

LILCO, July 27, 1984

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

DOCKETED  
USNRC

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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 TO STRIKE PORTIONS OF THE  
TESTIMONY OF MICHAEL D. DIRMEIER AND  
JAMSHED K. MADAN ON BEHALF OF SUFFOLK COUNTY

Pursuant to 10 CFR § 2.743(c) the Long Island Lighting Company ("LILCO") moves to strike portions of the "Testimony of Michael D. Dirmeier and Jamshed K. Madan on Behalf of Suffolk County" (Dirmeier and Madan Testimony) on the grounds that they are immaterial, irrelevant and/or incompetent.

The specific portions of the Dirmeier and Madan Testimony which should be stricken and the grounds for striking them are set forth below.

I. LILCO's Financial Qualifications are Not Relevant

LILCO moves to strike from pages 21, line 15 through page 43, line 14 and page 47, lines 14-18 of the Dirmeier and Madan Testimony, which address LILCO's financial qualifications to operate a nuclear power plant, on the ground that it is not material and not relevant. The testimony, which discusses LILCO's current financial resources and LILCO's financing capabilities as it allegedly impacts upon LILCO's ability to operate Shoreham during low power

testing, represents another of Suffolk County's attempts to inject the issue of financial qualifications into this low power licensing proceeding. This Board has already ruled in its Order Regarding Discovery Ruling of June 27, 1984 that LILCO's financial qualifications to operate Shoreham are "not relevant" to the issues raised by the application for an exemption from GDC 17. Order at 2. The Order Regarding Discovery Ruling succinctly states that the issue of public interest does not encompass financial qualifications:

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

Order at 2-3.1/

Moreover, the financial qualification issue has been removed from consideration by the Commission itself. The Commission has unequivocally stated that financial qualifications are not to be litigated in operating license proceedings. Financial

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1/ Apparently the County agrees that the June 27 Order precludes this testimony as well as that described in the following portion of this motion. The County's Motion in Limine, filed July 9, 1984, so indicates.

Qualifications Statement of Policy, 49 Fed. Reg. 24,111 (June 12, 1984).

Finally, the testimony should be stricken based on the Board's inherent authority to police its proceedings against improper conduct. Regardless of its truth, this portion of the Dirmeier and Madan Testimony directly conflicts with testimony sponsored by Suffolk County as a primary member of a Coalition opposing rate relief for LILCO before the New York Public Service Commission and, in part, given by these same witnesses. The language of the Administrative Law Judge's Second Recommended Decision in Case 28553 (issued July 13, 1984) is instructive:

The Coalition goes on to further assert that LILCO may be able to raise outside funds without Commission rate action, and cites the Company's reported late June effort to borrow \$200 million, which the Coalition thinks must indicate a belief on the Company's part that such money might be available. LILCO replies that this merely shows it "it pursuing all possibilities in its effort to survive."

LILCO also contrasts the "bright financial prospects" claimed by the Coalition in its brief here against documents filed with the NRC one day later by Suffolk County (a principal member of the Coalition) and the State. There the issue was LILCO's financial ability to operate Shoreham. Suffolk County and the State filed an affidavit (from the same consulting firm that testified for the Coalition in our proceeding) the motion asserting that "LILCO is on the brink of financial disaster," has no access to external financing," and that "there is not a shred of evidence that LILCO can avert a default on the \$90 million bond payment that becomes due on September 1." (Emphasis added).

These statements by one of its leading members are indeed in flat contradiction of the Coalition's brief in this proceeding. On the part

of Suffolk County, at least, possessing responsibility for both submissions, this represents a disregard of the most fundamental requisites for responsible advocacy. I recommend that the Commission express its strong condemnation of this conduct.

Second Recommended Decision at 12-13.

II. Uncertainty of Full Power Operation and Cost of Decommissioning Are Not Relevant

LILCO moves to strike the testimony contained at page 43, line 14 through page 47, line 10 and the sentence contained in lines 18-21 on page 47 on the grounds that the question of uncertainty concerning the ultimate licensing of Shoreham and the cost of decommissioning a plant that has been operated at 5% power are not issues in this proceeding. First, the Commission has on at least two occasions held that any uncertainty attendant to whether LILCO may receive a full power license for Shoreham does not preclude low power testing. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC \_\_\_\_ (1984) (no environmental impact statement needed for low power testing); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-83-17, 17 NRC 1032 (1983) (emergency planning need not be resolved prior to low power testing). Indeed, LILCO's Motion for a Protective Order, which was granted by Order of June 27, sought protection from an inquiry into decommissioning costs. Although the Board did not expressly refer to this issue in its Order, LILCO raised the issue in its Motion, argued it and the County

implicitly agreed that it was included because it made no further attempt at discovery on these issues.

Even without the Commission's two previous rulings, the proffered evidence would be immaterial. Once the diesel generator issue is resolved, LILCO would be able to engage in low power testing regardless of the status of the emergency planning issues necessary for a full power license. 10 CFR § 50.47(d). The Commission's 1983 Order merely confirms this. Thus, the issue in this proceeding is not whether low power testing should precede the granting of a full power license, but only when it should occur regardless of any uncertainties. In short, the uncertainties are common to both the exemption and non-exemption scenarios.

### III. The Witnesses Are Not Qualified to Render Certain Opinions

The following portions of the Dirmeier and Madan Testimony should be stricken because Dirmeier and Madan are not competent witnesses.<sup>2/</sup>

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<sup>2/</sup> Federal Rule of Evidence 702 requires that a witness be qualified by "knowledge, skill, experience, training or education" in order to express an expert opinion. Moreover, the opinion must be one which will "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Where, as here, a witness purports to express expert opinions about matters in which he has no knowledge, skill, experience, training or education, he is not competent to express the opinions and the opinions would not assist the trier of fact.

A. No Expertise Concerning Life of Plant or Oil Consumption -- Page 20, Line 7 through Page 21, Line 3.

This portion of the Dirmeier and Madan Testimony addresses the savings in oil consumption that would occur if a low power license were granted and states that "LILCO's claim of oil savings can only be true if earlier operation results in a change in the operating life of Shoreham." Dirmeier and Madan are financial analysts and have no experience in the operation of nuclear power plants, in forecasting the cost or availability of oil or in planning for power generation facilities. Consequently, neither witness has the expertise to render an opinion on the effect, if any, low power operation will have on the life of the Shoreham plant or the effect on fuel savings. This portion of the testimony should be stricken as not competent and unreliable.

B. No Expertise in the Cost of Operating Shoreham or the Cost of Responding to An Accident -- Page 22, Lines 8-18, Page 22, Lines 8-18, Page 22, Line 20, Page 21, Line 3 3/

LILCO moves to strike this portion of the Dirmeier and Madan Testimony on the ground that the witnesses, as financial analysts, have no expertise concerning the cost of operating Shoreham at low power levels or the cost of responding to an accident. This portion of the testimony should be stricken as unreliable.

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3/ With respect to the testimony discussed in Sections III.B, C, D and E of this Motion, the grounds discussed in these sections are in addition to and alternative to the grounds discussed for striking the same testimony in Sections I and II above.

- C. No Expertise in the Level of Services Provided by LILCO -- Page 22, Lines 18-20; Page 25, Line 16-Page 26, Line 7; Page 34, Lines 7-20; Page 41 Line 11-Page 42, Line 16

LILCO moves to strike these portions of the testimony, which concern the level of services now being provided to LILCO's customers and the negative effect the County's witnesses claim low power testing would have on the level of services provided to LILCO's customers, on the ground that the testimony is not within the expertise of the witnesses. Neither Dirmeier nor Madan has worked for a utility; nor are they experts in the services provided by the utility industry to its customers. Moreover, they cannot be in a position to assess the impact that LILCO's austerity program has had on the service it provides to its customers. Nor can they assess the impact, if any, of a low power testing program on non-nuclear services.

- D. No Expertise on the Issue of "Public Interest" -- Page 21, Line 16 - Page 22, Line 6; Page 27, Line 20 - Page 28, Line 6; Page 41, Line 11 - Page 43, Line 13

These portions of the Dirmeier and Madan Testimony should be stricken on the ground that the witnesses have no expertise to assess or express an opinion as to the public interest." First, Suffolk County's witnesses are not clothed with an official capacity to assess what is in the public interest. These witnesses can, at most, testify, if at all, about the facts of LILCO's present situation and the facts about low power testing. It is this Licensing Board who must decide, based on the facts presented,

whether low power testing would be in the public interest. Second, the testimony given by Suffolk County's witnesses lacks adequate foundation to make an assessment of whether low power testing would be in the public interest. The testimony fails to consider, and the witnesses have no competence to consider, other elements of "public interest" such as training and reducing dependence on foreign oil.

E. No Expertise on the Costs of  
Decommissioning -- Page 44 - Page 47, Line 10.

LILCO moves to strike this portion of the testimony on the ground that Dirmeier and Madan lack the expertise necessary to testify as to opinions or facts concerning the costs of decommissioning and salvage and reclamation value of Shoreham after low power testing, or the potential costs of waste storage and handling. Dirmeier and Madan are financial analysts; they are not engineers, members of the nuclear industry or members of the utility industry. They are not familiar with the task of decommissioning a power plant that has been operated at 5% power, nor with the costs attendant to that decommissioning. Likewise the salvage and reclamation value of the plant and the potential costs of waste storage and handling are based directly on the degree to which the plant is contaminated, whether it can be decontaminated and the magnitude of the nuclear waste which must be stored. The witnesses have no expertise with any of the foundational issues. As a result, they have no basis on which to project costs for these tasks.

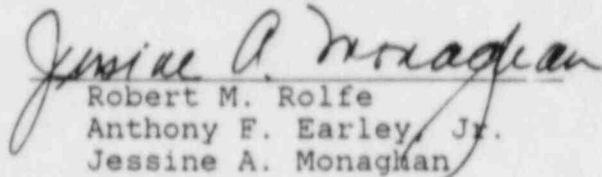


IV. CONCLUSION

For the reasons stated above, the Board should strike the indicated portions of the Testimony of Michael D. Dirmeier and Jamshed K. Madan on Behalf of Suffolk County.<sup>4/</sup>

Respectfully submitted,

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<sup>4/</sup> In the interest of efficiency, this motion is submitted in advance of Dirmeier's and Madan's appearance on the stand and is based solely on the matters appearing in their pre-filed testimony. If the Board permits Dirmeier and Madan to testify, LILCO may raise additional grounds for striking the testimony following voir dire and cross-examination of the witnesses.