UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence Brenner, Chairman
Dr. George A. Ferguson
Dr. Peter A. Morris

In the Matter of	Docket No. 50-322-OL
LONG ISLAND LIGHTING COMPANY	August 13, 1984
(Shoreham Nuclear Power Station, Unit 1)	LBP-84-30

MEMORANDUM AND ORDER DENYING SUFFOLK COUNTY AND THE STATE OF NEW YORK PETITION FOR EXCEPTION FROM REGULATIONS PRECLUDING FINANCIAL QUALIFICATIONS CONTENTION AND MOTION FOR CERTIFICATION TO THE COMMISSION

I. BACKGROUND

At the July 5, 1984 prehearing conference, this Board established a schedule for hearings on the only issue still pending before us -- the reliability of the emergency diesel engines. 1/ Discovery has already been completed in this proceeding. The hearing will commence September 5. The other Shoreham Licensing Boards are even further along procedurally. The Board chaired by Judge Miller began hearings on the

1/ This schedule is also set forth in the Board's confirmatory order of July 17, 1984, slip op. at 6.

issue of emergency power sufficient for low-power testing on July 30. Those hearings were completed on August 7 with the exception of possible hearings on one sub-issue. The Board chaired by Judge Laurenson, which is hearing offsite emergency planning issues, is expected to complete its hearings this month.

On July 3, Intervenors Suffolk County and the State of New York [2/] filed the following financial qualifications contention, pursuant to 10 C.F.R. § 2.714 of the Commission's regulations.

> (a) that Long Island Lighting Company ("LILCO") is not financially qualified to engage in the activities authorized or to be authorized by the operating license (including a "low power" license) which LILCO is seeking for the Shoreham Nuclear Power Plant ("Shoreham"), in accordance with the Commission's regulations; (b) that LILCO has failed to demonstrate that it possesses the financial qualifications to carry out, in accordance with the Commission's regulations, the operation of the Shoreham plant; and (c) that LILCO has failed to demonstrate that it possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for Shoreham plus the costs of permanently shutting the facility down and maintaining it in a safe condition.

[2/] New York is participating as a governmental party pursuant to 10 C.F.R. § 2.715(c). For ease of reference we will refer to the County and the State as "Intervenors" proposing the financial qualifications contention.

Since Commission regulations preclude a financial qualifications review of an electric utility in an operating license proceeding, [3/] Intervenors have petitioned that an exception be made to those regulations, pursuant to Section 2.758(b).

Section 2.758(b) permits exception to a regulation when application of the regulation to a particular proceeding would not serve the purpose for which the regulation was adopted. Intervenors assert that the application of the financial qualifications regulations to this proceeding would serve "no purpose" and that "LILCO's impending financial collapse" undermines the basic presumption behind these regulations: "the assumption that a public utility has the financial strength to engage in the activities for which it seeks a license from the Commission." [4/] In support of this assertion Intervenors have filed the affidavit of Michael Dirmeier. Intervenors also request that this

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[3/] 10 C.F.R. § 2.104(c)(4) states that the issue of financial qualifications shall not be considered by the presiding officer in an operating license hearing if the applicant is an electric utility." See also 10 C.F.R. Section VIII of Appendix A to Part 2, §§ 50.33(f), 50.40(b) and 50.57(a). These regulations remain in effect for operating license applications until the Commission finalizes the new rule eliminating the financial qualifications review. Financial Qualifications Statement of Policy, 49 Fed. Reg. 24,111 (June 12, 1984).

[4/] Memorandum in Support of Motion of Suffolk County and the State of New York for Leave to File a Contention on LILCO's Financial Qualifications to Operate Shoreham, For an Exception from Commission Rules, and for Certification to the Commission [hereinafter Intervenors' Memorandum] at 23.

Board certify the issue to the Commission, pursuant to Sections 2.718 and 2.730, if it should deny the petition for exception.

Both LILCO and the NRC Staff oppose admission of Intervenors' contention. Both assert that it is inexcusably late and that Intervenors have not shown that the balance of factors for admitting a late contention weigh in Intervenors' favor. LILCO further believes that the petition for exception should be denied because Intervenors have failed to make a prima facie showing that the rules would not, under special circumstances in this proceeding, serve the purpose for which they were intended. LILCO also opposes certification of the issue to the Commission.

For the reasons stated herein, this Board finds that Intervenors have not made a prima facie showing that application of the financial qualifications regulations to this proceeding would not serve their purpose. In addition, we find that Intervenors' motion is inexcusably late and that the balance of factors do not weigh in favor of admission of the contention, even if an exception were permitted. We further find it unnecessary to certify the issue to the Commission, and deny Intervenors' motion to that effect.

II. JURISDICTION

Intervenors have filed their petition before this Board and the Licensing Board chaired by Judge Miller. The Miller Board was established on March 30, 1984, solely to hear and decide LILCO's "Supplemental Motion for Low Power Operating License," dated March 20, 1984. See Notice, 49 Fed. Reg. 13,611 (April 5, 1984). The subject of that motion is LILCO's proposal to provide backup emergency electrical power sufficient to support low power operation without the need for the emergency diesel generators (EDG's). The issue of the reliability of the Shoreham EDG's is pending for litigation before this Board. The question of whether the Commission's rule precluding the consideration of financial qualifications as a prerequisite to issuance of an operating license should be waived in the case of Shoreham does not arise out of LILCO's supplemental motion for low power.

The Miller Board was not granted jurisdiction to hear all issues that could affect the decision of whether a low power license should be authorized. Rather, as just described, it was established only to hear and decide issues relating to the acceptability of LILCO's proposal to provide emergency electrical power without reliance on the EDG's. 5/

5/ Whether any questions involving LILCO's financial situation are relevant to consideration of LILCO's proposal for emergency electrical
(Footnote Continued)

This Board possesses residual licensing board jurisdiction over operating license issues not otherwise delegated to either the Miller Board, or, in the case of emergency planning issues, to the Board chaired by Judge Laurenson. Accordingly, we have jurisdiction to rule on the County's petition, filed under 10 C.F.R. § 2.758, for an exception to or waiver of the Commission's rule precluding litigation of the financial qualifications of LILCO to operate Shoreham. The Miller Board agrees that this Board is the proper one to rule on the County's petition for an exception.

III. PETITION FOR EXCEPTION TO FINANCIAL QUALIFICATIONS REGULATIONS

Section 2.758(b) of the Commission's regulations permits a regulation to

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

(Footnote Continued)
power from sources other than the EDG's, because the proposal involves a request for waiver of a General Design Criterion, is not a matter before us. That issue is properly before the Miller Board, and has been pursued before that Board by separate pleadings from the parties.

An affidavit which specifies the specific aspect of the proceeding as to which application of the rule would not serve its purpose must be submitted with the petition. Id. Special circumstances justifying the waiver or exception should be stated with particularity. Carolina Power & Light Company (Shearon Harris, Units 1 and 2) LBP-82-119A, 16 NRC 2069, 2073 (1982). If a licensing board finds that a petitioner has made a prima facie showing that the regulation should be waived or an exception granted, the question is then directly certified to the Commission. 10 C.F.R. § 2.758(d). The petition for waiver or exception should be granted only in "unusual and compelling circumstances." Northern States Power Company (Monticello, Unit 1), CLI-72-81, 5 AEC 25, 26 (1972).

Intervenors assert that LILCO's current financial difficulties constitute "special circumstances" warranting waiver of the financial qualifications regulations in this proceeding. Intervenors' Memorandum at 23. As proof of LILCO's "dire financial straits," Intervenors point to (1) LILCO's cash shortage (Dirmeier Affidavit at 8); (2) the fact that "[n]either Moody's, Standard & Poor's Corporation, nor Duff & Phelps considers any of the Company's securities to be of investment grade" (Id. at 9); (3) the institution of a prudency investigation by the New York Public Service Commission (PSC) and the associated $1.8

billion proposed disallowance of Shoreham related construction costs [6/] (Id. at 10); and (4) the possible acceleration of $500 million in outstanding debts related to the Nine Mile Point default (Id. at 13). From these circumstances Intervenors conclude that "it cannot be determined that LILCO is financially qualified to operate Shoreham at any power level." Id. at 2.

The Commission originally proposed to eliminate the review of financial qualifications in operating license and construction permit proceedings for electric utilities in 1981. Financial Qualifications; Domestic Licensing of Production and Utilization Facilities, 46 Fed. Reg. 41,786 (August 18, 1981). This proposal was premised on the conclusions that a financial review did little to identify health and safety problems and that the regulated status of electric utilities generally assured recovery of reasonable costs. Id. The final rule eliminating this review was adopted in March of 1982. Elimination of Review of Financial Qualifications of Electric Utilities in Licensing Hearings for Nuclear Power Plants, 47 Fed. Reg. 13,750 (March 31, 1982).

6/ On February 10, 1984, the Staff of the New York Public Service Commission filed testimony recommending that only $2.296 billion, of an estimated overall cost for Shoreham of $4.1 billion, be included in the rate base when Shoreham becomes operational. Dirmeier Affidavit at 10.

On February 7, 1984, the Court of Appeals for the District of Columbia Circuit remanded the rule to the Commission. New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C. Cir. 1984). While the Court did not vacate the rule, it found that the rule was not adequately supported by its stated basis. In response to the Court's concerns, the Commission proposed a new rule which would eliminate the financial qualifications review only at the operating license stage. Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Reviews and Hearings for Nuclear Power Plants, 49 Fed. Reg. 13,044 (April 2, 1984). In its June 12, 1984 Policy Statement, the Commission stated that the rules eliminating review of financial qualifications in operating license proceedings would remain in effect until the new rule was promulgated. Financial Qualifications Statement of Policy, 49 Fed. Reg. 24,111 (June 12, 1984).

The purpose of the financial qualifications regulations, applicable to electric utilities, is to eliminate Staff review of the issue in operating license proceedings on a case by case basis. Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Reviews and Hearings for Nuclear Power Plants, 49 Fed. Reg. 13,044, 13,045, col. 2 (April 2, 1984). The Commission clearly stated that the basis for this exemption was that a utility's regulated status ensured that it recovered reasonable costs of operation, assuming prudent management. Costs to operate a nuclear power plant in

conformance with NRC regulations are presumed to be reasonable and thus recoverable through the ratemaking process. Id.

The Commission's presumptions were not made in a vacuum. They rest on the line of Supreme Court cases, such as FPC v. Hope Natural Gas Co. 320 U.S. 591 (1944) which allow a regulated electric utility to recover reasonable costs. Id. Practical experience also supported the Commission's presumption.

> Under the financial qualifications reviews at the operating license stage conducted under the original rule, the Commission has found in every case that the state and local public utility commissions could be counted on to provide all reasonable operating costs to licensees, including costs of compliance with NRC requirements associated with safe plant operation. As a result, electric utilities applying for operating licenses have invariably been found financially qualified. Id., col. 3.

We find that Intervenors have failed to make a prima facie showing that such circumstances exist in this case which would undermine the Commission's assumptions in promulgating the financial qualifications regulations. Admittedly, the Dirmeier affidavit cites with particularity facts which reflect darkly on LILCO's financial picture. While the facts on which Intervenors rely -- the Nine Mile Point default, problems in obtaining external financing and the institution of prudency proceedings -- may support the contention, they are not dispositive of the petition for exception.

In order to show that the regulations should be waived, Intervenors would have to show that LILCO cannot recover its operating costs through rate regulation. Intervenors have indicated that the New York Public Service Commission has instituted a prudency investigation and that its Staff has proposed to deny $1.8 billion in Shoreham related construction costs. Yet this proceeding has not been concluded and thus its outcome remains wholly speculative. The Commission has already expressed disfavor with speculating on the outcome of ongoing proceedings to determine the application of specific regulations to a proceeding. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC ___, (June 6, 1984); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-83-17, 17 NRC 1032 (1983). 7/

7/ In the cited 1983 decision, the Commission disagreed with the recommendation of the Licensing Board, which included two of the members of this Board, not to permit low power testing unless and until there could be reasonable assurance that the emergency planning prerequisites for full power operation could be satisfied. Even if the Commission had agreed with the Board, the circumstances giving rise to that Board recommendation in the context of emergency planning do not apply to the subject of financial qualifications. In the former situation, the potential bar to eventual operation ran with the Shoreham facility regardless of the entity operating it. In the present context of financial qualifications, there is no basis to speculate even if Intervenors' most dire financial forecasts are realized, that the plant could not be operated in accordance with all safety requirements by either a restructured LILCO or by some other entity. This would be subject to an NRC assessment of any significant change in the entity proposing to operate the Shoreham plant (e.g., LILCO in some form of bankruptcy or a different utility operator) if and when such a proposed change is necessitated by the outcome of the State rate-proceedings or

(Footnote Continued)

Nor does this situation present issues of considerable safety significance for which a reasonable assurance now of the future outcome of the rate proceeding would be desirable. Intervenors do not allege that any particular safety problems result from LILCO's "dire" financial situation; and apparently none exist. In fact, their only fear is that "the citizens of the State and County could be faced with an irradiated plant whose owner cannot afford to operate, shut it down, or clean it up safely." Intervenors' Memorandum at 33. Although possible, it is not probable that this fear will be realized. It is unlikely that LILCO would not be found financially qualified to operate Shoreham if and when it satisfies all applicable NRC prerequisites to operation. In addition, the New York State PSC is unlikely to deny LILCO reasonable operating costs, if and when Shoreham commences commercial operation, since it does not generally do so. 8/

(Footnote Continued)
other circumstances. Indeed, based on the PSC's general position (see note 8 below), it is more speculative to assume that no entity would be permitted the rate relief to cover the costs of operation of Shoreham than it is to assume that there would be a variety of financial arrangements which would permit some qualified entity to do so. For example, an entity not saddled with LILCO's present terms of debt service on construction funds could need a lesser degree of rate relief than LILCO would to cover its costs.

8/ Attachment 1 to the Eaker Affidavit, filed in support of LILCO's July 16, 1984 Reply to Intervenors' motion, attests to this fact. In response to a National Association of Regulatory Utility Commissioners' questionnaire, the New York Public Service Commission stated that it "makes allowances for all the necessary and prudently incurred operating costs, including NRC safety requirements."

Nor would every denial of rate relief constitute sufficient basis for waiving the financial qualifications regulations. "When [the] NRC changed its rules, it could not have contemplated that any utility covered thereby would never have financial difficulties or that a State would never deny a utility some of the return it was seeking." Houston Lighting and Power Company (South Texas Project, Units 1 and 2) LBP-83-37, 18 NRC 52, 59 (1984). To form the basis of a waiver of the regulations, the result of a state rate proceeding would have to meet the "unusual and compelling circumstances" standard. Monticello, supra, 5 AEC at 26. Denial of rate relief in and of itself is not unusual, unless it signals a systematic denial of costs. Whether it is compelling depends largely on its impact on LILCO, which at this point remains speculative.

Absent evidence of a systematic denial of costs, it would be inappropriate for this Board to explore financial qualifications based on the denial of construction related costs. This is an operating license proceeding, and although Intervenors were free to request that this Board examine specific safety related problems which have allegedly resulted from lack of funds for construction, it is inappropriate for this Board to hear those financial qualifications issues related to construction in the abstract. We discussed these precepts over two years ago. See Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-82-41, 15 NRC 1295, 1305 (1982) (Construction Permit Extension Amendment).

Intervenors maintain, however, that by adding up LILCO's debts and assets, it is clear that LILCO does not have sufficient funds to operate Shoreham. However, this ignores the fact that LILCO may recover its costs of operating Shoreham through the ratemaking process, and that these funds should be used to operate Shoreham safely, in conformance with NRC regulations. To say that the funds would not be used for this purpose, requires the presumption that they will be reapportioned from the safety area to other areas. There is no basis for this Board to make that assumption at this time. In addition, while the New York Public Service Commission does not specifically conduct audits to ensure that revenues are not reallocated, it does monitor plant performance and orders special audits if problems arise. Thus, it indirectly assures "that monies to be spent on nuclear plant operation are not spent elsewhere." Attachment 1, to Eaker Affidavit at 4.

The bulk of the allegations in the Dirmeier Affidavit appear to be directed more toward proving the contention than toward supporting the petition for exception. We do not dispute that the Nine Mile Point default and LILCO's low bond rating is evidence of LILCO's overall weak financial position. Yet, this Board is not permitted to hear those issues until Intervenors have made a prima facie showing that the financial qualifications regulations should be waived. What Intervenors have overlooked is that the Commission exempted electric utilities because of their regulated status which generally guarantees recovery of reasonable costs and insulates a utility, at least to some extent, from

traditional economic forces. It cannot be presumed that the Commission issued these regulations on the assumption that the financial picture of utilities would always be rosy. It did presume that utilities could obtain sufficient funds to operate a plant safely through rate relief. Intervenors have not made a prima facie showing that this presumption does not apply in this case.

It is not clear that Intervenors are required to raise a safety issue to support a petition for waiver of the financial qualification regulations. Admittedly, the major emphasis of NRC regulation of nuclear power plants has been on health and safety issues and not financial issues in the abstract. Yet, in its recent Policy Statement, the Commission specifically stated that the lack of demonstrable connection between financial qualifications and safety was not the rationale behind the new rule. Financial Qualifications Statement of Policy, 49 Fed. Reg. 24,111, col. 2 (June 12. 1984). 9/ However, challenges to this rule may be limited to cases where the petitioner makes a prima facie showing, not that rate relief has been denied but that the local utility has been denied "costs of compliance with NRC requirements associated with safe plant operation." Elimination of

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9/ LILCO cites to the Commission's decision in Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-83-21, 18 NRC 157 (1983) as the basis for its conclusion that Intervenors need to raise a safety issue to support their pettion for waiver. This decision was issued prior to the 1984 Policy Statement.

Review of Financial Qualifications of Electric Utilities in Operating License Reviews and Hearings for Nuclear Power Plants, 49 Fed. Reg. 13,044 at 13,045, col. 3 (April 5, 1984) (emphasis added).

Because Intervenors have failed to make a prima facie showing that application of the financial qualifications regulations to this proceeding would not serve the purpose for which these regulations were adopted, we must deny their petition for waiver or exception. Specifically, Intervenors have not shown that LILCO cannot obtain sufficient funds to operate Shoreham safely through the ratemaking process. We are aware however, that LILCO is experiencing financial difficulties, and it may be appropriate for the Commission to have the Staff determine if these difficulties have led to any safety problems to date, and to continue to monitor more closely than it normally would, LILCO's operational readiness (staffing, resources, etc.) if and after any operating license is issued. Cf. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-83-21, 18 NRC 157 (1983), where the Commission directed the Staff to review the situation to determine if any safety problems arose as a result of financial difficulties.

IV. STANDARDS FOR DETERMINING ADMISSION FOR LATE FILED CONTENTIONS

Intervenors' motion to file a contention is untimely. Hearings before this Board, on issues for which the record has already been

reopened, are scheduled to commence on September 5. Hearings before the Miller Board have already been concluded except for possible hearings on one sub-issue.

However, a contention may be admitted if the balance of the following factors weigh in an intervenors' favor.

i. Good cause, if any, for failure to file on time.

ii. The availability of other means whereby petitioner's interest will be protected.

iii. The extent to which petitioner's participation may reasonably assist in developing a sound record.

iv. The extent to which petitioner's interest will be represented by existing parties.

v. The extent to which petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a). We find that only the fact that no other party will litigate this contention weighs in Intervenors' favor. Thus, on balance, these factors weigh heavily against admission of the contention.

A. Good Cause

New information in a previously unavailable document has generally constituted a valid basis for the late filing of contentions and

evidence of good cause. However, good cause does not exist when information which forms the factual basis of the contention is publicly available elsewhere. Duke Power Company (Catawba, Units 1 and 2) CLI-83-19, 17 NRC 1041 (1983). Despite the fact that Intervenors cite frequently to LILCO's Position Paper on Shoreham, 10/ which was submitted on May 31, 1984, all information crucial to the contention was publicly available elsewhere well before that date. Other details which may be newer, add little, if anything, to the factual basis of the contention.

Intervenors premise their contention primarily on the conclusion that LILCO cannot raise the funds necessary to cover expected expenditures for 1984, and that the financial uncertainties caused by the prudency investigation and the Nine Mile Point default exacerbate those difficulties. Drawing largely on LILCO's Securities and Exchange Commission Form 10-K, dated March 30, 1984, Intervenors attempt to show that, even after accounting for funds saved through austerity programs and by omitting common stock dividends, LILCO will have a cash shortfall of approximately $80 million. Dirmeier Affidavit at 8. They maintain that LILCO cannot obtain these needed funds through external capital

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10/ The purpose of the position paper submitted to Governor Cuomo was to outline a plan for rate phase-in of Shoreham costs and to ensure that LILCO and its rate payers achieved some stability. Position Paper - Shoreham Nuclear Power Station, Exhibit D to Dirmeier Affidavit at 2-3.

markets because "[a]ll of LILCO's existing lines of credit have been drawn down" (Id. at 9) and none of its securities are considered investment grade (Id. at 10). To further support their contention, Intervenors point to the institution of the prudency investigation, where the Staff of the New York Public Service Commission proposes to disallow $1.8 billion in Shoreham related construction costs, and to the Nine Mile Point default, where the acceleration of approximately $500 million debt is forestalled only by successive thirty day agreements. Intervenors contend that these events place LILCO on the brink of financial collapse.

Most of the information referred to in the Dirmeier Affidavit was derived directly from LILCO's Form 10-K. However, Intervenors maintain that the May 31 Position Paper adds some crucial pieces of information -- particularly not only the fact "that LILCO was teetering on the brink of bankruptcy but also that the Company requires the affirmative action of third parties (over whom LILCO has no control or influence) to stave off disaster: a billion-dollar-bail-out and concessions in the prudency proceeding." Intervenors' Memorandum at 29. In addition, "the Position Paper reveals, again for the first time, that additional austerity measures would not suffice to avert bankruptcy." Dirmeier Affidavit at 16.

The Board finds no particularly startling factual averments in these statements which could not have been discovered by reviewing

publicly available documents at an early date. At a minimum, this information was contained in LILCO's Form 10-K which was available by the beginning of April. However, while the Form 10-K does provide specific numbers, LILCO's general financial difficulties were well known before even this document became available.

LILCO's cash shortage and the possibility of bankruptcy cannot be considered new information. The cash shortage problem was discussed in LILCO's Form 8-K, dated December 22, 1983 (Attachment 4 to Eaker Affidavit) and in testimony before the New York Public Service Commission in January and February of 1984 (Attachment 11 to Eaker Affidavit). That testimony indicated that the Company might run out of cash in the Fall of 1984. Intervenors were parties to the proceeding in which this testimony was taken. Additionally, LILCO acknowledged that austerity measures, announced on March 6, would not solve these problems. (March 7, 1984 New York Times Article at B2, Attachment 10 to Eaker Affidavit.) The possibility of bankruptcy also cannot be considered new information. It was well publicized in late 1983 both in newspaper headlines [11/] and in articles reporting on Shoreham. [12/] It

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11/ See Attachment 12 to Eaker Affidavit 11/20/83 Newsday article, (Reports of Bankruptcy Option Send LILCO's Stock Plunging); and 12/2/83 Newsday article (LILCO's Dire Option: Bankruptcy).

12/ See Attachment 12 to Eaker Affidavit, 10/17/83 and 11/22/83 New York Times articles.

is impossible to believe that Intervenors, who are so integrally involved in both this proceeding and the New York Public Service Commission rate proceeding, could have missed this information.

LILCO's difficulties in obtaining external financing have also been well known for some time. As Intervenors themselves note, Moody's began lowering its ratings of LILCO's securities in December of 1983. Dirmeier Affidavit at 9. LILCO's Form 8-Ks, filed in December 1983 and January 1984, also note the Company's external financing difficulties. Attachment 4, 6 and 7 to Eaker Affidavit. In addition, LILCO's witness in the New York Public Service Commission proceeding indicated in January and February 1984 that if LILCO missed paying dividends, it would have difficulty in obtaining external financing. Attachment 11 to Eaker Affidavit. LILCO announced suspension of common stock dividends on March 6. Attachment 10 to Eaker Affidavit.

The two events on which Intervenors rely most heavily, the prudency investigation and the Nine Mile Point default, also cannot be considered recent for the purposes of this motion. The Staff of the New York Public Service Commission filed testimony, in State proceedings in which Intervenors are parties, proposing the disallowance of $1.8 billion in Shoreham-related costs on February 10, 1984. The default on payments for Nine Mile Point construction occurred on February 9. Since it was extremely well publicized, it is impossible to believe that Intervenors were not aware of the default at an early date. Yet, even if they were

not, the information was disclosed in LILCO's February 21, 1984 Form 8-K. Attachment 9 to Eaker Affidavit.

Intervenors could also have made the assertion that LILCO's financial picture was dependent on the actions of LILCO's lenders and the outcome of the prudency investigation at an earlier date. Their assertions as to the importance of these events are based primarily on the fact that LILCO has limited cash and its problems in obtaining outside financing. Yet, as indicated previously, these problems were known in late 1983, prior to the occurrence of the Nine Mile Point default and the prudency investigation. Even if Intervenors were not capable of gauging their effect on LILCO, LILCO's Form 10-K makes it explicit as Intervenors themselves note. The effect of these events "as stated by Price Waterhouse [is that] LILCO 'cannot give any assurance of its ability to meet its capital and operating requirements.'" Intervenors' Memorandum at 8 quoting Form 10-K.

Governor Cuomo's rejection of the plan outlined in the Position Paper also adds little, if anything, to the factual premise of the contention. As indicated above, LILCO's financial picture was well known prior to this event. Intervenors do not assert that the Governor ever intended to approve this plan, or any plan, such that LILCO's financial picture would have been substantially brighter prior to the rejection.

Although Intervenors cite quite frequently to the May 31, 1984 Position Paper, this is not sufficient to support the assertion that good cause exists for the late filing. The facts upon which Intervenors rely to support their contention, including the Nine Mile Point default, the prudency investigation, cash flow problems, and external financing difficulties were publicly available no later than mid-February 1984. For these reasons, this Board cannot find that Intervenors have shown good cause for waiting until July 3 to file their contention.

B. Other Means of Protecting the Party's Interest

Intervenors contend that "[t]here is no evidence that LILCO's financial qualifications to operate the Shoreham plant will be reviewed, evaluated or even considered by the NRC, unless the proposed contention is admitted." Intervenors' Memorandum at 30. This Board does not dispute this statement. However, the NRC is not the only entity which can ensure that LILCO has the financial qualifications to operate the plant safely. Only the New York Public Service Commission has the authority to allow rates sufficient to cover the costs of operation. If it fails to allow the sufficient rates, it may then be appropriate for the NRC to review the issue. At this point, however, the Intervenors are free to raise their concerns with the New York Public Service

Commission. Thus, we cannot say that there is no other means of protecting Intervenors' interest in LILCO's financial qualifications.

C. Assistance in Developing a Sound Record

We do not dispute the fact that Suffolk County has engaged expert consultants to evaluate LILCO's financial condition. This is clear from the Dirmeier Affidavit. However, the fact that the County has engaged these experts is not wholly dispositive on the issue of whether Intervenors can assist in developing a sound record.

This Board has stated that it does not believe that the standard for reopening the record adds anything to the standards for accepting late filed contentions, when such contentions are not related to previously litigated issues. This is because a test for significance and triability is implicit in determining whether an untimely contention will be admitted. Long Island Lighting Company (Shoreham Nuclear Power Station Unit 1) LBP-83-30, 17 NRC 1132, 1143 (1983). In particular, "the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record is only meaningful when the proposed participation is on a significant, triable issue." Id.

At this time, we do not find that Intervenors have presented a significant, triable issue which would assist this Board in developing a sound record. No health and safety concerns have been advanced nor does

it appear that any are implicated. Intervenors have not shown that the PSC will not allow LILCO sufficient funds to operate Shoreham safely. In fact, Intervenors' only fear is of an irradiated plant whose owner cannot afford to operate it safely. As stated previously, once the plant is constructed in conformance with all applicable regulations, it is unlikely that LILCO will be unable to recover the cost of safe operation through the rate proceeding. Even if Intervenors' financial forecasts are correct, there would be no reason why the plant could not be operated, even if by some other entity, provided that all safety standards are met.

For these reasons we find that Intervenors' contention does not present the significant triable issue necessary for them to assist in developing a sound record.

D. Extent To Which Petitioner's Interest Will Be Protected By Other Parties

The Board agrees that no other party is likely to protect Intervenors' interest in litigating the financial qualifications issue. However, this factor is far outweighed by the other considerations.

E. Extent To Which Participation Will Broaden Issues Or Delay The Proceeding

Intervenors cannot seriously expect this Board to believe that admission of this totally new contention "is not likely to have a material impact on the length of these proceedings." Intervenors' Memorandum at 32. Hearings before this Board are scheduled to commence on September 5, only two months after Intervenors filed this contention. The Miller Board is even further along procedurally. The hearings before that Board commenced within a month of the filing of the contention and have already, except possibly for one sub-issue, been completed. In order to hear this contention, we would have to authorize a new round of discovery. New testimony would have to be prepared and filed, in advance of the hearing, so as to address this new issue. Under these conditions it is impossible to see how the expected length of the proceedings could not be substantially increased.

Admittedly, this Board has stated that "the extent to which the petitioner's participation will broaden the issues or delay the proceeding is properly balanced against the significance of the issue." Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP 83-30, 17 NRC 1132, 1143 (1983). However, as stated previously, the financial qualifications issue is not nearly as significant as Intervenors would have us believe. Supra, p. 24-25.

On balance, even if we were to find a prima facie basis for granting the petition for exception, we could not admit the contention because it is inexcusably late. The only factor of the balancing test which weighs in Intervenors' favor is the fact that no other party will litigate the financial qualifications issue. This is not sufficient to overcome the unreasonable delay which the contention would impose on these proceedings; the fact that Intervenors have failed to show good cause for filing so late; the existence of an alternative forum, the state rate proceeding, in which Intervenors may protect their interests through direct participation; and the lack of any safety significance at this time.

IV. Conclusion

For the reasons stated, we find that Intervenors have not made a prima facie showing that special circumstances exist so that application of the financial qualifications regulations to this proceeding would not serve the purpose for which they were intended. Thus, we deny Intervenors' petition, pursuant to Section 2.758(b), for exception to those regulations. In addition, we find that Intervenors' contention is inexcusably late and that the balance of factors for determining admission of a late-filed contention weighs heavily against Intervenors.

The Board further finds no reason to certify this issue to the Commission, pursuant to 10 C.F.R. §§ 2.718(i) and 2.730(f). To do so

would be contrary to the normal course charted by Section 2.758(d). This issue does not require a prompt decision from the Commission to prevent delay or expense; nor does a prompt decision appear necessary to prevent "detriment to the public interest." As we previously stated Intervenors' contention has no apparent health and safety significance at this time. In any event, the Commission (and the Appeal Board) will be cognizant of this ruling and may direct certification on their own initiative if they believe it appropriate to do so. Intervenors may also petition the Appeal Board or the Commission to consider this issue on directed certification. However, we decline to seek certification, because we do not find it necessary in these circumstances.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Lawrence Brenner

Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
August 13, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence Brenner, Chairman
Dr. George A. Ferguson
Dr. Peter A. Morris

In the Matter of	Docket No. 50-322-OL
LONG ISLAND LIGHTING COMPANY	
(Shoreham Nuclear Power Station, Unit 1)	August 13, 1984

COURTESY NOTIFICATION

As circumstances warrant from time to time, the Board will mail a copy of its memoranda and orders directly to each party, petitioner or other interested participant. This is intended solely as a courtesy and convenience to those served to provide extra time. Official service will be separate from the courtesy notification and will continue to be made by the Office of the Secretary of the Commission. Unless otherwise stated, time periods will be computed from the official service.

I hereby certify that I have today mailed copies of the Board's "Memorandum and Order Denying Suffolk County and the State of New York Petition for Exception from Regulations Precluding Financial Qualifications Contention and Motion for Certification to the Commission" to the persons designated on the attached Courtesy Notification List.

Valarie M. Lane
Valarie M. Lane
Secretary to Judge Lawrence Brenner
Atomic Safety and Licensing Board

Bethesda, Maryland
August 13, 1984

Attachment

Anthony F. Earley, Jr., Esq.
Darla B. Tarletz, Esq.
Counsel for LILCO
Hunton and Williams
707 East Main Street
P.O. Box 1535
Richmond, VA 23212

Odes L. Stroupe, Jr., Esq.
Counsel for LILCO
Hunton & Williams
BB&T Building
333 Fayetteville Street
P.O. Box 109
Raleigh, North Carolina 27602

E. Milton Farley, III, Esq.
Counsel for LILCO
Hunton & Williams
P.O. Box 19230
2000 Pennsylvania Avenue, N.W.
Washington, DC 20036

Richard J. Goddard, Esq.
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

Alan R. Dynner, Esq.
Douglas J. Scheidt, Esq.
Counsel for Suffolk County
Kirkpatrick, Lockhart, Hill,
Christopher and Phillips
1900 M Street, N.W., 8th Floor
Washington, DC 20036