed for four reasons:

1. The required affidavit supporting the motion is defective. To the extent that it merely recites or summarizes material contained in numerous unsworn documents, it is insufficient to support any allegation of fact contained in the motion. The affidavit contains no averment of the veracity of the unsworn materials recited in it, and thus lends, on its face, no independent weight to them. To the extent that the Affidavit purports to assert the truth of the statements contained therein, it places the affiants in the position of witnesses subject to cross-examination by LILCO and other parties. Under the applicable Disciplinary Rule of the ABA's Code of Professional Responsibility as adopted in the District of Columbia, DR 5-102(A), the requirement that an attorney become a witness for his client requires him and his firm to withdraw, absent exceptions not applicable here.

2. The motion is untimely. Suffolk County and New York State had been insisting, before improper forums, on the removal of Judges Miller, Bright and Johnson, as well as Chief Judge Cotter and Chairman Palladino, for some two months before filing this motion. During this period, in the low-power proceeding before Judges Miller, Bright and Johnson motions have been filed, orders issued, discovery conducted, and the schedule and shape of the low-power proceeding developed. Motions for recusal or disqualification must be filed as soon as the information supporting

it becomes known to the moving party. Particularly in view of the undeniable relevance of time in this proceeding, the dilatoriness of the County and State is inexcusable.

3. The allegations set forth in the motion do not establish the kind of prejudgment of substantive issues in dispute among the parties necessary to sustain a motion for recusal or disqualification. All the allegations show, even if taken at face value, is a concern by duly appointed officials, acting in their administrative capacity, that the outcome of the proceeding not be determined by its pace rather than its record. Concern about the schedule for a proceeding is not only procedural rather than substantive; it is also a matter within the sound discretion of administrative agencies.

4. The June 25 Order dispositively puts the lie to the assertion of involvement by Judges Miller, Bright and Johnson in the series of events alleged by Suffolk County and New York State to have been improper. There is no way, without demonstrating that the factual representations by Judges Miller, et al. on pages 5-7 of the Order are simply untrue (and the Motion does not imply such an outcome, much less demonstrate it) that the three judges, or any of them, were involved in the events at issue, much less that the events were improper.

I. The Affidavit Supporting the Motion for Disqualification is Insufficient

The regulations' requirement, at 10 C.F.R. § 2.704(c), that averments in a motion to recuse or disqualify be supported by affidavits is soundly based on the premise that accusations of sufficient gravity to require removal of a duly appointed adjudicatory officer not only be sufficiently specific to establish the alleged grounds for disqualification but also be attested to with requisite solemnity. Houston Lighting & Power Company, et al., (South Texas Project, Units 1 and 2), ALAB-672, 15 NRC 677 (1982); Long Island Lighting Company (Shoreham Nuclear Power Station), (Docket No. 50-322-OL-4 (Low Power), Appeal Board Memorandum and Order (June 19, 1984), summarily affirming Licensing Board Telegraphic Order dated June 19, 1984. The Affidavit of counsel for Suffolk County and New York State, attached to both the Miller, et al. motion of June 21 and the Cotter motion of June 22, is deficient in the following three ways.

1. The Affidavit, on its face, contains nothing to provide the basis of credibility which underlies the affidavit requirement of § 2.704(c). It bears no averment whatever of the authenticity or truth of the documents whose contents are being quoted from or summarized in the Affidavit. The Affidavit merely states that its purpose is "to furnish source data" for the County/State Motions (Affidavit, ¶ 1) (though it does not attach the source documents); and states that it is 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. . . ." (Affidavit, ¶ 2). Nowhere in the Affidavit is there any representation whatever of the authenticity or accuracy of the "publicly available documents" quoted from or characterized; or of the quotations or characterizations; or even of the affiants' "personal recollections." In short, on its face the Affidavit conveys nothing to enhance the credibility of its averments beyond their inclusion in an unsworn pleading.

Such an averment is essential: without it, the Affidavit is worth nothing more than the original signature on a pleading of counsel who, as officers of the court, are under an ethical duty to not misrepresent facts or law to duly constituted tribunals. The County and State have already tried this argument once, in their June 18 filing; it has been decisively rejected both by the Licensing Board and the Appeal Board. Shoreham (June 19, 1984), supra.

2. If the Affidavit is accepted as being asserted for the truth of its contents, then in some, if not all, respects affiants are in the position of witnesses testifying on the matters contained in the Affidavit. Even if the authenticity of "publicly available" documents were accepted under a business-records or official-documents exception to the hearsay rule, there are some documents which do not fall neatly within this exception and whose

contents do not speak for themselves; one document that is not public (Chief Judge Cotter's personal notes, referred to at Affidavit, ¶¶ 16, 19); numerous documents, not attached, which are quoted from briefly or merely characterized, and which would have to be put into perspective if their contents were to be taken at face value (Affidavit, passim); some documents which are argumentative legal pleadings by Suffolk County or New York State (Affidavit, ¶¶ 26, 27); news clippings (Affidavit, ¶ 32); and other matters as to which affiants' recollections are the source proffered (e.g., Affidavit, ¶¶ 11, 12). LILCO does not accept some of the characterizations contained in the Affidavit and is not in a position as to others to accept or reject them without an opportunity to question their sponsors.

LILCO submits that, at a minimum, those portions of the Affidavit which are not based on the affiants' personal knowledge or which do not relate to facts as to which they are competent to testify should not be considered. Attorneys' affidavits should be considered on the same basis as other affidavits; "[t]he material contained therein must be based upon personal knowledge and relate to facts as to which the affiant attorney is competent to testify." Midland Engineering Co. v. John A. Hall Construction Co., 398 F. Supp. 981, 990 (N.D. Ind. 1975). All statements in the Affidavit that constitute legal arguments, such as references to pleadings, clearly do not meet this test and should not be considered. Moreover, to the extent that the Affidavit contains

conclusions or opinions or consists merely of recitations, summarizations or characterizations of the contents of documents not authored by affiants, there has been no showing that any of the affiants are qualified or competent to attest to the accuracy of those assertions. Thus, all such recitative and conclusory statements or expressions of opinion should also be ignored.

3. A potentially more serious consideration requires that the Affidavit be disregarded totally. Messrs. Brown and Lanpher are lawyers with the firm of Kirkpatrick, Lockhart, Hill, Christopher & Phillips, counsel for Suffolk County in this proceeding. Affidavit, ¶ 1. Mr. Palomino is Special Counsel to the Governor of the State of New York and counsel for New York in this proceeding. Id. Papers of record in this case indicate that Messrs. Brown and Lanpher have been involved in their firm's representation of Suffolk County, New York, in matters relating to the Shoreham Nuclear Power Station since at least February 1982. Papers of record also indicate that Mr. Palomino has been counsel of record for New York State since it became active in this proceeding in January 1984.

Courts bear the initial responsibility for the supervision of the members of their bars, Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602 (8th Cir. 1977); Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975), including the application of the Code of Professional Responsibility. Fred Weber, Inc., supra, 566 F.2d at 605. There is no exception in the Code for practice before administrative

agencies. The Commission's regulations provide for regulation of the conduct of lawyers practicing before it, 10 C.F.R. §§ 2.713, 2.718(e), (m), and the Appeal Board has held the Code of Professional Responsibility to apply to Commission proceedings. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 916 (1982).

The Code of Professional Responsibility, as adopted by the District of Columbia Court of Appeals, includes Disciplinary Rule 5-102(A), which reads as follows:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

It is evident that none of the exceptions enumerated in DR 5-101(B) is applicable to this situation.3/ Moreover, any

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3/ DR 5-101(B) reads as follows:

> (B) A lawyer shall not accept employment, in contemplation of litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.

(footnote continued)

course other than exclusion of the Affidavit would, since LILCO does not accept as uncontroverted all of the allegations in the Affidavit, require an evidentiary hearing. See Forts v. Ward, 566 F.2d 849 (2d Cir. 1977). The Affidavit should not be considered unless Messrs. Brown, Lanpher and Palomino were available to testify and be subject to cross-examination. See Two Wheel Corp. v. American Honda Corp., 506 F. Supp. 806, 816 n.11 (E.D.N.Y. 1980). But, if they were to testify at the evidentiary hearing, they and all in privity witn them would be in violation of DR 5-102 and

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(footnote continued)

> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
>
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
>
> (4) As to any matter, if recusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

The only one of these exceptions that could even conceivably apply to the present case is exception (4). The easy answer to any "hardship" argument is that counsel for Suffolk County and New York State need not have designated three of their senior attorneys to have sponsored the affidavit. For instance, Peter Cohalan, County Executive of Suffolk County, delivered written and oral testimony demanding Chairman Palladino's recusal at the May 18, 1984 Congressional hearings before Congressman Markey's subcommittee, and heard the live testimony of Chairman Palladino; he could have made this affidavit. Counsel's decision to submit the affidavit themselves was either a litigative ploy or a self-inflicted wound.

subject to disqualification.4/ That onerous result can be avoided only by refusing to consider the Affidavit of Messrs. Brown, Lanpher and Palomino.

Suffolk County and New York State cannot have it both ways: either the Affidavit must be excluded or Messrs. Brown, Lanpher and Palomino must step out of their role of attorneys and become witnesses, with disqualification of their firms and agencies. In either event, any result other than rejection of the disqualification motions for failure to satisfy § 2.704(c) would be incorrect and highly prejudicial to LILCO.

II. The Motion to Disqualify is Fatally Untimely

The Licensing Board properly rejected the motion for disqualification as untimely. Order at 2-4. Both courts and

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4/ In the case of Messrs. Brown and Lanpher, this would include the entire firm of Kirkpatrick, Lockhart, Hill, Christopher & Phillips; in the case of Mr. Palomino, it would include the Office of the Special Counsel of the Governor and any other individuals representing New York State in a legal capacity in this proceeding. If these disqualifications occur, the replacement of counsel in this litigation should not be permitted to postpone any further the low power licensing proceedings before the Atomic Safety and Licensing Board, since Suffolk County's and New York State's attorneys were well aware of DR 5-102 at the time they filed the Affidavit. Indeed, they have been on actual notice of this defect in the Affidavit since April 27, 1984, when LILCO moved to strike the similar Affidavit of Lawrence Coe Lanpher in the related Cuomo, et al. v. NRC litigation (D.D.C., No. 84-1264), dismissed voluntarily by Suffolk County and New York State on May 1, 1984. In short, Suffolk County and New York State should not be able to take advantage of the impropriety of submitting the Affidavit in order to achieve their primary goal of delay.

administrative agencies have required that motions for disqualification or recusal be filed as soon as the party seeking recusal becomes aware of the information leading to the request so as to avoid unnecessary delay in the proceeding. Marcus v. Director, Office of Workers Compensation Programs, 548 F.2d 1044, 1051 (D.C. Cir. 1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1198 (1983). This requirement for prompt action increases administrative efficiency by avoiding unnecessary delay in the proceeding should recusal be warranted, id., and prevents conversion of "the serious and laudatory business of insuring judicial fairness into a mere litigation strategy." Delesdernier v. Porterie, 666 F.2d 116, 121 (5th Cir.), cert. denied, 103 S. Ct. 86 (1982).

A review of the actions of which the County and Governor Cuomo complain clearly demonstrates that their motion is untimely, since they were in a position to have sought disqualification of Judges Cotter, Miller and Bright two months before the motion was filed, and no more recent evidence has been addressed which would justify the two-month delay in seeking disqualification.

The actions by Judges Miller, Bright, and Johnson of which the County and Governor Cuomo complain all occurred between March 30 and, April 20 (really, April 6), 1984. Those events may be summarized by the following chronology of pleadings, events of record in this proceeding, and other events averred (however faultily) by the County/State Affidavit:5/

5/ The related actions by Judge Cotter of which the County and Governor Cuomo complain occurred between March 16, 1984, when

(footnote continued)

(footnote continued)

Judge Cotter is stated to have met with Chairman Palladino, and approximately March 30, 1984, when Judge Cotter issued the order establishing a new licensing board. Those events may be summarized by the following chronology:

March 16	Chairman Palladino meets with Judge Cotter and others to discuss the delay in the licensing at Shoreham and other plants. Judge Cotter's personal notes of the March 16 meeting states that LILCO would go bankrupt if it had to wait until December of 1984 for an initial decision.
March 22	Chairman Palladino's "working paper" sent to Judge Cotter; paper states that Commission would like low power litigation to be expedited and outlines a schedule for the hearing.
March 23	Judge Cotter's draft order submitted to Chairman Palladino; order proposes that LILCO's low power proposal be expedited, that a new licensing board be appointed, and that the schedule for litigation be expedited (16 days for discovery, 5 days between the close of discovery and the filing of testimony, 5 days until the start of the hearing, and 10 days for the hearing).
March 27	Memorandum to Judge Cotter from Judges Brenner and Morris; memorandum states "depending 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."
March 30	Judge Cotter issues an Order entitled "Establishment of Atomic Safety and Licensing Board to Preside in Proceeding."

March 30	Miller Board established; parties notified by telephone, with confirmation in writing, that oral arguments on LILCO's low power motion would be heard on April 4 and that a schedule for expedited decision would be considered.
April 3	Suffolk County's Comments on Notice of Oral Arguments; Comments state there is no basis for any expedited process.
	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; motion asserts that an expedited schedule would deny due process.
April 4	Chairman Palladino distributes a memorandum to the Commission and the Miller Board transmitting Chairman Palladino's March 22 "working paper" and Judge Cotter's March 23 draft order.
	Miller Board hears oral argument.
April 6	Memorandum and Order Scheduling Hearing on LILCO's Supplemental Motion for Low Power Operating License.
April 16	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 20	Order Denying Intervenors' Motion to Vacate Order.

Not only did all the events complained of occur over two months before the motion to disqualify Judges Miller, et al. was filed, but the intervenors' own writings demonstrate that the County and Governor Cuomo were keenly aware of the very events about which they now complain not later than April 11, 1984. On

that date, the Suffolk County Executive, Peter Cohalan, wrote a letter to the Commission outlining the events that become the foundation for the motions to disqualify and alleging that Judges Cotter, Miller and Bright were biased (see Attachment 1 hereto). (The same statement was made about Judge Cotter). Despite intervenors' knowledge and statements that they would seek disqualification of those Judges, it was not until June 21, 1984 in the case of the Miller Board, and June 22, 1984, in the case of Judge Cotter, that either Suffolk County or New York State formally sought disqualification of any of the judges. The following chronology clearly demonstrates that intervenors have repeatedly raised the spectre of disqualification without ever presenting the issue before the appropriate forum for decision:

April 11	Suffolk County Executive, Peter F. Cohalan, in a letter to the Nuclear Regulatory Commission outlines the same events which became the basis for the motions for disqualification, and requests the Miller Licensing Board be disestablished by the Commission. [Attachment 1].
April 16	Joint Request of SC/NYS for the Commission to Direct Certification; by reference to County Executive Cohalan's letter intervenors again suggest that the Licensing Board be disestablished by the Commission. [Attachment 2].
April 23	Amended Complaint for Injunctive and Declaratory Relief in Cuomo v. NRC, Civ. Action No. 84-1264, United States District Court for the District of Columbia; Intervenors outline the chronology of events of which they now complain and allege that "the actions of defendants Palladino, Cotter, Miller, Bright and

Johnson as set forth herein have been of such a nature as to cause a disinterested observer to conclude that each of these defendants in some measure has adjudged the facts as well as the law in advance of the hearing on LILCO's low power motion." Intervenors pray that the court "temporarily, preliminarily and permanently enjoin and disqualify defendants . . . from convening, participating in, proceeding with, or authorizing any hearing or other proceeding concerning LILCO or Shoreham." [Attachment 3].

April 27

LILCO's Memorandum of Law in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction or Failure to State a Claim Upon Which Relief Can Be Granted and in Opposition to Motion for Preliminary Injunction; memorandum states that the issue of disqualification was not properly before the federal district court and that any such action for recusal or disqualification must be brought before the NRC in accordance with the Commission's rules of practice, specifically 10 C.F.R. § 2.704(c). [Attachment 4].

Memorandum to Counsel to the Parties in Cuomo et al. v. NRC et al.: intervenors again state "the County [and New York State] will file additional requests with the Commission for disestablishment of the Licensing Board consisting of Judges Miller, Bright and Johnson (beyond the April 11 written request of the Suffolk County Executive) and also for recusal of such Judges and Chairman Palladino and Judge Cotter." [Attachment 5].

Status Report to Commissioners: Miller Board incorporates Intervenors' Memorandum to Counsel to the Parties in Cuomo, et al. v. NRC et al. in Status Report. [Attachment 6].

May 4

Joint Response of Suffolk County and the State of New York to Commission's Order of April 30, 1984, at pages 41 to 42;

> Intervenors reiterate their intent to move for disestablishment of the existing licensing board. [Attachment 7].6/

Finally, the County and State, despite these views of record, acted for over two months before the Miller Board, taking the benefits of its existence and legitimacy without complaint, before filing the disqualification motion. Since the Commission's order of May 16, 1984, ordering LILCO to file an exemption petition and remanding the low power proceeding to the Licensing Board, the intervenors have filed numerous papers before the Miller Board without questioning its qualification to rule. Likewise, the Board, with neither opposition from the intervenors nor mention of a motion to disqualify, has continued to conduct the proceedings by issuing orders and holding conferences with the parties. Those motions and orders are chronicled below:

June 1	Joint Motion of Suffolk County and the State of New York for the Commission's Prompt Attention and Ruling on Pending County and State Motions and For Stay of Inconsistent ASLB Orders in the Interim. [Joint Motion before the Commission and before the ASLB].
June 5	Order Denying Stay and Motion of Suffolk County and State of New York.
June 8	Notice of Resumed Hearing.
June 11	Order: Commission order ruling on the intervenors request for clarification.

6/ On May 4, LILCO also filed comments in response to the Commission's April 30 Order and again noted the lack of any properly filed motion for recusal. LILCO point was reiterated during oral argument on May 7 before the Commission when the timeliness issue was expressly addressed. (May 7 Tr. at pp. 22-23, 53-54).

June 13	Suffolk County and State of New York Memorandum in Opposition to LILCO's May 22, 1984, Motions for Summary Disposition on Phase I and Phase II of LILCO's Proposed "Low Power Testing."
June 20	Order granting LILCO's Motion for Protective Order and Motion in Limine, to which the County and State had filed written responses.
June 22	Conference of the Parties; Board grants LILCO's Motion for a Protective Order and resolves discovery disputes ordering LILCO to produce to County documents for which the work product privilege was claimed.

Thus, for two months prior to the time that Suffolk County and the State of New York moved to disqualify Judges Miller, Bright and Johnson (and Judge Cotter), they remained silent on the question of disqualification while availing themselves of the benefits of the Licensing Board as a forum. Such a period of delay has not been tolerated in other comparable proceedings. See Seabrook, 18 NRC at 1199 (motion for disqualification late when party waited almost two months to raise its concerns); Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 32 n.6 (1979) (motion filed more than six weeks after the order on which it was predicated is untimely).

Certainly, timeliness cannot be considered solely for the sake of adjudicatory efficiency but must be viewed in the context of the stage of the proceedings at which the motion for disqualification is raised and the extent to which the motion raises new evidence or raises evidence which could not have been raised at an earlier date.

The proceedings before the Miller Board are, as noted in its June 25 Order at 4 n.4, well underway: discovery has been completed, testimony is due to be filed July 16, and the hearing is scheduled to begin July 30. Nevertheless, despite their apparent determination since at least April 11 to seek the disqualification of the Licensing Board members or Judge Cotter, the County and State failed to act before a competent forum. This two-month delay in properly raising this issue, particularly given the multiplicity of attempts to raise it improperly in the interim and the absence of any new facts, suggests that litigation tactics, rather than any concern with fairness, may have prompted the motion. This is particularly true when one considers that the County and Governor Cuomo have seen fit, in the interim, to file motions before the Licensing Board on which the Licensing Board must rule.

III. The Motion to Disqualify, Even if Accepted at Face Value, Does Not Establish Cause for Disqualification

The County/State motions allege, at most, that the Chairman of the Commission had received information that led him to become concerned that Shoreham low-power licensing proceedings were progressing at a pace that would not permit their completion before the end of 1984 at the earliest -- or before LILCO, after 15 years of effort and a completed plant, had gone bankrupt; that in consultation with Chief Judge Cotter, among others, he explored means

of accelerating this schedule, including appointment of a new Licensing Board not burdened with the same responsibilities for other cases faced by the previous Licensing Board; and that the new Licensing Board, consisting of Judges Miller, Bright and Johnson, had set about its new duties in an expeditious manner, on a proposed schedule similar to one allegedly discussed earlier by the Chairman and Chief Judge Cotter. The Affidavit does not allege, and of course the Miller Board's June 25 Order directly disproves, any notion that meetings took place at all, properly or not, between the Miller Board and Chief Judge Cotter or Chairman Palladino.

Even taking all of the Affidavit's assertions at face value -- which LILCO, without full knowledge of the facts, is not prepared to do -- all they amount to is a description of efforts by agency officials charged with administrative as well as adjudicative responsibility to avert the unseemly prospect of having a license application be lost, after the expenditure of fifteen years and over $4 billion, where all safety-related issues other than the clearly reparable diesel generators had long been satisfactorily resolved, simply because the agency was incapable of bringing the operating license process to an end. (Active operating-license hearings involving over 170 days of live proceedings before four licensing boards, over 14,700 pages of prefiled testimony, 32,000 pages of transcript, and 330 exhibits have been in progress since spring 1982; the operating license

proceeding began in 1975.) All the allegations amount to is a concern that the record of the proceeding rather than its schedule have a chance to determine its result.

Disqualification of a judge or an agency official acting in an adjudicative capacity is unusual. There is a presumption of the decisionmaker's honesty and integrity. See Withrow v. Larkin, 421 U.S. 35, 47 (1975). This presumption is overcome only if the decisionmaker harbors an attitude that a fair-minded person would be unable to set aside so that he could evaluate objectively the arguments presented by all parties. See United States v. Conforte, 624 F.2d 869, 881 (9th Cir.), cert. denied, 449 U.S. 1012 (1980). Thus, for example, a general bias in favor of nuclear power does not disqualify an adjudicator from participating in a nuclear licensing decision if the adjudicator can base his decision on the evidence before him. See Carolina Environmental Study Group v. United States, 510 F.2d 796 (D.C. Cir. 1975).

The Commission has adopted as its standard for disqualification of persons sitting in an adjudicatory capacity the same standard as that set for federal judges, and set forth at 28 U.S.C. §§ 144 and 455.7/ Houston Lighting and Power Company (South Texas

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7/ Sections 144 reads as follows in pertinent part:

Bias or prejudice of judge

(footnote continued)

Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1366 (1982). That

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(footnote continued)

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Section 455 reads as follows in pertinent part:

> Disqualification of justice, judge or magistrate
>
> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other

(footnote continued)

standard has recently been expressed by the Appeal Board as follows:

> [An] administrative trier of fact is subject to disqualification if he has a direct, personal, substantial pecuniary interest in a result; if he has a "personal bias" against a participant; if he has served in a prosecutive or investigative role with regard to the same facts that are an issue; if he has prejudged factual -- as distinguished from legal or policy -- issues; or if he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), No. 50-354-OL, ALAB-759, slip op. at 12 (Jan. 25, 1984) (quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973)). The Commission has held in

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(footnote continued)

> interest that could be substantially affected by the outcome of the proceeding;
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i)Is a party to the proceeding, or an officer, or trustee of a party;
>
> (ii)Is acting as a lawyer in the proceeding;
>
> (iii)Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iv)Is to the judge's knowledge likely to be a material witness in the proceeding.

applying these standards, consistent with federal court precedent, that only bias or prejudgment attributable to extra-judicial sources requires disqualification. Houston Lighting and Power Co., supra, 15 NRC 1363, 1365, citing United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).8/

8/ The County/State motion proceeds on the assumption that the applicable standard is a nonstatutory test set forth as dicta in Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied 361 U.S. 896 (1959) (emphasis added) and cited as precedent in Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970): that "a disinterested observer may conclude that the agency has in some measure prejudged the facts as well as the law of a particular case in advance of hearing it." The County/State motion then attempts to advocate this test in the broadest possible terms without reference either to cases that actually apply it or to the subsequently promulgated recusal/disqualification statute, 28 U.S.C. § 455. The Cinderella case clearly does not proscribe the actions here. That case involved an appeal from a cease-and-desist order of the Federal Trade Commission. In that case, while the order of the trial examiner was on appeal to the Commission, the Chairman of the Commission had made a public speech which expressed, in strong and colorful terms substantive views on the merits of issues on appeal which the reviewing Court later found to inevitably imply judgment on his part. 425 F.2d at 490. The Court characterized the Chairman's speech as "entrenching [the] Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record," id., and as "[giving] the appearance that he has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves." Id. The Court also noted that the Chairman had earlier refused to recuse himself on bases of, as he himself stated, his own "discretion and sound judgment, . . . irrespective of the law's requirements." Id. at 590-91. The actions attributed to Chief Judge Cotter and to Judges Miller, Bright and Johnson, which (1) go only to procedural issues of scheduling, and (2) convey no sense of placing their own notions of discretion and judgment above the law's requirements, are a far cry from the behavior found in Cinderella to constitute prejudgment. It is also interesting to note that at least three

(footnote continued)

The allegations in the County/State motions do not meet this standard. There is no allegation that Judges Miller, Bright or Johnson, or Chief Judge Cotter, have shown any predisposition on factual matters in dispute among the parties, or that any of them has attempted to influence the substantive views of anyone else on such issues in advance of hearing testimony on the merits.

The acts of which the County and State accuse Judges Miller, Bright and Johnson and Chief Judge Cotter -- in Chief Judge Cotter's case, of participating in the shaping of an expedited schedule, and in the case of Judges Miller, et al., of implementing such a schedule, so that the schedule itself (specifically, its length) does not artificially dictate the result -- indicate no predisposition on the merits. Scheduling questions are procedural, not substantive. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-757, 18 NRC 1356, 1359 n.17 (1983). The public interest in setting a schedule for licensing hearings is best served by proceeding as rapidly as is possible, consistent with providing the opportunity for all

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(footnote continued)

of the cases reversing agency action involved the very same Commissioner of the FTC. Cinderella, supra, at 591, citing Texaco, Inc. v. FTC, 336 F.2d 754, 760 (D.C. Cir. 1964); American Cyanamid Co. v. FTC, 363 F.2d 757, 767 (D.C. Cir. 1966). Cinderella does not proscribe the conduct alleged (and in any event not proven) here. Cf. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 66 (law review article not sufficient basis for disqualifying ASLB judge).

parties to be heard. See Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 684-85 (1975); Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975). The Commission has recognized the public interest in concluding licensing proceedings expeditiously and certainly prior to completion of construction of a nuclear plant. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981); Statement of General Policy and Procedure: Conduct of Proceedings for the Issuance of Construction Permits and Operating Licenses for Production and Utilization Facilities for Which a Hearing is Required under Section 189A of the Atomic Energy Act of 1954, as amended, 10 C.F.R. Part 2, Appendix A. As a result, the Commission's policy is to encourage expedited hearings as a means of avoiding licensing delays and to maintain its commitment to a fair and thorough hearing process.

Licensing Boards are required by Commission regulations, 10 C.F.R. § 2.718, "to take appropriate action to avoid delay." Against the background of Shoreham and the Commission's policies on delay, the Miller Board's actions cannot be said to manifest disqualifying bias.9/

9/ Similarly, Chief Judge Cotter -- who is not even sitting in an adjudicatory capacity at Shoreham -- is an administrative as well as adjudicative officer charged with establishing Licensing Board panels to perform in accordance with Commission directives

(footnote continued)

Further guidance may be gleaned by comparing the present situation to two other instances in which recusal or disqualification was an issue. In the Diablo Canyon proceeding, Commissioner Hendrie declined to recuse himself after discussing scheduling matters with the applicant in an off-the-record meeting. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant), Nos. 50-275-OL and 50-323-OL (Commissioner Hendrie's Memorandum to Counsel for Parties, March 13, 1980). In contrast, in the only instance disclosed by research in which an adjudicative officer at NRC has been removed from a case, the Hope Creek Appeal Board found that an appearance of impropriety existed because the disqualified judge had actually worked for the applicant on the particular plant at issue and that work had been cited in the decision approving a construction permit. See Hope Creek, slip

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(footnote continued)

and policy. 10 C.F.R. §§ 2.721(a), (b), (d). The actions attributed to him appear merely responsive to Commission policy. His participation in the meeting on March 16, 1984 did not, as alleged by the County and State, involve improper ex parte contacts. Ex parte communications involve substantive matters at issue in the proceeding. 10 C.F.R. § 2.780(a)(2); Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-313, 3 NRC 94, 96 (1976). Scheduling questions are purely procedural. See Public Serv. Co. of New Hampshire (Seabrook (Seabrook Station, Units 1 and 2), ALAB-757, 18 NRC 1356, 1359 n.17 (1983). The mere fact that he performs these other duties does not necessitate his recusal. If it did, it would be impossible for any agency administrator to carry out both adjudicatory and other legal duties. Cf. Kennecott Copper Corp. v. FTC, 467 F.2d 67, 79-80 (10th Cir. 1972) (Commission not disqualified when Act requires it to perform other duties involving the very subject matter of the case), cert. denied, 416 U.S. 909 (1974).

op. at 17. The actions of Judge Cotter far more closely resemble the first example than the latter; the actions of Judges Miller, Bright and Johnson do not even merit serious question.10/

10/ Additional perspective on whether the previous conduct or statements of an official with adjudicatory functions may be of such a nature as to lead a disinterested observer to conclude that improper prejudgment of facts and law has occurred is gained by comparing them with actions or statements which were not considered by the only competent judge -- the official himself -- to warrant recusal. In that regard, it is helpful to remember Commissioner Gilinsky's May 1983 dissent from the Commission's refusal of Suffolk County's demand that it preemptively terminate emergency planning proceedings at Shoreham before ever allowing any evidence to be taken. There, Commissioner Gilinsky clearly indicated his views on the outcome:

> [T]he Commission has failed to deal with the actual issue in this case. That is: can there be adequate emergency preparedness (as distinct from planning) if neither the State nor the County Governments will participate?
>
> The answer is, clearly, No. There cannot be adequate emergency preparedness for the surrounding population without the participation of a responsible government entity.

Long Island Lighting Company (Shoreham Nuclear Power Station), CLI-83-13, 17 NRC 741, 744 (1983). Such views, if logically pursued by Commissioner Gilinsky, would utterly have precluded his voting in favor of an operating license for Shoreham, despite statutory and regulatory provisions which not only empower but obligate the Commission to hear fairly the merits of a plan sponsored only by a utility. The actions and statements of Judges Cotter, Miller, Bright and Johnson, unlike those of Commissioner Gilinsky, go only to scheduling, not to substance; yet Commissioner Gilinsky never recused himself from Commission decisions and deliberations on Shoreham.

IV. The Allegations in the Motion to Disqualify Are Refuted by the June 25 Order

Even if --as is not the case -- the facts asserted by the motion would be sufficient to disqualify Judges Miller, Bright and Johnson if accpted as true, they have been unequivocally refuted by the individual and collective statements of the members of that Board in the June 25 Order at 5-7, particularly at 7:11/ There is neither assertion in the disqualification motion nor any other reason, why the presumption of impartiality and good-faith

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11/ It is in some senses particularly apt for a judge being asked to disqualify himself to comment on the factual allegations against him. As the Court stated in State of Idaho v. Freeman, 507 F.Supp. 706, 721 (D.Idaho 1981);

> "If a judge who is being asked to disqualify himself cannot make all relevant facts known or rebut those facts that are false and which if left unrefuted would create a reasonable question of impartiality, the result would be an essentially pre-emptive proceeding where the judge would be 'the victim of the appearance of impropriety . . .' with no recourse to remove a possible taint on his integrity. Furthermore, allowing a judge the liberty to evaluate the truth, as well as the sufficiency of the alleged facts, is compatible with the Congressional attempt to control bad-faith litigants' manipulation of the disqualification procedure. This is evident because section 144 has attending procedural requirements to prevent abuse of the disqualification process; section 455 on the other hand permits the judge to edit the inaccurate allegations which could be the basis for disqualification under an appearance of partiality standard." See 46 U. Chic. L. Rev., supra at 250."

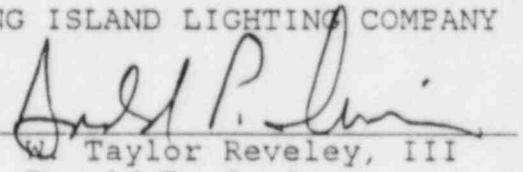
execution of duties given to judges should not be honored here. The statements of the Miller Licensing Board members totally refute any notions of improper influence, predetermination of factual matters, or other bias on their parts. Their statements should be accepted as dispositive.12/

CONCLUSION

In deciding the motion for disqualification of Judges Miller, Bright and Johnson, the Appeal Board should consider the matters discussed above. Based on them, it should affirm the Miller Licensing Board's denial of the motion.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY



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DATED: July 6, 1984

12/ The combination of individual and collective judgments by the members of the Miller Licensing Board was entirely proper, since each judge is the proper determiner of his own recusal. Houston Lighting and Power Company (South Texas Project), ALAB-672, 15 NRC 677 (rev'd on other grounds), 679, and cases cited thereat.

ATTACHMENT 1

1 SC

COUNTY OF SUFFOLK

OFFICE OF THE COUNTY EXECUTIVE

'84 APR 12 P2:14

PETER F. COHALAN
SUFFOLK COUNTY EXECUTIVE

JOHN C. GALLAGHER
CHIEF DEPUTY

April 11, 1984

Nunzio J. Palladino, Chairman
Nuclear Regulatory Commission
1717 H Street, N.W.
Room 1114
Washington, D.C. 20036

50-322

Dear Mr. Chairman:

I am writing on Suffolk County's behalf to object to your recent personal intervention in the Shoreham licensing proceeding and to ask that you and your colleagues take prompt action to remedy the procedural irregularities which your intervention produced.

By memorandum to your colleagues dated March 20, you characterized the Shoreham proceeding as experiencing "licensing delays" and proposed an "expedited hearing" so that "a low power decision might be possible" for LILCO on an expedited basis. Your memorandum followed press reports of a meeting that you had with LILCO's Board Chairman and stated that you had discussed Shoreham's "licensing delays" on March 16 with certain NRC staff personnel, including "Tony Cotter." Mr. Cotter, who is the NRC's Chief Administrative Judge, and the NRC's other Judges sit as adjudicators in contested licensing proceedings such as Shoreham. They are, by law, required to be impartial in their judgments and free from the undue influence of anyone, including the members and chairman of the NRC.

On March 30, Mr. Cotter issued an unanticipated order which precipitously changed the Licensing Board Judges who would consider LILCO's request for a low power license. On the same day, these new Judges issued a separate order which mandated that they would decide LILCO's low power license request on an "expedited basis." Neither the previous Licensing Board which had heard and rejected LILCO's low power license request on February 22, nor Mr. Cotter, nor any other NRC Judge had ever suggested the need to "expedite" the Shoreham proceeding.

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On April 4, the new Judges convened an "oral argument" of counsel. Two days later, the Judges "expedited" consideration of LILCO's low power license request in the fashion of an entirely new form of proceeding: a so-called "limited evidentiary hearing on an expedited basis." The Board's "expedited basis" turned out to mean the flat rejection of every significant legal and procedural request of Suffolk County and a mockery of due process. The "limited evidentiary hearing" turned out to mean crippling the County's ability to prepare and present a meaningful substantive case so thoroughly that it was tantamount to barring the County from being heard on the merits. (In this light, it is inconsequential that the Board went even farther by stating that it could have probably ruled on LILCO's low power license request with no hearings at all.)

Adding insult to the County's injury, the Board punctuated its order with the statement (contrary to the explicit representations of Suffolk County and New York State) that the "expedited schedule will not prejudice any party to this proceeding." Seen in this context, the Board's order was a tribute to the power of your office as Chairman to influence the purportedly impartial decisionmaking of the Licensing Board.

The effects of your personal involvement in Shoreham, Mr. Chairman, did not end with the Licensing Board's abusive procedural ruling. They tainted the NRC Staff as well. From January 26 through April 3, the Staff, and Messrs. Denton and Eisenhut particularly, publicly repeated their position that Shoreham would not be permitted to operate, even at low power, until the "serious problems" (as Mr. Denton put it) with the Transamerica Delaval emergency diesels were resolved. On April 4, as part of the "expedited basis"-juggernut that you had set running in March, the Staff unexpectedly reversed itself. At that time, the Staff announced to the Licensing Board that not only did it now support low power operation of Shoreham with the defective Transamerica Delaval diesels, but with no onsite emergency power system whatsoever. The Staff went so far as to read the Commission's regulations, which explicitly require onsite emergency power and have always been interpreted by the NRC to mean just that, out of existence. Then, in keeping with the spirit of its other rulings, the Licensing Board bought the Staff's arguments one hundred per cent.

Mr. Chairman, the inevitable inference to be drawn from these events is that your meeting with LILCO's Board Chairman, your expression of interest to "expedite" the Shoreham proceeding when meeting with Mr. Cotter and the NRC Staff on March 16, and your March 20 memorandum proposing "expedited" treatment of LILCO's low power license request signalled the Licensing Board Judges and the Staff to shift gears; they were now to rush forward and issue a low power license for Shoreham, despite the

effect this would have on the concerns for safety expressed by Suffolk County and New York State. The Licensing Board and Staff, in turn, took your signal as a marching order. And, without any justification, they "expedited" the Shoreham proceeding so faithfully that the Board is now poised to issue a low power license for Shoreham while significant safety issues, such as the following, remain outstanding:

(1) There is no qualified onsite emergency power source at Shoreham, as required expressly by NRC regulations, because the installed Transamerica Delaval diesels are defective (the new replacement diesels which LILCO has ordered will not be ready for operation until late 1985);

(2) LILCO is financially unqualified to operate Shoreham, because the company is teetering on bankruptcy and the New York Public Service Commissioin Staff has, following a year-long investigation, recommended that no more than $2.2 billion of the "grossly mismanaged" $4.1 billion Shoreham project be permitted into LILCO's rate base;

(3) LILCO is organizationally unqualified to manage and direct operations of Shoreham, because the company's upper management is known, by the NRC itself, to lack requisite experience in nuclear power management;

(4) LILCO is technically unqualified to operate Shoreham, because the company does not have the requisite licensed operators with BWR operating experience;

(5) There is no offsite emergency preparedness for Shoreham, and no reasonable basis to assume there ever will be;

(6) Both Suffolk County and the State of New York oppose issuance of a low power license on safety and economic grounds (issuance of a low power license would prejudice these interests).

The stark fact, Mr. Chairman, is that there is no justification for the NRC even to consider issuance of a low power license at this juncture, let alone to rush the proceeding forward with the present public-be-damned spirit. Shoreham's electricity -- by LILCO's own admission -- will not be needed for 10 years. Why then rush forward with action which prejudices the public interest for the sake of licensing an unsafe, unneeded, uneconomical, and unwanted plant?

The answer is that you, followed by the Staff and the Licensing Board, have sought to aid LILCO's efforts to gain access to Wall Street money markets. Although this objective lies beyond the NRC's proper health and safety jurisdiction, there is unfortunately recent precedent for such an abuse. On March 16, FEMA admitted using its regulatory authority in the Shoreham proceeding for the purpose of seeking to give LILCO "breathing space with Wall Street."

The only interest that the NRC should have in LILCO's financial health, Mr. Chairman, is whether and how the company's financial frailties might cause it to cut corners on safety. The recent statements of LILCO's Board Chairman that the company has "four months left" and that "the plant will have to be abandoned" unless the NRC and FEMA use some undefined "power" are testimony to the company's financial illness. So is the continuing downgrading of LILCO's securities and the $2.2 billion cap on Shoreham's costs which the Public Service Commission Staff has proposed as LILCO's recovery for the $4 billion Shoreham plant. (The PSC Staff found that the remaining costs for Shoreham were "imprudently" incurred by LILCO because the company had "grossly mismanaged" the Shoreham project.)

In light of the company's financial instablility, the NRC, for example, should want to know whether LILCO will be able to attract and retain qualified nuclear management and operators for Shoreham. Similarly, the NRC should inquire whether LILCO's proposal to operate Shoreham without a qualified onsite emergency power system is caused by the company's financial inability to wait for the installation of new diesel generators in late 1985. The NRC should not be using the power of its federal authority to force the Shoreham plant at hell-bent speed on the local and State governments which oppose it on substantive safety grounds. That is a denial of due process. Yet, that is just what the NRC, with your personal encouragement, has done here.

Mr. Chairman, your actions have unfortunately converted the Shoreham proceeding into a forum where the accommodation of LILCO's financial interests, as LILCO perceives those interests, is the paramount objective. The Licensing Board and Staff, in shaping the way they exercise their own responsibilities, have loyally followed your lead by giving LILCO's financial interests priority over the public's health and safety. If the Shoreham proceeding is ever to possess integrity as an adjudication in which public safety issues are addressed fairly, you must personally act to rectify the procedural abuses which your earlier personal involvement produced. On behalf of Suffolk County, I therefore request you and your fellow Commissioners:

(1) Take the necessary action to disestablish the Licensing Board that has abused due process and issued unfounded orders to "expedite" with artificially "limited evidentiary hearings" LILCO's low power license request;

(2) Issue an order to the Staff and to the Licensing Board Panel that the Shoreham proceedings, including any proceeding on LILCO's low power license request, should not be expedited except on a showing by LILCO of good cause and special circumstances that are within the purview of the NRC's health and safety jurisdiction; and that in no event should expedition, if any, of this proceeding bar a party from developing and making a meaningful presentation of its case on the merits; and

(3) Reply promptly to this letter so that all affected parties can know precisely where their interests stand.

The County awaits your early reply so that, one way or another, this unfortunate situation can be remedied.

Sincerely yours,

PETER F. COHALAN
SUFFOLK COUNTY EXECUTIVE

cc: Governor Cuomo
Commissioner Gilinsky
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal

PFC/ps

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

JOINT REQUEST OF SUFFOLK COUNTY AND NEW YORK STATE FOR COMMISSION TO DIRECT CERTIFICATION OF MATTERS ADDRESSED IN THE "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," IF LICENSING BOARD FAILS TO VACATE SUCH MEMORANDUM AND ORDER PROMPTLY

Attached herewith are copies of the "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." The Licensing Board's Order was issued on April 6, 1984, and the Joint Objections are being filed with the Board today.

The County and the State hereby jointly request that if the Licensing Board does not forthwith vacate its Order, as they have requested, the Commission should immediately direct certification of the matter and render a prompt decision in accordance with the County's and State's objections. See Part IV of the Joint Objections. We emphasize that time is of the essence. Under the arbitrary and prejudicial schedule

set by the Licensing Board, the hearing on LILCO's unprecedented low power proposal commences on April 24. Commission action as quickly as possible is clearly in the public interest. The Joint Objections demonstrate that the Licensing Board's Order violates NRC regulations and deprives the County and the State of due process of law. These significant issues are appropriate for the Commission's immediate attention.

Finally, the County wishes to emphasize that there is a pending request of the Suffolk County Executive, Peter F. Cohalan, that the present Licensing Board with jurisdiction over LILCO's low power license request be promptly disestablished by the Commission and a further Commission order be issued to assure no further Licensing Board violations of due process of law.

Respectfully submitted,

Martin Bradley Ashare
Suffolk County Department of Law
Veterans Memorial Highway
Hauppauge, New York 11788

Herbert H. Brown
Lawrence Coe Lanpher
Alan Roy Dynner
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
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Attorneys for Suffolk County

Fabian G. Palomino
Special Counsel to the Governor
of New York State
Executive Chamber, Room 229
Capitol Building
Albany, New York 12224

Attorney for MARIO M. CUOMO
Governor of the State of New York

Dated: April 16, 1984

ATTACHMENT 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIO M. CUOMO, Governor
of the State of New York
Executive Chamber
Capitol Building
Albany, New York 12224
(518) 474-1238

and

THE COUNTY OF SUFFOLK, NEW YORK
A New York Municipal Corporation
c/o H. Lee Dennison Executive
Office Building
Veterans Memorial Highway,
Hauppauge, New York 11788
(516) 360-4049

Plaintiffs,

v.

Civil Action No. 84-1264

UNITED STATES NUCLEAR
REGULATORY COMMISSION
1717 H Street, N.W.
Washington, D.C. 20555

and

NUNZIO J. PALLADINO
Chairman
United States Nuclear Regulatory
Commission
1717 H Street, N.W.
Washington, D.C. 20555

and

B. PAUL COTTER
MARSHALL E. MILLER
GLENN O. BRIGHT
ELIZABETH B. JOHNSON
Administrative Judges
United States Nuclear Regulatory
Commission
1717 H Street, N.W.
Washington, D.C. 20555

and

LONG ISLAND LIGHTING COMPANY
250 Old County Road
Mineola, New York 11501

Defendants.

AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Jurisdiction

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 in that this action arises under the Constitution and laws of the United States. In particular this action arises under the Fifth Amendment to the Constitution, the Atomic Energy Act, 42 U.S.C. § 2011 et seq., the Administrative Procedure Act, 5 U.S.C. § 551 et seq., and the Declaratory Judgment Act, 28 U.S.C. § 2201. Venue is proper under 28 U.S.C. § 1391.

The Parties

2. Plaintiff Mario M. Cuomo is the duly elected Governor of the State of New York ("New York State" or the "State"), a sovereign State of the United States of America with a population of more than 16 million residents.

3. Suffolk County, New York ("Suffolk County" or the "County") is a duly constituted local government and political subdivision of the sovereign State of New York located on Long Island, New York, having governmental jurisdiction over an area consisting of approximately 920 square miles with a population of approximately 1.3 million residents.

4. Defendant Nuclear Regulatory Commission ("NRC" or the "Commission") is a five member independent regulatory commission established by act of Congress (42 U.S.C. § 5841) with authority to, among other things, grant operating licenses to nuclear power facilities. Defendant Nunzio J. Palladino is the duly designated Chairman of the NRC, and is sued in his official capacity.

5. Defendant B. Paul Cotter, Jr., is the Chief Administrative Judge for the NRC. Defendants Marshall E. Miller, Glenn O. Bright, and Elizabeth B. Johnson are each Administrative Judges assigned to the Atomic Safety and Licensing Board, an adjudicatory tribunal under the jurisdiction and supervision of the NRC, established pursuant to Section 191 of the Atomic Energy Act (42 U.S.C. § 2241). Defendants, Miller, Bright and Johnson are currently empaneled to preside over a certain hearing pertaining to the granting of an operating license for a

nuclear power plant in Suffolk County, said hearing being scheduled to commence Tuesday, April 24, 1984. These three defendants as well as defendant Cotter are sued in their respective official capacities.

6. The Long Island Lighting Company ("LILCO"), a New York corporation, is a public utility which provides electric power to residents of Suffolk County. LILCO is constructing the Shoreham Nuclear Power Station ("Shoreham") in Suffolk County and seeks an operating license for Shoreham from the NRC.

Facts Giving Rise to the Action

7. Suffolk County and New York State are opposing the grant of this license in the subject administrative proceeding before the NRC's Atomic Safety and Licensing Board ("Licensing Board" or "Board") in Docket No. 50-322-OL-4 (Low Power) on the grounds that, inter alia, this nuclear facility does not have an adequate and reliable electric power system, as required by NRC regulations. (10 C.F.R. Part 50, Appendix A, General Design Criterion 17). The onsite electric power system, comprised of three emergency diesel generators (the "diesels"), must function in the event of an offsite power outage, to operate emergency pumps necessary to cool down the plant and

prevent overheating of the nuclear core and a melt-down of the core should an accident occur. Concerns regarding, inter alia, the reliability of the Shoreham diesels were first raised by the County during the Winter of 1983 and were dramatically verified in August, 1983, when the crankshaft of one diesel at Shoreham broke in half during testing. Thereafter, inspections over the next six months disclosed numerous cracks in major components of the Shoreham diesels, including pistons, crankshafts, cylinder heads, engine blocks and a supercharger thrust bearing.

8. The Staff of the NRC ("NRC Staff" or "Staff"), an independent party to the proceedings then being conducted before an NRC Licensing Board composed of Chairman Lawrence Brenner and members George Ferguson and Peter Morris (the "Brenner Board"), publicly stated in January 1984 that all problems with the Shoreham diesels would have to be resolved before LILCO could obtain a license to load nuclear fuel and operate Shoreham at not greater than 5% of rated power (a "Low Power License").

9. On February 22, 1984, the Brenner Board ruled that, based upon available information, there was no justification for a Low Power License for Shoreham "in advance of a complete

litigation" of the objections and concerns regarding the Shoreham diesels advanced by Suffolk County and the State of New York. Recognizing the magnitude and seriousness of the issues to be decided, the Brenner Board established a litigation schedule including discovery, which contemplated an approximate nine-month time period.

Chairman Palladino Intercedes

10. The Brenner Board's February 22 ruling was a serious setback for LILCO, because LILCO was suffering a severe financial crisis due in part to the diesel problems and LILCO's consequent inability to obtain an operating license for Shoreham. According to LILCO's 1983 Annual Report and its audited financial statements:

(a) LILCO's ability to raise funds in 1984 for construction and other operating capital requirements was (and remains) uncertain.

(b) After April 27, 1984, LILCO could be in default on $500 million of bank loans, permitting the acceleration of all of LILCO's long-term debt.

(c) Due to the recommendation of the staff of the New York Public Service Commission, which governs LILCO's

electricity rates, that no more than $2.296 billion of Shoreham's $4.1 billion projected cost be allowed in LILCO's rate base because of the imprudency of LILCO's management, "the Company's ability to meet its financial obligations" could be "jeopardize[d]." Moreover, LILCO's chairman William J. Catacosinos, through a letter dated March 9, 1984 published in the Company's 1983 Annual Report, stated:

> Our inability to open Shoreham has created a serious cash shortfall for LILCO. Accordingly, since January 30[, 1984], 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). A copy of the March 9, 1984 letter is attached hereto as Exhibit 1.

11. On March 9, 1984, the NRC Staff notified defendant Palladino, as well as the other four NRC Commissioners, of the "potential licensing delays" of 9 months for Shoreham.

12. Although the NRC Commissioners have a quasi-judicial function, in that, inter alia, orders of Licensing Boards regarding operating licenses may be reviewed by them, defendant

Palladino, on March 16, 1984, met with members of the NRC Staff, including lawyers and "Tony Cotter" (defendant Cotter), to discuss the "delay" in the licensing of Shoreham. On March 20, 1984, defendant Palladino sent a memorandum to the other four NRC Commissioners (the "Palladino Memo", a copy of which is attached hereto as Exhibit 2), proposing that in order to "reduce the delays at Shoreham" the Commission should

> [c]onsider 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.

(Emphasis added).

13. Moreover, two days later, on March 22, 1984, in testimony before a Congressional Budget Oversight Hearing, defendant Palladino stated:

> [I]t is urgent for the Commission to consider an expedited review of the diesel problem at Shoreham because the [Brenner] Board has said that they want that resolved before low power and I think a narrow issue like that could be addressed and might possibly permit acceleration of fuel loading and low power.

LILCO's Effort to Operate Without Any Onsite Power System

14. On March 20, 1984, LILCO filed with the Brenner Board an unprecedented motion to obtain a Low Power License for Shoreham with no onsite electric power system at all ("LILCO's Low Power Motion"). LILCO's Low Power Motion represented a dramatic and basic change in the proposed mode of operation of the Shoreham plant, as for more than 7 years the plans and design documents for Shoreham have required, for operation at any power level, that there be an onsite electric power system consisting of the three diesel generators which, as discussed earlier, have been plagued with problems.

15. The Atomic Energy Act, as construed by the NRC, prohibits the NRC from considering financial issues, including the condition of a utility, in licensing proceedings. Such issues have been held to be outside the zone of interests protected by the Atomic Energy Act. Nevertheless, in its March 20 Low Power Motion, LILCO requested the Board to immediately send its Motion to the NRC Commissioners, "the NRC's highest tribunal," for their decision, because, inter alia, of LILCO's "enormous financial investment" in Shoreham "that now generates nothing but carrying charges."

16. LILCO'S Low Power Motion requires extraordinary and careful analysis, since it is a proposal which eliminates the requirement of NRC regulations for backup onsite power adequate to prevent a melt-down and release of radioactivity in the assumed event that offsite electric power is lost. Indeed, if granted, LILCO's proposal would be the first time in history that a nuclear power plant in the United States has been licensed without an electric power system (either onsite or offsite) which is fully qualified for nuclear service.

17. On March 26, 1984, Suffolk County filed its preliminary views on LILCO's Low Power Motion. The County noted that it would require substantial time to respond to this unprecedented Motion because of new, complex factual issues raised about the nature and reliability of the Shoreham facility's ability to withstand earthquakes, as well as other elements of LILCO's offsite electric power system which, under the Motion filed by LILCO, were to make an onsite system unnecessary, including: (a) LILCO's interconnection capacity with the New York Power Pool and with the New England Power Grid, (b) the four 138 KV circuits and three 69 KV circuits supplying offsite electric power to Shoreham, (c) the power from 10 gas turbines at Holtsville, Long Island (d) other offsite gas turbines east of Shoreham, (e) a 20 megawatt gas turbine to be installed at

Shoreham, and (f) four mobile diesel engines to be installed at Shoreham. The County stated that it had to retain expert consultants and have adequate discovery before a meaningful response to the LILCO Motion could be made. New York State supported the views expressed by Suffolk County.

The Product of Chairman Palladino's Intercession

18. On March 30, 1984, ten days after the Palladino Memo was written and eight days after defendant Palladino's testimony before Congress, the NRC Staff responded to LILCO's Low Power Motion and completely reversed its position that no license, including a Low Power License, should be issued for Shoreham until the onsite diesel problems were solved. In response to the "marching orders" of defendant Palladino, and without addressing any of the County's and State's concerns regarding the time required to respond to LILCO's Low Power Motion, the NRC Staff, without explanation, called for an expedited hearing on the Motion to begin within one month.

19. On March 30, 1984, the same day that the Staff reversed its position and supported LILCO's Low Power License, defendant Cotter issued an order establishing a new licensing board composed of defendant Miller (as Chairman) and defendants Bright and Johnson (collectively, the "Miller Board") "to hear

and decide" LILCO's Low Power Motion. The order noted the "advice" from the Brenner Board (which had jurisdiction over the diesel matters and which had issued the February 22 Order that upset LILCO's schedule) that "two of its members are heavily committed to work on another operating license proceeding." However, according to a published 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.

20. On the same day (March 30), the Miller Board, set up by defendant Cotter following his discussion with defendant Palladino, moved with extraordinary speed and notified the parties by telephone that it would hear oral arguments on April 4, 1984 on LILCO's Low Power Motion. The Miller Board also issued an order on March 30 that it would hear on April 4 the substantive issues raised by the parties "in their filings, as well as a schedule for their expedited consideration and determination." (Emphasis added).

21. In response, on April 3, 1984, the County and the State of New York objected that there was no legitimate basis

for expedited treatment of LILCO's Low Power Motion, and emphasized that considerable time was necessary to respond and prepare to address the merits of LILCO's Low Power Motion.

22. On April 4, 1984, (according to a letter of April 12, 1984, to defendant Palladino from Congressman Edward J. Markey, Exhibit 3 hereto), defendant Palladino

> circulated a follow-up memorandum to the other Commissioners that included a proposed order drafted by Judge Cotter and a paper written by [Palladino's] staff that would have set forth an expedited schedule in which the Shoreham low power licensing proceeding would be completed in thirty to sixty days.

23. On April 6, 1984, following the April 4 oral argument of counsel, the Licensing Board issued an order (the "Low Power Order") setting an expedited schedule for a hearing on LILCO's Low Power Motion. The Low Power Order requires the entire proceeding to terminate by May 5, 1984, which is 29 days after the date the Low Power Order was issued, and therefore well within the period mandated in the April 4 follow-up memorandum from defendant Palladino. A copy of the Low Power Order is attached hereto as Exhibit 4.

24. The Low Power Order, issued on Friday afternoon, April 6, 1984, set the following 29 day expedited schedule for proceedings:

(a) April 6 -- Discovery opens, limited to document requests and depositions.

(b) April 16 -- the end of discovery of documents and taking of depositions. This 9-day period encompassed 5 business days and two weekends.

(c) April 19 -- issuance of the NRC Staff's evaluation of LILCO's technical proposal for operating a nuclear power plant, for the first time in history, with no onsite electric power system.

(d) Good Friday, April 20 -- All testimony, including the County's and the State's direct written testimony, must be filed. Such testimony should be written by expert consultants of the County and the State and contain their written opinions on the issues in contention, based upon their analyses of LILCO's Low Power Motion, supporting affidavits and information supplied by LILCO, documents obtained from LILCO and the NRC Staff through discovery, depositions taken of LILCO and Staff experts, and the Staff safety evaluation report.

(e) April 24 -- the hearing commences on Long Island. This gives the County and the State Easter weekend and Easter Monday to review and analyze the written testimony of LILCO and the Staff to be filed on Good Friday, to prepare the County's and State's witnesses for the hearing, to prepare for cross-examination of LILCO's and the Staff's witnesses, and otherwise to prepare for trial.

(f) May 5 -- the hearing must end. The hearing is scheduled to run for 11 days from April 24 through May 5, with a recess only on Sunday, April 29.

The Miller Board gave no reasons for its extraordinary expedited schedule.

25. The schedule set by the Board is arbitrary and unreasonable, and clearly denies the County and the State of New York an opportunity to prepare for the hearing and to be meaningfully heard on the issue of a Low Power License for Shoreham. It is impossible for the County and the State to retain experts, prepare discovery requests, review thousands of documents produced in discovery, take the necessary deposition

of LILCO and NRC Staff personnel, prepare written testimony, review the testimony of other parties, and prepare for the hearing in 17 days -- the period the Licensing Board allowed between the opening of discovery and the date the hearing is scheduled to start. Indeed, by contrast the NRC regulations provide for a minimum period of 15 days between the filing of the written testimony and the commencement of the hearing. 10 C.F.R. Section 2.743(b).

26. Efforts by the State of New York and Suffolk County to comply with the Licensing Board's schedule have demonstrated that the schedule could not possibly be followed and effectively precludes the County and New York State from representing their citizens at the hearing. The County has diligently proceeded to attempt to retain expert consultants and to carry on discovery, as described in various affidavits filed simultaneously with this Complaint. The County's new experts have found it impossible to perform their analyses by April 20, much less file written testimony by that time.

27. On Monday, April 16, 1984, Suffolk County and New York State filed a joint motion with the Miller Board requesting it to vacate the Low Power Order or refer the matter to the NRC Commissioners, because the Order violated NRC

regulations and denied the County and the State due process of law in violation of the Fifth Amendment of the Constitution. A similar motion was made directly to the NRC Commissioners. On Friday afternoon, April 20, 1984, the Miller Board denied the County/State joint motion in its entirety; and on Monday April 23, 1984, the NRC Commissioners in closed session also considered the Motion but refused to intervene.

28. The issues posed for resolution in the Licensing Board proceeding are critical to all the citizens of the State of New York and in particular to the citizens of Suffolk County who live and/or work in close proximity to the Shoreham facility.

29. The schedule set forth by the Miller Board, if implemented, will effectively deny Suffolk County and the State of New York the opportunity to participate in a meaningful manner on behalf of the constituencies on whose behalf each of these Plaintiffs acts.

30. The Fifth Amendment to the U.S. Constitution guarantees that federal administrative agencies must provide due process of law by providing sufficient time for parties to administrative proceedings to prepare for an administrative hearing in a meaningful fashion.

31. In addition, Section 274(l) of the Atomic Energy Act, 42 U.S.C. § 2021(l), and the Commission's own Rules of Practice at 10 C.F.R. § 2.715(c), expressly provide that with respect to an application for Commission license authority, the Commission shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to such an application.

CAUSE OF ACTION

32. The time schedule established by the Licensing Board for participation in LILCO's Supplemental Motion for Low Power Operating License evidences a callous disregard for the rights of the County and the State of New York to prepare a meaningful response to this unprecedented effort of LILCO to commence low power operations without any onsite electrical capability.

33. The actions of defendants Palladino, Cotter, Miller, Bright and Johnson as set forth herein have been of such a nature as to cause a disinterested observer to conclude that each of these said defendants in some measure has adjudged the facts as well as the law in advance of the hearing on LILCO's low power motion.

34. The Miller Board's action and the Commission's inaction effectively abridge Plaintiffs' constitutionally protected Fifth Amendment rights to due process of law, and in addition deprive Plaintiffs of their statutory right guaranteed by Section 274(1) of the Atomic Energy Act, 42 U.S.C. § 2021(1), as implemented by the Commission in its own Rules of Practice at 10 C.F.R. § 2.715(c).

35. In addition, the Miller Board's action and the Commission's inaction raise the likelihood that the Commission will consider the merits of this critical case without meaningful input from the representatives of the citizens of New York, including Suffolk County, who are most directly affected by this action, and who stand to lose the most from an incorrect decision on this critical issue.

36. Unless this Court acts to preserve the status quo, Plaintiffs and their constituents will be irreparably injured by the denial of their constitutionally protected rights to due process of law, and the public interests accordingly will be compromised by this blatant deprivation of the constitutional rights of some 16 million citizens of the State of New York, including the 1.3 million citizens of Suffolk County.

WHEREFORE, Plaintiffs pray that the Court:

1. Enter judgment declaring that the Defendants' actions deprive Plaintiffs of their right to a fair hearing as guaranteed by the Due Process Clause of the Fifth Amendment; and

2. Temporarily, preliminarily and permanently enjoin Defendant Nuclear Regulatory Commission, from convening, proceeding with, or authorizing any hearing concerning LILCO's Supplemental Motion for Low Power Operating License until such time as said Defendant establishes a hearing date which affords Plaintiffs a reasonable and meaningful period of time in which to prepare for this hearing;

3. Temporarily, preliminarily and permanently enjoin and disqualify Defendants Nunzio J. Palladino, B. Paul Cotter, Jr., Marshall E. Miller, Glenn O. Bright, and Elizabeth B. Johnson from convening, participating in, proceeding with, or authorizing any hearing or other proceeding concerning LILCO or Shoreham.

4. Award Plaintiffs their costs and expenses in this action, including reasonable attorneys' fees; and

5. Order such other and further relief as the Court determines to be just and necessary.

Respectfully submitted,

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April 26, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIO M. CUOMO, Governor of the State of New York, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 84-1264
UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.,	)	Judge Gesell
Defendants.	)	

LONG ISLAND LIGHTING COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

I. PRELIMINARY STATEMENT

At approximately 3:30 p.m. on April 23, 1984, Suffolk County and Mario M. Cuomo filed in this Court a Complaint for Injunctive and Declaratory Relief seeking, inter alia, temporarily to restrain and preliminarily to enjoin administrative hearings scheduled to begin April 24, 1984, before a Nuclear Regulatory Commission (NRC) Atomic Safety and Licensing Board (ASLB) concerning an application by Long Island Lighting Company (LILCO) to load fuel and conduct low power testing at its Shoreham Nuclear Power Station. A 20-page affidavit by the County's counsel and other affidavits of putative consultants who explain that they could not prepare in time for the scheduled administrative hearings accompanied the

Complaint, as did several exhibits. Significantly, the affidavits failed to explain why the consultants were not contacted earlier by the County or why they could not expedite their work. Plaintiffs further accompanied their Complaint with some, but not all, of the pertinent pleadings and orders of the ASLB.

A hearing lasting nearly two hours was held by this Court beginning at 5:25 p.m. on April 23. At that time, LILCO was permitted to intervene as a defendant. After arguments of counsel, the Court refused to accept LILCO's proffer of the remaining ASLB orders and pleadings material to the issues raised by plaintiffs. Instead, the Court agreed to accept only the six-page memorandum of the Licensing Board denying the County's belated attempt to extend that proceeding.[1/] Based on plaintiffs' pleadings and supporting affidavits and the incomplete record from the Licensing Board, this Court issued a temporary restraining order and accompanying Memorandum Opinion on April 25, 1984.

1/ The original ASLB scheduling order was issued April 6. Rather than acting promptly to seek to set it aside, the County took the full ten days allowed by NRC regulations and did not file any objections to the Board's order until April 16. In contrast, plaintiffs were apparently prepared to file this action less than three days after denial of their objections to the scheduling order were denied.

LILCO has moved this Court to dismiss this action for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Simply, there is no jurisdictional basis for this Court to intervene in an incomplete agency proceeding merely to correct alleged scheduling deficiencies which can be reviewed upon appeal when the agency action becomes final. In short, this Court should not become a refuge for those disenchanted with agency scheduling. Nor should disgruntled intervenors be able to delay administrative proceedings by premature and unsupported conclusory allegations of bias by the administrative law judges.

This memorandum is filed in support of LILCO's Motions to Dismiss, as well as in opposition to the plaintiffs' Motion for Preliminary Injunction.

II. FACTS

All facts discussed herein are derived from plaintiffs' pleadings and affidavits, the record before the ASLB or evidence which LILCO will introduce, orally or by affidavit, at the hearing now scheduled for May 3.

The operating license proceeding for Shoreham is in its eighth year. Extensive hearings, tens of thousands of pages of transcript and far-ranging discovery culminated in

April 6, 1984, the Miller Board denied the plaintiffs' motions to dismiss and found that LILCO had made a sufficient preliminary showing pursuant to 10 C.F.R. § 50.57(c). Although the Board concluded that the record was probably sufficient to render a decision under § 50.57(c), it nevertheless ordered additional evidentiary hearings on narrowly focused issues. Its order defined the narrow factual issues to be heard as follows:

> (a) Assuming an accident such as a LOCA [loss of coolant accident] at five percent power, how much time would plant operators have befoe emergency core cooling was necessary, and
>
> (b) Could such core cooling be supplied within that time?

The Miller Board further permitted discovery to continue until April 16, 1984, ordered the filing of testimony on April 20 and scheduled the start of hearings on April 24.

Inexplicably, no discovery requests were received by LILCO from the County until April 12, 1984.[2/] As described in more detail below, the County's discovery requests and their review of documents produced by LILCO was largely perfunctory.

2/ The State of New York has little reason to complain in these proceedings. It has not taken any steps and has never indicated the intent to present any witnesses, to hire any consultants or to engage in discovery.

On April 16, the County and State filed Joint Objections to the Miller Board's April 6 order. This 48-page pleading, accompanied by numerous exhibits, attacked the Board's rulings on the law, the Board's scheduling and the Board's integrity. As directed by the Board, LILCO responded on April 19. On April 20, the Board issued its order denying the County's and State's objections.

The NRC Staff, which was also served with LILCO's Supplemental Motion on March 20, completed its review and filed its Supplemental Safety Evaluation Report on April 19. Both LILCO and the Staff filed their direct testimony on April 20. On April 24, hearings began as ordered. LILCO presented seven witnesses during that time in four panels. Despite repeating its objections to the Board's scheduling order, the County participated in that hearing by engaging in voir dire examination, cross-examination of the witness panels (including cross-examination based on documents obtained during discovery) and motions to strike various segments of the testimony.[3/] At approximately 11:30 a.m. on April 25, LILCO was about to rest its case in chief when all participants in the hearing were informed of the TRO issued by this Court.

3/ The State of New York did not so participate at the hearings. Its counsel was present at the commencement of hearings, objected to the proceedings and elected to stand on its legal arguments. Counsel for the State left the hearings following the lunch break on April 24 and did not reappear.

Further facts will be addressed as necessary in the argument portion of this brief.[4/]

III. ARGUMENT

A. This Court Lacks Subject Matter Jurisdiction Over the Amended Complaint

1. There Is No Subject Matter Jurisdiction for this Court to Intervene in an Agency Scheduling Dispute

The scheduling order issued by the Miller Board is not reviewable in this Court at this time. First, if the scheduling order were a final order, it would be reviewable exclusively in the court of appeals pursuant to 28 U.S.C. § 2342(4). Second, and fundamentally, the scheduling order is not a reviewable "final order."

4/ On April 26, the County and State filed an Amended Complaint seeking additionally to enjoin further participation by Chairman Palladino or Judges Cotter, Miller, Bright and Johnson in any licensing proceeding pertaining to LILCO. No facts supporting this request are averred in the Complaint other than a conclusory allegation that those defendants have prejudged the facts. Since LILCO is not apprised of the basis for this serious accusation by virtue of the pleadings or otherwise, it cannot address them in the factual portion of this brief and can only address them in the abstract when discussing the law.

a. The Statutory Scheme Precludes This Court's Review of the ASLB's Scheduling Order

Section 189 of the feder l Atomic Energy Act, 42 U.S.C. § 2239, provides:

> (a)(1) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. . . .
>
> (b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended, and to the provisions of section 10 of the Administrative Procedure Act, as amended.

Section 2342 of Title 28, in turn, provides:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--
>
> . . . .
>
> (4) All final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42 . . . .

The NRC has assumed the regulatory functions of the former Atomic Energy Commission. Thus, a final order of the NRC entered in any proceeding for the granting of any license under the Atomic Energy Act is reviewable exclusively in the

court of appeals.[5/] San Luis Obispo Mothers for Peace v. Hendrie, 502 F. Supp. 408, 411-12 (D.D.C. 1980); Desrosiers v. NRC, 487 F. Supp. 71, 74-75 (E.D.Tenn. 1980).

Plaintiffs here allege jurisdiction of the ASLB's scheduling order under general federal question jurisdiction and the Administrative Procedure Act (APA). Such jurisdiction does not exist because of the exclusive jurisdiction of the court of appeals as discussed above. If it did, however, the scheduling order could be reviewed only if it constituted "final agency action" under section 10(c) of the APA, 5 U.S.C. § 704. The order is not final under either the APA or 28 U.S.C. § 2342.

b. The Scheduling Order Is Not Final and Is Not Reviewable at this Time

The general rule has been stated as follows:

> In determining whether an order is sufficiently final for purposes of judicial review, "the relevant considerations . . . are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action."

5/ Limiting the jurisdiction of the court of appeals to review of final orders does not vest this Court with jurisdiction over non-final orders. E.g., San Luis Obispo Mothers for Peace v. Hendrie, 502 F. Supp. 408, 411-12 (D.C. D.C. 1980); Desrosiers v. NRC, 487 F. Supp. 71, 74-75 (E.D. Tenn. 1980).

American Dairy of Evansville, Inc. v. Bergland, 627 F.2d 1252, 1260 (D.C. Cir. 1980), quoting Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970). In sum, the finality requirement is designed to prevent disruption of ongoing agency proceedings and interference with interlocutory procedural rulings.

In this case, plaintiffs seek immediate review of an order of a licensing board that established a procedural schedule, and they ask this Court to stop the hearings. It is difficult to imagine anything more interlocutory in character than a hearing panel's scheduling order. Similarly, it is impossible to conceive of anything more disruptive of an ongoing agency proceeding than a court order enjoining it. In short, the very concept of this lawsuit strikes at the heart of the rule requiring finality of an agency's order as a predicate to judicial review.

The Supreme Court reaffirmed the general rule requiring finality in FTC v. Standard Oil Co. of California, 449 U.S. 232 (1980). In that case, Standard Oil Company of California (Socal) sought review of an FTC complaint initiating a proceeding. Socal argued that, if it were not permitted to obtain immediate review of the FTC complaint, Socal would be irreparably injured by having to defend the proceeding and would not be able to obtain effective judicial review at the

conclusion of the FTC proceeding. The Supreme Court rejected both of these arguments. It rejected the notion that the irretrievable loss of time and money and the harrassment of defending litigation had anything to do with a claimed right to immediate judicial review.

On the other hand, the Court noted:

> In contrast to the complaint's lack of legal or practical effect upon Socal, the effect of the judicial review sought by Socal is likely to be interference with the proper functioning of the agency and a burden for the courts. Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. Weinberger v. Salfi, 422 U.S. 749, 765 (1975). Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary. McGee v. United States, 402 U.S. 479, 484 (1971); McKart v. United States, 395 U.S. 185, 195 (1969). Furthermore, unlike the review in Abbott Laboratories, judicial review to determine whether the Commission decided that it had the requisite reason to believe would delay resolution of the ultimate question whether the Act was violated. Finally, every respondent to a Commission complaint could make the claim that Socal had made. Judicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before adjudication concludes.

Id., 449 U.S. at 242-43.

This case falls squarely within the ruling in Standard Oil. Immediate judicial review of an agency's

scheduling order clearly raises the spectre of judicial interference with all kinds of routine interlocutory agency orders.[6/] Practically any objection to any agency's preliminary procedural rulings can be framed as a "violation of procedural due process." The ALSB's scheduling order does not purport to grant a low power license for Shoreham; nor does it definitively determine any legal right of plaintiffs. Plaintiffs might be forced to deal with the exigencies of rapid preparation in litigation, but, like the litigation burdens in Standard Oil, this is simply an incident of the plaintiffs' participation in the NRC proceedings.

Finally, plaintiffs can show no irreparable harm from the scheduling order. If the ASLB, the Atomic Safety and Licensing Appeal Board, or the NRC itself, determines that the record established at the hearings is inadequate for a reasoned decision, or if plaintiffs can make a showing of good cause, the record may be supplemented or rebuttal testimony may be filed. See, e.g., 10 C.F.R. § 2.714(a)(1) (standards for late filed contentions); Vermont Yankee Nuclear Power Corp. (Vermont

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6/ Mindful of the confusion and delay inherent in such procedural litigation, NRC regulations prohibt interlocutory appeals of ASLB rulings. 10 C.F.R. § 2.730(f). The NRC is particularly reluctant to permit interlocutory review of scheduling orders. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-293, 2 NRC 660 (1975).

Yankee Nuclear Power Station), ALAB-24, 6 AEC 358 (1973) (hearings may be reopened); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-335, 3 NRC 830 (1976) (NRC appeal boards may call for further factual developments). As in Standard Oil, the ASLB's scheduling order may be reviewed at the conclusion of the NRC proceedings and, if necessary, corrected upon judicial review under 28 U.S.C. § 2342(4).

The rule requiring finality of an agency's order as a predicate for judicial review has been applied routinely, both within and outside this circuit, to actions of the NRC and its predecessor, the AEC. In San Luis Obispo Mothers for Peace v. Hendrie, 502 F. Supp. 408 (D.D.C. 1980), this Court held that it had no jurisdiction to review the decision of Commissioner Hendrie not to disqualify himself from acting on the operating license application for the Diablo Canyon plant. Plaintiffs, intervenors in the licensing proceeding, alleged jurisdiction under the APA and general federal question jurisdiction and claimed a violation of procedural due process. Relying on 42 U.S.C. § 2239(b) and 28 U.S.C. § 2342, this Court concluded that it had no jurisdiction. It stated:

> This Circuit has repeatedly and specifically stated that, in all but rare cases, a motion challenging the action of an agency official is not cognizable prior to a final administrative decision or otherwise than pursuant to specific,

> applicable statutory procedures. [Citations omitted].

Id. at 410-11.

Importantly, this Court found that the plaintiffs in Hendrie had failed to show a patent violation of agency authority or manifest infringement of substantial rights that could not be remedied by the statutorily prescribed means of review. The issue of Commissioner Hendrie's disqualification would be fully reviewable upon completion of the agency licensing proceedings, "should plaintiffs seek review in the Court of Appeals, the only appropriate forum to hear their claim." Id. at 411.

The rule requiring finality has been applied by the Court of Appeals to other significant agency rulings governing the conduct of hearings. In Natural Resources Defense Council, Inc. v. NRC, 680 F.2d 810 (D.C. Cir. 1982), NRDC petitioned the Court of Appeals for review of the NRC's decision to deny an adjudicatory hearing on certain license amendments and to apply, instead, abbreviated procedures under a new "military functions" rule. The jurisdiction of the Court of Appeals was alleged to be invoked under 42 U.S.C. § 2239(b) and 28 U.S.C. § 2342(4). NRDC asserted that its rights in the license amendment proceeding would be substantially prejudiced by use of the abbreviated procedures. The Court of Appeals found that

it lacked jurisdiction. The NRC's procedural ruling was not a final order, because it was not a decision on the license amendment. The Court continued:

> Most importantly, the availability of relief on review of a final order in the license proceeding dictates against judicial review at this time. E.g., Ecology Action, 492 F.2d at 1001; Citizens for a Safe Environment, 489 F.2d at 1022; Thermal Ecology, 433 F.2d at 526. NRDC's claims concerning the application of the "military functions" rule can be raised and addressed upon judicial review of a final NRC decision on the NFS-Erwin license amendments. We are aware that deferring review until there has been a final agency decision may necessitate additional administrative proceedings if we find that the NRC improperly applied the "military functions" rule. That risk, however, is inherent in a system of judicial review that is limited to final orders. It cannot justify reviewing agency action that is otherwise interlocutory.

Id. at 816. The Court of Appeals also found that waiting until the NRC had completed the license amendment proceeding would give the Court of Appeals the benefit of a factual record.

The decision of the Court of Appeals in NRDC v. NRC is functionally indistinguishable from the case before this Court. Plaintiffs' claims of prejudice from a schedule in a proceeding that has not been completed, and which plaintiffs' seek to enjoin, are premature. Upon an appropriate showing, the NRC can take any necessary corrective action to expand or supplement the record or the proceedings. Any procedural error

likewise may be corrected on judicial review of the NRC's final decision.

c. Plaintiffs' Claims Fit Within None of the Exceptions to the Finality Rule

There are only two extremely narrow exceptions to the rule permitting federal court review of only a final administrative order. First, as indicated in Ecology Action v. AEC, 492 F.2d 998 (2d Cir. 1974), and in certain decisions of the D.C. Circuit, see, e.g., Sterling Drug, Inc. v. FTC, 450 F.2d 698, 710 (D.C. Cir. 1971), interlocutory review may be obtained in rare instances where an agency has very clearly violated an important constitutional or statutory right. "Very clearly violated" means that the violation must be so patent that reversal on review of a final order would be a certainty and factual development by the agency would not assist the court in any way in making its decision. NRDC v. NRC, supra; Association of National Advertisers v. FTC, 617 F.2d 611, 620 (D.C. Cir. 1979). An interlocutory order may be reviewed only if the agency's ruling "is so flagrantly wrong and demonstrably critical as to make it apparent that the agency is not merely courting the possibility of reversal but is running into the certainty of it if the ultimate decision should be against the proponent of the evidence." Ecology Action, supra, 492 F.2d at 1001. Cases such as Fitzgerald v. Hampton, 467 F.2d 755 (D.C.

Cir. 1972) and Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962) fit within this narrow exception. For example, in Amos Treat, the agency was violating regulations clearly proscribing participation by a former investigator as an adjudicatory officer, an action which also fragrantly violates the notion of a fair trial. Disagreement concerning a scheduling order does not fall within this "flagrant" category.

Importantly, courts in this circuit have always recognized that the Amos Treat doctrine must be narrowly construed. SEC v. R.A. Holman & Co., 323 F.2d 284, cert. denied, 375 U.S. 943 (1963). See also Association of National Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980). Similarly, authorities and commentators have criticized Amos Treat and recommended that it be limited to its particular facts. See National Rifle Association of America v. United States Postal Service, 407 F. Supp. 88, 92 n.3 (D.D.C. 1976); See also Administrative Law Treatise § 13.02, at 458, 461 (1970 Supp).

The second narrow exception is review of egregious agency action that could not be effectively reviewed or corrected on review of a final order. This category of cases is exemplified by Gulf Oil Corp. v. DOE, 663 F.2d 296 (D.C. Cir. 1981). There, the plaintiff sought to prevent the destruction of records that could have proved essential to

effective review and correction of any final order. In that limited circumstance, it appeared that review had to be immediate or not at all. See 663 F.2d at 311.

In granting the temporary restraining order (TRO) in this case, the Court misapprehended the distinction drawn in Gulf Oil between the facts of that case and the Supreme Court's decision in Standard Oil. Gulf Oil does not stand for the broad proposition that immediate review of all interlocutory agency decisions is appropriate whenever anyone claims a need to "get[] the proceeding tried fairly." See Memorandum Opinion, April 25, 1984, p. 4; Gulf Oil, 663 F.2d at 311. Instead, immediately after the passage quoted in Judge Johnson's Memorandum Opinion, the Court of Appeals explained the limited reason for permitting immediate judicial review:

> Indeed the Supreme Court in Standard Oil assumed that "a record which would be inadequate for review of alleged unlawfulness in the issuance of a complaint can be made adequate" by judicial remedy after the administrative process has run its course. 101 S. Ct. at 496 (emphasis supplied). The district court here, however, determined it could not make such an assumption because of specific allegations and evidence of record destruction, and on the facts before it, we are not disposed to differ with its conclusion. Thus we conclude that, despite the lack of a final order, the dispute over the need to preserve a record as to alleged agency wrongdoing was sufficiently urgent and the issue sufficiently joined to meet the ripeness requirement.

Gulf Oil, 663 F.2d at 311. The concern of the Court of Appeals in Gulf Oil, therefore, was simply that it appeared that there would be no way to correct the agency's alleged errors if review had to wait for a final decision. Such is not the case on the facts presented to this Court. Indeed, review of plaintiffs' claim of prejudice in this case can take place effectively only after the proceeding has run its course.[7/]

The authorities construing these narrow exceptions to the rule of finality hinge on a practical analysis. They are not based on talismanic labels. Plaintiffs cannot, therefore,

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7/ In San Luis Obispo Mothers for Peace v. Hendrie, supra, this Court analyzed its earlier opinion in Association of National Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980). National Advertisers sets forth three criteria for interlocutory review of agency orders in only "rare circumstances": the issue (1) must involve no disputed factual issues demanding the creation of a better administrative record; (2) must be a pure question of law; and (3) must be an issue of first impression that will not necessarily permit future piecemeal attacks on administrative processes. Id. at 411.

As a practical matter, review of plaintiffs' claims will be more efficient after completion of the administrative record. For example, plaintiffs insist on the necessity to perform studies concerning the seismic resistance of LILCO's offsite power sources. It may be that such analyses are unnecessary, however. Based on evidence before the ASLB, it could find that seismic resistance of these power sources is not determinative of any issue because more than 30 days might elapse before AC power would be needed to operate plant emergency systems in the event of an earthquake. The importance of this issue and of the County's professed inability to prepare for it is impossible to evaluate in a vacuum.

simply rely on the cry of "pr edural due process" to invoke this Court's jurisdiction.[8/] In Sterling Drug, Inc. v. FTC, 240 F.2d 698 (D.C. Cir. 1971), which is cited in the Court's Memorandum Opinion, the Court of Appeals flatly rejected the petitioner's claim that it was being denied due process clause, by the agency's refusal to grant certain discovery. Id. at 710-12. The Court of Appeals held that even if the FTC continued to deny the discovery and decided on the merits against the petitioner:

> Sterling will be able to raise the due process issue on appeal from the Commission's final order in the case. At that time we will have before us the entire record of the proceedings and the Commission's rulings and will thus be qualified to determine whether Sterling received a fair hearing. This is not such a strictly legal question that it can be properly decided on the incomplete facts and arguments now before us. Accordingly, we feel its resolution should be deferred until the Commission proceedings have run their course.

450 F.2d at 711. This Court similarly held that it had no jurisdiction to consider allegations of due process violations

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8/ This Court's Memorandum Opinion attempted to distinguish the Supreme Court's decision in Standard Oil primarily on the basis that statutory rights were involved in Standard Oil and constitutional rights are alleged in this case. The cases in this Circuit and elsewhere make no distinction between "constitutional" rights and "statutory" rights in determining the availability of immediate judicial review.

prior to the entry of a final order by the NRC in San Luis Obispo Mothers for Peace v. Hendrie, supra. Thus, merely labeling a claim as "constitutional" or as involving "procedural due process" does not circumvent the rule requiring finality of an order before it may be judicially reviewed.

If a talismanic incantation of "procedural due process" could automatically circumvent the final order rule, as plaintiffs would have this Court do, this purported exception would swallow the rule. Practically any interlocutory agency ruling would be immediately reviewable. The Supreme Court has cautioned strongly against permitting such an erosion of the "final order" rule. FTC v. Standard Oil Co., 449 U.S. at 242-43.

d. The ASLB's Discretionary Scheduling Determination Has Not Compromised Any Due Process Rights of Plaintiffs

Even if this Court finds jurisdiction in this case, the ASLB's decision to expedite the Shoreham low-power license hearing has not deprived plaintiffs of any right to due process. The Board's determination of what process is due plaintiffs at this stage of the protracted Shoreham proceedings falls well within the permissible scope of the substantial discretion reserved to it. This court should not substitute plaintiffs' views as to what procedure is necessary for the product of the considered judgment of the ASLB.

It is well established that scheduling is an area of licensing board discretion to be interfered with, even by the NRC itself, only in "truly exceptional situations." See, e.g., Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-295, 2 NRC 668 (1975); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 250 (1974). As demonstrated below, the facts fall far short of any "exceptional" situation.

Plaintiffs allege that the time contemplated by the April 6 order is inadequate to permit it to prepare for litigation of low power issues. The plaintiffs' complaint is groundless: it understates the time available to Suffolk County to gain knowledge concerning matters relative to this litigation; overstates the scope of the litigation and hence the breadth of matters to be inquired into; and ignores the County's own dilatoriness in using its available time.

Plaintiffs attempt to depict the Board's Order of April 6, 1984, as providing the first indication that low power proceedings involving emergency power sources other than the TDI diesels would be conducted. But the County was on explicit notice of LILCO's exact proposal as of March 20, when it was served on the County.[9/] That proposal was supported by four

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9/ LILCO's proposal was also served on New York State. The State, however, has not alleged that it has made any efforts to

(footnote continued)

detailed affidavits, with attachments, sponsored by LILCO's experts. Moreover, the County knew nearly a month earlier, as of the February 22, 1984, prehearing conference, that LILCO would likely be filing proposals for low power operation using backup power sources in addition to the TDI diesels. Indeed, in a submittal filed on the Board and parties on February 7, 1984, LILCO urged the Licensing Board to consider the enhanced reliability of LILCO's offsite power system because of the special features included in its design. LILCO's submittal discussed many of the features that were later described in greater detail in its March 20 filing.[10/] Thus, the County had over two months' notice of the types of power sources upon which LILCO intended to rely.[11/] And it had over a month to

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(footnote continued)

secure expert assistance nor did it seek any discovery during the period allotted.

10/ One additional off-site power source, a block of four diesel generators, was included in the March 20 filing.

11/ The Board is entitled in the exercise of its discretion to consider, for example, the time that had previously been available to the requesting party to prepare to meet issues it could fairly anticipate, and to take into account that party's general familiarity with the case. See Carter-Wallace, Inc. v. Gardner, 417 F.2d 1086, 1095 (4th Cir. 1969) (no abuse of discretion in hearing examiner's denial of a continuance where movant had had six months to prepare a response to evidence for its own files), cert. denied, 398 U.S. 938 (1970). Cf. ASLB Order at 4 (plaintiff's discovery request have been desultory and pro forma).

analyze LILCO's specific proposal for low power operation.

Further, the County has been on notice for years of the existence of virtually all of the factual issues it now portrays as being newly created. General Design Criterion 17 (10 C.F.R. Part 50, Appendix A, General Design Criterion 17), which governs the requirements for on-site and off-site power for nuclear power plants, also applied to Shoreham in 1977-81, when the County was formulating its safety contetions. GDC 17 applies to the capacity of offsite as well as onsite electric power systems to support the performance of specified safety functions in the event of postulated accidents. GDC 17 also requires that provisions be made to minimize the probability of losing electric power supplies. See 10 C.F.R. Part 50, Appendix A, Criterion 17, first and last paragraphs. In short, the same offsite power sources that Suffolk County now demands extended periods to examine were used in the safety analyses contained in the Final Safety Analysis Report for Shoreham and were available for litigation, with the required assumption that onsite power was lost, when Suffolk County was framing its safety contentions years ago. The only very recent development since then concerning the reliability of offsite power sources is their enhancement by the addition of certain new power sources, a 20 MW gas turbine and four mobile diesel generators physically located on the Shoreham site (though not deemed

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LBP-82-3, 15 NRC 61, 186 (1982) ("the low power motion context is not a free opportunity to brng in new contentions").[14/] Thus, under § 50.57(c) a party has a right to be heard on the extent to which its existing contentions are relevant to the activity to be authorized. 10 CFR § 50.57(c).

The County and State were given ample opportunity to argue that its pre-existing contentions on the adequacy of Shoreham's onsite diesels were pertinent to the activities to be conducted. The County and State presented their arguments in responses to LILCO's low power motion. Moreover, they were given essentially unlimited opportunity to argue their positions in front of the Licensing Board on April 4. Finally, they re-argued their position in a filing before the Licensing Board and the Commission in their attempt to vacate the Board's order and stay the proceeding.

In essence, the County and State argued that, as a matter of law, LILCO must have a fully litigated onsite power source prior to conducting any operating activities at Shoreham. Thus, in their view, the pre-existing contentions on the on-site power source precluded any license for Shoreham.

14/ In NRC proceedings, an intervenor does not have an unlimited right to participate in any matter that strikes its fancy. Issues to be litigated must be timely raised and stated with specificity, and have an adequate basis. 10 C.F.R. § 2.714.

The Board, however, disagreed. It held that NRC regulations do not require, as a matter of law, a fully litigated on-site power source for the activities proposed by LILCO. Memorandum and Order Scheduling Hearings on LILCO's Supplemental Motion for Low-Power Operating License at 11-12. In fact, the Board completely excluded from consideration any reliance on the existing onsite power source. Id. at 3. Consequently the County's pre-existing contentions were irrelevant to the motion pending before the Board. As the Board observed,

> a low power license could probably be ruled upon without further evidentiary hearings/11 upon affidavits and counteraffidavits . . . .
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> 11/Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 at 362 (1981).

By providing an opportunity for evidentiary hearings, the Licensing Board gave the County and State a greater opportunity to voice their views then required under the NRC's regulations.

Despite this additional opportunity to participate, the County has not taken advantage of the time available to it. As outlined above, Suffolk County was aware of potential factual issues that would be developed well before the Board's April 6 order. At the very latest, the County could have begun inquiring actively into LILCO's exact case on March 20, the day

LILCO's supplemental low power motion was served on it. The County has often seized the opportunity for formal or informal discovery with alacrity in other aspects of this proceeding; its failure to do so here must be taken as deliberate.[15/]

Notwithstanding the County's contrary desires, the Board's intention to move quickly was signaled by its telephone notice of March 30 setting an April 4 oral argument, by its remarks at the ensuing conference, and by its April 6 order. Still LILCO did not receive any discovery requests from Suffolk County until April 12, eight days after the conference and six days after the Board's order.[16/] Even at that, Suffolk County's discovery requests, though extraordinarily burdensome, were of the boilerplate type that could have been formulated on a first reading of LILCO's March 20 motion and affidavits. In fact, the requests were very similar to the types of discovery that the County alleged it needed in its March 26 filing and reiterated at the April 4 argument.

15/ The County did capitalize on one opportunity for free discovery during this period: its representatives attended an open meeting, convened by the NRC Staff, on March 29 to discuss LILCO's low power motion.

16/ One discovery request was dated April 11 but not received until April 12 because sent by Federal Express rather than telecopier; the request dated April 12 was telecopied and received that evening.

The County's pursuit of the document discovery actually requested has been equally desultory. LILCO, following receipt of the County's first discovery request, had documents assembled for examination and copying on Long Island the next day, April 13, and offered to make them available around the clock. Suffolk County responded to the invitation by sending one lawyer recently assigned to the case and two paralegals; they spent between three and four hours going through some of the available documents, requested extensive copying (which was performed overnight), and departed.[17/] Further, despite knowledge since March 20 of LILCO's potential witnesses' identities and of the gist of their proposed testimony, Suffolk County neither took nor requested depositions.[18/]

The County's pursuit of expert witnesses has been similarly lackadaisical. Despite the clear indication as early

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17/ Documents responsive to the second request were also assembled and made available for review on Long Island by April 14; Suffolk County forewent this opportunity, choosing instead to have them copied and sent to its attorneys' offices in Washington, which was accomplished by April 16. In addition, two paralegals reviewed documents on Long Island on April 16.

18/ The County's diffidence about taking depositions here is in marked contrast to its conduct in other phases of the case, where the County, according to LILCO records, has taken depositions of at least 51 LILCO and other parties' experts and noticed (but not taken, for one reason or another) many more.

as February, 1984 that LILCO intended to propose alternatives relying in whole or inpart on the enhanced reliability of LILCO'S offsite power sources, the County took no steps to secure additional consultants.[19/] Indeed, even when LILCO made a specific proposal, supported by four affidavits, including exhibits, the County made no effort to hire new consultants to engage LILCO's proposal. It was not until April 4, more than two weeks after LILCO filed its motion,[20/] that the County made any effort to hire additional consultants. Minor Affidavit at 6. Mr. Minor claims it "did not retain experts prior to the Licensing Board's April 6 Order because the County's position was that for legal reasons, the LILCO Motion needed to be dismissed." Id. at 7. In short, the County made a tactical decision to rely on its legal arguments at the expense of developing a factual case. Now that the gamble has been lost, the County seeks to benefit from its own misjudgment of the strength of its case. It cannot be permitted to do so.

19/ As reflected in the Affidavit of Gregory C. Minor, the County has retained the services of MHB Associates for a number of years. Thus, the County had immediate access to consultants it has used on a wide range of subjects in the Shoreham proceedings. The County also had previously retained the services of Dennis Eley.

20/ Under NRC rules of practice, parties normally have only 10 days to respond to motions. 10 CFR § 2.730(c). Thus, the County delayed at its own peril.

The inescapable conclusion is that the County's professed unpreparedness to proceed at this point is substantially, if not entirely, of its own making. Suffolk County has deliberately chosen not to bestir itself.[21/]

In establishing an expedited prehearing schedule providing limited time for discovery, the ASLB struck a balance between the public interest in a prompt adjudication of the merits of LILCO's low power license motion and the desire of plaintiffs for an extensive period for preparation. It is the Board's province to determine what procedures are most appropriate. See West Chicago v. NRC, 701 F.2d 632, 646 (7th Cir. 1983). The agency's conclusion that the plaintiffs were not entitled to more time is not evidence that their due process rights have been trampled. E.g., 900 G.C. Affiliates, Inc. v. New York, 367 F.Supp. 1, 4 (S.D.N.Y. 1973).

Plaintiffs here were hardly deprived of an opportunity to be heard. Expedited administrative action "has always been permissible when the [government's] interest in acting promptly to promote the general welfare, including economic well-being, outweighs the individual's interest in

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21/ One test for determining whether a curtailment of discovery is reversible error requires a showing that more diligent discovery was not possible. Northern Indiana Public Service Co., supra, citing Eli Lilly and Company v. Generix Drug Sales, Inc., 460 F.2d 1096, 1105 (5th Cir. 1972).

having an opportunity to be heard before the [government] acts, perhaps in error, in ways that may cause him significant injury." Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1081 (D.C Cir. 1974) (Leventhal, J.), citing Arnett v. Kennedy, 416 U.S. 134 (1974). In fact, there is no due process problem where a party is denied entirely the opportunity to be heard on a license application before the license is issued, id., a considerably more severe constraint than that imposed here by the Board's simple act of expediting a hearing schedule. "Surely, their [the Board's determination to expedite] is not unconstitutional where, as here, the sole responsibility for the public health and safety is firmly vested in the agency, Power Reactor Development Co. v. Int'l Union of Elec. Workers, 367 U.S. 396 (1961)], the possibility of harm from the agency's action is seen only by petitioner in its sole judgment, and that judgment rests upon its view of numerous complex technical questions within the competence of the agency to evaluate." Id.

Here, in contrast to Union of Concerned Scientists, plaintiffs would be heard in the licensing proceeding itself prior to issuance of any license. If there was no constitutional deprivation in Union of Concerned Scientists resulting from "being shunted over to the simultaneous rule making," id., then a fortiori there was no such due process

violation here. All the ASLB has done is afford plaintiffs somewhat less time for preparation than they would like. Plaintiff's disappointment at this decision does not rise to the level of constitutional injury.

In summary, the County's due process claim is unfounded because scheduling matters are within the discretion of administrative tribunals. In the instant case, the Licensing Board did not violate any constitutional right. Importantly, any deficiencies in the time available for preparation and discovery were remedied by the Board's hearing schedule. Eleven days of cross-examination are ample time to ensure full development of an evidentiary record in the limited context of the low power motion.[22/]

2. The Disqualification Issue
Is Not Properly Before This Court

In their Amended Complaint for Injunctive and Declaratory Relief, plaintiffs further request that the Court "temporarily, preliminarily and permanently enjoin and disqualify Defendants Nunzio J. Palladino, B. Paul Cotter, Jr., Marshall E. Miller, Glenn O. Bright, and Elizabeth B. Johnson

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22/ Although the Board specified a firm deadline for the close of hearings, a documented incomplete development of the facts during the 11-day hearing would have provided a sound basis for a motion to extend the hearing schedule.

from convening, participating in, proceeding with, or authorizing any hearing or other proceeding concerning LILCO or Shoreham." Amended Complaint ¶ 20. Like the dissatisfaction with the scheduling order, the disqualification issue is not properly before this Court.

The general rule in cases which seek to enjoin the participation of allegedly disqualified personnel in agency proceedings is that the court should stay its hand pending the exhaustion of the administrative process and the entry of a final order. Association of National Advertisers, Inc. v. FTC, 460 F. Supp. 996, 998 (D.D.C. 1978), rev'd on other grounds, 627 F.2d 1151 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980); Nader v. Volpe, 466 F.2d 261, 265-68 (D.C. Cir. 1972). The exception to this exhaustion and finality doctrine is extremely narrow. First, it must be a case where the agency has had an adequate opportunity "to pass in the first instance upon the claimed disqualification of its own members." Amos Treat & Co. v. S.E.C., 306 F.2d 260, 265 (D.C. Cir. 1962); see also Fitzgerald v. Hampton, 467 F.2d 755, 769 (D.C. Cir. 1972); Association of National Advertisers, Inc. v. FTC, 627 F.2d at 1156-57. Second, the facts must demonstrate either that the issue in question cannot be raised from a later order of the agency or that the agency has very clearly violated an important constitutional or statutory right. Fitzgerald v. Hampton, 467 F.2d at 769.

Plaintiffs' Amended Complaint fails to meet either criterion for invoking the exception. First, plaintiffs have not met the threshold requirement of providing the agency with an adequate opportunity to rule upon the disqualification issue. They have not, in accordance with the Nuclear Regulatory Commission's Rules of Practice or the requirements of federal case law, sought recusal of any of the administrative law judges serving on the Licensing Board, nor have they sought the recusal of Chief Administrative Law Judge Cotter or Chairman Palladino. See 10 CFR § 2.704(c). Moreover, plaintiffs have established no reason for this Court to permit a circumvention of the Commission's Rules of Practice. These Rules specifically provide that a party may move that the presiding officer or a board member disqualify himself and that, if the motion to disqualify is not granted, it shall be reviewed by the agency itself.

Plaintiffs also fail to meet the second requirement for the exercise of federal jurisdiction to enjoin the participation of agency members in an adjudicatory proceeding. They must show that the issue in question is not one that can be raised on review of a final order of the agency or that the agency has very clearly violated an important constitutional or statutory right.

Here, the issue of disqualification could in fact be raised in the first instance before the agency. Once the NRC has made a final reviewable decision, the issue of disqualification could be raised before the Court of Appeals without prejudicing plaintiffs' rights. See San Luis Obispo Mothers for Peace v. Hendrie, 502 F. Supp. 408 (D.D.C. 1980). Further, the Amended Complaint, even if all of its allegations are taken as true, utterly fails to establish any constitutional or statutory right which would be endangered by proceeding with a motion to disqualify before the NRC or by continuing the low power licensing proceeding without disqualification of any agency official.

In their Amended Complaint and in their Memorandum Of Points And Authorities In Support Of Plaintiffs' Application For A Temporary Restraining Order And Motion For A Preliminary Injunction, plaintiffs put forth broad, vague assertions of bias that are not accompanied by factual references that would provide any basis for a finding of bias. Plaintiffs allege, inter alia, that Chairman Palladino determined that hearings on low power testing for Shoreham should begin as soon as possible; that through a memorandum authored by Chairman Palladino and Chairman Palladino's meeting with Judge Cotter and the NRC Staff, the Chairman's determination to expedite the Shoreham licensing proceeding was communicated to subordinate

NRC officials; and that the Licensing Board adopted an expedited schedule in accordance with the views of Chairman Palladino.

A desire for expedition of NRC licensing proceedings, even if it were shared equally by all the officials whom plaintiffs seek to disqualify, does not constitute prejudgment of the merits of the application for a low power license for Shoreham. This certainly provides no indication of any taint of the proceedings so irrevocable as to prejudice any final determination. In short, the harm plaintiffs allege does not rise to the level of any denial of due process, much less a clear and patent violation that might permit immediate review. Like this Court's decision in San Luis Obispo, plaintiff's threshold showing fails to provide any basis for immediate review. See 502 F. Supp. at 411.

A comparison of the circumstances presented by plaintiffs' Amended Complaint and the cases in which federal courts have intervened in administrative proceedings to disqualify an agency official clearly demonstrates that intervention is not appropriate in this proceeding. Plaintiffs rely heavily on Amos Treat. In Amos Treat, broker-dealers sought to enjoin a Security and Exchange Commission proceeding on the grounds that a member of the Commission, sitting in a judicial capacity, had participated in the investigation and

prosecution of the proceedings in his prior position as Director of the Commission's Division of Corporate Finance. The court held that allowing a member of an investigative or prosecutorial staff who had actively participated in an investigation to later sit as a judge in the adjudicatory aspects of the same proceeding constituted a patent denial of due process. No additional factual development before the agency would assist the court in resolving the issue. The patent denial of due process, coupled with a prior agency decision not to disqualify the Commissioner, provided the district court with a basis for jurisdiction.

In this proceeding there has been no comparable constitutional deprivation. The agency officials whom plaintiffs seek to disqualify have not participated in the proceedings in an investigatory or prosecutorial posture, nor has it been demonstrated that they have in any way prejudged the merits of the low power license proceeding. Plaintiffs have made no showing that the continued participation of Chairman Palladino, Chief Administrative Law Judge Cotter, or Judges Miller, Bright, and Johnson would so irrevocably taint the proceedings that any final determination would be invalid.

B. The Amended Complaint Fails to State A Claim Upon Which Relief Can Be Granted Insofar as It Seeks Disqualification

Plaintiffs have sought to disqualify NRC officials from acting in this case. Plaintiffs' sole complaint is that these officials of the NRC have expedited the hearings on one aspect of the Shoreham proceeding. Courts and agencies often expedite proceedings when they determine that it is appropriate. Indeed, it is the duty of courts and agencies to decide issues expeditiously. If expediting a proceeding constituted grounds for disqualification, agencies would be crippled and protracted delay would prevent agencies from carrying out their legal responsibilities. Indeed, Suffolk County's key strategy in opposing Shoreham is to delay any decision on any issue at all costs. Plaintiffs have now taken the extraordinary step of seeking to disqualify agency officials when they refuse to go along with plaintiffs' strategy to kill Shoreham by protracting proceedings unnecessarily.

The test for disqualification of a member of a federal regulatory agency from participating in an adjudicatory proceeding is well established in this circuit. See Association of National Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980); Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), vacated on other

representations in its advertising and had engaged in deceptive practices in violation of Section 5 of the Federal Trade Commission Act. Specifically, the Commission alleged that Cinderella advertised "courses of instruction which qualify students to become airline stewardesses" and that its graduates were "qualified to assume executive positions." Cinderella, 425 F.2d at 584 n.1. During the time that the case was pending before the Commission, Chairman Dixon gave a speech in which he stated:

> . . . "What about carrying ads that offer college educations in five weeks, . . . or becoming an airline's hostess by attending a charm school? . . . Granted that newspapers are not in the advertising policing business, their advertising managers are savvy enough to smell deception when the odor is strong enough."

Cinderella, 425 F.2d at 590 (emphasis omitted). The D.C. Circuit found that Chairman Dixon's remarks gave the appearance that he "ha[d] already prejudged the case and that the ultimate determination of the merits [would] move in predestined grooves." Cinderella, 425 F.2d at 590.

In stark contrast to both Texaco and Cinderella, even taking all of the allegations in the Amended Complaint as true, Chairman Palladino, Chief Administrative Law Judge Cotter and Administrative Law Judges Miller, Bright and Johnson have not

acted in a manner that would indicate that they have prejudged the merits of the Shoreham case. Plaintiffs allege in Paragraphs 11 through 13 of their Amended Complaint that Chairman Palladino was notified by the NRC Staff of potential licensing delays for Shoreham, that he met with members of the NRC Staff including lawyers and Administrative Law Judge Cotter to discuss the delay in the licensing of Shoreham, that he sent a memorandum to the other NRC commissioners proposing that 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." (Palladino Memorandum, Exhibit 2 to Amended Compliant). Plaintiffs further aver that Chairman Palladino stated in testimony before a Congressional Budget Oversight Hearing that

> it is urgent for the Commission to consider an expedited review of the diesel problem at Shoreham because the Board has said that they want that resolved before low power and I think a narrow issue like that could be addressed and might possibly permit acceleration of fuel loading and low power.

In short, Chairman Palladino in his capacity as Chairman of the Nuclear Regulatory Commission, has taken steps to prevent unwarranted delays in licensing proceedings. Avoidance of delay is espoused by the Commission's own regulations and

policy statements. E.g., 10 C.F.R. § 2.718, and 10 C.F.R. Part 2, Appendix A (Statement of General Policy and Procedure: Conduct of Proceedings for the Issuance of Construction Permits and Operating Licenses for Production and Utilization Facilities for Which a Hearing Is Required Under Section 189A of the Atomic Energy Act of 1954, As Amended).

To accomplish expeditious resolution of NRC licensing proceedings, Chairman Palladino has apparently urged members of his agency to address the matter of delay in licensing proceedings. Nothing in the public statements made by Chairman Palladino and quoted in plaintiffs' Amended Complaint indicates that the Chairman has in any way prejudged the merits of the Shoreham case.

Plaintiffs further allege in Paragraphs 19, 20 and 22 that Judge Cotter issued an order establishing a new Licensing Board; that Judge Cotter was quoted in Nucleonics Week, April 5, 1984 as stating that it was his idea to appoint the Board; that the Board was set up by Judge Cotter following a discussion with Chairman Palladino; and finally that Congressman Edward J. Markey stated in a letter of April 4, 1984, to Chairman Palladino that Chairman Palladino had circulated a memorandum to the other NRC commissioners

> that included a proposed order drafted by Judge Cotter and a paper written by [Palladino's] staff that would have set forth an expedited schedule in which the Shoreham low power licensing proceeding would be completed in 30 to 60 days.

Clearly, the statements attributed to Judge Cotter as well as Judge Cotter's actions in appointing a new Licensing Board are not indicative of a prejudgment of the merits of the Shoreham proceeding. Indeed, Judge Cotter's statements and his actions reflect his responsibilities as Chief Administrative Law Judge of the NRC to regulate the assignment of administrative law judges to cases in order to regulate the docket.

Finally, plaintiffs charge in paragraphs 20 through 25 of their Amended Complaint that Judges Miller, Bright and Johnson, set an expedited schedule for a hearing on LILCO's low power motion. Plaintiffs have averred no statements or actions by the ASLB which would indicate that they have in any way prejudged the merits of the Shoreham proceeding. A decision to proceed on an expedited schedule does not constitute a prejudgment of the merits of a case as the plaintiffs would apparently urge this Court to believe. If it did, no agency could act on an expedited schedule. In short, even according to the allegation in the plaintiffs' Complaint, all reasonable inferences, the allegations of the Complaint which are

unsupported by any factual evidence or affidavits do not provide a basis for this Court to determine that Chairman Palladino, or Administrative Law Judges Cotter, Miller, Bright, or Johnson have in any way prejudged the merits or the law concerning the Shoreham proceeding. Accordingly, plaintiffs' claim for disqualification of agency officials should be dismissed.

C. Plaintiffs Fail to Meet the Tests for Issuance of a Preliminary Injunction

For at least two reasons, no preliminary injunction should issue in this case. First, plaintiffs fail to satisfy the criteria specified in Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958). Second, as a matter of equity, no injunction should issue because the County and State come into this Court with unclean hands.

1. The Virginia Petroleum Jobbers Association Standards Are Not Met

Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958), states four criteria which must be examined prior to issuance of a preliminary injunction. They include:

(a) Has the petitioner made a strong showing that it is likely to prevail on the

merits . . .?[23/]

(b) Has the petitioner shown that without such relief, it will be irreparably injured?

(c) Would the issuance of a stay substantially harm other parties interested in the proceedings?

(d) Where lies the public interest?

Consideration of these tests warrants denial of the requested preliminary injunction.

a. The County and State Will Suffer No Irreparable Harm

Plaintiffs seek to enjoin completion of hearings. The threatened harm to the plaintiffs, if any, derives from the holding of hearings. Even upon a decision favorable to LILCO, the issuance of a license would not be imminent,[24/] as that would be followed by further appeals and concomitant

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23/ If plaintiffs demonstrate that the remaining three tests weigh heavily in their favor, the Court need only find that plaintiffs' present a "serious legal question." Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). For this reason, LILCO will address this criterion last in its discussion of the Virginia Petroleum Jobbers test.

24/ A favorable decision is not the last step in the NRC's process as further action by the NRC Staff is required. See 10 C.F.R. § 50.57.

opportunity for staying the effect of any ruling. Nor does the County cite any reason why this issue cannot be reviewed following completion of the hearings and upon a full record. In short, even if the plaintiffs are correct, this situation can be remedied later.

The only possible harm postulated to the plaintiffs is the expense attendant to appearance at hearings and participation in them. Yet the expense of participating in litigation is not irreperable harm. FTC v. Standard Oil Company of California, 449 U.S. 232 (1980).

The County argues that the mere allegation of a deprivation of a constitutional right rises to the level of irreparable harm. As discussed above, the law says otherwise. Courts confronting similar claims, in deciding jurisidictional issues, have held that the violation of due process rights without more does not rise to the level of irreparable harm. Only those alleged constitutional deprivations which cannot later be evaluated or remedied constitute irreperable harm. A mere scheduling quarrel clearly does not fall in that category.

Even if plaintiffs' allegations had merit, the worst that could befall them is the expense of having to supplement the administrative hearing record through additional hearings.

b. The Harm to LILCO

In contrast, LILCO suffers the potential for severe harm through protraction of the licensing process. The Shoreham licensing proceeding is now in its eighth year; LILCO is entitled to prompt action on its application. Delay in completing the scheduled hearings may ultimately delay the issuance of a license which, in turn, could delay LILCO's effort to engage in low power testing that must be completed before full power operation. Though such low power testing will take several months to complete, given the history of this protracted licensing proceeding, it would be unreasonable to expect the County not to pursue every avenue of administrative and judicial appeal, thus resulting in months of proceedings following completion of the presently suspended hearings. For every day that the plant does not operate, LILCO incurs a cost in excess of $1.25 million.

c. The Public Interest Will Not Be Aided by Issuance of a Preliminary Injunction

The public interest does not dictate issuance of a preliminary injunction. Even considering the interests of the citizens of Suffolk County and the State of New York as putatively represented by their government and governor, respectively, there is no harm. As discussed above, if it is later determined that the scheduling of the hearings unlawfully

prevented the County and the State from presenting their case, the situation can be remedied easily by holding new or supplemental hearings.

In a broader sense, however, the public interest may be damaged by issuance of the injunction. If this Court establishes itself as the arbiter of scheduling disputes and similar preliminary issues short of final agency action, it is reasonable to anticipate a plethora of actions similar to this one by disgruntled agency litigants. Perhaps mindful of this threat, the vast majority of courts have repeatedly thwarted these attempts to inject the federal judiciary into the midst of administrative proceedings. Should such a precedent be established, however, additional delay, and concomitant expense to the taxpayers, will surely follow in many administrative proceedings.

d. Plaintiffs Are Not Likely to Prevail on the Merits

Given the "equity" factors listed in Virginia Petroleum Jobbers do not favor the plaintiffs, they must establish the likelihood of prevailing on the merits in order to warrant issuance of a preliminary injunction. Reargument of the law is not necessary here. As discussed above incident to LILCO's motion to dismiss for lack of subject matter jurisdiction, there is no due process deprivation suffered by

the plaintiffs. The schedule imposed by the Miller Board simply was not unreasonable given the narrow issues and the time afforded the County to act. Indeed, the harm perceived by the plaintiffs is largely self-inflicted as discussed earlier. Similarly, plaintiffs have demonstrated no basis for disqualification of Chairman Palladino, Judge Cotter, or the three member Miller Board.

2. Plaintiffs Have Unclean Hands

As indicated previously, the State's and County's professed inability to prepare adequately for hearings on LILCO's low power motion is largely self-inflicted. Despite obvious indications as early as February that LILCO would submit an alternative proposal for low power operation, the County took no steps to engage whatever consultants it deemed necessary. Similarly, following LILCO's detailed submittal of its proposal on March 20, the County did little to engage it on the merits, choosing instead to rely on its legal arguments. Finally, when formal discovery was authorized, the County failed to pursue its opportunities aggressively. For its part, the State aparently did nothing to engage LILCO's proposal in preparation for hearings on the merits. Consequently, neither the State nor the County are entitled to the equitable relief sought since they appear before this court with unclean hands.

IV. CONCLUSION

As discussed above, there are multiple reasons for dissolving the Temporary Restraining Order issued on April 25 and dismissing this action. Accordingly, this Court should grant LILCO's motions to dismiss for lack of subject matter jurisdiction and, alternatively, failure to state a claim upon which relief can be granted. Even short of dismissal, this Court should dissolve the Temporary Restraining Order and deny plaintiffs' motion for a preliminary injunction.

LONG ISLAND LIGHTING COMPANY

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Of Counsel

MEMORANDUM

April 27, 1984

TO: Counsel for Parties in Cuomo et al. v. NRC et al.

FROM: Kirkpatrick, Lockhart, Hill, Christopher & Phillips

RE: Resolution of Pending Litigation

At the outset of discussions among the parties, Suffolk County wishes to make its position clear.

1. As for the elements of a reasonable hearing schedule, the County rests upon its representations at the April 4 conference of counsel before the NRC Licensing Board, as supported subsequently by the affidavits which have been submitted. We attach hereto a detailed statement of that schedule, with some amendments which reflect recent events. Unless the NRC can demonstrate that a schedule more agressively paced than the County's will better protect the public's health and safety (which is the NRC's mandate in this proceeding), there is no basis for any schedule other than the County's.

2. As for any deviation from the schedule proposed by the County and supported by the County's affidavits, the County requests that any party proposing such a deviation state the reasons, if any, that:

(a) it believes such deviation is necessary despite the County's representations and affidavits; and

(b) it believes such deviations will foster more effective protection of public safety than the County's proposed schedule.

3. As for the County's request for relief before the District Court that Chairman Palladino, Chief Administrative Judge Cotter, and Judges Miller, Bright, and Johnson be disqualified from participation in Shoreham-related matters, the County wishes to make this the subject of discussion and possible resolution among the parties. In particular, the County requests that appropriate NRC officials with authority to discuss this matter on behalf of the Commission (presumably the Office of General Counsel) be present.

4. The County believes that the involvement of Judges Miller, Bright, and Johnson in the consideration of a new hearing schedule, as directed by the Commission on April 26, is inappropriate. These Judges are Defendants in the U.S. District Court action filed by the County and State and are specifically named in the Court's order restraining NRC action. The County will therefore request the Commission to remove such Judges participating in any conferences with the parties.

5. The County will file additional requests with the Commission for disestablishment of the Licensing Board consisting of Judges Miller, Bright and Johnson (beyond the April 11 written request of the Suffolk County Executive) and also for recusal of such Judges and Chairman Palladino and Judge Cotter.

cc: ASLB Judges (by hand)
Daniel Berkovitz, Esq. (by hand)
Robert M. Rolfe, Esq. (by hand)
Edwin Reis (by hand)
Fabian G. Palomino, Esq. (by telecopier)

ATTACHMENT 6

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
Marshall E. Miller, Chairman
Glenn O. Bright
Elizabeth B. Johnson

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Generating Plant, Unit 1)	Docket No. 50-322-OL-4 (Low Power) April 30, 1984

STATUS REPORT TO COMMISSIONERS

During the evening of Thursday, April 26, 1984, the members of the Licensing Board and counsel for the parties were informed by telephone by a member of the NRC General Counsel's office that the Commissioners were entering a scheduling order. We were told that the parties were to confer among themselves and with this Board as soon as possible to address a new schedule for further proceedings on the supplemental motion. The Chairman of the Board was to report on the status of the conferences not later than noon on Monday, April 30, 1984.

Pursuant to this information, the Board promptly scheduled a conference with counsel to discuss responses to the Commission's action. The conference was established for 2:00 p.m. the following day, Friday,

April 27, and all counsel were notified thereof by telephone on the evening of April 26.[1]

On Friday, April 27, counsel for Suffolk County advised the Board that they were unavailable at 2:00 p.m. because of conflicts in their schedules, but would be available after 3:30 p.m. The Board through its law clerk (Eleanor Frucci, Esq.) asked for details of such schedule conflicts inasmuch as all parties were originally involved in evidentiary hearings in New York on that date. Counsel for Suffolk County stated that the conflicts arose from their conferences with their own client in Washington, D. C. on that date.[2] Although counsel were advised that this conflict was of their own making and the conference would commence at 2:00 p.m., these attorneys never appeared. As the transcript shows (Tr. 12-13), they advised the Board's representative from time to time of their activities, but they did not appear at 2:00 p.m., or at 3:30 p.m., or at 4:00 p.m. They apparently did meet with counsel for LILCO and the Staff shortly after 4 o'clock. Counsel for the other Intervenor, the State of New York as an interested state, informed the Board by letter that it does not "deem it appropriate" to

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1 Robert Perlis for the NRC Staff was notified at 7:05 p.m.; Richard Zahnleuter for the State of New York at 7:45 p.m.; Lawrence Coe Lanpher for Suffolk County at 8:15 p.m. and Robert Rolfe for Long Island Lighting Company at 9:03 p.m. on April, 1984. See also Tr. 10-12.

2 Tr. 3-4.

have a conference with this Board because of its challenges to the hearing (Tr. 6-7).

The Board noted that it was not conducting any proceedings or hearings as enjoined by the U. S. District Court's Order filed April 25, 1984 in Civil Action No. 84-1264. It merely "tried to comply with the Commission's request to permit conferences between and among the parties and the Board" (Tr. 18). The Board further concluded:

> Judge Miller: Very well. In view of the nature of the events this afternoon, the non-appearance and the continued excuses or pretexts or whatever by counsel and now this document, which presumably took a little time to prepare, would indicate that counsel for Suffolk County and the State of New York have no intention of proceeding before or with this Board in any but an exceedingly dilatory, if not intransigent, fashion. We don't wish to have any further proceedings.
>
> We are obeying the mandate of the Court as we understand it. This is not a proceeding, as you know. We simply tried to comply with the Commission's request to permit conferences between and among the parties and the Board. Inasmuch as that is impossible, we will ask to have this transcript written up as promptly as possible. It will be transmitted Monday to the Commissioners together with our status report. (Tr. 17-18)

A copy of the Transcript of the conference is appended hereto as Attachment 1.

Finally, in making this status report concerning scheduling of further proceedings, the Board notes that the evidentiary hearings were held in Hauppauge, New York on April 24-25, 1984, prior to the entry of the TRO. LILCO had presented the testimony of seven witnesses, together with exhibits. These witnesses were cross-examined by counsel for Suffolk County, and also addressed Board questions. Accordingly, the

need for discovery in this proceeding can now for the first time be measured against actual evidence, rather than be based upon surmise or conjecture.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Marshall E. Miller

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 30th day of April, 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)	)	

JOINT RESPONSE OF SUFFOLK COUNTY AND THE STATE OF NEW YORK TO THE COMMISSION'S ORDER OF APRIL 30, 1984

On April 30, 1984, the Commission issued an Order vacating the schedule adopted by the Licensing Board in its April 6 Order[1/] and called for arguments on May 7, 1984 concerning the applicability of the NRC's General Design Criteria (particularly GDC 17) to LILCO's proposal to operate Shoreham at low power with no onsite power system and several other matters. This Joint Response is filed pursuant to the Commission invitation for written comments to be submitted by Noon on May 4. See Order at 3.

1/ ASLB Memorandum and Order Scheduling Hearing on LILCO's Supplemental Motion for Low Power Operating License, April 6, 1984.

(a) Explain why it believes such deviation is necessary despite the County's representations and affidavits; and

(b) Explain why it believes such deviations will foster more effective protection of public safety and security than the County's proposed schedule.

The County's and State's suggested schedule is described in detail in Attachment 3 hereto, an April 27, ASLB filing by the County (in which the State joined). The schedule has the following major milestones:

Completion of discovery and preparedness of technical analyses	July 9
Prefiled testimony submitted	July 19
Commence hearing	August 7

On April 27, 1984, the County met with the Staff and LILCO to discuss the foregoing schedule proposal. At that meeting, LILCO indicated that it would agree to a schedule resulting in a hearing starting on May 30; the Staff would agree to a hearing starting on June 18. Neither LILCO nor the Staff responded to the details of the County's proposal or even sought to explain why any dates proposed by the County and State were inappropriate or contrary to the public interest.

Finally, in recent submissions to the Commission and the the U.S. District Court, the County has made clear its view

that if there need to be further proceedings concerning LILCO's Supplemental Low Power Motion, the existing Licensing Board should be disestablished and a new Board appointed to preside. The County respectfully suggests, therefore, that if the Commission does order further proceedings, it direct that these be before a newly appointed Board.

Respectfully submitted,

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Governor of the State of New York

May 4, 1984

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO'S BRIEF IN SUPPORT OF THE ORDER OF JUDGES MIILLER, BRIGHT AND JOHNSON DENYING THE SUFFOLK COUNTY/NEW YORK STATE MOTION TO DISQUALIFY THEM were served this date upon the following by U.S. mail, first-class, postage prepaid or by hand (as indicated by one asterisk) or by Federal Express (as indicated by two asterisks).

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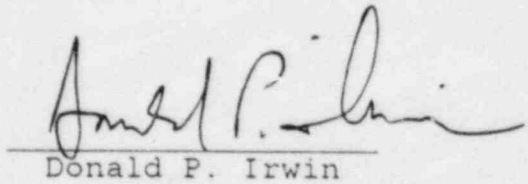

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DATED: July 6, 1984