

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

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

AFFIDAVIT OF EDWARD W. EACKER

Edward W. Eacker, being duly sworn, deposes and says as follows:

1. My name is Edward W. Eacker. I am Treasurer of Long Island Lighting Company. My business address is 250 Old Country Road, Mineola, New York 11501.

2. I make this affidavit in response to the July 3, 1984 motion of Suffolk County and New York State for leave to submit a financial contention, and its attachments, including particularly the affidavit of Michael D. Dirmeier, in the NRC's Shoreham proceeding, NRC Docket 50-322(OL). This affidavit has two primary purposes. The first is to provide support for the proposition that New York State public utility regulators -- the Department of Public Service and the Public Service Commission -- allow electric utilities to collect revenues sufficient to permit the safe and reliable operation of their systems. The second is to demonstrate that information of the type presented in the Suffolk County/New York State papers was available considerably earlier than they suggest: that much of it was available by late 1983, and

virtually all of it by the end of February of this year. This affidavit will not, in general, comment on the accuracy of the facts asserted in the Suffolk County/New York State papers about specific aspects of LILCO's financial condition, even though they are in material respects inaccurate and misleading.

I. ADEQUACY OF FUNDING FOR SHOREHAM OPERATION

3. Substantial portions of the Suffolk County/New York State papers are directed to the argument that, absent further borrowings or rate relief, LILCO will not have available to it adequate funds to operate the Shoreham plant safely. These arguments are misplaced. Even if, as the motion alleges will occur, LILCO were to experience a cash shortfall, this does not detract from the fact that the New York State Public Service Commission (PSC) has the responsibility to set rates that will provide adequate revenues to permit the safe and reliable operation of the systems of regulated utilities, including LILCO, in New York State. It has been my experience that the PSC, while it seldom, if ever, provides utilities the rate of return on their investment to which they believe they are entitled, nevertheless is cognizant of the need to provide adequate revenues to support operating, fuel, maintenance and capital requirements for operating utilities.

4. The New York State Department of Public Service, the parent organization of the PSC, has recently reaffirmed this policy of providing adequate revenues for safe and reliable power

plant operation in the course of normal ratemaking proceedings, in its response to a questionnaire sent to all State public utility commissions by the National Association of Regulatory Utility Commissioners (NARUC). In that response, covered by letter dated April 26, 1984 from Frank Berak, Chief, Rates and Valuation Section, Power Division (Attachment 1 to this Affidavit), the Department stated that the normal ratemaking process provides for:

1. ensuring adequate revenue to cover the costs of meeting NRC safety requirements. (Q & A 1).
2. meeting the costs of compliance with NRC requirements, orders and directives, including specific additions, alterations or improvements at operating nuclear power plants (e.g., replacement of safety-related equipment, fire protection equipment, security equipment, special qualifications for electrical equipment). (Q & A 2a-2c).

5. The Department response to the NARUC questionnaire also states that the PSC

allow[s] for the costs that utilities ask for, but it is the utilities' responsibility to spend funds properly. Utilities are expected to spend the amounts necessary to cover the total cost of operation. (Q & A 3a).

In addition, the answers to the questionnaire indicate that PSC staff members monitor nuclear power plant performance on a continuing basis, ordering special audits if problems are encountered. Thus the PSC assures, indirectly, that monies to be spent on nuclear power plant operation are not spent elsewhere. (Q & A 3a-3c).

6. The PSC is particularly sensitive to nuclear power plant performance and outages since nuclear outages generally increase utilities' total fuel costs. Thus the PSC indirectly acts to assure that utilities spend the necessary amounts for proper operation of their nuclear plants. (Q & A 4). The PSC has established performance incentive plans with respect to nuclear plant operation (Q & A 6), and will penalize utilities for excessive outages (Q & A 7).

7. The Department specifically anticipates the phasing-in of Shoreham's construction costs within a 2 to 5 year period. (Q & A 8a, 8b). However, the Department does not intend to permit any phasing-in of costs to impact the availability of adequate funds for safe plant operation; the allocation of adequate funds for this purpose would be enforced by the PSC's general regulatory authority to issue safe and adequate services. (Q & A 8c).

II. TIMELINESS

8. The affidavit of Mr. Dirmeier relies on six documents, four of them dated in May or June of this year (Dirmeier Attachments C-F), one dated February 21, 1984 (Dirmeier Attachment B: Form 8-K) and the other dated March 30 (Dirmeier Attachment A: Form 10-K) for the purpose of documenting LILCO's current financial condition. Suffolk County and New York State assert that the events involving LILCO's financial condition did not become focused until after publication of LILCO's May 30, 1984 "Position Paper" (Dirmeier Attachment D) (Memorandum at 4-5, 25-29). These

documents are several months more recent than the first public documentation of the current financial difficulties facing LILCO. Any assertion that LILCO's financial difficulties have begun, or even become manifest, only in the past several weeks is either naive or disingenuous. The general outline, if not the exact present details, of LILCO's current difficulties were all being disclosed publicly by LILCO and by other sources in the latter months of 1983 and in January and February of 1984 through a variety of means. These include: (1) forms filed with the Securities and Exchange Commission, which are publicly available and are served also on New York State authorities; (2) papers filed in various rate proceedings before the New York Public Service Commission, to which the State of New York (represented by the Attorney General, the Consumer Protection Board, and the PSC Staff) and Suffolk County are parties; and (3) reports in the public press. No purpose would be served by an exhaustive repetition of all the details of this process; but various examples will suffice:

a. As a result of the damage to emergency diesel crankshafts in August 1983, the proposed commercial operation date for Shoreham was slipped beyond April 1, 1984 and hearings before the PSC on present electric rates were suspended temporarily to determine its impact. Form 8-K, October 24, 1983 (Attachment 2, p. 1).

b. Standard & Poor's placed LILCO on its "Credit Watch" list, with negative implications in November 1983. Form 8-K, December 5, 1983 (Attachment 3, p. 1).

c. Governor Cuomo, having become involved in Shoreham in February 1983 by indicating that he would not impose a State emergency plan on Suffolk County, convened an ad hoc commission chaired by SUNY-Stony Brook President John Marburger to evaluate Shoreham in the summer and fall of 1983. The Marburger commission's report was not issued until mid-December. However, rumors circulated about the contents of the report during its preparation. One story, carried in the New York Times of October 17, indicated that the draft report indicated that if LILCO investors were required to absorb \$1 billion of the cost of Shoreham (then projected to be \$3.5 billion), LILCO would be driven to bankruptcy (See Attachment 12). A second rumor, this one carried in the November 20 Newsday, indicated that one of the options being considered by the Marburger Commission was a LILCO bankruptcy; LILCO's stock dropped over 12% -- from 14 1/4 to 12 5/8 -- the day that report circulated. See Attachment 12. A third report, in the New York Times of November 22, reported that consideration was being given by unnamed "officials" to whether reorganization of LILCO through bankruptcy would help or hurt Long Island. Felix Rohatyn, the financier, was quoted in the article as calling bankruptcy "not at all unthinkable." One of the Marburger panel members was quoted in the same article as advocating that LILCO stockholders be taxed with part of the cost of the Shoreham plant through an unspecified "imaginative approach." The December 2 edition of Newsday featured a long article on a potential LILCO bankruptcy. See Attachment 12. The report of Governor Cuomo's

Shoreham Commission, when it was finally released on December 14, 1983, did "little or nothing to relieve the present uncertainties respecting Shoreham." Form 8-K, December 22, 1983 (Attachment 4, p. 3). A week later, Governor Cuomo announced that New York State would intervene in the NRC hearings to oppose the emergency response plan being proposed by LILCO. Id.

d. On December 10, 1983, Duff & Phelps reduced the rating on LILCO's First Mortgage Bonds, General and Refunding Bonds, and Preferred Stock, and on December 19 withdrew their commercial paper rating. Moody's downgraded the Company's commercial paper to "Not Prime." Both D&P and Moody's accompanied their downratings with gloomy predictions of LILCO's financial status. As LILCO reported:

D&P noted that the outlook for the Company indicated "extended and deeper financial strain, and increased risks related to the Shoreham nuclear plant with delays and further politicizing of the Shoreham issues." Moody's attributed its action to uncertainty surrounding operation of the Shoreham plant and the recovery of the investment in the plant and concern that "further erosion of cash flow and coverages excluding AFUDC could seriously impede financial flexibility."

Attachment 4, p. 4. As of December 16, 1983, the Company had cash and short-term investments estimated to be sufficient to meet its cash requirements to the end of May 1984 without additional external financing. Attachment 4, p. 5. At the December 21, 1983 meeting of the Board of Directors, the Board decided that the absence of favorable developments in the near future could affect the level or continuation of subsequent dividends on the common stock. Attachment 4, p. 5.

e. In December, Citibank, N.A. notified LILCO that it would be resigning as trustee under the Company's First Mortgage because of a conflict between its roles as trustee and creditor to the Company. Form 8-K, December 23, 1983 (Attachment 5, p. 1 and attached Form 8 (December 27, 1983). This resignation was soon followed by that of Manufacturers Hanover, the trustee under LILCO's General and Refunding Mortgage.

f. In December 1983 one of the banks involved in the Revolving Credit Agreement of the Tri-Counties Resource Trust notified LILCO that it would not extend the maturity of the obligations under that Agreement beyond the current maturity date of September 1986. Form 8-K, December 29, 1983 (Attachment 6, p. 2). At the same time LILCO disclosed that as of December 29, 1983, it would have to borrow \$700 million to complete planned 1984 construction and other capital requirements but that it could not predict with certainty that such funds could be obtained. Id.

g. On January 5, 1984, LILCO filed a Form 8-K containing the following passages:

The Company had expended approximately \$3.2 billion on the Shoreham unit as of December 31, 1983. The Company expects that gross expenditures for Shoreham will be approximately \$677 million in 1984. Additional delays beyond 1984 are estimated to cost an additional \$40 to \$45 million each month, almost wholly for carrying charges, including insurance, taxes and overhead expenses (depending upon, among other factors, the outcome of the Company's pending application for rate relief). Because of the continuing difficulties in obtaining an operating license for Shoreham, the prospect exists for further delays and uncertainties, further increases in its costs and severe financial strains for the Company.

For several years a major portion of the Company's earnings have consisted of Allowance for Funds Used During Construction (AFC). This condition is expected to continue until the completion of Shoreham and its inclusion in rate base. AFC is the cost of funds invested in a construction project expected to be recovered from customers over the service life of the project through revenues when the project is completed and included in rate base. Such AFC does not represent cash earnings. Therefore, the Company is heavily dependent on external financing until Shoreham is adequately reflected in rates. There can be no assurance as to the amount or the timing of such rate relief from the Public Service Commission of the State of New York (PSC).

Some members of Governor Cuomo's study commission and, according to some newspaper reports, various government officials have suggested that Shoreham be totally abandoned or indefinitely mothballed. Any such outcome could well have a serious adverse financial impact on the Company and, unless the PSC grants to the Company prompt and adequate rate increases, could jeopardize the continued financial viability of the Company.

The Company's 1984 financing plan calls for the sale of an aggregate of approximately \$700 million of debt and equity securities. However, given the various adverse factors now impacting the Company, no assurances can be given regarding the Company's ability to raise sufficient funds in 1984 and in future years in order to meet its construction and other capital requirements and operational needs. To the extent the Company is unable to raise such funds in 1984 or in subsequent years, the Company's initial response would be to reduce the level of its capital and operating expenditures. In addition, the absence of favorable developments in the near future could affect the level or continuation of dividends on the Common Stock. The Company can give no assurance that such measures will be sufficient in the circumstances, nor can it now predict what other measures it might then take.

Form 8-K, January 5, 1984 (Attachment 7, pp. 2-3). At the same time, the Company disclosed that all of the banks in the Tri-Counties Resource Trust Credit Agreement had refused to extend that Agreement beyond the current maturation term of September 1986. Id. at 3.

h. In a Form 8-K dated January 10, 1984, LILCO disclosed that it had withheld \$26.2 million in real estate tax payments to Suffolk County for Shoreham, which had been being taxed as an operating reactor (Attachment 8, p. 1). The same document announced that the Board of Directors had directed the Company's management to develop a program of austerity measures to minimize cash expenditures, id. at 2.

i. The Company reported the following description of its financial status in its February 21, 1984 Form 8-K (Attachment 9, pp. 1-2):

The Company's present 1984 financing plan calls for the sale of an aggregate of approximately \$700 million of debt and equity securities. The Company had on hand as of February 20, 1984 cash and short-term investments of approximately \$214 million. The \$214 million on hand includes gross cash proceeds of \$52.5 million from the direct sale of 5,000,000 shares of Common Stock in January 1984 and approximately \$10.4 million in proceeds from the sale of Common Stock through the Company's Automatic Dividend Reinvestment Plan in February 1984. Given the various adverse factors now impacting the Company, no assurances can be given regarding the Company's ability to raise sufficient funds in 1984 and in future years in order to meet its construction and other capital requirements and operational needs. To the extent the Company is unable to raise such funds in 1984 or in subsequent years, the Company's initial response would be to reduce

the level of its capital and operation expenditures. In this connection, to conserve cash, the Company has announced that it would reduce its non-fuel related operations and maintenance expenditures, estimated at approximately \$250 million in 1984, by \$100 million without significantly affecting customer service and that it has suspended construction payments for its share of Nine Mile Point.

2. For additional information relating to its suspension of payments, see Item 5f below. In addition, the absence of favorable developments in the near future could affect the level or continuation of dividends on the Common Stock. The Company can give no assurance that such measures will be sufficient in the circumstances, nor can it now predict what other measures it might take. After giving effect to the suspension of payments for Nine Mile Point 2 but before giving effect to the proposed austerity program, to additional financing, to any change in dividend policy, or to other cash conservation measures, the Company estimates that the \$214 million in cash and short-term investments on hand as of February 2, 1984 is sufficient to continue the Company's operations only into early summer of 1984.

The same Form 8-K also reported that the PSC Staff had proposed to allow only approximately \$2.3 billion of the approximately \$4 billion anticipated to be spent on Shoreham into the rate base, and the Company's offers to permit disallowances of up to \$500 million in return for a change in posture by New York State and Suffolk County in the Shoreham licensing case (id. at 2-3). In the meantime, the Company projected the following financial posture:

The Company has expended approximately \$3.2 billion on the Shoreham unit as of December 31, 1983. The Company expects that gross expenditures for Shoreham will be approximately \$634 million in 1984. Additional delays beyond 1984 are estimated to cost an additional \$40 to \$50 million each month,

almost wholly for carrying charges, including insurance, taxes and overhead expenses, depending upon, among other factors, the outcome of the company's pending application for rate relief. Based upon a fuel loading date of October 1, 1984 and a commercial operation date of July 1, 1985, the cost of Shoreham is estimated at \$4.1 billion. Because of the continuing difficulties in obtaining an operating license for Shoreham, the prospect exists for further delays and uncertainties, further increases in its costs and for severe financial strains for the Company.

Id. at 3. The same Form 8-K also reported that the Company had suspended payments on February 9 for Nine Mile Point Unit 2, in which it had already invested approximately \$570 million, and disclosed the existence of potential legal liability for future payments or impairment or extinction of its current investment. Id. at 7. The same Form 8-K disclosed further downgrading of the Company's securities. Id. at 8-9.

j. On March 6, 1984, LILCO announced the following additional measures:

(1) institution of internal austerity measures including elimination of nearly 20% of the Company's employees, compensation reductions for remaining employees, and severe restrictions on normal administrative expenses;

(2) elimination of cash dividends on common stock for the balance of 1984 or until such time as the Company's financial condition permitted their restoration. These events were widely reported by newspapers at the time. See Attachment 10.

9. In rate proceedings before the New York PSC to which Suffolk County and New York State (represented by three agencies

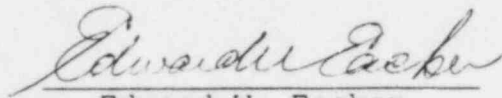
-- the Attorney General, the PSC Staff and the Consumer Protection Board) were parties (Case No. 28553), LILCO's witness, Thomas H. O'Brien, was questioned extensively on LILCO's financial condition on January 31 and February 2, 1984. His testimony (excerpted at Attachment 11), which both Suffolk County and the State heard, graphically depicted LILCO's financial condition:

a. Absent further financing or other measures, LILCO expected to run out of cash by June 1984 (Tr. 3181). With austerity but no further capital, the Company would run out of cash in August or September (Tr. 3200).

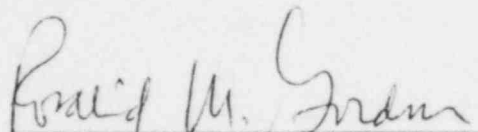
b. On February 2, Mr. O'Brien opined that if LILCO were to skip even one dividend, he doubted whether LILCO would be able to maintain access to financial markets, either through sale of securities or borrowing from banks (Tr. 3507-09), and reaffirmed that without additional financing the Company would run out of cash in June 1984. (Id.)

10. In short, each of the elements to which the pending Suffolk County/New York State motion now points -- cash shortages, downgraded securities, threats not to permit full recovery of Shoreham's cost, austerity measures, omitting stock dividends, withdrawal from Nine Mile Point 2 -- all were matters in the public domain by March 6, 1984. The use of more recent documents by Suffolk County and New York State to document these matters should not be understood to suggest that full information on them was not available publicly, or that Suffolk County and New York State were not aware of it in fact, at the time the events were occurring.

In my judgment it would be very difficult to believe that responsible County and State officials could have failed to have been aware on a day-to-day basis of these developments as they were occurring, by means of daily press accounts, SEC filings, testimony in proceedings to which they are parties, and other contacts with LILCO.


Edward W. Eacker

Subscribed and sworn to before me this 17th day of July, 1984, in the ^{County} City of Nassau, State of New York.


Notary Public

My Commission expires: _____

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