UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board



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| In the Matter of | ) | '84 JUL 18 A10:46 |
| | ) | Docket No. 50-322-OL |
| LONG ISLAND LIGHTING COMPANY | ) | and |
| | ) | Docket No. 50-322-OL-4 |
| (Shoreham Nuclear Power Station, Unit 1) | ) | (Low Power) |
| | ) | |



LILCO'S REPLY TO MOTION OF SUFFOLK COUNTY AND NEW YORK STATE FOR LEAVE TO FILE A CONTENTION ON LILCO'S FINANCIAL QUALIFICATIONS

On July 3, 1984, Suffolk County and New York State filed a joint motion seeking the admission of a late-filed contention on LILCO's financial qualifications ("Motion of Suffolk County and the State of New York for Leave to File Contention on LILCO's Financial Qualifications to Operate Shoreham, for an Exception from Commission Rules, and for Certification to the Commission," hereinafter, "Motion").1/ This motion represents but one of a last-minute spate of attempts by Suffolk County to inject the issue of financial qualifications into the Shoreham licensing

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1/ The motion was accompanied by a memorandum in support of the motion (hereinafter, "Memorandum"), an affidavit of Michael D. Dirmeier (hereinafter, "Affidavit"), and a proposed contention on LILCO's financial qualifications to operate Shoreham (hereinafter, "Contention").

These papers were filed with two Licensing Boards in the Shoreham proceeding. LILCO believes that the arguments in this Reply apply equally to the issues before either Board, but notes that the Board with jurisdiction over low-power issues has recently denied a virtually identical motion by Suffolk County and New York State. See note 2.

proceeding.2/

This latest motion begins with a recognition that the NRC's regulations, as most recently articulated in the Commission's June 7, 1984 Financial Qualifications Statement of Policy, expressly preclude the review of the financial qualifications of electric utilities during an operating license proceeding. Motion at 1-2. Accordingly, the motion seeks an exception from the application of the regulations in this proceeding. Motion at 2. Finally, in the event that their motion is denied, Suffolk County and New York

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2/ Suffolk County has repeatedly attempted to raise financial qualification issues in the low-power proceeding. The County has sought extensive document discovery of LILCO's financial records, Suffolk County's Second Discovery Request to LILCO Relating to LILCO's Application for Exemption, dated June 11, 1984, and sought to depose George J. Sideris, LILCO's chief financial officer, and others on LILCO's financial qualifications to operate the Shoreham facility. On June 27, 1984, the ASLB assigned to the Shoreham low-power proceeding ("the Miller Board") granted a protective order prohibiting the deposition of Mr. Sideris, finding that "general, detailed financial information is not relevant to [the low-power testing] inquiry." June 27 Order at 3. On July 9, 1984, following the filing of the motion that is the subject of this response, Suffolk County filed yet another pleading on this issue with the Miller Board. Captioned as a "Motion in Limine on the Admissibility of Evidence Relating to Public Interest," it seeks in essence a reconsideration of that Board's protective order. While the County argues that that motion is separate and distinct from the motion at issue -- presumably because the motion in limine is being filed under § 50.12(a) and the motion to file a financial qualification contention under § 2.758 -- the arguments presented in each are virtually identical.

It should be noted, also, that prior to the Commission's amendment of its regulations in 1982 to remove financial qualification issues from operating license proceedings, neither Suffolk County nor New York State -- both of them parties at the time -- had filed contentions relating to financial qualifications in connection with the Shoreham operating license.

State request its immediate certification to the Commission. Motion at 3. For the reasons detailed below, Suffolk County and New York State have failed to make the prima facia showing required by 10 CFR § 2.758 that an exception to the Commission's rule is warranted, and therefore their motion should be denied at the threshold. Even if the County and State were to be found to have succeeded in making a prima facia showing of a need for an exception, their motion is inexcusably late and hence does not meet the requirements for late-filed contentions contained in 10 CFR § 2.714, and must again be denied.

## I. APPLICABLE COMMISSION REGULATIONS

On August 28, 1981, the Commission proposed the elimination of the requirements for review of financial qualifications of electric utilities seeking construction permits and operating licenses for nuclear power plants. 46 Fed. Reg. 41,786 (1981). On March 31, 1982, the Commission promulgated final regulations which codified this elimination of financial qualification requirements for electric utilities. 47 Fed. Reg. 13,750 (1982). Challenges to these amendments were heard by the U.S. Court of Appeals for the D.C. Circuit, which on February 7, 1984 remanded the rule to the Commission after finding that certain asserted factual bases for the rule did not support the rule's language. New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C. Cir. 1984).

On April 2, 1984, the Commission, in response to the D.C. Circuit's concerns, again published in proposed form those portions of the rules relating to operating license proceedings. 49 Fed. Reg. 13,043 (1984). The language of the proposed rules was virtually identical to that of the corresponding sections of the remanded March 31, 1982 rules. In addition, in order to resolve uncertainties about the effect of the issuance of the D.C. Circuit's mandate on pending operating license proceedings, the Commission issued a policy statement clarifying the continuing applicability of the Commission's amended regulations to licensing proceedings. 49 Fed. Reg. 24,111 (June 12, 1984). The Commission stated:

> The Commission has concluded that the issuance of the mandate does not have the effect of restoring the previous [i.e., pre-1982] regulation under which financial qualification review was required as a prerequisite for a reactor construction permit or operating license.
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> . . .
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> It would not appear reasonable to construe the Court's opinion as requiring that the Commission instruct its adjudicatory panels in these proceedings to begin the process which would delay the licensing of several plants which are at or near completion, only to be required to dismiss the contentions when the new rule takes effect in the near future.
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> Accordingly, the March 31, 1982 rule will continue in effect until finalization of the Commission's response to the Court's remand. The Commission directs its Atomic Safety and Licensing Board Panel and Atomic Safety and Licensing Appeal Panel to proceed according.

Id. at 24,111.3/ Thus, contrary to Suffolk County's and New York State's suggestion, see Memorandum at 19, this Board has no choice but to follow the Commission's June 12 Policy Statement and apply the NRC's amended financial qualification regulations in this proceeding. See In the Matter of Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-___, slip op. at 2-3 (June 13, 1984).

Since Suffolk County's and New York State's request to submit a late-filed financial qualification contention is prohibited by the Commission's June 12 Policy Statement, it must be denied unless Suffolk County and New York State can both qualify for an exception under § 2.758 and demonstrate they have met the standards of § 2.714 for filing a late contention.

## II. INTERVENORS' REQUEST FOR AN EXCEPTION UNDER 10 CFR § 2.758

As a general rule, NRC regulations cannot be subject to attack in an adjudicatory proceeding. 10 CFR § 2.758(a). The only exception to this general rule is provided in § 2.758(b), which permits a party to petition for an exception from the

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3/ The Commission's decision to proceed with the licensing of power plants under a rule whose ultimate acceptance by the courts is still in doubt is not without precedent. The NRC's Table S-3 rule was followed by Licensing Boards for more than 7 years between its remand by the D.C. Circuit in NRDC v. NRC, 547 F.2d 633 (D.C. Cir. 1976), rev'd sub nom. Vermont Yankee v. NRDC, 435 U.S. 519 (1978) and its ultimate acceptance by the Supreme Court in Baltimore Gas & Electric Co. v. NRDC, ___ U.S. ___, 103 S.Ct. 2246 (1983).

application of a regulation in a given proceeding. That provision clearly states that

> [t]he sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.

10 CFR § 2.758(b).4/ This provision has been interpreted as requiring the petition to be accompanied by an affidavit which (1) identifies the specific aspect of the subject matter of the proceeding as to which the purpose of the rule would not be served and (2) sets forth with particularity the special circumstances alleged to justify the waiver or exception requested. In the Matter of Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-75-35, 1 NRC 701 (1975). Licensing Boards have been extremely reluctant to grant exceptions under § 2.758,5/ and indeed, the

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4/ If a Licensing Board determines that a party has made a prima facia showing under § 2.758(b), then the issue must be certified directly to the Commission for its decision on whether the exception should be granted. 10 CFR § 2.758(d).

5/ Of approximately 60 NRC proceedings research has disclosed as involving attempted challenges to the Commission's regulations under § 2.758, a waiver of a regulation was granted in only two of them. Interestingly, each of these waivers was granted to the applicant. See In the Matter of Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303, 1308 (1977) (waiver granting review of antitrust issues prior to the filing of the FSAR. All parties were in agreement on the need to waive this filing requirement); In the Matter of Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-75-9, 2 NRC 180 (1975) (waiver of § 50.46(a)(3) with regard to compliance with ECCS Final Acceptance Criteria in construction permit proceedings following showing of reasor-

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Commission has held that an "exception can be granted only in unusual and compelling circumstances," In the Matter of Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), CLI-72-31, 5 AEC 25, 26 (1972). These "unusual and compelling circumstances" can be demonstrated only by the presentation of persuasive evidence and not bare allegations. In the Matter of Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-49, 18 NRC 239, 240 (1983).

In none of the previous cases where exceptions to the Commission's financial qualification rules have been sought have the required "unusual and compelling circumstances" been demonstrated.6/ Further, in rejecting attempts to litigate financial

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able assurance of favorable resolution of outstanding ECCS issues).

Two other proceedings are worthy of brief mention. First, in In the Matter of Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-80-1, 11 NRC 37 (1980), the Licensing Board found that a prima facia showing had been made for a waiver of § 50.44. However, on certification, the Commission found that a waiver of § 50.44 was not required, since the issue sought to be litigated could be tried under another part of the regulations. In the Matter of Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674, 675 (1980). Second, in In the Matter of Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), CLI-78-3, 7 NRC 307 (1978), the Commission granted an exception to the Table S-3 Uranium Fuel Cycle rule to permit the Appeal Board to consider the environmental effects of radon-222 in deciding the merits of intervenors' appeal. The waiver was granted not as a result of filings seeking such a waiver, but rather resulted from the Commission's review of the Appeal Board's decision and its use of independent information obtained from the Staff on the continuing validity of the radon values contained in the Table S-3 rule.

6/ Exceptions to the financial qualification regulations have been sought under § 2.758 in three proceedings. In the Matter

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qualification contentions, even where a § 2.758 exception question was not involved, the Commission and Licensing Boards have relied on two basic factors, both of which are applicable here: first, movants' failure to link alleged financial concerns to the protection of public health and safety, In the Matter of Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-83-21, 18 NRC 157, 159 (1983); and second, a recognition that it is a State public service commission's duty to establish rates designed to cover the operating costs of a nuclear facility, In the Matter of Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 57-58 (1983), citing In the Matter of Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977).

Simply stated, Suffolk County and New York State have failed to make this requisite prima facia showing of unusual and compelling circumstances; hence their motion must be denied. In their motion, Suffolk County and New York State seek exceptions from the provisions of 10 CFR § 2.104, Sections VI and VIII of Appendix A

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of Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-83-52A, 18 NRC 265 (1983); In the Matter of Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-49, 18 NRC 239 (1983); and In the Matter of Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52 (1983). In addition, financial qualification issues were also the basis for an attempt to revoke an operating license under § 2.206. In the Matter of Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), DD-83-3, 7 NRC 137, aff'd CLI-83-21, 18 NRC 157 (1983).

to Part 2, §§ 50.33(f), 50.40 and 50.57,7/ allegedly based on showings contained in their accompanying Memorandum and Affidavit. Motion at 2. However, a review of the section of the Memorandum (pp. 19-24) dedicated to establishing this showing of need indicates that the intervenors have neither identified the specific purposes of the rule which would not be served by adherence to it, nor set forth with particularity the special circumstances that would justify an exception to the rule. The intervenors' attempted showing is fatally flawed because it mistakenly focuses on the factual bases for the Commission's amendments to the financial qualification rules instead of considering how those amendments further the fundamental purpose of those rules, and it fails to establish a nexus between financial concerns and the protection of the public health and safety.

The financial qualification inquiry at the operating license stage -- assuming that it even applies to a regulated utility -- is focused on whether a company will be able to "obtain the funds necessary to cover estimated operation costs for the period of the license, plus the estimated costs of permanently shutting the

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7/ While their motion is styled as a motion for leave to file a contention on LILCO's financial qualifications to operate Shoreham, various of the cited provisions, especially § 2.104(b) and Section VI of Appendix A to Part 2, pertain to a utility's financial qualifications to construct a nuclear plant. To the extent that the motion seeks a waiver from provisions relating to construction permit proceedings, it should be denied as beyond the scope of this proceeding. See In the Matter of Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 54-55 (1983).

facility down and maintaining it in a safe condition." See 10 CFR § 50.33(f)(1)(ii). This was exactly the question the Commission considered when it decided to amend its financial qualification requirements with regard to electric utilities. 49 Fed. Reg. 13,045 (1984). Thus, the pertinent inquiry is whether, assuming a plant is operating and hence included in the rate base, a utility will be allowed by its rate commission to recover the costs of operating the plant, including the costs of compliance with future NRC requirements associated with safe plant operation. The Commission concluded that State regulatory commissions uniformly allow such reasonable cost recovery. As is shown below and in the Eacker Affidavit at ¶¶ 3-7, this conclusion is applicable in New York State; as is indicated in answers to a recent questionnaire provided to the National Association of Regulatory Utility Commissioners (NARUC) by the New York Department of Public Service, the New York Public Service Commission routinely grants to utilities the costs required for the safe and reliable operation of power plants, including nuclear power plants. Suffolk County's and New York State's filings do nothing to contradict this assertion by the New York State agency responsible for public utility rate-making.

Suffolk County and New York State argue that special circumstances exist in this proceeding for an exception from the Commission rules because:

> it cannot be said (i) that LILCO will "recover costs of constructing generating facilities [i.e., Shoreham] through the ratemaking process"; (ii) that "reasonable costs necessary to meet . . . [LILCO's] obligations" will be recovered through the ratemaking process; (iii) that the New York PSC can be "counted on to provide reasonable operating costs" to LILCO; and (iv) that LILCO today would "invariably" be found to be financially qualified.

Memorandum at 21-22. Division of these allegations into four specific parts dignifies them with spurious precision: they do not correspond to generally recognized analytical categories in any systematic fashion. Parsing them, there appear to be not four considerations at work but only two: (1) recovery of the investment expended in construction of Shoreham, and (2) obtaining adequate revenues to ensure the plant's safe operation.8/

Treating first the question of construction expenses (loosely, allegations i, and perhaps ii and iv), to the extent that they focus on LILCO's ability to obtain funds to cover construction costs (see 10 CFR § 50.32(f)(1)(i)), they should have been raised during the construction permit proceeding and now are completely untimely. See note 7 above. To the extent, however, that they relate to the extent to which the New York Public Service Commission will allow LILCO to place the costs of Shoreham

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8/ Intervenors' articulation of those alleged special circumstances is so broad that it is impossible to determine how they affect the purposes for the promulgation of the Commission's financial qualification rules. Accordingly, they must be rejected for want of particularity. See In the Matter of Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-75-35, 1 NRC 701 (1975).

into the rate base and recover them through depreciation over the life of the plant, they involve issues that are presently being investigated by the New York PSC in its ongoing case on the prudency of various Shoreham-related expenditures (PSC Case No. 27563). See Eacker Affidavit, p. 10, ¶ 8(i). Consideration of these alleged special circumstances would require an NRC licensing board to speculate on the outcome of the currently ongoing prudency investigation before the PSC and to apply that speculative conclusion about the amount of Shoreham's costs that would be included in LILCO's rate base to unknown future events in order to determine how that cost recovery would affect LILCO's ability to operate the Shoreham plant. Certainly, the NRC did not intend for its licensing boards to acquire roving mandates so incoherently related to their basic purpose of determining health-and-safety issues.

The other general thrust of the allegations (items iii, and perhaps ii and iv) concerns the question of whether LILCO will obtain adequate revenues to operate the Shoreham plant safely and reliably. Once again, this question inherently delves into ratemaking matters that are the subject not only of the prudency investigation but also of current pending ratemaking proceedings before the New York PSC (PSC Case No. 28553). In short, these assertions also merely invite NRC licensing boards to tread the same ground that other State agencies with jurisdiction to consider financial dimensions of utility management are already treading.

In any event, to the extent that the allegations raise questions about New York State Public Service Commission policy with regard to operating costs, they are effectively rebutted by a recent set of responses by the New York Department of Public Service to a questionnaire circulated by NARUC to State public service commissions. New York State's response, dated April 26, 1984, clearly indicates that in New York, reasonable costs of operation are recoverable by utilities within the general ratemaking process. Specifically, New York State responded:

1. Q. Does the PUC have specific rate-setting authority and responsibility that may be used to ensure adequate revenues to recover the costs of meeting NRC safety requirements?

   A. No. While we do not have specific rate-setting authority to meet NRC safety requirements, the Commission general rate making process assures that such costs are met.

2.a. Q. Does the PUC provide specific costs allowances in general rate orders or other directives to assist the utility in meeting NRC safety requirements, orders, and directives?

   A. No. Within the regular rate making process the Commission makes allowances for all the necessary and prudently incurred operating costs including NRC safety requirements.

2.c. Q. Historically, have utilities with operating nuclear plants that have requested revenue allowances for NRC safety requirements always received such allowances?

   A. Yes. Same as 2.a.

[Emphasis supplied]. Thus, Suffolk County and New York State have done no more than speculate on future action of the New York PSC, speculation that has no basis in history or current New York Department of Public Service practice, as stated by the Department itself. Accordingly, the third alleged special circumstance does not warrant an exception to the Commission's financial qualification rules. Experience with the New York Public Service Commission confirms these statements in its questionnaire. See Eacker Affidavit at ¶¶ 3, 4-7.

At bottom, any consideration of financial qualifications by the Commission, particularly at the operating license stage, must proceed in light of the fact that the Commission is not a rate-making agency: that function is committed by law to State agencies and the Federal Energy Regulatory Commission, and this Commission can neither compel nor preclude a given result by those agencies. All it can do, in reality, is rely on those agencies' good-faith exercise of their statutory functions. Further, if those agencies perform their functions, revenues would be available to their regulated utilities to assure safe operation of nuclear power plants owned by them. Any conclusions that such funds would not be properly spent implies conclusions about the competence or integrity of the utility's management. In the absence of such allegations -- and there have been none made, much less proven, in the Motion, Memorandum or Affidavit -- it must be presumed that funds received from the New York State Public Service Commission would be properly spent.9/

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9/ Commission Bernthal put it aptly in his additional views on the financial qualification rules as republished this

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The other possible basis for inquiring into financial qualifications is that diversion of funds from safety-related aspects of plant operation or maintenance could adversely affect the safe operation of the plant. As to this proposition, the concern -- safe operation of nuclear power plants and prevention of departure from the required high standards -- is at the core of the NRC's responsibilities. However, inquiring into financial

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> [D]enying a license for lack of financial qualification in this context means that the Commission would be prejudging the ability of [an] applicant to construct and operate the plant consistent with public health and safety; the Commission would be denying a license because of the possibility that the applicant might cut corners on safety. That finding, in turn, must stem from a conclusion that the applicant may not have the requisite character and integrity to carry out its responsibilities pursuant to the Commission's regulations. Thus, the Commission would, in effect be making an adverse finding on the character and integrity of the applicant without any basis for doing so other than [the] financial status of the applicant. Denial of a license by the Commission on that basis would be arbitrary and capricious, and could in my view, be successfully challenged as such. As noted earlier, a judgment on an applicant also amounts to a judgment on the public utility commission of oversight jurisdiction. For these reasons, I question whether the Commission should require any financial review unless there is an independent concern about the management integrity of an applicant.

49 Fed. Reg. 13,046 (additional views of Commissioner Bernthal) (emphasis in original).

qualifications is an extremely inefficient, unfocused means of assuring adherence to safety standards. Rather, the panoply of self-observation and self-evaluation, reporting and surveillance mechanisms set in place by the Commission's regulations, lived with daily by regulated nuclear power plant operators, and enforced by numerous layers of Commission personnel, is a far more sensitive, focused and accurate means of detecting and correcting safety-related problems than generalized financial inquiries. See In the Matter of Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-83-21, 18 NRC 157, 160 (1983).

Suffolk County and New York State have failed to make a prima facia showing that unusual and compelling reasons exist for an exception from the Commission's financial qualification regulations; accordingly, their motion to file a contention on LILCO's financial qualifications must be rejected.

## III. SHOWING REQUIRED FOR LATE-FILED CONTENTIONS

Even if Suffolk County and New York State were found to have made a prima facia showing of need for an exception, their motion for leave to file a late-filed contention must still pass the standards of § 2.714. That provision identifies five factors that must each be weighed in the balancing conducted by Licensing Boards to determine whether to admit a late-filed contention; they are

> (i) Good cause, if any, for failure to file on time;
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> (ii) The availability of other means

> whereby the petitioner's interest will be protected;
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> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;
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> (iv) The extent to which the petitioner's interest will be represented by existing parties; and
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> (v) The extent to which the petitioner's participation will broaden the issue or delay the proceeding.

10 CFR § 2.714(a)(1); In the Matter of Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983). In applying these factors to a case involving a contention filed following the publication of documents essential to the license application, the Appeal Board in In the Matter of Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460 (1982), established a three-part test for the good cause showing required by § 2.714(a)(1)(i).10/ Under it, for good cause to be shown, the late-filed contention:

> 1. [must be] wholly dependent upon the content of a particular document;
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> 2. could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of that document; and
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> 3. [must be] tendered with the requisite degree of promptness once the document comes into existence and is accessible for public examination.

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10/ This test was accepted by the Commission in In the Matter of Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983).

17 NRC at 1043-1044. The burden for making these showings that significant new evidence is available rests on the parties seeking to file the late contentions, and this burden cannot be met merely by making claims to that effect. In the Matter of Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 804 (1983).

Suffolk County and New York State have failed to carry this burden. In fact, stripped of its mere allegations, intervenors' motion is nothing more than another brazen attempt to delay an ultimate decision on LILCO's application for an operating license.

First, Suffolk County and New York State argue that good cause exists for the filing of their proposed contention at this time. Memorandum at 25-29. This good cause showing is premised on financial information that allegedly became available only during the last three months, id. at 25, and more particularly, on a May 30, 1984 "Position Paper" submitted by LILCO to Governor Cuomo, id. at 4-5 and 25. Suffolk County and New York State assert that this position paper disclosed for the first time that LILCO would require "affirmative action of third parties" to avoid bankruptcy, id. at 27 and 29, and that only on June 6, 1984, when the Governor of New York (one of the parties sponsoring the motion in question) rejected LILCO's proposal, did it become apparent that such affirmative action was not forthcoming, id. at 29.

These proffered showing are not sufficient to establish good cause as articulated by the Appeal Board in Duke Power. See p. 17 above. While Suffolk County and New York State have attempted to

premise their motion on a single document -- the May 30 Position Paper, a closer review of available information indicates that nothing regarding LILCO's actual financial condition in this particular document was new; and that the only piece of "new" information in it was the refusal of Governor Cuomo, who had been actively opposing the Shoreham plant for six months, to reverse his position: information on LILCO's actual financial condition was quite fully developed (even though some details later developed further) in the December 1983-February 1984 time frame, and had taken substantially their present form by March 6, 1984. See Eacker Affidavit at ¶¶ 8-10. Indeed, Suffolk County and New York State have made no attempt to do anything more than baldly -- and incorrectly -- assert that such information was not previously available: not only was it publicly available, they were on actual notice of it on a real-time basis. Eacker Affidavit at ¶¶ 8-10. Finally, since information on LILCO's present financial position has been available for at least six months, intervenors have failed to demonstrate that their late-filed contention was "tendered with the requisite degree of promptness." Thus, Suffolk County and New York State have failed to meet any of the three standards for establishing good cause.

Second, Suffolk County and New York State argue that no other means are available for protecting their interests. Memorandum at 30. Their argument is premised on the assertion that LILCO's financial qualifications will not be reviewed, or even considered, by the NRC. Id. This argument simply ignores the purpose of the

Commission's regulatory requirements designed to ensure the safe operation of nuclear plants. As is discussed above, the purpose of the financial qualification inquiry at the operating license stage is to assure that adequate financing will be available for the safe operation of a nuclear plant. For electric utilities, this is assured through State rate regulation. In addition, the Commission's continuing inspections of operating plants ensure that should plant safety be compromised for want of adequate operating capital, steps can and will be taken to remedy these safety concerns. Thus, other means exist for protecting Suffolk County's and New York State's concern about plant safety than the litigation of a financial qualification contention.11/

Third, Suffolk County and New York State argue that their participation will assist in the development of a sound record. Memorandum at 31. In support, they cite their past participation in these proceedings. Id. While the question of whether or not Suffolk County and New York State would assist in the development of a sound record rests on future events, and hence, is purely a matter of speculation, LILCO would merely note that past history suggests that Suffolk County's participation may not always have futhered the goal of developing a sound record. In the Matter of Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, slip op. at 93 and 203 (1983) (Shoreham Partial Initial

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11/ This argument also blinks intervenors' attempts at every turn in New York State proceedings to prevent LILCO from obtaining the degree of return to which it is entitled.

Decision).12/

Fourth, Suffolk County and New York State assert that their interests cannot be adequately represented by other parties. Memorandum at 32. To the extent Suffolk County and New York State are arguing that no other party will advance their proffered arguments, LILCO cannot disagree.

Fifth, Suffolk County and New York State argue that the litigation of their proffered financial qualification contention is "not likely" to have a material impact on the length of the operating license proceedings, citing the ongoing low power, offsite emergency planning and TDI diesel generator hearings. Memorandum at 32. Intervenors' assertion is nothing more than a smoke screen to hide the fact that should their financial qualification contention be admitted, it would most certainly be the pacing item in the operating license proceedings. The other three remaining portions of the Shoreham operating license proceeding are all through their discovery phases, and to varying degrees, through the filing of testimony and hearing phases. All are moving toward completion in the coming weeks and months. By comparison, should Suffolk County's and New York State's financial qualification

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12/ Suffolk County and New York State's suggestions that a bar to their participation on financial qualification issues would be "contrary to the NRC regulations," Memorandum at 31, is without basis. The Commission has long recognized that participation in its adjudicatory proceedings is not an absolute right, and that that right can be limited by reasonable Commission regulations. See In the Matter of Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983).

contention be admitted, discovery would have to be taken, prefiled written testimony filed, hearings held, and proposed findings drafted on issues yet to be defined. Nothing suggests that this process would proceed any more expeditiously than have the other portions of this incredibly tortuous proceeding. Indeed, if Suffolk County's discovery requests in the low power proceeding regarding LILCO's financial status are any indication, see Suffolk County's Second Discovery Request to LILCO Relating to LILCO's Application for Exemption, dated June 11, 1984, the County and New York State will seek to raise any and all aspects of LILCO's past and future financial history under their proffered contention. The public interest would not be served by such additional delay.13/

Thus, Suffolk County and New York State have failed to demonstrate under the standards of § 2.714(a) that their late-filed contention should be admitted. The contention is inexplicably late and will serve only to delay further an already lengthy proceeding.

## IV. CERTIFICATION TO COMMISSION

The final request in Suffolk County's and New York State's

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13/ Such delay would be all the more intolerable because it would be totally duplicative: the same sets of facts are currently being litigated in two proceedings before the New York State Public Service Commission: a general rate case (Case No. 28553), and an investigation into the prudency of various Shoreham expeditures (Case No. 27563). Suffolk County and New York State are both parties to each of these proceedings.

motion is that if their motion is denied the Board certify its order to the Commission. Motion at 3. Intervenors offer no showing of a need for immediate Commission review, but rather talismatically recite simply that certification is required "to prevent detriment to the public interest and unusual delay and expense." Motion at 3; see Memorandum at 34. Since the granting of this request for certification is within the Board's discretion, see 10 CFR §§ 2.718(i) and 2.730(f), LILCO offers its views to the Board for its consideration.

Depending on the Board's resolution of the issues presented above, the certification question could arise in one of three settings:

(1) the Board decides that an exception is warranted under § 2.758(b), and that while late-filed, the proffered contention should be admitted under the standards of § 2.714;

(2) the Board decides that an exception is warranted under § 2.758(b), but concludes that the proffered contention is untimely; and

(3) the Board denies the request for an exemption under § 2.758(b).

Should the certification question arise under the first setting, the Board must, by regulation, certify the issue to the Commission. 10 CFR § 2.758(d). Under the second and third scenarios, LILCO believes that the Board's interlocutory order need not be certified. However, should the Board decide that certification is appropriate, LILCO believes that under either of these settings the issues should be certified to the Appeal Board and not directly to the Commission. Cf. In the Matter of Long Island

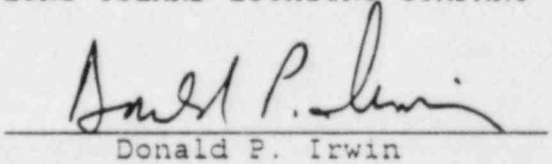
Lighting Co., (Shoreham Nuclear Power Station, Unit 1), LBP-83-21, 17 NRC 593, 596-97 (1983). This is the more appropriate action since the Board would need to be reversed on several preliminary issues before the Commission would be statutorily required to determine whether an exception should be granted under § 2.758(d).

## CONCLUSION

For the above stated reasons, LILCO believes that Suffolk County and New York State have failed to demonstrate that they are entitled to an exception to the Commission's financial qualification regulations. Even if entitled to such an exception, Suffolk County's and New York State's proffered contention is inexcusably tardy and should be denied admisssion under § 2.714. Thus, Suffolk County's and New York State's motion for leave to file a contention on LILCO's financial qualifications should be denied.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY



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DATED: July 16, 1984

## CERTIFICATE OF SERVICE



In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
Docket Nos. 50-322-OL and 50-322-OL-4 (Low Power)



I hereby certify that copies of LILCO'S REPLY TO MOTION OF SUFFOLK COUNTY AND NEW YORK STATE FOR LEAVE TO FILE A CONTENTION ON LILCO'S FINANCIAL QUALIFICATIONS were served this date upon the following by first-class mail, postage prepaid.

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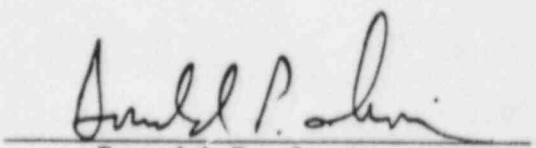

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