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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)	)	

SUFFOLK COUNTY AND STATE OF NEW YORK VIEWS AS TO WHY THE ASLB'S SEPTEMBER 5 ORDER MAY NOT SERVE AS A BASIS FOR A "PHASE I AND II" LICENSE

I. INTRODUCTION

By Order dated September 7, 1984, the Commission invited the views of the parties as to "whether the Licensing Board's September 5, 1984 Order may serve as the basis for issuance of a license for Phase I and Phase II of LILCO's low power testing program." (Order, CLI-84-16, p. 1.) Suffolk County and New York State hereby submit that the Board's Order may not serve as such a basis. Rather, the Board's September 5 Order should be vacated as being contrary to, if not in repudiation of, the Commission's May 16 Order.

Suffolk County and the State of New York respectfully urge the Commission to hold brief oral argument on this matter (on the order of 10 minutes per party). The oral argument which was held on May 7 on the earlier low power issues proved beneficial. Brief argument, perhaps on September 21 (the date tentatively

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scheduled for Commission consideration of this matter) would also be beneficial.

II. DISCUSSION

On May 16, the Commission directed the Board to apply the standard of Section 50.12(a) (as explained in CLI-84-8) in determining whether LILCO should be granted an exemption from GDC 17 and to conduct any proceeding on a LILCO exemption request "in accordance with the Commission's rules." CLI-84-8, p. 3. The Board did neither. Instead, the Board rejected the Commission's Section 50.12(a) standard, replaced it through "interpretation" with a watered-down standard, and acted contrary to the Commission's rules. The Board even went so far as to reverse its own July 24 ruling that it had "no power or jurisdiction" to grant LILCO a Phase I and II license unless and until LILCO satisfied Section 50.12(a) requirements for an exemption. The Board took this action sua sponte, without a pending motion for reconsideration and without giving the parties an opportunity to address the issues on which it pivoted its decision. 1/

The Board's September 5 Order makes a mockery of the substantive and procedural rulings which were forged by the Commission through a tough and tortured process. Indeed, the Commission's May 16 Order followed U.S. District Court litigation instituted by the County and State against the NRC (necessitated

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1/ The Board's September 5 Order relied, inter alia, on the Staff's alleged change of position at the August 16 oral argument and on SECY-84-290 and SECY-84-290A. None of these matters was considered in the parties' initial filings in response to the LILCO summary disposition motions that were before the Board.

by the earlier refusal of the Board and Commission to proceed in accordance with the NRC's rules), extensive briefing to the Commission, oral argments before the Commission, and special deliberations of the Commission. The May 16 Order was thus a clear and considered articulation of the Commission's intention and principle: in order for LILCO to obtain any license prior to resolution of TDI diesel issues, LILCO would have to show that it is entitled to an exemption from GDC 17 and other applicable regulations. The Licensing Board, however, found that the Commission's May 16 Order was "not without serious ambiguities." (Order, p. 3). The Board's Order accordingly veered off -- even injecting into the Commission's words a self-styled "rule of reason" -- until reaching the unsustainable result that a Phase I and II license should be issued.

For these and the following reasons, Suffolk County and New York State request the Commission to vacate the Licensing Board's September 5 Order. In the Attachment hereto, the County and State provide a more extensive discussion of several issues raised by the Board's Order, including the NRC's lack of authority under the Atomic Energy Act and the NRC's regulations to issue the No Power License which LILCO is in fact requesting in the name of Phase I and II.

Moreover, we bring to the Commission's attention for decision the overriding issue of the propriety of the Miller Board sitting as adjudicators in the Shoreham proceeding. By a request for recusal filed with the Miller Board on June 21, 1984,

the County and State moved Judges Miller, Bright, and Johnson to disqualify themselves from participating in this proceeding. On June 25, 1984, those Judges denied this request, and on July 20, 1984 (ALAB-777), the Appeal Board affirmed the Judges' decision. The County and State contend that the participation of the Miller Board on Shoreham matters is contrary to well-settled judicial standards, and that the Commission should now act to disqualify the Board.2/

The following is a brief statement of the views of Suffolk County and New York State as to why the Licensing Board's September 5 Order may not serve as a basis for a Phase I and II license.

1. The Board has recommended issuance of a type of license that is not permitted under the Atomic Energy Act and the NRC's regulations. The NRC may issue only a Construction Permit or an Operating License (including an Operating License limited to low power levels). LILCO, however, is requesting a No Power License -- that is, a license to load fuel and conduct cold criticality tests. This is neither a Construction Permit nor an Operating License. It is thus not permitted by law.

In fact, LILCO's No Power License request is designed to fragment the Commission's licensing process into the smallest particle of a license that LILCO thinks it has a chance of

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2/ We note that by Order dated September 12, 1984, the Commission extended the time within which it may act to review the Appeal Board's decision. Given that the County's and State's June 21 Motion for disqualification is thus before the Commission, we are not attaching hereto another copy of such Motion.

getting. Its goal, therefore, is not to comply with the mandatory two-staged licensing process which Congress and the NRC have established, but to circumvent that process by adding more licensing stages which dilute the substance of the central issues. Condoning this kind of circumvention of the Regulations would undermine the licensing process itself, and would invite applicants to customize their license requests in any piecemeal fashion that suits their momentary ends.

At this very moment, LILCO's low power license exemption request is pending before the Licensing Board. Low power operation is a legitimate issue contemplated by law, and that is where the attention of the Commission and parties belongs. The Board's September 5 Order is no more than a distraction from the real issues of substance. It creates legal and policy obstacles and, accordingly, should provide no basis for Commission action. Therefore, the Commission should vacate the Board's Order and further rule that it will not entertain LILCO's request for a No Power License.

2. The Board in part based its September 5 Order on its concern:

> that a court of law reviewing these orders might well conclude that LILCO was being discriminated against and treated differently than other utilities similarly situated, contrary to the equal protection of the laws and the due process requirements of the Fifth Amendment to the United States Constitution. (Order, p. 7)

First, this is a baseless statement which the Commission should discard summarily. Indeed, a court "might well" do one

thing or another. It is no more than playing with a crystal ball for the Board to engage in such wholesale speculation. The fact is that the issue with which the Board is apparently so concerned "might well" never even get to court. What is most important here is not what "might well" be done by someone else some day, but what is supposed to be done now by the Board and Commission under the rule of law and the facts of record.

Second, the Board's invocation of the spectre of due process and equal protection of the laws is unfounded and misplaced. No party has alleged a constitutional violation. LILCO has not claimed that the Commission is unreasonably discriminating against it. The Board has simply jumped to an abstract conclusion without reference to the particular facts of record, without considering the context of this proceeding, and without citing any legal authority to support its conclusory statement.

Finally, the issue here has nothing to do with the Board's alleged concern for "similarly situated" utilities -- Grand Gulf, Catawba, or any other.3/ The issue has only to do with the Board's failure to apply the Commission's May 16 Order to

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3/ In fact, these other utilities are not "similarly situated." If the Board had asked for the parties' views, the County and State would have so informed the Board. First, Shoreham's TDI diesels are straight, 8 cylinder diesels; those at Catawba and Grand Gulf are V-8 or V-16's. Thus, the diesels are different in important respects. Second, the crankshafts at Shoreham are totally different from those at Catawba and Grand Gulf. Third, at Shoreham the crankshafts have cracked, the replacement crankshafts have been found by the Staff not to meet the DEMA standards set forth in Reg. Guide 1.9, and the engine blocks have had extensive cracking. None of these problems has occurred at Catawba or Grand Gulf.

Shoreham. That Order is the law of the case in this proceeding. The Commission itself confirmed this by a vote which is recorded in Mr. Chilk's July 27 Memorandum to the General Counsel and EDO.

Accordingly, the Board's statement quoted above provides no basis for issuance of a Phase I and II license.

3. The Licensing Board's September 5 Order provides that LILCO need not demonstrate the bases for a Section 50.12(a) exemption prior to issuance of a Phase I and Phase II license. The Board's ruling violates the Commission's May 16 Order, as explained at length in the Attachment hereto, because that Order clearly requires an exemption before any license may be issued. The Licensing Board recognized this earlier on July 24, when it stated that it did "not have the power or jurisdiction to grant LILCO's Motion for summary disposition of Phases I and II" unless and until LILCO satisfied the requirements for an exemption. (July 24 Order at 9-10).4/ The Board had no reason for changing its mind on September 5.

Indeed, nothing material has changed since July 24. The Commission met on July 25 to discuss the exemption process, but the outcome of the meeting was that the May 16 Order would

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4/ Suffolk County, the State of New York, and the Staff had all urged the Licensing Board to apply the May 16 Order and to hold that an exemption was required for Phases I and II. See NRC Staff Response to LILCO Motions for Summary Disposition of Phases I and II, June 13, 1984; Suffolk County and State of New York Memorandum in Opposition to LILCO's May 22, 1984 Motions for Summary Disposition on Phase I and Phase II of LILCO's Proposed "Low Power Testings", June 13, 1984.

continue to apply to Shoreham.5/ For the Licensing Board to change its July 24 decision in the face of no new material facts underscores the capricious and unsupported nature of its action.

4. The Board stated that it "interprets the Commission's Order of May 16, 1984 (CLI-84-8) as implicitly containing a rule of reason in applying the requirements of GDC-17 to fuel loading and low power testing." (Order, p. 10) The Board's interpretation is unfounded and, in fact, is not an interpretation but a revision of what the Commission actually said. Indeed, the Commission's May 16 Order is straightforward and unambiguous. It does not imply a rule of reason or anything else. For the Board to tilt, as it did in undercutting the May 16 Order, unfortunately brings to mind the Board's earlier ruling when it read GDC 17 out of the regulations by "harmonizing" the GDC into Section 50.57(c). (See Board Order dated April 6, 1984, p. 11.) Clearly, what was "harmonizing" then is "implication" now. In both cases, the Board's action has emasculated the Regulations.

5. The Board's Order ignores the pending low power security proceeding, which was mandated by the Commission's July 18 Order and confirmed by the Commission's August 20 Order. Even assuming, arguendo, that a Phase I and II license could be

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5/ The Staff's August 16 statements at the Board's oral argument and the Staff's August 17 response to LILCO's directed certification request are referred to by the Board in its September 5 Order. That Staff pleading and its oral argument changed nothing in terms of the legal standard of the May 16 Order, which the Board was bound to apply. Moreover, the Staff never changed its earlier view that an exemption was required for Phases I and II.

lawfully issued, such could not be done until LILCO were found to be in compliance with the NRC's security regulations. There is no such compliance, and the matter is now pending before the Board.

6. The Board's Order ignores major issues -- including the No Power License issue -- which were briefed and argued by the County and State. This violates the fundamental requirement that adjudicators address the issues raised, confront the arguments made by the parties, decide the issues, and provide a meaningful explanation of the reasons for the decision. (See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 40-42 (1977). There is thus no adequate predicate -- no basis -- for an NRC decision on LILCO's request for a Phase I and II license. Consequently, it is necessary for the Commission to make a de novo review of the merits of the arguments made by the County and State with respect to the issue of a Phase I and II license. Only then could a decision properly be rendered on the merits of the issues.

7. The Miller Board should have been disqualified from presiding in this proceeding or participating in any other Shoreham-related matters. The Commission should disqualify the Miller Board now, and a qualified Board should be convened to preside over LILCO's exemption request and related matters.

Both the Miller Board and the Appeal Board declined to disqualify the Miller Board. In both instances, those Boards failed to apply properly the disqualification standard which is

controlling. That standard is set forth in Cinderella Career Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970). It requires disqualification of the Miller Board if "a disinterested person may conclude that [the Board] has in some measure adjudged the facts as well as the law of [the] case in advance of hearing it." Id. at 591. Clearly, that is the situation here, and two Commissioners -- surely disinterested observers on this issue -- have called for replacement of the Miller Board. See CLI-84-8 (additional views of Commissioners Gilinsky and Asselstine). The full basis for disqualification of the Miller Board is set forth in the June 21 joint motion of the County and State. The County and State respectfully refer the Commission to that motion, which is hereby incorporated by reference.

Finally, in the May 16 Order, the Commission asked the parties to include a discussion of the factors specified in 10 CFR §2.788(e). The County and State submit that these stay factors have no applicability to the instant proceeding, because this is a special exemption proceeding in which the Commission created a review function for itself as a precondition to permitting any ASLB license authorization to become effective. Indeed, this proceeding represents the first instance where the NRC is reviewing a proposed license for a plant which has no safety grade emergency AC power system. Such a situation requires full-scale and deliberate Commission review, not the limited and procedurally oriented review of Section 2.788(e).

Nevertheless, turning to the Section 2.788(e) factors, Suffolk County and the State of New York note the following:

1. Whether the moving party has made a strong showing that it is likely to prevail on the merits. The discussion hereinabove and in the Attachment demonstrates that the Licensing Board's September 5 Order was contrary to the Commission's May 16 Order, the Atomic Energy Act, and NRC Regulations. Accordingly, a strong showing has been made that Suffolk County and the State will prevail on the merits.

2. Whether the party would be irreparably injured if the stay is not granted. Given that the unlawful No Power License sought by LILCO would not materially contaminate the reactor, the County and State do not contend that there would be irreparable injury (in that sense) if a stay were not granted. However, the County and State contend that the integrity of this licensing proceeding would be irreparably injured because of the unlawful fragmentation of the required two-stage licensing process into a piecemeal and multi-phased proceeding which dilutes the central issues in controversy.

3. Whether the granting of the stay would harm other parties. The grant of a stay would not harm LILCO. The Licensing Board at this time is considering the briefs which have been submitted in the low power exemption proceeding. A decision by the Licensing Board on the record already compiled, as well as on the pending security matter, will follow in due course. Thus, by granting a stay, the Commission would cover only the

relatively short period until a decision on the exemption request is issued.

Further, the need for a Low Power License (LILCO's so-called Phases I, II, III and IV) cannot be demonstrated at this time. Indeed, there are many obstacles to commercial operation of Shoreham. The chief among these are the still unresolved questions concerning the adequacy of diesel generators for power operation above five percent, and whether LILCO could establish an adequate offsite radiological emergency response plan in compliance with 10 CFR §50.47. These issues will not be resolved until well into 1985. Accordingly, there is no need for a low power license, which would only contaminate a reactor destined to remain idle for many months under any circumstances. A fortiori, there is no need for a Phase I and II license, which is a mere particle of the unnecessary low power license.

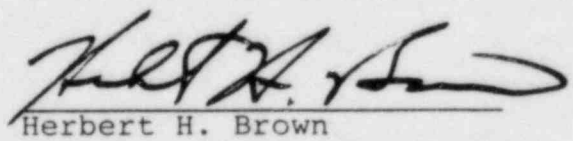
4. Where the public interest lies. The public interest clearly lies in assuring compliance with the NRC's regulations and the Commission's May 16 Order. The Licensing Board has acted contrary to both the regulations and the Order. Moreover, it has failed even to address the legality of issuing what amounts to a No Power License. At a minimum, the Commission should take cognizance of this threshhold issue and straighten out what is clearly a violation of the statutorily mandated two-staged licensing process. It should also address the other issues which the County and State briefed to the Board, but which the Board ignored.

The public interest also lies in having NRC decisions made by adjudicators who are not sitting in violation of well-settled judicial standards. The County and State submit that the Miller Board should be disqualified. There is no justification for the Commission to avert its eyes from this issue and permit the decision of that Board to stand.

Finally, the public interest lies with those who represent the public. Here, those are the County and State. LILCO's interests are purely private and of no weight in assessing the public interest.

For the foregoing reasons and those set forth in the Attachment hereto, Suffolk County and New York State submit that the Board's September 5 Order may not serve as the basis for a Phase I and II license, and that the Commission should rule that no such license shall be granted.

Respectfully submitted,



Herbert H. Brown
Lawrence Coe Lanpher
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036

Attorneys for Suffolk County

Fabian G. Palomino (MHE)

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Fabian G. Palomino
Special Counsel to the Governor
of New York State
Executive Chamber, Room 229
Capitol Building
Albany, New York 12229

Attorney for MARIO M. CUOMO,
Governor of the State of New York