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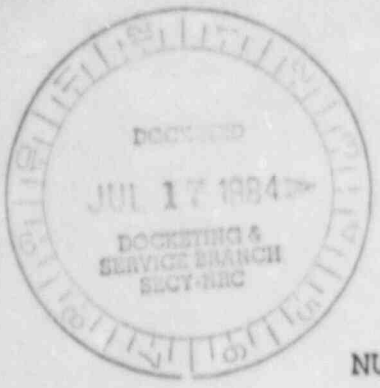

LILCO, July 16, 1984

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)	)	
	)	

LONG ISLAND LIGHTING COMPANY'S RESPONSE TO
MOTION FOR DIRECTED CERTIFICATION ON SECURITY ISSUES

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Thirteen days after the Licensing Board granted LILCO's Motion for Protective Order and Motion in Limine concerning the relevance of alleged security issues in this proceeding, Suffolk County and the State of New York belatedly, and without explanation for their delay, plead that this proceeding "is moving at a rapid pace" and that "prompt intervention of the Commission" is necessary. The Suffolk County and State of New York Motion for Directed Certification of June 20 ASLB Order Granting LILCO's Motion in Limine (Motion for Certification) is untimely, presents no reason why the discrete issue of security need be considered by the Commission through the unusual procedure of certification, and is substantively without merit.1/ It should be denied.

1/ The Licensing Board has already denied a parallel motion by Suffolk County and New York State, dated July 3, for referral of

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I. BACKGROUND

On March 20, 1984, LILCO filed its Supplemental Motion for Low Power Operating License, proposing four phases of low power testing to be conducted without reliance on the TDI diesel generators to perform the functions specified in General Design Criterion 17. As the Commission knows, LILCO's position was that its numerous offsite AC power sources combined with two enhancements at the site -- a 20 megawatt gas turbine and four 2.5 megawatt GM EMD diesel generators -- provided adequate assurance that the functions specified in GDC 17 would be fulfilled during low power testing with no increase in risk to public health and safety. At the time LILCO filed its Supplemental Motion, the County had but two general categories of contentions pending in the licensing

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its June 20 Order in Limine. In its July 5 Order Denying Motion for Referral (Attachment A), the Licensing Board found that the Motion for Referral was "in effect an argument for reconsideration, and an attempt to reargue matters already taken into account and ruled upon by the Board." Of course, any such motion for reconsideration would have been untimely by June 30, 1984. See Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-110, 16 NRC 1895, 1896 (1982) ("Although the [10 day] provision governing the timeliness of appeals from final decisions is only suggestive, we think that the brief time allowed for motions for reconsideration on such a complex matter indicates an analogous period for application to motions concerning the reconsideration of interim matters.").

proceeding: (1) those pertaining to emergency planning, and (2) those pertaining to the TDI diesel generators. Thus, when LILCO filed its Supplemental Motion, thereby postulating that the TDI diesel generators were unnecessary during low power testing, the sole issues before the newly constituted Licensing Board pertained to the ability of LILCO to restore AC power to Shoreham in the event of a loss of offsite power within the time parameters necessary to prevent any increased risk to public health and safety.2/

On May 16, 1984, the Commission held that LILCO must seek an exemption in order to proceed with low power testing absent qualified emergency diesel generators. That Order directed LILCO to include in its Application for Exemption a discussion of the following:

> 1. The "exigent circumstances" that favor the granting of an exemption under 10 CFR § 50.12(a) should it be able to demonstrate that, in spite of its non-compliance with GDC 17, the health and safety of the public would be protected. [footnote omitted].
>
> 2. Its basis for concluding that, at the power levels for which it seeks authorization to operate, operation would be as safe under the conditions proposed by it, as operation would have been with a fully qualified onsite A/C power source.

2/ The emergency planning contentions are not relevant since low power testing is not contingent upon resolution of that issue. 10 CFR § 50.47(d); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-83-17, 17 NRC 1032 (1983).

Commission Order at 2-3. Accordingly, LILCO filed its Application for Exemption on May 22, 1984 seeking "an exemption under § 50.12(a) from that portion of General Design Criterion 17, and from other applicable regulations, if any, requiring that the TDI diesel generators be fully adjudicated prior to conducting the low power testing described in LILCO's March 20 Motion." Application for Exemption, p. 4.

Although the Application for Exemption addressed several issues pertaining to exigent circumstances and public interest as required by the Commission's May 16 Order, the proposed mode of operation during low power testing and, importantly, the proposed method of providing emergency AC power did not differ from that previously proposed. With the exception of the procedures for connecting the AC power sources to the appropriate emergency systems, neither the Supplemental Motion nor the Application for Exemption propose any change in the plant's normal mode of operation during low power testing. LILCO does not seek an exemption from any security requirements in connection with its low power motion. Moreover, the Application for Exemption does not impact upon LILCO's security arrangements to protect the nuclear fuel. LILCO simply seeks to conduct low power testing relying upon its numerous offsite power sources, and the 20 megawatt gas turbine and four GM EMD 2.5 megawatt diesel generators at Shoreham, to provide

AC power instead of its offsite power system and the TDI diesel generators.

Despite the absence of any pending security contention, despite the County's having entered into an all-encompassing security agreement resolving all security contentions, despite the Licensing Board's Order of December 3, 1982 dismissing all security contentions and despite the absence of any legitimate concern about national security, Suffolk County and New York State have repeatedly indicated their intent to raise security issues in the low power proceeding. E.g. Suffolk County's Preliminary Views on Scheduling Regarding LILCO's New Motion, March 26, 1984, ¶ 2f; Transcript April 4, 1984, Oral Argument at 122; Request for Production of Documents, April 11, 1984, ¶ 17; April 20, 1984 letters from Lawrence Lanpher to Licensing Board; Joint Response of Suffolk County and the State of New York to the Commission's Order of April 30, 1984 filed May 4, 1984 at 8, 11, 26, 36.3/ In an attempt to thwart the County's and State's apparent goal of

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3/ Although the Intervenors have not specified in detail the nature of their alleged security concerns, their May 4, 1984 filing with the Commission indicates their concerns that the 20 MW gas turbine at Shoreham, being outside the main security area, may have inadequate protection, and that the EMD diesel generators, while inside the main security area of the plnt "are assured of only normal protection to Part 73 requirements." Joint Response of Suffolk County and the State of New York to the Commission's Order of April 30, 1984, Attachment 1, p. 5.

belatedly raising as many issues as possible in hopes of delaying the licensing proceeding, LILCO filed a Motion for Protective Order and Motion in Limine (Attachment B) on June 2, 1984, seeking "an order precluding all discovery requests whose relevance is to the issue of security and for an order in limine that any evidence whose sole materiality is a question of security is inadmissible." Motion for Protective Order and Motion in Limine, p. 1. On June 20, 1984, after full briefing by the County, State and Staff,4/ the Licensing Board granted LILCO's Motion.

II. THE MOTION FOR CERTIFICATION IS NOT TIMELY

The Licensing Board's Order granting LILCO's Motion in Limine was issued June 20, 1984. Offering no explanation for their delay, Suffolk County and New York State did not seek review of the Order until July 3, when they filed simultaneous motions for referral and for directed certification. The Motion for Certification contains no new substantive arguments and, indeed, is but a rehash of the Suffolk County and State of New York

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4/ The Staff supported LILCO's Motion. NRC Staff Response to LILCO Motion for Protective Order and Motion in Limine. (Attachment C). The Suffolk County/New York State Opposition is Attachment D, LILCO's Motion for Leave to File Reply Brief is Attachment E, and the June 20 Order Granting LILCO's Motion in Limine is Attachment F to this response.

Opposition to LILCO "Motion for Protective Order and Motion in Limine" filed June 19, 1984.

The County's and State's delay in seeking certification can only be interpreted in one of two ways. First, the delay belies their plea that prompt intervention by the Commission is necessary. If the County and State were truly concerned with promptness, they would have acted expeditiously in seeking referral and certification, not waited nearly two weeks until a time when discovery had ended and the filing of testimony (due today, July 16) was thirteen days away. Second, and alternatively, the County's and State's delay can be seen as part of a larger pattern of dilatory tactics. One is reminded of the County's and State's apparently deliberate delay in moving for the disqualification of Chairman Palladino, Chief Judge Cotter and the Licensing Board judges, "so close to important dates in the established hearing schedule as to be productive of unnecessary delays." Order Denying Intervenors' Motion for Disqualification of Judges Miller, Bright and Johnson, p. 4 (ASLB, June 25, 1984). This delay was difficult to comprehend in view of the Intervenors' having first raised the disqualification issue, albeit procedurally improperly, more than two months prior to the filing of the motions. Following the Commission's May 16 Order, the intervenors engaged in similar tactics by filing a barrage of requests for clarification and

motions with the Commission in an apparent attempt to forestall the Licensing Board's scheduling of resumed hearings.5/ Now, again, it appears as if the strategy of Suffolk County and New York State is to file numerous motions timed to effect the maximum disruption on the licensing process in hopes that a delay of the

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5/ The County's and State's filings with the Commission included:

Date	Pleading
May 21, 1984	Request for Clarification of Commission's Order of May 16, 1984;
May 22, 1984	Request by the State of New York for Clarification of the Commission's Order;
May 24, 1984	Joint Motion of Suffolk County and the State of New York to Strike LILCO's Three Unauthorized Pleadings Entitled "LILCO's Motion for Summary Disposition on Phase I Low Power Testing;" "Motion for Summary Disposition on Phase II Low Testing;" and "Motion for Prompt Response to LILCO's Summary Disposition Motions";
May 30, 1984	Joint Suffolk County and New York State Supplement to Requests for Clarification of Commission's May 16 Order;
May 31, 1984	Joint Request of Suffolk County and New York State for Prompt Clarification of the Posture of This Proceeding;
June 1, 1984	Joint Motion of Suffolk County and the State of New York for the Commission's Prompt Attention to and Ruling on Pending County and State Motions and for Stay of Inconsistent ASLB Orders in the Interim.

July 30 hearing might be accomplished.6/ Such an attempt should not be rewarded.

III. SECURITY IS A DISCRETE ISSUE PRESENTING NO NEED FOR CERTIFICATION

Although the Commission has not directly specified criteria for direct certification, numerous Appeal Board cases indicate that the procedure is to be used sparingly and only in unique and extenuating circumstances. Thus, certification will not be granted, absent exceptional circumstances, on questions of the admission of evidence, e.g., Power Authority of the State of New York (Greene County Nuclear Power Plant), ALAB-439, 6 NRC 640

6/ In a similar vein, the County and State have just filed (also on July 3) an additional motion jointly with the Licensing Boards in the general OL ("Brenner Board") and Low Power ("Miller Board") proceedings, seeking to file a financial qualifications contention, and requesting certification of the issue to the Commission. That motion is not only barred by the Commission's regulations and its Financial Qualifications Statement of Policy, 49 Fed. Reg. 24111 (June 12, 1984), and without substantive merit on the facts, but is also based on facts that Suffolk County's own consultants concede have been in the public domain for nearly half a year -- since the January-early-March time frame. This gambit follows an earlier unsuccessful attempt by the Intervenors to inject the financial qualifications issue into this low power proceeding under the rubric of "public interest" considerations incident to LILCO's Application for Exemption. The Licensing Board thwarted that effort by granting LILCO's Motion for Protective Order. Order Regarding Discovery Rulings (June 22, 1984). Undaunted, the Intervenors have subequently filed a Motion in Limine seeking again a ruling on whether financial qualifications evidence would be admissible.

(1977); Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-353, 4 NRC 381 (1976). Yet this is precisely what the Intervenors seek here, direct certification of a ruling on a motion in limine. Similarly, discovery orders rarely merit directed certification, e.g., Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-634, 13 NRC 96, 99 (1981); Houston Lighting & Power Company (South Texas Project, Units 1 & 2), ALAB-608, 12 NRC 168, 170 (1980). Yet, LILCO's motion included a Motion for Protective Order. And, directed certification is not favored on the issue of whether a contention should be admitted, e.g., Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-326, 3 NRC 406, reconsideration denied, ALAB-330, 3 NRC 613, revised and reversed in part on other grounds sub nom., USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976). But, again, the Intervenors seek direct certification of the Board's decision that no security issue will be heard, which is tantamount to a decision concerning the admission of a contention.

Even if the County's and State's position had substantive merit, there is simply no compelling logistical or procedural reason for invoking the unusual and disruptive procedure of direct and immediate certification to the Commission. Security is a discrete issue. Factually, the security issue bears little or no

relationship to health and safety issues concerning the length of time in which AC power must be restored in order to cool the core or concerning the reliability of the power generation sources on which LILCO will rely. Thus, even in the unlikely event of reversal of the Licensing Board's June 20 Order, there would be no wasted effort or inefficiency in conducting the July 30 hearing as now scheduled and making findings of fact and recommendations concerning the health and safety, exigent circumstances and public interest issues properly before the Licensing Board.

Indeed, much greater delay and disruption would undoubtedly ensue from an immediate certification. Certification would almost certainly be followed by a motion for stay or postponement of the July 30 hearing pending Commission deliberation, by requests for additional discovery by the County and other pre-hearing maneuverings. Though the security issue has no impact on public interest or health and safety issues properly before the Licensing Board now, the Intervenors' previous tactics foretell their attempt to parlay and directed certification into a delay of the July 30 hearing.7/

7/ Of course, the mere filing of a motion or certification of an issue does not stay any pending proceedings before the Licensing Board. 10 CFR §§ 2.730(g). And, if the issue is certified, there should be no stay of the Licensing Board's proceedings. Given the County's and State's penchant for swelling the record with repeti-

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On the other hand, if the Licensing Board erred in granting LILCO's Motion in Limine, the error can be easily remedied following a proper appeal. No additional development of the record is necessary for such an appeal. The December 3, 1982 Order of the Security-issues Licensing Board, dismissing all security contentions in the Shoreham proceeding, and the all-encompassing and dispositive Final Security Settlement Agreement are part of the record in the Shoreham proceeding.8/ Thus, it was appropriate for the Licensing Board to have relied upon the December 3, 1982 Order of the Security-issues Licensing Board, dismissing all security contentions on the basis of the existence of the security agreement. If the Commission were to reverse the Low Power Board on

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tive voluminous motions and other papers, there is no reason why they should not be able to pursue the certified question and the low power hearing simultaneously -- even if their ability to do so were a proper consideration, which it is not.

8/ A separate licensing board had been set up in the fall of 1982 to try security issues. Testimony on the issues was filed, prehearing conferences had been held and a hearing date was set, but the need for hearings was obviated by the conclusion on November 24, 1982 of a global Final Security Settlement Agreement between LILCO and Suffolk County. This agreement, also signed by the Staff, was accepted by the Licensing Board in complete resolution of all security issues in the Shoreham operating license proceeding. Memorandum and Order Canceling Hearing, Approving Final Security Settlement Agreement, And Terminating Proceeding (December 3, 1982) (unpublished) (Attachment Y). See Part IV.C. below.

this issue, further hearings could simply be held on the discrete question of the Final Security Settlement Agreement's scope or meaning or, if necessary, the security measures in place for low power operation. There would be no need to repeat earlier evidence and the Licensing Board's findings on other issues would not be impugned. Only in the event that the Licensing Board rules favorably to LILCO on the other pending issues and the Commission reverses the Licensing Board on the security question would evidence ever need to be taken concerning the security issue.

In sum, contrary to the County's and State's assertions, there would be no "unusual delay and expense" resulting from a denial of certification. In fact, there is no justification for this procedure other than to serve the County's and State's avowed goal of delay and, in turn, keeping Shoreham closed.

IV. THE MOTION FOR CERTIFICATION LACKS SUBSTANTIVE MERIT

Although the merits of LILCO's Motion in Limine and Motion for Protective Order are not germane to the propriety of certification, LILCO will respond to the County's and State's substantive arguments. Those arguments have already been rejected twice by the Licensing Board.

A. No Common Defense and Security Issues Are Raised by LILCO's Application for Exemption

The County and State consistently have maintained that the reference to the "common defense and security" in 10 CFR § 50.12(a) requires adjudication of the security issues they attempt to raise. Not surprisingly, the County and State have not once cited, referred to or attempted to explain the plain language of the Atomic Energy Act, 42 U.S.C. § 2014(g), which provides that "the term 'common defense and security' means the common defense and security of the United States."

The Commission has long recognized the distinction between "common defense and security" as defined in the Act, and other Part 73 security issues. "The common defense and security" is limited solely to matters such as the safeguarding of nuclear materials, the absence of foreign control over the applicant, and the availability of special nuclear material for defense needs. Seigel v. Atomic Energy Commission, 400 F.2d 778 (D.C. Cir. 1968).9/ The Court of Appeals in Seigel held that the Commission had persuasively demonstrated that the Congressional concerns

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9/ In Seigel, the Court of Appeals upheld the Commission's position that it was not required to consider, in licensing cases, the security risk posed by the possibility of enemy attack or sabotage within the concepts of "the common defense and security" or "the public health."

embodied in the phrase "the common defense and security" were such things as "the requirements of the military; of keeping such materials in private hands secure against loss or diversion; and of denying such materials and classified information to persons whose loyalties were not to the United States." Seigel, at 784. In contrast, the Court agreed with the Commission that the Congressional intent in including the phrase "the public health and safety" in the statute was "congressional preoccupation . . . with industrial accidents and the dangers they presented to employees and the neighboring public." Seigel, at 784 (emphasis in original). Those types of security questions are covered by the Commission's security regulations in 10 CFR Part 73.

There has been no suggestion that LILCO's request for a low power license implicates the defense and security of the United States.10/ The question which the County seeks to raise is not one of threats to the security of nuclear fuel. Instead, the putative issue involves the security of the AC power facilities

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10/ To the extent that such questions are cognizable in operating license proceedings, they are included within the Commission's regulation governing issuance of operating licenses, § 50.57(a)(6), which, like § 50.12(a), also refers to "the common defense and security"; and no such issues have been raised at Shoreham. Low power proceedings are not occasions to raise new issues except those uniquely within the scope of low power operation; and there has been no showing that any "common defense and security" issues are presented uniquely by low power operation.

which, even if insecure, pose no threat to national security. This distinction is important and, not surprisingly, ignored by the Intervenors. Their concerns clearly relate to "industrial accidents" or health and safety issues, not the security of nuclear fuel or materials.11/ Accordingly, § 50.12(a) does not require adjudication of security issues in this instance independently of any security contentions which might otherwise be pending and pertinent to low power operation, and there are none.

Nor is the Licensing Board's June 20 Order inconsistent with the Commission's May 16 Order. In response to the Intervenors' plethora of unnecessary and procedurally improper "requests for clarification" and motions, see pp. 8-9 above, the Commission stated that "it is for the Licensing Board to address in the first instance the 'common defense and security' showing required under 10 CFR 50.12(a)." June 8 Commission Order at 2-3. Somehow, the County and State erroneously interpret this directive for the Licensing Board to consider whether security should be an issue as a decision on the merits that security is in fact an issue. No such interpretation follows from the Commission's language. Instead,

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11/ The Motion for Certification even recognizes the distinction between "the common defense and security" requirement of § 50.12(a) and the more general security concerns of Part 73. It is the Part 73 type of concerns -- those related to health and safety -- that the Intervenors seek to raise improperly here.

the quoted language is apparently reflective simply of the Commission's admonition to the County and State that their numerous "requests for clarification" were procedurally improper and raised issues which should have been presented to the Licensing Board in the first instance.12/ When LILCO matured this issue by filing its Motion for Protective Order and Motion in Limine, the Licensing Board did rule on it "in the first instance." This is precisely the course of action directed by the Commission. There is no conflict between the Licensing Board's June 20 Order and the Commission's May 16 Order. Consequently, certification cannot legitimately be predicated on this ground.

B. There Is No Pending Security Contention

As the Licensing Board observed, there are no pending contentions concerning security. The Memorandum and Order Canceling Hearing, Approving Final Security Settlement Agreement, and Terminating Proceeding (Attachment Y) was entered on December 3, 1982 by a Licensing Board in this proceeding. All security contentions of Suffolk County were then dismissed on the basis of the Final Security Settlement Agreement. And, as well established by

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12/ Interestingly, neither the County nor the State chose not to present to the Licensing Board any of the issues raised in the various requests for clarification.

precedent, filing of a request for a low power license is not an appropriate opportunity for filing new contentions. E.g. Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 803 n.78 (1983).13/

Moreover, the Application for Exemption provides no factual basis for the late filing of a new security contention. LILCO seeks no exemption from any security requirements. And, its offsite power sources are not subject to Part 73 requirements. Safety Evaluation Report (Supp. 5), NUREG-0420 at 13-3 (April, 1984). Thus, in addition to the lack of any national security issue raised by the Application for Exemption, there is no procedural basis for the Intervenors to resurrect previously dismissed security contentions.

The County and State attempt to obscure this lack of any pending security contention and to avoid the effect of the all-encompassing Final Security Settlement Agreement by arguing,

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13/ The Motion for Certification notes, irrelevantly, that New York State was not a party to the Agreement. New York State was a full (if inactive) party to this case in 1982 when security issues were resolved and never sought to participate in them. It was on notice of these issues and is bound by their resolution. Further, the State has no pending security contention and does not attempt to make any showing justifying the late filing of any such contention. In any event, the State's interests appear to be actively expressed by Suffolk County. Nearly all motions and pleadings of the two intervenors have been submitted jointly and the State has not participated actively on its own in these low power proceedings.

spuriously, that the Staff has somehow injected security issues into this low power proceeding. For numerous reasons, the County and State apparently misconstrue the Staff's Supplemental Safety Evaluation Report and the proposed testimony of Staff witness Charles E. Gaskin. First, the Staff's mention of security issues in the SER does not vitiate the lack of any security contention. If there is no contention, then the Staff may still consider a matter, in the exercise of its regulatory functions, without automatically injecting it into contention for adversary hearings. Thus, as occurred here, the Staff might appropriately take note of the County's calculated scwing of doubt about whether it will abide by certain of its contractual obligations under the Security Agreement.14/ The Staff's consideration of that issue, however, does not afford the County a free opportunity to disavow those obligations and, by so reneging, inject new issues to be litigated in these licensing proceedings.

Second, the substantive issue considered in Mr. Gaskin's testimony was solely whether the emergency AC power which will be available during LILCO's proposed low power testing will be sufficient to power the security system at Shoreham. He concluded that it would be. There was no consideration of the adequacy of

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14/ See footnote 15 below.

security arrangements. Indeed, the scope of Mr. Gaskin's testimony was succinctly described by him:

> Q.3. What is the scope of your testimony?
>
> A.3. My testimony addresses the acceptability of the Shoreham security system's emergency power capability for low power operation.

(NRC Staff testimony of Charles E. Gaskin regarding application for low power license, p. 2) (Attachment G). The only other matter addressed by Mr. Gaskin was "some uncertainty regarding the commitments made by the Suffolk County police to respond to security related emergencies at the site." According to Mr. Gaskin, uncertainty arose out of a letter from Donald J. Dilworth, then Police Commissioner of Suffolk County, to Robert F. Reen of LILCO dated March 15, 1983 (Attachment H). That uncertainty obviously long preceded and is totally independent of LILCO's Supplemental Motion for Low Power License (filed March 20, 1984) and Application for Exemption (filed May 22, 1984). Thus, the uncertainty does not arise from any matters at issue in this proceeding. It provides no basis for late filing of a new security contention seventeen months later.15/

15/ The original occasion for Commissioner Dilworth's letter had been LILCO's submission of a pending revision of the Shoreham Security Plan to the Suffolk County Police Department for advance review, pursuant to the Final Security Settlement Agreement. Commissioner Dilworth's letter waived the SCPD's right of review on

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the stated basis that radiological emergency response might be required in connection with a given level of security incident at Shoreham; that the Suffolk County legislature had recently determined that Suffolk County would not participate in emergency planning at Shoreham and had directed the Suffolk County Executive to take no actions inconsistent with that determination; and therefore that the SCPD felt that review of the pending revision to the Shoreham Security Plan would be appropriate. See Attachment H.

Suffolk County has, ever since, used its deliberately cultivated ambiguity about the SCPD's intention to fulfill its obligations under the Agreement in an attempt to complicate closure of security issues at Shoreham. Voluminous correspondence in the wake of Commissioner Dilworth's letter clarified that (1) the SCPD disclaimed any intent to abrogate or rescind the Final Security Settlement Agreement, (2) the SCPD would continue to protect Shoreham as a construction site prior to fuel load, and (3) the SCPD would protect the Shoreham plant as an operating reactor pursuant to an operating license issued after full trial and final decision on offsite emergency planning issues. See Letter, Irwin to Miller, March 18, 1983 (Attachment I) and Letter, Miller to Irwin, March 30, 1983 (Attachment J). However, the SCPD (or more accurately, Suffolk County attorneys writing on its behalf) has repeatedly ducked LILCO's requests that it dispel any remaining doubt created by Commissioner Dilworth's letter by reaffirming directly that it would consider itself bound to respond in accordance with the terms of the Final Security Settlement Agreement in the event of a security contingency occurring following issuance of a low-power license to Shoreham pursuant to 10 CFR § 50.47(d), but prior to issuance of a final decision on offsite emergency planning issues. See Letter, Irwin to Miller, April 1, 1983 (Attachment K); Letter, Miller to Irwin, April 11, 1983 (Attachment L); Letter, Irwin to Miller, March 30, 1984 (Attachment M); Letter, Irwin to Miller, April 18, 1984 (Attachment N); Letter, Irwin to Caruso, April 18, 1984 (Attachment O). No satisfactory substantive response to this question has ever been received from the SCPD, despite LILCO's repeated attempts to secure it.

At one point during the period immediately following March 15, 1983, controversy arose between LILCO and Suffolk County concerning how much of the information concerning the SCPD's intent to fulfill its obligations under the Final Security Settlement Agreement should be treated as Safeguards Information. Not

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Accordingly, there has been no security issue injected into

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surprisingly, Suffolk County thought it all should be so treated, and arbitrarily stamped all correspondence dealing with the dispute with the label "Safeguards Information"; LILCO disagreed, arguing that information regarding a party's intention to fulfill an agreement is distinguishable from the actual terms of the agreement. LILCO then obtained the declassification of pertinent documents, pursuant to normal procedures, by the Staff and ONMSS. See Letter, Novak to Pollock, March 25, 1983 (Attachment P); Letter, Irwin to Bordenick, June 18, 1984 (Attachment Q); Letter, McCorkle to Bordenick, June 22, 1984 (Attachment R); Letter, Bordenick to Irwin, June 27, 1984 (Attachment S). Suffolk County attempted to invoke the jurisdiction of the Licensing Board which had approved the Final Security Settlement Agreement, to resolve this dispute; this attempt was refused by that Board on April 11, 1983 in a Memorandum and Order holding that the Final Security Settlement Agreement, approved by its Order of December 3, 1982, had fully resolved "a major segment of the Shoreham operating license proceeding, to wit: all contentions concerning issues of physical security of the plant," LBP-83-20, 17 NRC 580, 583, and that the December 3 Order had been a final, appealable order that had not been appealed from. Id.

By late 1983, the NRC Staff became concerned that Commissioner Dilworth's letter and subsequent correspondence indicated ambiguity on the SCPD's part as to whether it would fulfill its obligations under the Final Security Settlement Agreement in all circumstances. (See Letter, Edwin J. Reis, Esq. to W. Taylor Reveley, III, Esq., November 22, 1983, at 2.) (Attachment T).

Finally, on March 30, 1984, with the imminence of the low power proceeding, LILCO wrote again to Suffolk County requesting that it resolve the ambiguity it had created about honoring its commitments under the Agreement (Attachment L). On April 18, having received no answer, LILCO wrote to the NRC Staff (Attachment M), with notice and a parallel letter to Suffolk County (Attachment N), to set up a meeting to resolve that ambiguity. The meeting, to which the County was invited (Attachment U), was scheduled for May 18, but was postponed at the County's request (Attachment V), and rescheduled, with notice to the County (Attachment W) for June 11. The County, despite its expressions of interest in attending and an invitation to attend, did not appear at the meeting, at which the matter was substantively dealt with.

this proceeding by the Staff and there is no conflict between the position of the Staff and the Board's Order. Indeed, the Staff supported LILCO's Motion in Limine and Motion for Protective Order.

C. The Security Issue Has Been Dispositively Resolved By the Final Security Settlement Agreement

On November 24, 1982 LILCO and Suffolk County entered into a 33-page Final Security Settlement Agreement (the "Agreement") resolving all nine security contentions which had been raised by Suffolk County, and covering the gamut of potential security issues at Shoreham. See Attachment X, pages 2-4.16/ The Agreement states:

> D. By this Agreement, LILCO and the County document that each or either of them, as appropriate, has implemented or will implement the actions described below, which respond to the concerns expressed in the County's nine security contentions in the Shoreham security proceeding. The County has determined that these actions, the details of which are described below, respond to and satisfy the County's security concerns and will result in material improvement to the security arrangements at Shoreham. Accordingly, the County finds that its nine security contentions are resolved.

16/ Relevant portions of this Final Security Settlement Agreement -- pages 1 through 5 (¶ F) and 31-33 -- were declassified by ONMSS on June 22, 1984 in response to LILCO's June 18 request (see Attachments Q-S).

Agreement at 4-5, ¶ D. The parties urged the Board to dismiss the contentions at the proceeding on the basis of the Agreement. Id. at 33.

The Agreement thus resolved all issues in dispute between LILCO and Suffolk County in the operating license proceeding. The NRC Staff concurred in it. New York State, though not a party to the Agreement, was a full party to the litigation at that time. It was thus on notice of the security proceedings and could have participated in them. It is bound by their resolution under basic principles of estoppel, and its failure to have raised any concerns at that time does not give rise now to any right to raise them belatedly.

The Agreement was accepted on December 3, 1982 by the Atomic Safety and Licensing Board which had been established to hear security issues, in an unpublished Order dated December 3, 1982 (Attachment Y). No party appealed from that Order. (See that Board's subsequent Order, LBP-83-20, 17 NRC 580 (April 3, 1983), declining to exercise jurisdiction over a request by Suffolk County to treat certain correspondence as Safeguards Information.) Thus the Final Security Settlement Agreement, as approved, became final and binding on all parties; as a result, as the Low Power Licensing Board has recently noted, "issues in regard to security no longer exist in this proceeding." Order Granting LILCO's

Motion in Limine, June 20, 1984, at 3. In short, the parties to the Agreement contemplated it as the structure for the future governance of their relationship on security matters.

A putatively 30-year agreement should have provisions for adaptation, and the Final Security Settlement Agreement does. In Part X, at pp. 31-33, the Agreement provides two distinct and separate means for adjusting matters pertaining to security. If the matter is one directly requiring modification of a provision of the Agreement or related documentation, LILCO is required to submit it to the Suffolk County Police Department for approval. On matters not so directly related to the Agreement, LILCO must submit the proposed change to the SCPD for comment, but implementation of the change is not dependent on the SCPD's approval. The pertinent language, from page 32, is as follows:

> LILCO further agrees that any future changes or revisions to either the physical security plan or any other documentation relevant to the security arrangements at the Shoreham site and embodied in this Agreement will require the review and approval of the SCPD.
>
> LILCO agrees that, with respect to any proposed changes or revisions in the physical security plan or any other documentation relevant to the Shoreham security arrangements requiring approval by the NRC, but not embodied within this Agreement, it will consult with and solicit the guidance of the SCPD prior to seeking approval from the NRC.

Of course, any such modifications would have to be consistent with

the NRC Staff's regulatory requirements and would have to receive the approval of the Staff, but as a matter of regulation rather than contract.

Thus the parties to the Agreement not only bound themselves to a resolution of all security issues among them under the Agreement, they also created, in that Agreement, a mechanism for effecting future changes. Any adjustments to security planning at Shoreham necessary because of low power operation (LILCO and the Staff agree that there are none) should be resolved by means of the Agreement, rather than by invocation of nonexistent jurisdiction of licensing boards. It should be noted that two licensing boards -- the one that initially approved the Agreement (LBP-83-20, 17 NRC 580) and the current Low Power Board (Order in Limine, June 20, 1984, at 2-3) -- have both rejected just such attempts by Suffolk County to circumvent its own Agreement. The Commission should likewise reject the County's effort.

VI. CONCLUSION

The Motion for Certification is untimely. It presents no compelling argument for referral and there is none. Further litigation on security issues is also precluded by the Final Security Settlement Agreement. Certification at this juncture would merely be a waste of time and resources and a source of further delay.

The Motion for Certification should be denied. To the extent, however, that the Commission may wish to entertain issues raised by the Motion for Certification, such consideration should not delay the July 30 hearing.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

By _____

Donald P. Irwin
Robert M. Rolfe
Anthony F. Earley, Jr.
Jessine A. Monaghan

Hunton & Williams
Post Office Box 1535
Richmond, Virginia 23212

DATED: July 16, 1984

ATTACHMENT A

Attachment A

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) July 5, 1984

ORDER DENYING MOTION FOR REFERRAL

The Intervenors Suffolk County and the State of New York on July 3, 1984, filed a motion for referral to the Commission of our Order Granting LILCO's Motion in Limine, entered June 20, 1984. The referral motion has been carefully considered by the Board, but no good reason appears for a referral to the Commission. The instant motion is in effect an argument for reconsideration, and an attempt to reargue matters already taken into account and ruled upon by the Board. We adhere to the reasons set forth in our June 20 Order regarding the nature and effect of prior Orders of another Licensing Board.

In view of the fact that an evidentiary hearing is scheduled to commence July 30, 1984, under an expedited schedule recommended by the Commission itself in this proceeding, the Intervenors' motion for

referral is denied forthwith. Inasmuch as the same type of motion for directed certification has been simultaneously filed with the Commission, the highest NRC appellate body can decide whether it now wishes to entertain such an appeal. We have cautioned the parties on several occasions that filing motions and other papers will not delay the scheduled commencement of the evidentiary hearing. For the foregoing reasons, the motion for referral is denied.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Marshall E. Miller

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 5th day of July, 1984.

ATTACHMENT B

Attachment B

LILCO, June 2, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

MOTION FOR PROTECTIVE
ORDER AND MOTION IN LIMINE

On numerous occasions, Suffolk County has indicated its belief that security issues are material to resolution of LILCO's request for a low power license and accompanying Application for Exemption. Because there are no pending contentions concerning security and because all security issues are covered by an agreement between the County and LILCO, time-consuming litigation of security issues in this proceeding is neither necessary nor appropriate. Accordingly, LILCO moves for an order precluding all discovery requests whose relevance is to the issue of security and for an order in limine that any evidence whose sole materiality is a question of security is inadmissible.

This issue is ripe for decision and it is important that the Board decide it at this stage of the proceedings. The County has repeatedly indicated its intent to pursue the security issue in this proceeding. E.g., Suffolk County's Preliminary Views on Scheduling Regarding LILCO's New Motion, March 26, 1984, ¶ 2f; Transcript April 4, 1984 Oral Argument at 122; Request for Production of Documents, April 11, 1984, ¶ 17; April 20, 1984 letters from Lawrence Lanpher to Board; Joint Response of Suffolk County and the State of New York to the Commission's Order of April 30, 1984, filed May 4, 1984, at 8, 11, 26, 36. Most recently, the issue arose when the County resumed its discovery on May 24 by inspecting LILCO's AC power facilities at Shoreham using 3 lawyers and 8 consultants. The County asked to inspect LILCO's security measures for these facilities. Though the inspection of security facilities was permitted, LILCO reminded the County of its objection to the materiality and relevance of security issues. See Lanpher to Rolfe letter May 23, 1984; Rolfe to Lanpher letter May 23, 1984 (attached).

Since the Board has set a thirty-seven day schedule for discovery, the parties need a ruling on this question to avoid wasting valuable discovery time and spending unnecessary resources on issues not material to this proceeding. As

important, the risk of dilatory discovery disputes -- perhaps leading to the delay of hearings -- should be eliminated by early resolution of the issue. And, the parties should be spared the uncertainty and potential waste of resources in preparing testimony for hearings.

The reasons for this immateriality are several. First, the Part 73 security issues to which the County has repeatedly alluded do not fall within the rubric of "common defense and security" to which 10 CFR 50.12(a) expressly refers. "The term 'common defense and security' means the common defense and security of the United States," 42 U.S.C. § 2014(g). See Siegel v. Atomic Energy Commission, 400 F.2d 778, 784 (D.C. Cir. 1968). There is no suggestion that LILCO's request for a low power license implicates the defense and security of the United States. The question which the County seeks to raise is not one of threats to the security of the nuclear fuel.1/ The issue involves only the security of AC power facilities which, even if attacked, pose no threat to national security.

1/ Nor could it legally raise such an issue. As noted below, all issues relating to the physical security of the plant have been resolved by a comprehensive settlement agreement.

Second, there are no pending contentions concerning security. As well established by precedent, filing of a request for a low power license is not an appropriate opportunity for filing new contentions. E.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 803 n.78 (1983). This Licensing Board's April 6 Memorandum and Order recognized the inappropriateness of security issues by excluding them from the statement of pertinent issues in this proceeding. And, LILCO has introduced no security issues by modifying its request for a low power license in seeking an exemption. LILCO seeks no exemption from any security requirements. The offsite power sources are not subject to Part 73 requirements. Safety Evaluation Report (Supp. 5), NUREG-0420 at 13-3 (April, 1984).

Third, there is in effect an all-encompassing Final Security Settlement Agreement for Shoreham signed by LILCO, Suffolk County and the NRC Staff. This Agreement, dated November 22, 1982, and classified as Safeguards Information, applies to all aspects of the operation of Shoreham without qualification or exemption. The Agreement was arrived at in complete settlement of all security-related contentions raised by Suffolk County in this proceeding. It was ratified on December 3, 1982 by the Atomic Safety and Licensing Board which

had been constituted to try the security issues raised by SC. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), Memorandum and Order Canceling Hearing, Approving Final Security Agreement, and Terminating Proceeding (Dec. 3, 1982) (unpublished). Not only did the Agreement resolve all existing security contentions, it also contains mechanisms for resolving security-related aspects of future changes in plant design.

Fourth, as LILCO has demonstrated in its affidavits and prefiled testimony, security for the AC power sources is not a health and safety concern. Except in the event of a LOCA,2/ the plant has more than 30 days to restore AC power. One or all of the AC power facilities could be lost by sabotage, yet repaired, replaced or substituted for in 30 days. And, the redundancy of LILCO's multiple AC power sources make it extremely unlikely that any security threat would successfully debilitate all of its offsite power sources. In sum, any safety concerns relating to the sabotage of LILCO's AC

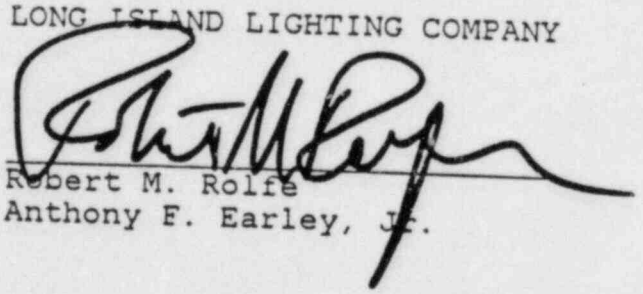
2/ The single failure criterion does not require LILCO to postulate a LOCA, a loss of normal offsite power and the successful sabotage of all of its black start AC power sources simultaneously. Common sense also dictates the conclusion that it is not credible to assume that a potential saboteur could choose the precise moment of a LOCA, itself highly unlikely, for his attack. Nor would it be credible or legally permissible to postulate that the LOCA is sabotage-induced since the plant is protected by an approved security plan.

power system are adequately covered by the analyses of the loss of offsite power event at 5% power. It would be pointless to permit speculative inquiries into the various potential causes (e.g. sabotage, weather) of such an event.

Accordingly, the Board should grant LILCO's motions and order that (1) there shall be no discovery in this proceeding of matters whose sole relevance is to security issues and (2) no evidence whose sole materiality is security shall be admissible in the hearings in this proceeding.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY



Robert M. Rolfe
Anthony F. Earley, Jr.

Hunton & Williams
Post Office Box 1535
Richmond, Virginia 23212

DATED: June 2, 1984

Attachment A

KIRKPATRICK, LOCKHART, HILL, CHRISTOPHER & PHILLIPS
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TELEPHONE: (202) 452-7000
TELEX: 440301 KIRK UI

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1500 OLIVER BUILDING
PITTSBURGH, PENNSYLVANIA 15222
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WRITER'S DIRECT DIAL NUMBER
202/452-7011

May 23, 1984

(BY TELECOPIER)

Robert Rolfe, Esq.
Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

Dear Bob:

I talked several times yesterday with Tony Earley regarding a visit to the Shoreham site set for 10:30 a.m. on Thursday, May 24, 1984. When we arrive at the site, we will ask for John Morin. As discussed with Tony, we intend to take pictures and thus request that the appropriate passes be provided.

First, the people who will be on the visit are as follows:

	SS No.
Lawrence Coe Lanpher	223-60-9267
Karla J. Letsche	223-80-0246
John E. Birkenheier	368-62-4504
Gregory C. Minor	562-48-8919
* Dale G. Bridenbaugh	503-62-5691
Robert Weatherwax	562-62-5691
M. M. El-Gasseir	560-02-2069
Dennis Eley	143-74-7297
Aneesh Bakshi	167-62-3119
Richard Roberts	047-50-6801
* Phillip McGuire	128-26-4889
Christian Meyer	560-82-6618

Those marked with an asterisk are not on the list given to John Morin by Tony. Please note that Dr. Roesset, who was on Tony's list, will not be attending.

I outlined to Tony the areas which we want to visit. Obviously, the primary areas are the power sources and associated components relied upon by LILCO for low power operation, and also the onsite power sources (TDI diesels) that would have been relied upon but for the TDI problems. The specific areas which we can identify in advance are set forth below. I note, however,

that other areas may also need to be visited once our experts have conferred further. At any rate, the areas already identified are:

> NSS and RSS transformers and associated structures; the 4 EMD mobile diesels and associated components, fuel supplies and cable/conduit to the plant; the 20 MW gas turbine and associated components, fuel supplies, and cable/conduit connecting to the 69 KV circuit; the 138 and 69 KV switchyards; the Wildwood Station; identification of location of burried cables; the 69 KV bypass; the TDI diesels; the emergency and non-emergency switchgear rooms; and the Shoreham control room.

Messrs. Roberts and McGuire, both County Police Officers, will be attending the site visit to assess the security arrangements proposed for low power operation. They will likely need to tour the entire protected area boundary, as well as the locations described above.

Some County personnel also intend to tour the Nicksville Operations Center after the site tour.

The County appreciates Tony's efforts to arrange for this visit.

Sincerely yours,

Lawrence Coe Lanpher

LCL/dk

cc: John Morin
Edmund Reis, Esq.
Fabian Palomino, Esq.
Steven Latham, Esq.

Attachment B

HUNTON & WILLIAMS
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May 23, 1984

FILE NO. 24566.3

DIRECT DIAL NO. 804 788- 8466

By Telecopier

Lawrence Coe Lanpher, Esq.
Kirkpatrick, Lockhart, Hill,
Christopher & Phillips
1900 M Street, N.W.
Washington, D.C. 20035

Long Island Lighting Company
Shoreham Nuclear Power Station
Docket No. 50-322-OL-4 (Low Power)

Dear Larry:

This will address several matters concerning discovery incident to LILCO's Supplemental Motion for Low Power Operating License and Application for Exemption.

1. At your request, a visit to the Shoreham site has been arranged for tomorrow, May 24, 1984 at 10:30 a.m. Your letter of May 23 indicates those who will be in attendance from the County. I assume that if any representative of New York State wished to attend, he would have coordinated his request through you.

There are three caveats to LILCO's willingness to provide the site tour. First, inspection of the TDI diesels will not be permitted both because of work going on in the area and because they have no relevance to the health and safety issues in this proceeding. In any event, the County has previously inspected the diesels and their installation. Second, accompanying you will be two County police officers who intend to "assess the security arrangements proposed for low power operation." Their attendance will be permitted, though LILCO does not agree that security issues are relevant or material to any issue before the Licensing Board. LILCO's willingness to afford the police officers the opportunity to see the areas identified in your letter is not to be construed in any way as a waiver of LILCO's position that security issues

are immaterial and irrelevant. Third, no photographs will be permitted in vital areas or in the normal switchgear room. Also before taking any photographs, the County must sign a nondisclosure agreement and agree that a copy of any photographs taken will be provided LILCO.

2. Enclosed is LILCO's Request for Production of Documents to the County. We request that the documents be produced in Hunton & Williams' Richmond Office no later than June 6, 1984.

3. Between June 7 and June 22, LILCO will depose the following persons:

(a) Robert K. Weatherwax;

(b) George Dennis Ely;

(c) Aneesh Bakshi;

(d) Dr. Christian Meyer;

(e) Gregory C. Minor;

(f) Professor Jose M. Roesset;

(g) Dale Bridenbaugh;

(h) Richard Hubbard;

(i) Mohamed M. El-Gasseir;

(j) Stanley Christensen.

LILCO will also depose during that period any additional consultants retained by the County, but not yet identified. We ask that you identify any such consultants as quickly as possible so that they may be deposed during the anticipated discovery period. Without waiving its objection to the raising of any security issue, LILCO will also depose Officers Roberts and McGuire during this time period if it is determined that security is an issue.

Rather than specify dates for the depositions of particular individuals, we have suggested a range of times to allow you maximum flexibility to arrange the depositions at a

convenient time for the deponents. Please let us know by May 30, at the latest, suggested dates for these depositions.

I look forward to your prompt response.

Sincerely yours,

Robert M. Rolfe

177/643
Enclosure
cc: Fabian Palomino, Esq.
Edward J. Reis, Esq.

LILCO, June 2, 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 MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE were served this date upon the following by Federal Express as indicated by an asterisk and otherwise by first-class mail, postpage prepaid, on June 4, 1984:

Judge Marshall E. Miller*
Chairman
Atomic Safety and Licensing Board
U.S. NRC
4350 East-West Highway
Fourth Floor (North Tower)
Bethesda, Maryland 20814)

Judge Glenn O. Bright*
Atomic Safety and Licensing Board
U.S. NRC
4350 East-West Highway
Fourth Floor (North Tower)
Bethesda, Maryland 20814

Judge Elizabeth B. Johnson*
Oak Ridge National Laboratory
P.O. Box X
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Oak Ridge, Tennessee 37830

Fabian Palomino, Esq.*
Special Counsel to the Governor
Executive Chamber, Room 229
State Capitol
Albany, New York 12224

Herbert H. Brown, Esq.*
Lawrence Coe Lanpher, Esq.
Kirkpatrick, Lockhart, Hill, Christopher & Phillips
1900 M Street, N.W., 8th Floor
Washington, D.C. 20036

Honorable Peter Cohalan
Suffolk County Executive
County Executive/Legislative Building
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Eleanor L. Frucci, Esq.*
Atomic Safety and Licensing
Board
4350 East-West Highway
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Edwin J. Reis, Esq.*
U.S. Nuclear Regulatory
Commission
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James Dougherty, Esq.
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Docketing and Service Branch
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Robert M. Rolfe

Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

DATED: June 2, 1984

ATTACHMENT C

June 19, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO LILCO MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE

I. INTRODUCTION

On June 2, 1984, LILCO filed a "Motion For Protective Order and Motion in Limine" to limit the litigation of security issues in the litigation of its application for a low power license under 10 C.F.R. § 50.57(c). LILCO in its motion asks "for an order precluding all discovery requests whose relevance is to the issue of security and for an order in limine that any evidence whose sole materiality is a question of security is inadmissible." The NRC staff supports this motion in the present posture of this proceeding.

II. DISCUSSION

As LILCO recites at p. 2 of its motion Suffolk County has repeatedly indicated its intent to pursue security issues in this proceeding in regard to the 10 C.F.R. § 50.57(c) application for approval of low power operation without qualified TDI diesels. The County had previously by a

Security Settlement Agreement for Shoreham, November 22, 1982, settled its "security concerns" in this proceeding. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), Memorandum and Order Cancelling Hearing, Approving Final Security Agreement, and Terminating Proceeding (December 3, 1982), at 2 (unpublished). 10 C.F.R. § 50.57(c).

The issues in this proceeding involve whether LILCO is entitled to a low power license under the regulations of the Commission. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, ___ NRC ___ (May 16, 1984). These regulations include provision for seeing that security is provided in nuclear generating plants. See 10 C.F.R. Part 73. Issues in regard to security no longer exist in this proceeding. They were settled by the stipulation of November 22, 1982, and dismissed by a Licensing Board order of December 3, 1982. An application for a low power license "does not open the proceeding for a new round of contentions," on matters where the record has already been closed. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 801 (1983). Where one seeks to raise these issues they must meet the standards for late-filed contentions and for reopening the record. Id.[1/]

To reopen issues, one would need to show -

1) The motion to reopen is timely made;

2) The matter involved addresses a significant issue, and

1/ The Commission Order of June 8, 1984, dealing with various motions of Suffolk County for clarification of CLI-80-4, did not state that security matters must be considered in this low power operation request, but that ". . . it is for the Licensing Board to address in the first instance the 'common defense and security' showing required under 10 C.F.R. § 50.12(a)." Thus it is on the Licensing Board to determine whether these matters should be considered in this proceeding.

3) A different result may be reached on consideration of the newly proffered material.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-738, 18 NRC 177, 180 (1983); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). The proponent of such a motion to reopen has a heavy burden. Id.

In the context of this proceeding, to reopen the record on security matters, it would have to be shown that the security concerns raise issues in the low power hearing that could not have been raised before on the application for the full power license, that these security issues are significant (i.e. present a credible threat), and that they could lead to a different result in a decision on the low power application. Thus, among other matters, the proponent of such a motion would have to show (1) that the security concern in regard to low power operation involves equipment not similarly relied upon for full power operation, (2) that a credible security incident could occur which affects the function of that equipment; and (3) that such an incident could realistically occur during low power testing when the equipment is needed to deal with a severe accident.[2/]

2/ Section 13.7 to Supplement to the Shoreham SER (NUREG-0420) details that the safeguards provided for the reactor coolant pressure boundary are to remain the same for low power operation as they are for full power operation. Thus, the likelihood of a security event causing a loss of coolant accident (LOCA) remains the same and any security issue in regard to that boundary could have been litigated in the security proceedings on the full power application. The SER also details that the only time offsite power or the augmented electrical equipment in dispute in this proceeding could be needed for safe shutdown would be during a LOCA (§§ 13.7 & 15), and there is no technical reason to protect offsite power sources or the augmented power sources for safe shutdown in the absence of a LOCA (§ 13.7).

Until Suffolk County or the State of New York successfully demonstates that the record should be reopened in regard to security issues they may not be a subject of litigation in this low power licensing proceeding. Similarly, as security issues have not been identified as a matter in controversy, discovery may not be had on that subject. See 10 C.F.R. § 2.740(b)(1).

III. CONCLUSION

For the above stated reasons LILCO's motion for a protective order against considering or discovering matters relative to security in the low power proceeding should be granted.

Respectfully submitted,

Edwin J. Reis
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland
this 19th day of June, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO LILCO MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 19th day of June, 1984:

Judge Marshall E. Miller, Chairman*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Judge Glenn O. Bright*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Elizabeth B. Johnson
Oak Ridge National Laboratory
P. O. Box X, Building 3500
Oak Ridge, Tennessee 37830

Eleanor L. Frucci, Esq.*
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Docketing and Service Section*
Office of the Secretary
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Edward M. Barrett, Esq.
Long Island Lighting Co.
250 Old County Road
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Honorable Peter Cohalan
Suffolk County Executive
County Executive/
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ATTACHMENT D

6/14/84

Attachment D

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

SUFFOLK COUNTY AND STATE OF NEW YORK OPPOSITION TO LILCO "MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE"

By Motions dated June 2, 1984, LILCO has moved this Board for an order "precluding all discovery requests whose relevance is to the issue of security and for an order that any evidence whose sole materiality is a question of security is inadmissible." LILCO Motion For Protective Order and Motion in Limine, p.1. Suffolk County and New York State hereby oppose LILCO's motions on the following grounds:

(1) The Commission's Order of June 8, 1984 (served June 11, 1984) conclusively demonstrates that the security provision of Section 50.12(a) applies to LILCO's request for exemption. Thus, the Commission stated: "Finally, it is for the Licensing Board to address in the first instance the 'common defense and

security' showing required under 10 C.F.R. 50.12(a)." (Order pp. 2-3, Emphasis added). Thus, a LILCO "showing" under the Section 50.12(a) "common defense and security" criterion is required in order for this Board even to consider LILCO's Application for Exemption. The interest of the County and State to pursue security-related issues via discovery is so that the County and State can have essential information with which to contest any LILCO "showing" if LILCO should decide to attempt to meet the Section 50.12(a) requirements.

The County and State emphasize that as of this date LILCO has not even attempted to make the "showing" required under Section 50.12(a). Instead, in its May 22 Application for Exemption, LILCO failed to proffer anything of substance related to security, choosing rather to characterize the Commission's May 16 Order as not requiring consideration of security issues. See Application for Exemption, p. 15, note 10. LILCO's characterization of the Commission's May 16 order is clearly erroneous, and the Commission's June 8 Order makes it categorically certain that a failure by LILCO to make the security "showing" expressly required by the terms of Section 50.12(a) requires rejection of LILCO's Application for Exemption.

(2) LILCO's motions are contrary to the explicit requirements of Section 50.12(a) of the NRC's regulations, which provide that an exemption may not be granted unless a finding is made that such exemption would "not endanger the common defense and security." Thus, even absent the clear direction given by the Commission, the plain words of Section 50.12(a) require denial of LILCO's Motions unless LILCO makes the requisite security showing.

(3) LILCO's motions constitute a direct challenge to Section 50.12(a) in contravention of Section 2.758, which prohibits the challenge of a regulation in an adjudicatory proceeding. Indeed, the Commission's Order of June 8 makes all the more clear that LILCO's Motions challenge not only Section 50.12(a) but the NRC's May 16 Order as well.

(4) LILCO's argument that there is no pending security contention (aside from being incorrect -- see point (6) below)) begs the question here at issue -- namely, the explicit security requirement of Section 50.12(a). The presence or absence of a security contention is irrelevant to the security standard imposed independently by Section 50.12.1/

1/ There is a puzzling statement in the Staff's "Response to Suffolk County's and the State of New York's Request for Clarification of the Commission's Order of May 6 . . . ."

(Footnote cont'd next page)

(5) LILCO's Motions ignore the company's responsibilities under Section 2.732, which places the burden of proof on LILCO. Under this regulation, LILCO must prove that the exemption it requests would not endanger the common defense and security. Since LILCO has not even attempted to make the common defense and security showing required by Section 50.12(a), it clearly has failed to sustain its burden of proof.

(6) LILCO's argument that the so-called "all encompassing Final Security Settlement Agreement" makes the security issue immaterial here (LILCO Motion, p. 4) is a mischaracterization of what that Agreement covers and a circumvention of Section 50.12. The Agreement covers the matters there addressed by the

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(Footnote cont'd from previous page)

There, at page 5, the Staff states, "Security issues have to date not been injected into this proceeding." The Staff's statement is incorrect. First, LILCO itself has injected security issues into this proceeding by filing its low power license request, which under Section 50.57(c) requires the finding that the grant of such license would "not be inimical to the common defense and security." See 10 C.F.R. § 50.57(a)(6). Second, the Staff's own SSER on LILCO's low power license, which discusses security issues, has injected security issues here. See SSER, Supp. 5, pp. 13-2 through 13-4. And LILCO's "Application for Exemption" again has injected security issues into this proceeding because Section 50.12(a) requires that LILCO prove and the Commission find that the grant of an exemption would "not endanger the common defense and security."

parties. Those matters included the Part 73 design basis threat with respect to the onsite emergency power system configuration then proposed by LILCO. Since then, LILCO has proposed an entirely new emergency power system. The vulnerabilities of this system must be considered under Section 50.12 and under Part 73 as well. Further, since the new AC power configuration clearly changes the bases for the prior settlement, the issues considered therein are clearly now revived and LILCO's compliance with Section 73.55 when preparing to operate in the new AC power configuration is a critical unresolved issue. (The County again reiterates its often repeated request that the NRC establish the requisite Part 73 procedures so that the necessary safeguards information can be properly addressed.)

(7) LILCO's argument that the "common defense and security" does not mean the provisions of Part 73 is contrary to law. It ignores the fact that the Commission has, throughout its history, defined the "common defense and security" by explicit regulatory standards -- those now embraced by Part 73. When Section 50.12(a) uses the phrase "common defense and security," it means just that: the standards of Part 73.2/ LILCO,

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2/ LILCO's citation of the Siegel case is misplaced. See Siegel v. Atomic Energy Comm., 400 F.2d 778 (D.C. Cir.

(Footnote cont'd next page)

nevertheless, persists in arguing that the term "common defense and security" is some sort of abstraction which is not applicable to LILCO's exemption request. See Application for Exemption at 15, note 10; Motion for Protective Order and Motion in Limine, at 3. LILCO is incorrect. First, the NRC's June 8 Order confirms that Section 50.12(a) requires a security "showing" by LILCO. Second, while in some contexts the term "common defense and security" involves national security and defense matters (particularly in contexts concerning military application of nuclear technology and exports and imports of nuclear materials), that term, with respect to nuclear power

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(Footnote cont'd from previous page)

1968). That case has nothing whatsoever to do with the issue here at bar. Siegel involved arguments that an intervenor must be permitted to litigate the question whether the plant could defend against an enemy attack (Cuba in the Siegel case). Siegel never considered the findings required under Section 50.12(a), the Part 73 design basis threat, or the requirements of Section 73.55 (the latter was not even adopted by the NRC until nearly a decade later). Moreover, LILCO states, "There is no suggestion that LILCO's request for a low power license implicates the defense and security of the United States." (Motion, p. 3.) LILCO's statement is legally and factually incorrect. Indeed, LILCO's low power license request requires findings under Section 50.57(c). These findings include the security requirements of Part 73. The Staff's discussion of security in its SSER is further testimony to that fact. Finally, LILCO itself has put security into issue by seeking a Section 50.12(a) exemption, which explicitly requires LILCO to prove that its request would "not endanger the common defense and security."

plants, means the physical protection and security arrangements set forth in Part 73. See, e.g., 42 Fed. Reg. 10836 (1977); 39 Fed. Reg. 40038 (1974). The physical protection and security arrangements for LILCO's new emergency AC power sources are a critical issue in the instant proceeding. The AC power sources now relied upon by LILCO are essentially unprotected -- in one case being entirely outside the protected area and in another case being within the protected area but in a wholly exposed location. This Board would be unable even to consider the issues embraced by 10 C.F.R §§ 50.12(a), 50.57(a)(6), and 73.55 unless LILCO assumes its burden of attempting to prove compliance with such security requirements.

(8) Section 50.12(a) requires that, in order to grant an exemption, the Commission must find that such exemption would not endanger the common defense and security. If LILCO does not satisfy this standard and does not sustain its burden of proof under Section 2.732, this Board and the Commission could not grant LILCO the exemption it requests. In such case, LILCO would be in default and there would be a failure of proof. Indeed, the County and State submit that LILCO is already in default, and for that reason alone this Board should summarily reject LILCO's exemption request.

The reasons proffered by LILCO in support of its Motions do no more than document the company's failure to carry its burden of proof on the explicit security requirement of Section 50.12(a). There is no legal or factual basis for LILCO's Motions. Accordingly, they should be denied.

Pespectfully submitted,

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June 14, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY AND STATE OF NEW YORK OPPOSITION TO LILCO "MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE," dated June 14, 1984, have been served on the following this 14th day of June 1984 by U.S. mail, first class; by hand when indicated by an asterisk; and by Federal Express when indicated by two asterisks.

Judge Marshall E. Miller, Chairman*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Glenn O. Bright*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Elizabeth B. Johnson**
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DATE: June 14, 1984

ATTACHMENT E

LILCO, June 19, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

LILCO'S MOTION FOR LEAVE TO FILE A REPLY TO THE SUFFOLK COUNTY AND STATE OF NEW YORK OPPOSITION TO LILCO MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE

LILCO believes that the papers already before this Board clearly establish adequate basis for granting LILCO's Motion for Protective Order and Motion in Limine. However, there are two aspects of the June 14, 1984 "Suffolk County and New York State Opposition to LILCO's Motion . . ." (the "Opposition") which LILCO could not reasonably have anticipated, and which can be addressed readily by documents not presently before this Board. Accordingly, if the Board desires to see further discussion, LILCO believes that good cause exists for the Board to permit the filing of a reply.

LILCO hereby requests this Board's leave, pursuant to 10 CFR § 2.730(c), to file a reply to address the following two matters: First, Suffolk County, without challenging any of LILCO's specific

representations as to the comprehensiveness or finality of the Final Security Settlement Agreement (the "Agreement") (LILCO Motion at 4-5), nonetheless denies its dispositiveness as to security issues in this proceeding (Opposition at 4-5) on bases that LILCO believes are simply and flatly inconsistent with the Agreement and Suffolk County's commitments under it.1/ Second, the Opposition suggests (Oppcsition at 4 note 1) that security matters are in fact before this Board, and at the Staff's instance. The fact is that the only treatment of security issues by the Staff (SSER 5 (April 1984), pp. 13-2 to 13-4) has been an analysis showing that for events postulated to occur coincident with a security contingency at Shoreham, backup AC power is not necessary to keep the reactor in a safe condition. The only other mention of security issues since the signing of the Security Agreement on November 22, 1982 has been occasioned by Suffolk County's repeated efforts, beginning in March 1983 -- several months before the TDI diesels experienced problems, and for reasons totally unrelated to them -- to create doubts whether it would fulfill its commitments under the Agreement.

LILCO could not have anticipated either of these arguments in the Opposition. However, correspondence and other documents not

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1/ The State of New York, a party to this proceeding when the Agreement was reached, did not choose to participate in security issues at the time and is bound by their complete settlement.

presently before this Board, but producible, would readily demonstrate their falsity.2/ If permitted to file a reply, LILCO is prepared to document the following with respect to the two assertions mentioned above:

A. With reference to the effect of the Final Security Settlement Agreement:

1. That Suffolk County is a party to it, and that New York State, though then a party to the Shoreham proceeding, chose not to participate in the resolution of security issues.

2. That the Agreement provided for total resolution of all security contentions raised by Suffolk County.

3. That the Agreement covers security for the operation of the Shoreham plant, with no exceptions or qualifications regarding low power or other details of operation or plant configuration or engineering considerations.

4. That the Agreement contains mechanisms for amendment of its various provisions by the parties.

2/ The Agreement is already in the record of this case (Docket 50-322-OL-2), as are the Licensing Board's Orders of December 13, 1982 and April 11, 1983; the letters which LILCO would produce are not. The Agreement and most of the letters are presently classified as Safeguards Information, and there is presently pending with the Staff a request from LILCO to declassify pertinent portions of the Agreement and correspondence. If this request is not timely acted upon by the Staff, LILCO will produce the pertinent documents in a manner consistent with the requirements of 10 CFR Part 73.

5. That the Agreement was accepted by order of a specially constituted Atomic Safety and Licensing Board in complete settlement of all security issues; and that that Board rejected a subsequent attempt by Suffolk County to revisit the Agreement, holding the Agreement to be final and finding itself without jurisidiction.

6. That the Opposition fasely represents that LILCO's present AC power configuration at Shoreham accounts for the County's current denial that the Agreement governs security during low power operation. Beginning on March 15, 1983 -- a month after the County's declared opposition on emergency planning issues but four months before the failure of the TDI diesels -- Suffolk County unilaterally stated conditions under which it would not commit to honor its commitments under the Agreement, and has refused or ignored subsequent attempts by LILCO, beginning in March 1983 and continuing to date, to obtain an unequivocal affirmation regarding those obligations. It was thus the pendency of emergency planning issues and Suffolk County's litigation strategy of attempting to prevent fuel loading or low power operation until after their ultimate disposition -- not the subsequent diesel problems and alternative AC power configuration -- that led Suffolk County to begin sowing doubts about its willingness to honor the Agreement.

If permitted to file a reply, LILCO would demonstrate these points by reference to portions of the Agreement and related correspondence.

B. With Reference to the Asserted "Injection" of Security Issues into this Proceeding:

1. That any doubt whether security issues were fully resolved at Shoreham, despite the existence and Board ratification of the Agreement, was created when the then-Commissioner of the Suffolk County Police Department, Donald J. Dilworth, wrote LILCO's Director of Security on March 15, 1983, asserting a relationship between emergency planning issues at Shoreham and casting doubt, for that reason, on the County's willingness to abide by its commitments under the Agreement.

2. That LILCO has subsequently attempted, unsuccessfully, to induce Suffolk County to clarify its position regarding whether it intended to provide local law enforcement liaison/response services in the event of a security contingency before the completion of emergency planning litigation; and that it was Suffolk County's repeated refusal to clarify its position which has led the NRC Staff, beginning in November 1983, to regard security as a matter which would have to be addressed in some fashion -- though not necessarily before this or any other Licensing Board -- prior to fuel loading.

3. That LILCO has again attempted beginning in March 1984, following the filing of the low power motion, to obtain from Suffolk County a statement of its intentions regarding provision of services under the Security Agreement; and that these requests have been ignored.

4. That beginning in late April or early May 1984, the NRC Staff began efforts to convene a meeting with LILCO and Suffolk County concerning Suffolk County's intentions with repect to provision of security services under the Agreement; that Suffolk County indicated its interest in attending the meeting, which was postponed at least once at Suffolk County's request; and that when the meeting was finally held on June 11, 1984, despite written and telephone notice to Suffolk County, the County failed to appear.

CONCLUSION

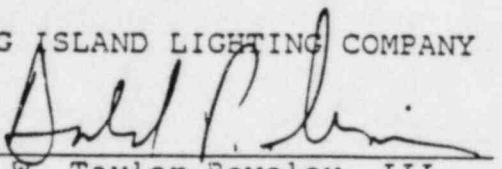
Neither of the arguments which LILCO would address in a reply, if leave is granted to file one, could have been anticipated by LILCO. However, if the Board grants leave to reply, documents in the Shoreham record (though not presently before this Board) will establish clearly, first, that the Final Security Settlement Agreement totally governs the issue of security among the parties, that it provides mechanisms for dealing with change which Suffolk County has ignored, and that the earlier security-issues Licensing Board declined once before to accept Suffolk County's invitation to look behind it; and second, that the "injection" of security issues into this proceeding has been by Suffolk County, improperly, rather than by the NRC Staff. These matters will further support the conclusion that there is no reason for this proceeding to expand its scope to take up security issues associated with low power operation. Thus, if the Board wishes to see

further discussion of these issues, good cause exists to permit LILCO to file the requested reply.

LILCO could file its Reply with one day of notification of the Board's granting of leave to file.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY



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DATED: June 19, 1984

LILCO, June 19, 1984

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 MOTION FOR LEAVE TO FILE A REPLY TO THE SUFFOLK COUNTY AND STATE OF NEW YORK OPPOSITION TO LILCO MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE were served this date upon the following by first-class mail, postage prepaid, or by hand (one asterisk), or by Federal Express (two asterisks).

Judge Marshall E. Miller*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Glenn O. Bright*
Atomic Safety and Licensing Board
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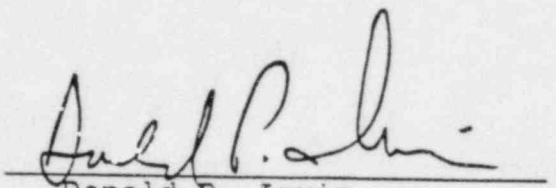

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DATED: June 19, 1984

ATTACHMENT F

Attachment F

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'84 JUN 20 P12:17

ATOMIC SAFETY AND LICENSING BOARD

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

In the Matter of	Docket No. 50-322-OL-4 (Low Power)
LONG ISLAND LIGHTING COMPANY	
(Shoreham Nuclear Generating Plant, Unit 1)	June 20, 1984

ORDER GRANTING LILCO'S MOTION IN LIMINE

On June 2, 1984, LILCO filed a "Motion for Protective Order and Motion in Limine" to preclude discovery upon or consideration of security issues in this proceeding. Suffolk County and the State of New York filed a joint response in opposition to the LILCO motion on June 14, 1984. The NRC Staff responded on June 19, 1984, saying, "the NRC Staff supports this motion in the present posture of this proceeding" (Response at 1). Also on June 19, LILCO moved pursuant to 10 CFR §2.730(c) for leave to file a reply to the County and the State's opposition to its motion.[1]

[1] In view of our disposition of LILCO's motion in limine, we do not address nor rely upon LILCO's motion for leave to file a reply.

Our disposition of LILCO's motion in limine is based upon the record before us regarding a prior security settlement agreement entered into by Suffolk County on November 24, 1982. A Memorandum and Order Canceling Hearing, Approving Final Security Settlement Agreement, and Terminating Proceeding, was entered on December 3, 1982, by a Licensing Board specially established to rule upon such security planning issues (copy appended hereto as Attachment A).

The Order of December 3, 1982, stated:

> Suffolk County (hereinafter "the County") and Long Island Lighting Company (hereinafter "LILCO") held numerous meetings and negotiations concerning the security contentions of the County. Periodic reports were filed by the parties. Finally, on November 24, 1982, all parties herein filed the "Final Security Settlement Agreement."
>
> II. FINAL SECURITY SETTLEMENT AGREEMENT
>
> The Final Security Settlement Agreement signed by LILCO, the County, and NRC Staff contains safeguards information which is protected and will not be restated here. 10 CFR §73.21. As pertinent here, the Agreement provides that the agreed upon actions "respond to and satisfy the County's security concerns.... Accordingly, the County finds that its nine security contentions are resolved." Id. at 4-5. The Agreement concludes as follows: "Based on the foregoing, the County, LILCO and the Staff jointly urge the Board to accept this Agreement and to terminate litigation of the County's nine security contentions." Id. at 33.

That Final Security Agreement, signed by Suffolk County and others, was approved, and thereby became final and binding upon all parties.[2] The State of New York could have contested such issues but did not do so at the time, and it is bound thereby. Accordingly, issues in regard to security no longer exist in this proceeding. It has also been held that an application for a low-power license "does not open the proceeding for a new round of contentions."[3]

It is so ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Marshall E. Miller

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 20th day of June, 1984.

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[2] A Memorandum and Order entered April 11, 1983, stated that the December 3, 1982 Order was a final appealable order, not subject to further consideration.

[3] Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 801 (1983).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges

James A. Laurenson, Chairman
Dr. Walter H. Jordan
Dr. Jerry Harbour

In the Matter of	)	Docket No. 50-322-OL-2
	)	ASLBP No. 82-478-05-OL
LONG ISLAND LIGHTING COMPANY	)	(Security Proceeding)
	)	
(Shoreham Nuclear Power Station, Unit 1)	)	December 3, 1982

MEMORANDUM AND ORDER CANCELING HEARING, APPROVING FINAL SECURITY SETTLEMENT AGREEMENT, AND TERMINATING PROCEEDING

I. JURISDICTION AND PROCEDURAL HISTORY

On August 24, 1982, at the request of the Atomic Safety and Licensing Board previously established to preside in the operating license proceeding, this Board was established "to continue to guide ongoing settlement efforts by the parties with respect to security planning issues and to preside over the proceeding on those issues only in the event that a hearing is required." Thereafter, Suffolk County (hereinafter "the County") and Long Island Lighting Company (hereinafter "LILCO") held numerous meetings and negotiations concerning the security contentions of the County. Periodic reports were filed by the parties. Finally, on November 24, 1982, all parties herein filed the "Final Security Settlement Agreement."

II. FINAL SECURITY SETTLEMENT AGREEMENT

The Final Security Settlement Agreement signed by LILCO, the County, and NRC Staff contains safeguards information which is protected and will not be restated here. 10 CFR § 73.21. As pertinent here, the Agreement provides that the agreed upon actions "respond to and satisfy the County's security concerns.... Accordingly, the County finds that its nine security contentions are resolved." Id. at 4-5. The Agreement concludes as follows: "Based on the foregoing, the County, LILCO and the Staff jointly urge the Board to accept this Agreement and to terminate litigation of the County's nine security contentions." Id. at 33.

The Nuclear Regulatory Commission recognizes and encourages fair and reasonable settlement of contested issues. 10 CFR § 2.759. We have considered the nine security contentions of the County, the Agreement of all parties to resolve those contentions, and the Commission's policy encouraging settlement. Accordingly, we conclude that the Agreement is fair and reasonable and should be approved. The parties and their counsel are deserving of a special commendation for their outstanding efforts which led to a resolution of the security contentions in this proceeding. We find no need to compel further appearances by the parties, and, hence, the hearing scheduled for Monday, December 13, 1982, is canceled.

ORDER

WHEREFORE, IT IS ORDERED this 3rd day of December, 1982, at Bethesda, Maryland, that the Final Security Settlement Agreement is APPROVED; the joint request to terminate this proceeding is GRANTED; the hearing previously scheduled for Monday, December 13, 1982, is CANCELED; and this proceeding is hereby DISMISSED.

ATOMIC SAFETY AND LICENSING BOARD

James A. Laurenson, CHAIRMAN

Dr. Jerry Harbour

Dr. Walter H. Jordan concurs in this Memorandum and Order but was unavailable to sign it.

ATTACHMENT G

April 20, 1984

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

IN THE MATTER OF:

LONG ISLAND LIGHTING COMPANY Docket No., 50-322 OL

(SHOREHAM NUCLEAR POWER STATION, UNIT 1)

NRC STAFF TESTIMONY OF CHARLES E. GASKIN REGARDING APPLICATION FOR LOW POWER LICENSE

Q.1. Please state your name and position.

A.1. My name is Charles E. Gaskin. I am a Plant Protection Analyst with the Power Reactor Safeguards Licensing Branch, Division of Safeguards, Office of Nuclear Material Safety and Safeguards.

Q.2. Please provide a brief description of your professional qualifications.

A.2. I have had 24 years experience in the security and law enforcement fields with the U.S. Navy, the Central Intelligence Agency, the Department of Justice and the Nuclear Regulatory Commission. In the capacity of a Plant Protection Analyst, I am responsible for performing reviews and assessments of the adequacy of site physical security plans developed to protect against radiological sabotage and against theft of special nuclear materials. I was responsible for the 10 CFR 73.55 review of the Shoreham Nuclear Power Station during the period of October 1979 to July 1981 and am currently responsible for the review as of July 1982 to present.

Prior to transferring to the Nuclear Regulatory Commission, I provided technical operation support in law enforcement for the Drug Enforcement Administration (DEA). While in the position of project manager with that organization, I gained experience in the positive operational side of security and participated in the establishment of security regulations for the DEA. I also developed equipment and techniques for surveillance purposes.

While at the CIA I was a technical security officer with overseas experience in both physical and technical security. I developed and implemented security systems and programs.

While in the U.S. Navy, I was with the Naval Security Group and was involved in communications security.

Q.3. What is the scope of your testimony?

A.3. My testimony addresses the acceptability of the Shoreham security system's emergency power capability for low power operation.

Q.4. What are the NRC regulatory requirements for emergency electrical power for the Shoreham security systems?

A.4. 10 CFR 73.55 requires that the alarm system Section 73.55(e)(2) and the communication system Section 73.55(f)(4) be provided with backup power sources. Staff guidance prescribes that a 24-hour backup capability (battery or battery plus generator) be available onsite.

Q.5. Given a postulated loss of offsite power, are onsite diesel generators necessary in order for the Shoreham security system to fulfill the requirements of Part 73 to 10 CFR?

A.5. The applicant has stated that the security system includes a dedicated battery bank and UPS with a six-hour operating capacity. Since the published staff guidance states that the onsite backup power for security related equipment should be capable of 24-hour operation, a supplemental capability is needed. This need could be satisfied by locating additional batteries onsite, or by using a portion of the AC power supplied by the mobile diesels for recharge which the applicant has proposed to be available during low power operation. The existing DC backup power for the security system is located within a vital area. The mobile diesels have not been designated as vital equipment and accordingly are not afforded the additional protection associated with this designation.1/

1/Current regulations do not require that emergency power sources for security systems be protected as vital equipment. However, NUREG-0992 recommends this practice, and a proposed rule presently before the Commission, if adopted, would require that onsite secondary power supply systems for alarm annunciation equipment and non-portable communications equipment be located within a vital island (SECY 83-311).

Q.6. Are there any other security related matters that need to be resolved.

A.6. There is some uncertainty regarding the commitments made by the Suffolk County Police to respond to security related emergencies at the site.1/ Since these commitments by the County Police are part of Shoreham's approved security plan, any change would necessitate our re-evaluation of this aspect of the plant's protection program. This matter is being pursued by the applicant and the staff.

1/Letter from Donald J. Dilworth, Police Commissioner, Suffolk County to Robert F. Reen, Long Island Lighting Company, dated March 15, 1983.

ATTACHMENT H

COUNTY OF SUFFOLK

Attachment H

DONALD J. DILWORTH
POLICE COMMISSIONER

POLICE DEPARTMENT

15 March 1983

Mr. Robert F. Reen
Site Security Supervisor
Shoreham Nuclear Power Station
Long Island Lighting Company
P.O. Box 628
Wading River, New York 11792

Dear Mr. Reen:

It is my understanding that LILCO has recently revised its operational Security Plan for the Shoreham plant and that you have requested the Suffolk County Police Department to review and comment on the revised Plan, identified as Revision 5A.

On February 17, 1983, by Resolution No. 111-1983, Suffolk County determined that no radiological emergency response plan could protect the health, welfare and safety of Suffolk County's residents in the event of a serious nuclear accident at Shoreham. Therefore, the County's radiological emergency planning process was terminated, and it was determined that no local radiological emergency plan for response to an accident at Shoreham would be adopted or implemented. Resolution No. 111-1983 further directed the County Executive "to take all actions necessary to assure that actions taken by any other governmental agency, be it State or Federal, are consistent with the decisions mandated by this Resolution."

The County Executive has instructed all County Department Heads "to assure that their departments do not take any action inconsistent with the County's position that Shoreham should not be permitted to operate. LILCO's revised Security Plan reflects LILCO's proposed security arrangements for an operating Shoreham plant. Moreover, it has been contemplated that one of the events which would trigger a local emergency response plan would be a certain level of security incident. Since there will be no local emergency response plan, there will be no capability for local emergency response action if an operational security breach were to occur. For the foregoing reasons, any review

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and/or response by this Department regarding the revised Security Plan would now be inappropriate. Should the situation regarding the emergency preparedness issue change, this Department would reconsider the status of its liaison.

Of course, the Department will continue to provide liaison for Shoreham as a construction site and, in accordance with the Agreement entitled "Resolution of Concerns Regarding LILCO's Part 70 License" dated June 3, 1982, for the new fuel while in storage on-site. In this regard, we understand that, for so long as the new fuel remains on-site, it will be stored at the one-hundred-seventy-five (175') foot elevation of the Reactor Building, subject to all appropriate security measures, as set forth in the June 3, 1982 Agreement.

Please acknowledge receipt of this letter, which contains Safeguards Information and is marked accordingly.

Very truly yours,

DONALD J. DILWORTH
Police Commissioner

DJD/cmw

SAFEGUARDS INFORMATION

ATTACHMENT I

Attachment I

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FILE NO. 24566.3

DIRECT DIAL NO. 804 788-8357

March 18, 1983

Michael S. Miller, Esq.
Kirkpatrick, Lockhart, Hill,
Christopher & Phillips
1900 M Street, NW
Washington, D.C. 20036

Shoreham Final Security Settlement Agreement

Dear Mike:

I am writing to you on a matter of some gravity, involving unsought but unavoidable questions surrounding Suffolk County's intention to comply with its obligations under the Final Security Settlement Agreement for the Shoreham Nuclear Power Station. I write to you, rather than continuing correspondence among principals, because you and I, as attorneys for Suffolk County and LILCO respectively in the negotiation of that agreement, spent many long hours over a period of several months hammering it out and therefore are not only familiar with its terms but understand its importance to all parties.

I have received a copy of the letter from Suffolk County Police Commissioner Donald J. Dilworth to Robert F. Reen dated March 15, 1983, which recites Resolution No. 111-1983 enacted by the Suffolk County Legislature and a subsequent directive of the Suffolk County Executive to County agency heads to "not take any action inconsistent with the County's position that Shoreham should not be permitted to operate." As a result of these actions, the Commissioner's letter states, "any review and/or response by [the Suffolk County Police] Department regarding [Revision 5A to the Shoreham Nuclear Power Station] Security Plan would now be inappropriate." The letter also indicates that the SCPD would "reconsider the status of its liaison" with LILCO if emergency preparedness issues are resolved.

As we both know, Revision 5A to the Shoreham Security Plan sets forth, directly or by reference, numerous aspects of LILCO's internal security arrangements for operation of the Shoreham Nuclear Power Station, as well as a description of liaison with the SCPD as the designated local law enforcement agency for Shoreham as an operational power station. It was forwarded at the beginning of February 1983 to the SCPD, as agent for Suffolk County, by LILCO for comment pursuant to paragraph X of the Final Security Settlement Agreement ("the Agreement") among LILCO, Suffolk County, and the NRC Staff, executed on behalf of Suffolk County on November 22, 1982. The Agreement resolved Suffolk County's nine security contentions in the Shoreham operating license proceeding, and established a detailed framework for the provision of equipment and other goods by LILCO to the SCPD and for the exchange of services between LILCO and the SCPD, including training, communications, and the provision of police services by the SCPD to the Shoreham plant.

While Commissioner Dilworth's letter does not refer to the Agreement, it is inescapable, given that Revision 5A was sent by LILCO to the SCPD in furtherance of its obligations under the Agreement, that the notice that the SCPD intends to decline its opportunity to review that Revision gives rise to more general concern as to the SCPD's intent to perform its obligations under the Agreement. That concern is underscored by the letter's recitation of recent County-level governmental actions, and especially by its statement that any "response by this Department regarding the revised Security Plan would now be inappropriate," since response by the SCPD when needed is the essence of the Agreement.1/

These circumstances, along with other miscellaneous recent events relating to implementation of the Agreement,2/ give

---

1/ I note parenthetically that numerous security contingencies contemplated by the Agreement to involve potential collaboration between LILCO and the SCPD would not involve any invocation of an emergency response plan, and thus cannot logically be connected with Suffolk County's position on emergency response planning.

2/ For instance, SCPD members have been assisting in training of security personnel at Shoreham. This week, those SCPD members notified LILCO that they would no longer be able to take part in such training.

rise to a serious concern on LILCO's part that Commissioner Dilworth's letter is intended to put LILCO on notice that the SCPD does not intend either to fulfill its liaison obligations under the Agreement following commencement of operation by Shoreham, nor to engage in further preparatory efforts provided for by the Agreement toward fulfillment of those obligations, at least as long as the County's position regarding emergency preparedness remains as it now is. Therefore, LILCO is compelled to demand and hereby demands that the SCPD provide LILCO with explicit written assurance, to be received not later than the close of business Friday, March 25, 1983, that the SCPD intends to perform each of its obligations under the Agreement, including particularly (but not limited to) the duty of providing local law enforcement liaison pursuant to paragraph II of the Agreement. Unless LILCO receives such assurance, it will be forced to conclude that Suffolk County, acting through the SCPD, has anticipatorily repudiated its contractual arrangements with LILCO under the Agreement.

With respect to another vitally important matter, LILCO understands from Commissioner Dilworth's letter that, in any event, the SCPD will continue to provide liaison for Shoreham as a construction site pursuant to the separate June 3, 1982 "Resolution of Concerns Regarding LILCO's Part 70 License," so long as LILCO continues to comply with the June 3, 1982 Resolution. You are hereby assured that LILCO intends to continue to abide by the terms of the June 3, 1982 Resolution in all respects and that no fuel will be removed from its storage conditions without advance notice to the SCPD and observance of any other requirements of the June 3, 1982 Resolution and any other applicable provisions of law. LILCO understands that the scope of liaison functions by the SCPD at Shoreham as a construction site under these conditions includes assistance in control of public demonstrations or disturbances. In the absence of written notice to the contrary by March 25, 1983, LILCO will continue to assume that the scope and level of SCPD liaison described in this paragraph continues.

Finally, the Commissioner's letter recites that it contains safeguards information. On my review of it, I can find nothing that fits within the definition of safeguards information as set forth in 10 CFR § 73.21(b)(1). The letter's reference to fuel storage location is company-proprietary information which it is LILCO's prerogative to preserve or waive.

LILCO demands the assurances above with regret. The relationship between LILCO and the SCPD has always been a productive one based on mutual respect. LILCO looks forward to the full restoration of that relationship.

Sincerely yours,

Donald P. Irwin
One of Counsel to Long Island
Lighting Company

91/730

ATTACHMENT J

Attachment J

KIRKPATRICK, LOCKHART, HILL, CHRISTOPHER & PHILLIPS

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March 30, 1983

Donald P. Irwin, Esquire
Hunton & Williams
P.O. Box 1535
707 East Main Street
Richmond, Virginia 23212

Dear Don:

In your letters of March 18 and 22, 1983, you have requested Suffolk County to clarify the status of the Shoreham Final Security Settlement Agreement ("Agreement"), dated November 22, 1982. On behalf of Suffolk County, this letter provides such clarification.

The County's position on the status of the Agreement is set forth in Commissioner Dilworth's letter to Mr. Reen, dated March 15, 1983. That letter makes clear that the County has not abrogated or canceled the Agreement. The Agreement reflects much hard work and good faith negotiation of security-related issues between the County and LILCO and, in the County's opinion, would underpin Shoreham's security preparedness for the Section 73.1 design basis threat if LILCO were to receive a license to operate that facility. If Shoreham ever were to be granted the commercial operating license which it presently is seeking, the County would act in accordance with the Agreement and would expect LILCO to do the same.

However, the County will not ignore the impact of recent events and engage in what is a futile exercise. The underlying premise of the Agreement is commercial operation of Shoreham; indeed, it is a security agreement for commercial operation -- the operation sought in LILCO's present application before the NRC -- with security for other phases (construction site, fuel storage, and demonstrations) being covered by different arrangements which are described hereafter. If Shoreham is not going to receive its commercial operating license, it would be a waste of effort and resources to move forward under the Agreement.

Events subsequent to November 22, 1982 have, by any reasonable assessment, created a strong possibility that Shoreham will not operate, and the County's position is that Shoreham certainly should not operate given the emergency preparedness obstacles. The lack of an emergency plan and preparedness by Suffolk County precludes operation of the facility.

As noted above, the County cannot put itself into the position of needlessly expending efforts and resources on the Agreement when it so strongly appears that the Agreement will never require implementation. At the same time, the County realizes that LILCO disputes its legal position regarding operation of the plant. In view of this legal dispute, the County has instituted steps to resolve as expeditiously as possible the legal issues surrounding possible operation of Shoreham. The County is disappointed that LILCO is opposing certification of these issues to the Commission, since that, with subsequent court appeal if appropriate, would provide the best means for rapid resolution of the present uncertainty. The County intends to continue to press for prompt resolution of this matter.

If LILCO's legal theory regarding Shoreham's operation is upheld and its present application is thus approved, then the County, as noted previously, will act in accordance with the Agreement. Until the question of Shoreham's commercial operation is resolved, however, the Agreement must necessarily be in a deactive status. Again, the County urges LILCO to join the County in seeking the most prompt resolution of the present situation -- immediate certification to the Commission.

The County believes that placing the Agreement in a deactive status (either permanently or temporarily) is the only sensible action to take at this time. The County emphasizes, however, that other County/LILCO security liaison actions unrelated to the Agreement continue in effect. Thus, the County continues to support fully and to abide by the security provisions for protection of fuel onsite, and it will continue to provide security for Shoreham as a construction site. These points should be accepted by LILCO with finality, and there is no need to address them further.

Moreover, as you are aware, the County and LILCO will need to work closely in detailed contingency planning for a possible demonstration at the Shoreham site on June 4 and 5, 1983. The County Police Department will of course provide protection of life and property at such a demonstration. It is imperative, therefore, that LILCO fully cooperate with the Department in planning for this situation.

Deputy Chief Elmer Wurtz, Deputy Chief of Patrol, Suffolk County Police Department, will serve as the Department's Task Force Commander for the possible demonstration at the Shoreham site. I have been advised by Deputy Chief Wurtz that he would like to commence immediately planning for this situation since the control of past demonstrations at Shoreham has benefited greatly from detailed advance planning. Please let me know what person at Shoreham he should contact in this regard or, in the alternative, have that person directly contact Deputy Chief Wurtz.

Thus, the situation with respect to Shoreham is as follows: all actions necessary to provide security liaision for Shoreham prior to operation are fully in effect; all actions necessary to provide security liaison for Shoreham during operation are in a deactive status awaiting definitive resolution of outstanding legal issues concerning whether Shoreham will operate. The Agreement is not cancelled or abrogated, but neither LILCO nor the County should waste resources needlessly when operation of the plant is so much in doubt.

One final matter needs to be addressed. LILCO appears to be taking steps to be in a position to make public the recent correspondence between LILCO and the County on security-related matters. See, for example, the NRC letter of March 25, 1983 which responds to LILCO's SNRC-864 (a copy of which the County has not received). The County reiterates its strong opinion that these security-related matters relate directly to matters of public order and safety which should remain confidential. We expect LILCO to act accordingly.

Sincerely,

Michael S. Miller

MSM:ph

ATTACHMENT K

Attachment K

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April 1, 1983

FILE NO. 24566.3

DIRECT DIAL NO. 804 788- 8357

Michael S. Miller, Esq.
Kirkpatrick, Lockhart, Hill,
Christopher & Phillips
1900 M Street, N.W.
Washington, D.C. 20036

BY TELECOPIER

Dear Mike:

Your letter of March 30, as amplified by our telephone conversation on the 31st, appears to resolve many of LILCO's questions stemming from Commissioner Dilworth's March 15 letter. LILCO is reassured that in the event, and from the time, that an operating license is granted to Shoreham, the SCPD will perform its obligations under the Final Security Settlement Agreement; the County can be assured that LILCO will do likewise. In addition, LILCO appreciates the County's reaffirmation that police protection will be provided for the Shoreham site prior to that time. LILCO will establish contact promptly with Deputy Chief Wurtz to begin necessary coordination.

Implicit in your letter is the assurance, notwithstanding the disagreement between LILCO and the County over emergency planning, that the County will not assert, either in connection with the pending application for a commercial operating license or in a necessarily corollary low-power license proceeding, that legally adequate local law enforcement liaison between the SCPD and LILCO does not exist. Such assurance, it seems to me, is logically inseparable from the propositions that the Agreement has not been abrogated by the County and thus remains in full force and effect, and that the County intends to provide police protection to the Shoreham site both prior to and following commencement of operation. Still, since your letter does not refer explicitly to the County's position before the Atomic Safety and Licensing Board, there remains, I suppose, a potential ambiguity on this one question, which LILCO feels a need to assure itself on. Given the narrowness of this one issue and the high probability that it has already been satisfactorily addressed, probably the best means of settling it, once and for all, is to put you to the trouble of replying only if LILCO has misread the County's position.

Thus, unless LILCO receives written notification to the contrary by the close of business next Wednesday, April 6, LILCO will conclusively presume that the assurances contained in your March 30 letter include the assurance that the County does not intend, in connection with either the ongoing operating license proceeding or a low-power license application, to assert, so long as the Final Security Settlement Agreement remains in effect, that liaison with local law enforcement authorities, as that concept is referred to in 10 CFR Part 73, §§ 73.46(h)(2), 73.50(q)(2) and 73.55(h)(2), or elsewhere as being necessary to authorize issuance of an Operating License to Shoreham by the NRC, does not exist. If, for any reason, this presumption would not be correct, it is of the essence that you get back to me by the evening of the 6th.

You have also suggested that various joint preoperational measures under the Final Security Settlement Agreement be deferred or "deactivated" temporarily. We would have to review the Agreement and the Security Plan filed with the NRC to see what would be entailed, since deferral of some items may well require adjustments to the Agreement and the Plan. However, I can assure you that if satisfactory confirmation of the matter above is received, LILCO will not be unreasonable in its reaction to practical suggestions that don't compromise the security of the plant, and will not use a mutually acceptable deferral of various joint items which had been scheduled to be completed prior to fuel load as the basis for an argument that the SCPD has violated the Agreement. We should talk further on an informal mechanism to confirm the mutual acceptability of any matters the County wishes to defer.

I apologize for setting the evening of the 6th, which I know is fairly tight, as a trigger date. I'm of the view that it should be practicable, however, since there are no further issues to resolve (i.e., this letter merely seeks explicit confirmation of what I believe is inherent in your letter of the 30th), the already extensive correspondence on this matter has moved at a brisk pace thus far, and -- perhaps most important -- I'd like to put this issue to bed before heading off on a little-deserved but much-desired vacation on the 7th.

Sincerely yours,

Don

Donald P. Irwin

91/867

ATTACHMENT L

Attachment L

KIRKPATRICK, LOCKHART, HILL, CHRISTOPHER & PHILLIPS

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April 11, 1983

Donald P. Irwin, Esquire
Hunton & Williams
P.O. Box 1535
707 East Main Street
Richmond, Virginia 23212

Dear Don:

In your letter of April 1, 1983, you state that my letter of March 30 implicitly assures LILCO that Suffolk County "will not assert, either in connection with the pending application for a commercial operating license or in a necessarily corollary low-power license proceeding, that legally adequate local law enforcement liaison between the SCPD and LILCO does not exist." Although your letter indicates that you find this "assurance" to be "logically inseparable" from the County's position on the status of the Final Security Settlement Agreement ("Agreement"), you have nevertheless requested the County to clarify what you believe to be a "potential ambiguity" regarding the Agreement.

The County's position on the status of the Agreement was set forth in Commissioner Dilworth's letter to Mr. Reen, dated March 15, 1983. My letter of March 30 provided further clarification of that position and made clear that the County has not abrogated or cancelled the Agreement. However, you were also advised that, until the question of Shoreham's commercial operation is resolved, the Agreement would necessarily be in a deactive status. This result was required by the fact that the Agreement is premised on the commercial operation of Shoreham -- the operation sought in LILCO's present application before the NRC.

Your letter of April 1, however, raises an issue concerning a possible low-power license application by LILCO for the Shoreham plant. This issue has not been previously mentioned in any of the correspondence that we have exchanged since your first letter to me on March 18. Further, to our knowledge, at this time LILCO has not made application for a low-power license,

and, as you presumably know, the County's position is that under the present circumstances of the Shoreham proceeding, LILCO is not eligible to receive a low-power operating license. Therefore, before we can respond to your letter of April 1 certain questions regarding a proposed low-power license application by LILCO must be resolved. In this regard, we would request a reply from you regarding the following:

1. When, if you know, does LILCO intend to apply for a low-power license?

2. If LILCO applies for a low-power license, what would be the terms and conditions of that license?

3. Since the purpose of a low-power license is to permit testing of the plant so that higher power levels can be achieved, it must be assumed that unless outstanding issues concerning Shoreham's operation are resolved in a manner favorable to LILCO, application for a low-power license is a necessarily futile act. Given the lack of adoption and implementation of an emergency plan and preparedness by Suffolk County and the resulting uncertainties regarding commercial operation of Shoreham, on what basis would LILCO consider making application for a low-power license?

4. What is LILCO's present time estimate for completion of construction necessary for fuel load? We are aware of LILCO's recent press statements targeting fuel load for August 1983. Is that a firm date?

Given the new low-power issue raised by your April 1 letter, we would appreciate receiving your prompt reply to the above questions. Once we have received your response, we will endeavor to reply expeditiously.

Sincerely,

Michael S. Miller

Michael S. Miller

ATTACHMENT M

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FILE NO. 24566.3
DIRECT DIAL NO. 804 788- 8357

March 30, 1984

Michael S. Miller, Esq.
Kirkpatrick, Lockhart, Hill,
Christopher & Phillips
Eighth Floor
1900 M Street, N.W.
Washington, D.C. 20036

BY HAND

Dear Mike:

On November 22, 1982, LILCO and the Suffolk County Police Department (SCPD) as agent for Suffolk County entered into a Final Security Settlement Agreement at Shoreham. On March 15, 1983, then-Commissioner Donald J. Dilworth wrote a letter to Robert F. Reen, Shoreham Site Security Supervisor, waiving the SCPD's right to review a pending revision to the Shoreham Security Plan, on the stated basis that radiological emergency response might be required in connection with a given level of security incident at Shoreham; that the Suffolk County legislature had recently determined that Suffolk County would not participate in emergency planning at Shoreham and had directed the Suffolk County Executive to take no actions inconsistent with that determination; and therefore that the SCPD felt that review of the pending revision to the Shoreham Security Plan would not be appropriate.

That letter and correspondence over the following several weeks clarified that (1) the SCPD disclaimed any intent to abrogate or rescind the Final Security Settlement Agreement, (2) the SCPD would continue to protect Shoreham as a construction site prior to fuel load, and (3) the SCPD would protect the Shoreham plant as an operating reactor pursuant to an operating license issued after full trial and final decision on offsite emergency planning issues. However, in that correspondence, the SCPD (or more accurately, you writing on their behalf) did not ever reaffirm directly that the SCPD would consider itself bound to respond in accordance with the terms of the Final Security Settlement Agreement in the event of a

security contingency occurring following issuance of a low-power license to Shoreham pursuant to 10 CFR § 50.47(d), but prior to issuance of a final decision on offsite emergency planning issues.1/

This issue could be, and was, left unresolved during the period of uncertainty in the spring and summer of 1983, prior to disposition of Suffolk County's motions on the question whether LILCO would be permitted as a matter of federal law to demonstrate on the facts whether adequate offsite emergency planning could be accomplished without Suffolk County's participation. That question has, of course, been resolved in LILCO's favor by the Commission's orders of May 12 and June 30, 1983 (CLI-83-13, -17). Under them, if LILCO can demonstrate on the facts that adequate offsite emergency planning can be accomplished without Suffolk County's participation, emergency planning issues are not a bar to LILCO's obtaining a full-term, full-power operating license for Shoreham, or to loading fuel and conducting low power testing.

Issuance of a final decision on offsite emergency planning is not, of course, a prerequisite to issuance of a license to load fuel and conduct low-power testing. 10 CFR § 50.47(d); CLI-83-17. As you know, on March 20, 1984 LILCO requested the Commission to permit it to load fuel and conduct low-power testing. Since that request does not presuppose completion of work on either the Transamerica Delaval or the Colt Diesels, it may be granted in the very near future. Therefore, it is necessary to remove any potential cloud over the adequacy of LILCO's security arrangements at Shoreham during the period between the loading of fuel pursuant to a § 50.47(d) license and

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1/ I realize that the date of a "final decision on emergency planning issues" is susceptible of a number of possible interpretations beginning with the issuance of an Initial Decision (or Partial Initial Decision) by an Atomic Safety and Licensing Board and ending with a possible decision by the U.S. Supreme Court. For purposes of this letter, I am using the phrase "prior to final decision on offsite emergency planning issues" to refer to the earliest time period available, i.e. fuel loading and low-power operation pursuant to 10 CFR § 50.47(d), prior to completion of ASLB hearings on offsite emergency planning issues.

issuance of a final decision on offsite emergency planning issues.

As LILCO analyzes the situation, there is no reason why the SCPD should not provide security services to Shoreham following fuel load and before a final decision on offsite emergency planning, and several why it should:

(1) The Final Security Settlement Agreement, under which the SCPD agreed to provide security services to Shoreham, applies on its face to Shoreham's operation generally and does not exempt any type of operation, e.g., fuel loading and low power testing, prior to a final decision on offsite emergency planning issues.

(2) The difficulty recited in Commissioner Dilworth's March 15, 1983 letter relates only to hypothetical security contingencies of such a nature as to have emergency planning overtones. Whether or not this hypothetical category is realistic in itself, it clearly does not include all security contingencies, and thus not all such contingencies run afoul of Suffolk County's self-imposed abstention from offsite emergency planning. Even as to those which do, LILCO itself will be doing that planning now in accordance with the Commission's regulations without Suffolk County's involvement.2/ Thus, under no circumstances does the SCPD's fulfillment of its security obligations under the Final Security Settlement Agreement impact emergency planning at Shoreham.

2/ At power levels up to 5% power, the Commission's regulations do not even require offsite emergency planning to be completed, 10 CFR § 50.47(d). Before LILCO can exceed 5%, it will have had to demonstrate the adequacy of its emergency planning efforts to the Atomic Safety and Licensing Board.

Despite these facts, and your representations as to the SCPD's intentions not to abrogate or rescind the final Security Settlement Agreement, the NRC Staff has apparently viewed Commissioner Dilworth's letter and subsequent correspondence as indicating uncertainty on the SCPD's part as to whether it will fulfill its obligations under the Final Security Settlement Agreement in all circumstances.3/ Because of the potential imminence of fuel load, it is essential to dispel this cloud. Please confirm to me in writing by the close of business Friday, April 6, that the SCPD intends, notwithstanding anything in Commissioner Dilworth's letter, to provide the security services to the Shoreham Nuclear Power Station contemplated by the Final Security Settlement Agreement under all circumstances of operation, including those pursuant to § 50.47(d) prior to a final decision on offsite emergency planning issues. In the absence of such a confirmation, LILCO will be forced to consider pursuing other remedies.

LILCO has always enjoyed a productive, professional relationship with the Suffolk County Police Department. LILCO has found the SCPD to be an organization with a tradition of consistently and effectively fulfilling agreements relating to the performance of its duties. LILCO has every expectation that this proud tradition will be maintained in this instance.

Sincerely yours,

Donald P. Irwin

91/730

cc: Edward M. Barrett, Esq.
Mr. Jack Notaro
Mr. Robert F. Reen
Mr. Brian R. McCaffrey
Mr. John P. Morin
W. Taylor Reveley, III, Esq.
Charles King Mallory, III, Esq.
James N. Christman, Esq.
Lee B. Zeugin, Esq.
Kathy E.B. McCleskey, Esq.

3/ See Letter, Edwin J. Reis, Esq. to W. Taylor Reveley, III, Esq., November 22, 1983, at 2.

ATTACHMENT N

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April 18, 1984

FILE NO. 24566.000003

DIRECT DIAL NO. 804 788-8357

Michael S. Miller, Esq.
Kirkpatrick, Lockhart, Hill,
Christopher & Phillips
Eighth Floor
1900 M Street, N.W.
Washington, DC 20036

BY FEDERAL EXPRESS

Dear Mike:

In the absence of a substantive reply to my March 30 letter to you, I have today sent the attached letter to the NRC Staff, requesting a meeting to resolve any ambiguity respecting Suffolk County's observance of its obligation under the Final Security Settlement Agreement (Agreement) at and following fuel load and prior to completion of emergency planning litigation.

As you know, LILCO has taken all steps within its power to fully implement the Agreement. Copies of amendments to the Security Plan and other documents have been forwarded to the SCPD via you for review. Individual commitments by LILCO have been acted on and are either complete or will be completed by fuel load to the extent required by the Agreement. The only areas where implementation of the Agreement remains substantially incomplete are those requiring the cooperation of the SCPD. As to those, LILCO has requested, without response, that the SCPD designate any areas of the Agreement which it desires to "deactivate," and has awaited the SCPD's renewal of interest in fulfilling those aspects of the Agreement for which it is responsible.

Complete implementation of the Agreement is not necessary, of course, to satisfy the NRC's security regulations; as you know, LILCO agreed to many provisions solely in the interest of settling litigation with the County and guaranteeing the cooperation of the SCPD. LILCO vastly would prefer operating Shoreham with the active cooperation of the SCPD to operating

without it, and stands ready to consummate all steps under the Agreement requiring the participation of the SCPD. However, under any circumstances of plant testing or operation where the SCPD chooses not to participate in security planning or response, LILCO, without waiving any of its rights under the Agreement, will take whatever independent compensating measures are necessary to satisfy NRC security regulations. LILCO will also hold the SCPD liable for any damages sustained by LILCO as the result of the SCPD's failure, in violation of the Agreement, to participate in security planning and response at Shoreham.

Sincerely yours,

Donald P. Irwin

91/730

Attachment

cc: Edwin J. Reis, Esq.
Bernard M. Bordenick, Esq.
Mr. Ralph Caruso

ATTACHMENT O

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April 18, 1984

FILE NO. 24566.000003

DIRECT DIAL NO. 804 788- 8357

Mr. Ralph Caruso
Shoreham Project Manager
U.S. Nuclear Regulatory
Commission Staff
7920 Norfolk Avenue
Bethesda, Maryland 20014

CONFIDENTIAL

BY FEDERAL EXPRESS

Long Island Lighting Company
Shoreham Nuclear Power Station
(Docket No. 50-322):
Security

Dear Ralph:

The purpose of this letter is to set about resolving any ambiguity about the arrangements for physical security at the Shoreham Nuclear Power Station in the event the plant loads fuel and commences low power testing and operation prior to the completion of emergency planning litigation.

As you know, on November 22, 1982, LILCO and the Suffolk County Police Department (SCPD) as agent for Suffolk County entered into a Final Security Settlement Agreement (Agreement) respecting operation of the Shoreham Nuclear Power Station. That Agreement, among other things, established the SCPD as providing backup security protection for Shoreham and did not, by its terms, exclude any category of licensed operation from its scope. On March 15, 1983, then-Police Commissioner Donald J. Dilworth wrote a letter to Shoreham Site Security Supervisor Robert F. Reen (Enclosure 1), waiving the SCPD's right to review a pending amendment to the Shoreham Security Plan and making various statements that could be interpreted by some as casting doubt about Suffolk County's intentions to fulfill its obligations under the Agreement.

In subsequent correspondence the SCPD, through counsel, affirmed its intent to fulfill its obligations under the Agreement, in all respects save fuel load and low power testing and operation prior to completion of emergency planning litigation. In those respects the County, while explicitly disavowing any intent to abrogate or rescind the Agreement, has not to date affirmed it despite repeated requests by LILCO that it do so. The pertinent correspondence is attached as Enclosures 2-12 hereto.1/

The Staff has taken note of this apparent uncertainty. LILCO has recently made a final attempt to secure clarification of the County's position, in a March 30, 1984 letter to counsel for Suffolk County (Enclosure 13) but has received only a nonsubstantive response (Enclosure 14). The previous history of this matter suggests that Suffolk County will not give LILCO a substantive response on this issue.

Given the potential imminence of fuel loading and low power testing and operation, LILCO believes it important to clarify this ambiguity and, if necessary, to work around it by providing, for fuel loading and low power testing and operation prior to the completion of emergency planning litigation, contingent substitutes for the the SCPD. To this end LILCO requests an early meeting with the Staff, this week if possible. LILCO believes that it would be appropriate for Suffolk County to attend the meeting to the extent necessary to determine its intent to provide offsite security protection for Shoreham for

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1/ Though some of the attached correspondence bears the legend "Safeguards Information," all such information has been declassified. Letter, T. M. Novak (NRC) to M. S. Pollock (LILCO), March 25, 1983. Nevertheless, LILCO believes that the substantive materials sent with this letter should be afforded confidential treatment; and that though the question of whether Suffolk County intends to fulfill its commitments under the Agreement may become public information if the County refuses to affirm those commitments, their specifics ought, as a general matter, to be treated on a need-to-know basis whether or not they themselves contain Safeguards Information.

fuel loading and low power testing prior to completion of emergency planning litigation.

Sincerely yours,

Donald P. Irwin

91/730

Enclosures:

1. Letter, Donald P. Dilworth to Robert F. Reen, March 15, 1983
2. Letter, Donald P. Irwin to Michael S. Miller, March 18, 1983
3. Letter, Michael S. Miller to Donald P. Irwin, March 21, 1983
4. Letter, Donald P. Irwin to Michael S. Miller, March 22, 1983
5. Letter, Michael S. Miller to Donald P. Irwin, March 23, 1983
6. Letter, Donald P. Irwin to Michael S. Miller, March 25, 1983
7. Letter, Michael S. Miller to Donald P. Irwin, March 25, 1983
8. Letter, Michael S. Miller to Donald P. Irwin, March 30, 1983
9. Letter, Donald P. Irwin to Michael S. Miller, April 1, 1983
10. Letter, Michael S. Miller to Donald P. Irwin, April 5, 1983
11. Letter, Michael S. Miller to Donald P. Irwin, April 11, 1983
12. Letter, Donald P. Irwin to Michael S. Miller, April 22, 1983
13. Letter, Donald P. Irwin to Michael S. Miller, March 30, 1984
14. Letter, Lawrence Coe Lanpher to Donald P. Irwin, April 3, 1984

cc w/enclosures: Edwin J. Reis, Esq.
Bernard M. Bordenick, Esq.
Michael S. Miller, Esq.

ATTACHMENT P

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

Docket No. 50-322

MAR 25 1983

Mr. M. S. Pollock
Vice President - Nuclear
Long Island Lighting Company
175 East Old Country Road
Hicksville, New York 11801

Dear Mr. Pollock:

Subject: Correspondence Regarding the Security Agreement for the Shoreham Nuclear Power Station

This is in response to your letter of March 24, 1983 (SNRC-864), which requested that the staff determine whether certain documents contained Safeguards Information. In your letter you referenced the following correspondence:

1. Letter, Donald J. Dilworth to Robert F. Reen, March 15, 1983 (marked "Safeguards Information");

2. Letter, Donald P. Irwin to Michael S. Miller, March 18, 1983;

3. Letter, Michael S. Miller to Donald P. Irwin, March 21, 1983 (marked "Safeguards Information").

We have reviewed these letters along with a related letter dated March 22, 1983 from Donald P. Irwin to Michael S. Miller, another dated March 22, 1983 from Donald P. Irwin to Bernard M. Bordenick (marked "Safeguards Information") and a third dated March 17, 1983 from Donald P. Irwin to Bernard M. Bordenick and Donald J. Kasun (marked "Safeguards Information"). We have identified no safeguards material in any of this correspondence, and have determined that the "Safeguards Information" markings have been improperly applied to them. We will correct the markings and handle these documents as non-Safeguards Information.

We request that you correct the markings on your copies of these documents and inform the originators that you have done so. We are providing copies of this letter to the originators and recipients of this correspondence so that all copies of the documents can be corrected.

Sincerely,

Thomas M. Novak, Assistant Director
for Licensing
Division of Licensing

cc: See next page

DON IRWIN, Hearing Attorney

ATTACHMENT Q