

LILCO, July 13, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
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Before the Atomic Safety and Licensing Board

SECRETARY
OF DEFENSE
ACCOUNTING & SERVICES
BRANCH

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

LILCO'S RESPONSE TO
SUFFOLK COUNTY'S MOTION IN LIMINE

In a misnamed and untimely "Motion in Limine on the Admissibility of Evidence Relating to Public Interest" (Motion in Limine), Suffolk County in effect seeks reconsideration of the Licensing Board's granting of LILCO's Motion for Protective Order. No new arguments are offered in support of the County's effort improperly to inject the issue of financial qualifications into this factually limited operating license proceeding. Instead, the Motion in Limine merely continues a history of attempts to seek reconsideration of virtually every order issued which the County perceives to be adverse to its goal of keeping Shoreham closed. The Licensing Board has chided Suffolk County repeatedly that its procedural antics will not delay the July 30 hearing. E.g., Order Denying Intervenors

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Motion for Disqualification of Judges Miller, Bright and Johnston (June 23, 1984); Order Denying Motion for Referral (July 5, 1984); Order Denying LILCO's Motion for Expedited Responses to Summary Disposition Motions (May 31, 1984).

The Motion in Limine is untimely because it comes seventeen days after the Licensing Board orally announced its decision granting LILCO's Motion for Protective Order.^{1/} The Order Regarding Discovery Rulings merely "confirm[ed] the oral discovery rulings made from the bench." Order Regarding Discovery Rulings, June 27, 1984, p. 1. Though the County purportedly seeks "to prevent . . . unnecessary delay and expense" (Motion in Limine, p. 14), it offers no explanation for its belated filing. Indeed, virtually all of the "facts" upon which Suffolk County bases its Motion in Limine were mentioned or alluded to by Suffolk County's consultants, Jamshed Madan and Micheal Dirmeier, in their depositions on June 14, were summarized in LILCO's Motion for Protective Order and were generally discussed by the County during the June 22 oral arguments. (Tr. 604-609, 614-15, 619-20). Indeed, the

^{1/} At most, ten days is the limit for filing motions for reconsideration of rulings on motions concerning interlocutory matters. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-110, 16 NRC 1895, 1896 (1982).

Motion in Limine is even too late to accomplish the County's ostensible purpose of avoiding the expense attendant to the preparation of testimony which has already been ruled inadmissible in principal. Filed July 9, the Motion in Limine requires no response before July 19, three days later than the July 16 deadline for filing testimony.

The Motion is misnamed because it does not, in fact, seek a ruling on the admissibility of "evidence relating to public interest." Instead, it seeks reconsideration of the ruling made by this Board that the issue of LILCO's financial qualifications to operate the plant "is not relevant." Order Regarding Discovery Rulings, p. 2. The County's Motion in Limine rehashes precisely the issue that was decided on June 22. The Order Regarding Discovery Rulings succinctly summarized that issue:

LILCO argued that but for the outstanding TDI contentions, it would be authorized to operate Shoreham at low power. Further, the "economic and financial considerations" among the equities to be weighed in deciding LILCO's Application for Exemption must be limited to the economic advantages of commencing low power testing sooner versus awaiting completion of adjudication of the TDI diesel issues. Considerations of LILCO's general financial health would not be relevant to that narrower issue.

Suffolk County's position was that the financial information sought is probative of the issue of whether the grant of LILCO's requested exemption is in the public interest.

Order at 2. The Board concluded:

The Protective Order was granted from the bench because general, detail financial information is not relevant to this inquiry (Tr. 712). The financial or economic hardships referred to under the category of "equities" in the Commission's May 16 Order (CLI-84-8, fn. 3), is limited to those which the Board is charged with looking at in this proceeding. Those matters include financial or economic impacts of the earlier commencement of activities under a low power license, compared or contrasted with the later time that low power operations could commence as a result of the final decisions of other Boards.

Order at 2-3.2/

Moreover, there is no substantive reason for the Licensing Board to alter its previous rulings.

"Well-established principles of administrative regularity require a movant to provide a strong factual showing in support

2/ The Motion in Limine spends two and one-half pages discussing whether "the public interest" is an issue for consideration by the Licensing Board. Under the terms of 10 CFR § 50.12(a), it is. As this Board recognized in its July 22 ruling from the bench, however, the evidence which the County seeks to admit is simply not relevant to the public interest as affected by the Application for Exemption.

of a motion for reconsideration." Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), Commission Order (June 8, 1984). Though the County attempts to distinguish the evidence it would proffer from the issue of financial qualifications, in fact, there is no distinction. The County clearly seeks to argue that the public interest will not be served because LILCO's alleged financial difficulties would render it unable to assure that low power activities could be conducted safely and that it would have the necessary resources to respond to any unpredicted exigency. Moreover, the County seeks to argue that LILCO's financial condition may make it unable to "shut down and safely decontaminate the plant, if necessary." Motion in Limine at pp. 11-12. Thus, the County seeks to litigate financial qualifications and inject the issue of the uncertainty as to whether the plant will ever be licensed.

As to the financial qualifications issue, the Commission has indicated that financial qualifications are not an issue for consideration in operating license proceedings. Financial Qualification Statement of Policy, 49 Fed. Reg. 24111 (June 12, 1984). Operating licenses include low power licenses.

Similarly, the question of uncertainty concerning the ultimate licensing of Shoreham is not an issue in these proceedings. The Commission has on at least two occasions held that any uncertainty attendant to whether LILCO may receive a full power license for Shoreham does not preclude low power testing. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC ____ (1984); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-83-17, 17 NRC 1032 (1983).

As importantly, any consideration of the uncertainty concerning the granting of a full power license, the possible cost of decommissioning the plant and LILCO's financial qualifications to operate the plant has no relevance to the potential economic benefit which LILCO will prove in this proceeding. All issues germane to LILCO's low power operating license have been favorably resolved in the Partial Initial Decision, but for issues concerning the diesel generators. Thus, once LILCO has qualified diesel generators, there will be no litigable issues pertinent to low power. By requesting the exemption, LILCO merely seeks to engage in low power testing in advance of resolution of the diesel generator issue. The question is not whether LILCO should engage in low power testing, as the County attempts to argue, but whether there is any advantage to commencing such low power testing early.

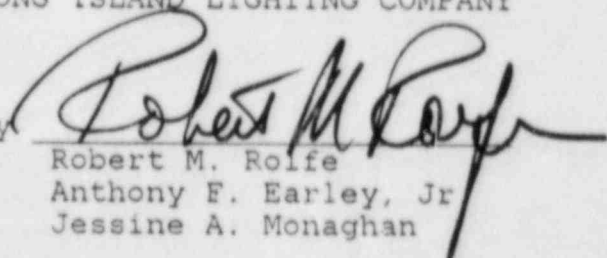
Finally, there is no reason for this issue to be referred to the Commission. Again, the County's delay in filing the Motion in Limine belies any belief by the County that this issue need be expeditiously resolved to prevent unusual delay or expense. And, the public interest certainly will not be served through piecemeal interlocutory appeals of evidentiary rulings such as this one.

Accordingly, the Licensing Board should reaffirm its June 22 and June 27 orders and hold that such evidence as the County seeks to admit as described in the Motion in Limine is irrelevant and immaterial. Thus, the requested further discovery is unnecessary. And, referral should be denied.

Respectfully submitted,

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DATED: July 13, 1984

LILCO, July 13, 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 RESPONSE TO SUFFOLK COUNTY'S MOTION IN LIMINE dated July 13, 1984 were served this date upon the following by U.S. mail, first-class, postage prepaid or by Federal Express (as indicated by one asterisks).

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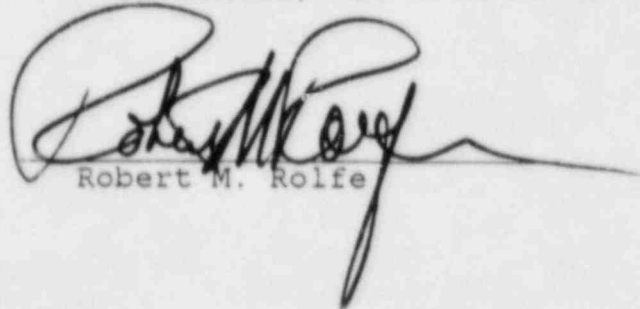
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