UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

SUFFOLK COUNTY AND STATE OF NEW YORK COMMENTS
CONCERNING COMMISSION REVIEW OF LILCO'S EXEMPTION REQUEST

I. Introduction

The State of New York and Suffolk County submit that the granting of an exemption and the issuance of a low power license for Shoreham would be a betrayal of public responsibility, an abuse of discretion, and an unlawful act.

-- A betrayal of public responsibility, because there is no public purpose to be served by the Commission's authorizing the contamination of Shoreham at this time. Pivotal issues which underscore the inadequacy of LILCO's emergency plan and LILCO's lack of legal authority to implement its plan are before the New York State Supreme Court. Pending the resolution of these matters, the contamination of Shoreham would be a waste of resources and a costly commitment of at least $150 million. Moreover, there is no time pressure or other reason for precipitous NRC action to energize Shoreham. Indeed, LILCO itself has admitted that the quantity of electricity which Shoreham represents will not be needed for a decade. A wait of several months to let the court decide determinative questions, therefore, is the prudent course.

-- An abuse of discretion, because the policy of the Federal government, as expressed by the President, "does not favor the imposition of Federal government authority over the objections of state and local governments." (See letter from President Reagan which is Attachment 1.) There is no conceivable public benefit to be achieved by a ruling which steamrolls Shoreham over the State and County. The Commission was not constituted to make itself LILCO's advocate, knocking State and County opposition out of the way so that LILCO can wedge its foot into the operating license door. Neither the public nor the institutions of government which are the central players here would profit from such a high-handed confrontation.

It is not without irony that the Commission is poised to issue a low power license for Shoreham over the objections of the State and local governments. A year ago, the Commission reinstated a license for Diablo Canyon, and there the Governor of California supported the license. In the Commission's brief before the U.S. Court of Appeals, the Commission argued for the legitimacy of its action by citing the "great weight" it gives to the views of a State government:

> Finally, the Supreme Court has noted that the debate over nuclear power is one in which the States have a vital stake. [Citing Vermont Yankee.] In this case the Governor of California, as representative of the people and the public interest, has indicated in hearings before the Appeal Board that he does not oppose this action. The views of the chief elected representative of the people of California should be accorded great weight in fixing where the public interest lies.

NRC Brief, page 34 (emphasis supplied, citations omitted). Here, in the

Shoreham case, the chief elected representative of the people of New York and the elected government of the people of Suffolk County oppose issuance of a low power license. See, e.g., the Resolution of the Suffolk County Legislature which is Attachment 2. The Commission should finally confront this fact with realism and give it "great weight," just as the Commission did in pleading before the Court of Appeals. Surely, it was with conviction and not convenience in mind that the Commission spoke to the Court.

-- An unlawful act, because this proceeding on LILCO's request to operate Shoreham under an exemption from NRC regulations has at every stage denied the State and County the due process of law. The seeds of these abuses were planted at the Chairman's ex parte meeting with the NRC Staff and the chief ASLB judge on March 16. While the U.S. District Court's April 25 Temporary Restraining Order against the NRC and the Miller Board put an end to the first showing of regulatory abuses, the exemption proceeding which followed proved that the past was just prologue. Not the least of these abuses was the Commission's decision to permit the Miller Board to preside over the new exemption hearing despite the opposition of the State, County, and two Commissioners. The Miller Board, which on October 29 recommended the issuance of a low power license, pursued a pattern of behavior which included a series of errors and abuses of such nature as to deny the County and State procedural and substantive due process under the U.S. Constitution, the Atomic Energy Act, and the Administrative Procedure Act. A fair-minded review of the record in this proceeding thus reveals a kaleidoscope of unsustainable procedural, evidentiary, and substantive rulings as the foundation for the Board's rationale in granting LILCO's every wish to the gross exclusion of the County and State's fundamental interests. These unsustainable rulings fall into the following general categories:

-- The Board's rejection of testimony submitted by the County and State on the very points on which the Board accepted evidence from LILCO. To compound these errors, the Board then relied on LILCO's evidence in formulating its findings of fact and conclusions of law.

-- The trial of this case on one legal theory under the Commission's May 16 Order and the Board's decision on another. In particular, the State and County presented their evidentiary cases -- to the extent the Board received their evidence -- on an interpretation of the "as safe as" standard which was different from how the Board itself interpreted and applied that standard in its October 29 decision.

-- The Board's failure to characterize accurately, let alone to confront, the major arguments of the County and State. For example, the Board did not even attempt to deal squarely with the "public interest" aspects of the exemption request. It ignored the substantive merits of the County and State's position and attempt to represent the public, and instead relied on LILCO's purported evidence of alleged economic "benefits" while excluding from the record the County and State's evidence of economic harms. The Board, with words and tone that reached toward apology and pity, ruled for LILCO for reasons of aiding LILCO's self-interests, business and financial. The public's interest never had a chance and, the "great weight" which in pleading before the Court of Appeals the Commission purported to accord to elected governments, ranked not even the status of a passing footnote.

-- The Board made findings of fact on security issues as it must under Section 50.12(a), despite having improperly rejected all the County and State's security contentions and thus precluding the presentation of evidence and litigation of such issues. No evidence is in the record to support any of the Miller board's so-called "findings of fact" related to security.

Stripped of the legalisms and procedural trappings in which the Commission has set this proceeding, there is only one issue for the Commission to address: Is there any legitimate reason for the Commission now to consider, let alone issue, a low power license for Shoreham? The answer is no. No, because the Commission owes its duty to the public, not to LILCO. While LILCO has for months broadcast its desire for a low power license in order "to send a signal to Wall Street," and while the Miller Board has actually telegraphed the message as desired by LILCO ("the granting of a low-power exemption would send a positive signal to the capital markets" (Decision at 61)), signal-sending and code words are not legitimate reasons for the NRC to exercise powers entrusted to it by the public for the benefit of the public.

Responsibility to the public here means that the issuance of a low power license should not even be considered while determinative issues related to emergency preparedness are pending in State court. No words by the Commission can ameliorate the wastefulness and costliness of permitting Shoreham to be contaminated at this time. The Commission's usual boilerplate language that a low power license should not be read as prejudicing a decision on full power issues would not suffice here. That language, under the extraordinary circumstances of this case -- and the gross politicalization by LILCO of the low power license issue -- would stand barren. Indeed, that language would be read as the Commission's wink of the eye to go with LILCO's "signal" to Wall Street.

Accordingly, the Commission has only one legitimate option: it must summarily reverse the unlawful decision of the Miller Board and refrain from considering the issuance of a low power license for Shoreham until the pending determinative legal issues concerning emergency preparedness have been decided by the courts. This action would be a sound exercise of the Commission's discretion and a manifestation of the public's interest. Any other action by the Commission would be nothing but homage to LILCO. It would clearly be unlawful.

II. Discussion

The Miller Board Decision which purports to grant LILCO's exemption request must be summarily reversed,1/ because the fundamental due process rights of Suffolk County and the State of New York were irremediably violated in the

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1/ The detailed position of Suffolk County and the State of New York concerning the LILCO exemption request is set forth in the Suffolk County and State of New York Proposed Findings of Fact, the Brief of Suffolk County in Opposition to LILCO's Motion for a Low Power Operating License and Application for Exemption, and the Brief of the State of New York in Opposition to LILCO's Application for a Low Power Operating License on the Basis of an Exemption from the Regulations Pursuant to 10 CFR § 50.12(a), all dated August 31, 1984. Copies are provided herewith as Attachment 3 for the convenience of the individual Commissioners.

course of the so-called "proceeding" conducted by the Miller Board. Thus, although some testimony was accepted into an evidentiary record, some cross examination and argument of counsel was permitted, and briefs were accepted purportedly on the issues identified in the May 16, 1984 Order (CLI-84-8), in fact what occurred during the exemption proceeding did not constitute a fair hearing at all.2/

The most blatant of the Miller Board's denials of due process was its repeated pattern of refusing to admit evidence submitted by the County and the State on issues articulated by the Commission in its May 16 Order, with accompanying rulings that LILCO and Staff evidence on precisely the same issues was admissible. This denial of the fundamental right to submit evidence was made even more prejudicial by the Miller Board's subsequent reliance upon the one-sided LILCO and Staff evidence in its October 29 Decision. We summarize some of these unlawful and grossly prejudicial rulings in Sections A-D below.

The Miller Board also made findings relating to the adequacy of LILCO's security plan to protect the proposed alternate AC power configuration. However, there was absolutely no basis for any such findings since the Miller Board had violated Commission guidance and refused to permit litigation of security

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2/ The fundamental due process right to a fair hearing was emphatically recognized by the United States District Court in its April 25 decision which enjoined the previous attempts by the Miller Board to conduct a proceeding in violation of the Constitution. See Cuomo v. NRC, Civil Action No. 84-1264, CCH Nuc. Reg. Reptr. ¶ 20,304 (D.D.C. 1984). In addition, the necessity for a fair hearing was recognized by the Commission in CLI-84-8, which required that the Licensing Board "shall conduct the proceeding . . . in accordance with the Commission's rules."

contentions submitted by New York and Suffolk County, the admissibility and the substantive accuracy of which, in large part, were supported by the NRC Staff. This Miller Board error is discussed in Section E below.

The Miller Board also made clearly erroneous rulings on many other legal and factual issues, and refused to consider matters which the Commission's own Section 50.12(a) precedents identify as key considerations in exemption decisions. We discuss these errors in Sections F-J below.

These errors constitute a denial of a fair hearing which must be remedied by the Commission. A fair trial before a fair tribunal is a basic requirement of due process. Fitzgerald v. Hampton, 467 F.2d 755, 764 (D.C. Cir. 1972). The Commission clearly cannot close its eyes to the gross deprivation of rights which has been permitted to take place.3/

The foregoing Miller Board errors came as no surprise. Rather, from at least early April 1984, the Commission was on notice that the Miller Board was

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3/ Due process requires the resolution of contested questions by an impartial and disinterested tribunal in a fair proceeding. Amos Treat & Co. v. SEC, 306 F.2d 260, 263-64 (D.C. Cir. 1962). See also Marshall v. Manzo, 380 U.S. 545, 552 (1965) (due process requires that parties be affored the opportunity to be heard "at a meaningful time and in a meaningful manner"); Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 304-05 (1937) (right to fair hearing is "one of the 'rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement"); NLRB v. Washington Dehydrated Food Co., 118 F.2d 980 (9th Cir. 1941) (due process requires a tribunal both impartial and mentally competent to afford a hearing); Union Bag - Camp Paper Corporation v. FTC, 233 F. Supp. 660, 666 (S.D.N.Y. 1964) (agency action denying party the right to present its evidence and summon the witnesses of its choice violates constitutional right of due process of law as well as concept of fairness necessary to every proceeding).

incapable of conducting this proceeding in a fair manner. Indeed, whether it be the Miller Board's grossly improper April 6 scheduling order which resulted in the District Court's TRO, the Miller Board's attempt to intimidate an attorney representing the County,4/ or a host of other substantive and procedural errors and irregularities committed by the Miller Board, this Commission has known that the exemption proceeding was being conducted in a fundamentally unfair manner. Indeed, two Commissioners expressly called for the Miller Board's replacement (CLI-84-8, views of Commissioners Gilinsky and Asselstine), as did both the State and County.5/ Thus, the present need to reverse the Miller Board's decision is merely the result of the Commission's not having exercised proper control of events at the outset.

Finally, this Commission must conduct a complete review of the Miller Board's decision. This is a proceeding instituted to consider LILCO's exemption request. As such, the Commission, not any licensing board, must grant or deny the exemption request. See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LPB-77-35, 5 NRC 1290 (1977).6/ This would

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4/ ASLB Order to Show Cause Why Disciplinary Action Should Not Be Imposed, April 13, 1984.

5/ May 4, 1984 Joint Response of Suffolk County and the State of New York to the Commission's Order of April 30, 1984, at 42.

6/ A licensing board may conduct hearings and render initial decisions on exemption requests. See, e.g., Connecticut Yankee, 2 AEC 393 (1964); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2 3, and 4), CLI-74-9, 7 AEC 197 (1974). However, as set forth in San Onofre, Section 50.12 requires that only "the Commission may . . . grant such exemption from the requirements of the regulations . . . as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest."

be true even if the Miller Board had not committed errors which constitute a denial of the Intervenors' fundamental rights. Particularly in light of those errors, however, this Commission is now obligated to consider fully the entire record of this proceeding. Thus, LILCO's assertion that the Commission's review is limited to a cursory stay-type review is erroneous.

A. Exclusion of Evidence Concerning LILCO's Alleged Good Faith Attempt to Comply with GDC-17

"The applicant's good faith effort to comply with the regulation from which an exemption is sought" is one "equity" to consider in determining whether exceptional circumstances exist to justify the granting of a Section 50.12(a) exemption. CLI-84-8 at 2-3, n.3. LILCO asserted that "LILCO's strenuous efforts to comply with GDC-17 . . . weigh in favor of the exemption." Application for Exemption, at 24. LILCO also submitted testimony concerning LILCO's alleged good faith efforts to comply with GDC-17, and asserted that among LILCO's "efforts" which justify the exemption were: LILCO's efforts relating to the procurement of TDI diesels which were designed and manufactured to meet performance standards identified by LILCO; LILCO's quality assurance efforts relating to the procurement, design, and installation of the TDI diesels; LILCO's pre-operational testing program relating to the TDI diesels; and, LILCO's efforts following the catastrophic failure of one of the TDI diesels at Shoreham to remedy that failure. <u>See</u> Tr. 1703-15.

In response, Suffolk County submitted pre-filed testimony on precisely the subject addressed by LILCO. The County's testimony established: that LILCO had failed to take reasonable actions with respect to the TDIs to ensure compliance with GDC-17; that LILCO's failures began in 1974 and continued through the early 1980's; and that the failures involved, among other things, LILCO's quality assurance efforts and pre-operational testing efforts. For no explicable reason, the Miller Board denied the admission of the County's testimony even though it admitted LILCO's testimony on the same subject. See Tr. 2385-89. Clearly, there is a denial of due process when a fact finder admits one party's testimony on a subject and refuses even to consider the testimony submitted by another party on the identical subject.7/

The prejudicial impact of this Miller Board error is manifest in the October 29 Decision. The Board found that: "the evidence shows that LILCO intends to comply fully with the requirements of GDC-17 for full-power operation"; "the testimony of Brian McCaffrey showed that the TDI diesels were purchased under specifications designed to comply with GDC-17. When problems were discovered, extensive efforts were undertaken to cure the deficiencies"; and, "LILCO's efforts as described in detail constitute the good faith to be considered in evaluating the equities, and support the grant of an exemption." October 29 Decision at 67, 98-101. The Miller Board thus relied solely upon the LILCO testimony in purportedly "weighing the equities" as required by the May 16 Order; in reality, of course, no such "weighing" occurred in the presence of

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7/ For the Commission's convenience, copies of the County's testimony are provided herewith since, due to the Board's ruling, the testimony is not included in the hearing transcript. See Attachment 4.

only LILCO's one-sided evidence. In denying the County's evidence, therefore, the Miller Board denied Intervenors the right to a hearing on the question of LILCO's good faith efforts to comply with GDC 17, one of the issues the Commission had expressly identified as pertinent to an exemption ruling.

B. Exclusion of County and State Evidence Concerning Economic and Financial Disadvantages Resulting from Granting Exemption, and Admission of LILCO Evidence Concerning Alleged Economic and Financial Benefits of Granting the Exemption

LILCO asserted there were at least two benefits of low power operation following the granting of an exemption: the reduction in dependence on foreign oil; and certain economic benefits to LILCO ratepayers. Both these alleged public interest "benefits" allegedly would be achieved when Shoreham begins full power operation. See Application for Exemption at 19-21. LILCO submitted testimony which discussed these so-called benefits. The LILCO testimony did not deal with benefits resulting from the conduct of low power testing which is what would be authorized by the exemption, but rather dealt only with possible benefits resulting from the assumed full power operation of Shoreham.8/

When the County submitted testimony concerning the substantial financial and economic harm to the public that would result from the exemption if the assumption that is the converse of LILCO's -- i.e., that there would be no full

8/ The County and the State moved to strike such testimony as irrelevant and speculative because it did not deal with "benefits" which would accrue as the result of the grant of the exemption -- the matter at issue -- nor would such benefits even materialize until after the plant achieved full power operation. That motion was denied. See Tr. 1237-68, 1356.

power operation -- was a premise for evaluating the public interest, the County was precluded from doing so. The County's testimony which discussed the economic penalties which would result from contaminating Shoreham to perform low power testing assuming that authorization for full power operation did not follow was not admitted by the Miller Board. See Tr. 2145-48.9/

According to the Commission's own statements, the assumption that full power operation will never be achieved is at least as appropriate as the one preferred by LILCO. Thus, in its November 21, 1984 Memorandum and Order (CLI-84-21), the Commission expressly rejected the suggestion that "once a Phase I and II license is granted, the eventual issuance of a full power license is a foregone conclusion." CLI-84-21 at 5.10/

The prejudice resulting from the Miller Board's admission of LILCO's testimony concerning alleged economic benefits of the exemption and its refusal to admit the County testimony based on the converse assumption, is again manifest in the Board's Decision. The Board's rulings concerning alleged financial and economic hardships rely only upon testimony submitted by LILCO.11/ See October

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9/ For the Commission's convenience, a copy of the referenced portion of Messrs. Madan and Dirmeier's testimony, that is, pages 41-47, which were among those stricken by the Board, is Attachment 5 hereto.

10/ See also Commissioner Gilinsky's Separate Views filed with CLI-83-13 ("There cannot be adequate emergency preparedness for surrounding population without the participation of a responsible government entity. And, however they may qualify their views now, I do not believe that a single Commissioner would actually approve the operation of the plant without such participation." (emphasis added))

11/ Richard Kessel, the Chairman of the State of New York Consumer Protection Board, whose job it is to represent the consumers of the State of New York,

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29 Decision at 60-63. Moreover, the specific findings concerning alleged fuel savings, reduced dependence on foreign oil, and benefits to ratepayers, are all based solely upon the LILCO-proffered assumption of eventual full power operation. Id. at 61. The fact that only such one-sided evidence was considered by the Miller Board in its exigent circumstance finding constitutes clear error and the denial of a fair hearing.12/

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submitted testimony on behalf of New York. A copy of his testimony, marked to reflect the Miller Board's rulings, is Attachment 6 hereto. As can be seen, much of it was stricken by the Board, but sentences stating that it is not in the public interest to contaminate a nuclear facility before uncertainties surrounding its future operation have been resolved, and that if Shoreham were operated at low power and subsequently were abandoned, the costs that ratepayers would ultimately bear would be increased, were (inexplicably) let in. LILCO argued that Mr. Kessel's testimony should be disregarded because it was not supported by any facts. See e.g., Tr. 3104-105. The County testimony stricken by the Miller Board provided substantial factual support for Mr. Kessel's more summary testimony. See Tr. 2145-48 and Attachment 5 hereto. Consistent with LILCO's suggestion, the Miller Board's Decision fails even to acknowledge the existence of Mr. Kessel's testimony on this matter of the public interest. The one citation to Mr. Kessel's oral testimony (see last transcript citation in n.127 in Decision) is incorrect; Mr. Kessel's statement does not support the Board's assertion for which it is cited.

12/ The Miller Board's reliance upon LILCO's testimony about the relationship between the issuance of a license and its own private financial needs was also clearly erroneous. Thus, the Board apparently accepted as "an equity" weighing in favor of the exemption, the LILCO testimony that "the granting of a low-power exemption would send a positive signal to the capital markets that would help to alleviate LILCO's financial distress in obtaining its totally needed cash by the issuance of securities." October 29 Decision at 61. This Commission cannot countenance such a clearly improper attempt by the Miller Board to base, even in part, a decision to operate a nuclear power plant upon a perceived need to "send a signal" to the capital markets.

C. Exclusion of County and State Testimony Concerning Where the Public Interest Lies with Respect to the Grant of the Exemption, and Admission of All LILCO Testimony Concerning the Same Issue

As noted, LILCO submitted evidence concerning purported benefits to the public which would result from eventual full power operation of Shoreham. Such evidence was apparently the only basis upon which the Miller Board determined that the granting of the exemption is in the public interest. See October 29 Decision at 103-104, ¶¶ 5 and 6.13/ Thus, the Miller Board's "conclusion of law" that "the Application meets the 'otherwise in the public interest' provision of 10 CFR § 50.12(a)" is based solely upon the Board's finding that LILCO had met the "exigent circumstances test set forth by the Commission"; that finding, in turn, is based solely upon the Board's so-called "balancing of the equities" and its finding that "the Application and evidence adduced in support thereof demonstrate the 'exigent circumstances' that favor the granting of an exemption...." This wholly circular analysis is devoid of any substantive content or basis in logic or fact and must be rejected. In actual fact, the Miller Board never even considered the interests of the public with respect to the LILCO request; rather, it considered only the one-sided "evidence" which dealt with LILCO's interests.14/

13/ The only other mention of the "public interest" in the October 29 Decision is under the heading "Public Interest in Adherence to Regulations." The discussion there makes no reference to any of the evidence which the County and State submitted or attempted to submit concerning the actual interests of the public living in Suffolk County and New York State concerning the exemption. See October 29 Decision at 68-69.

14/ The Miller Board's treatment of the public interest finding required under Section 50.12(a) violates Connecticut Yankee, 2 AEC 393 (1964), which held

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Furthermore, although LILCO was permitted to submit testimony concerning LILCO's slanted view of the public's interest, the Miller Board refused to admit evidence submitted by the actual elected representatives of the public -- the Governor of New York and Suffolk County -- which would have set forth several reasons why it is not in the public interest to grant an exemption to LILCO. Thus, Suffolk County submitted testimony which discussed the impact upon electrical service to LILCO's customers which would result from the exemption, and New York submitted testimony that the electrical power from the Shoreham is not needed for at least ten years. See Attachments 5 and 6. It cannot be disputed that the public servants who were denied the right to present evidence are in a far better position to advise the NRC regarding where the public interest lies than LILCO. See NRC representation to the Court of Appeals in the Diablo proceeding, cited above. Therefore, the Board's reliance upon LILCO's purported public interest testimony and its refusal even to consider the testimony submitted by the Governor, representing the millions of residents of the State, and Suffolk County, which has 1.3 million residents, whose obligation and responsibility it is to serve and protect the public who have elected them, constitutes clear error.

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that the public interest determination is not intended to be a repetition of the factors considered in making the safety of life and property findings, but rather "constitutes a distinct and separate aspect" of an exemption decision. Id. at 394, n.1. See also October 29 Decision at 69 for another example of this Miller Board error.

D. Exclusion of Suffolk County Testimony Which Demonstrated that Operation With the Alternate AC Power Configuration Would Not Be As Safe As Operation With a Fully Qualified On-Site Power System, and Admission of All Evidence Submitted by the Staff and LILCO Concerning the "As Safe As" Comparison

The Board admitted LILCO and Staff testimony asserting that operation of Shoreham with the alternate AC power configuration would be as safe as operation with a fully qualified source of on-site AC power. The Board refused to consider, however, County testimony which evaluated the relative safety of the alternate AC power configuration against that of a qualified on-site configuration. See Tr. 2856-58. In making this ruling, the Miller Board once again followed its pattern of denying Intervenors a fair hearing.

Specifically, the County testimony demonstrated that operation of Shoreham with the alternate AC power configuration would not be as safe as operation with a fully qualified onsite power system.15/ The County witnesses had performed both qualitative and quantitative (PRA) analyses in support of their opinions. Their testimony documents that low power operation with the alternate AC power system is quantifiably less safe than low power operation with a fully qualified AC power system: a loss of off-site power transient during low power operation of Shoreham is seven times more likely to lead to a core vulnerable condition with the alternate configuration than with a fully qualified source of on-site AC power; and the likelihood that Shoreham would experience an event leading to

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15/ Copies of the County testimony, which due to the Board's ruling is not contained in the hearing transcript, are provided herewith as Attachment 7.

core vulnerability during low power operation is two and one-half times greater under the alternate configuration than it would be under a qualified configuration. Such testimony was directly responsive to the comparison mandated by the Commission's May 16 Order.

The Miller Board clearly erred in refusing to admit this testimony.16/ The prejudice is again manifest in the October 29 Decision. Although the Board discussed to a limited extent the reliability of individual items of equipment involved in the alternate AC power configuration, it also asserted that a "point-by-point comparison of Shoreham's emergency power configuration with TDI diesels and without them" is not a proper comparison; rather, the Board asserted, a "functional comparison" is proper. See October 29 Decision at 25-26. In discussing this functional comparison, however, the Board considered only the LILCO and Staff testimony, since the County's evidence related to the functional comparison of the two systems was denied admission by the Board. Thus, the Board improperly characterized the County's position in the hearing as being limited to "a point-by-point comparison." Id. at 22-23, 25.17/

16/ The Board's assertion that a probabilistic risk assessment is not "a proper method to be used in this proceeding" (Tr. 2858) is simply wrong and, in any event, is beside the point. PRAs have been required by the Staff in some proceedings, and the full power PRA performed by LILCO has been reviewed by the Staff and was considered by the Brenner Board. Furthermore, while there may be no requirement to perform PRA analyses as a general matter, there is also no bar to the use of probabalistic data, if available, to evaluate the relative safety of operation in different configurations. The Miller Board's ruling, particularly in the face of its admission of all evidence submitted by LILCO and the Staff, was clearly erroneous and highly prejudicial.

17/ The Board similarly incorrectly asserted that:

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Moreover, the Miller Board's finding that evidence concerning the inferiority of the alternate equipment or its vulnerability to single failures was "irrelevant" (id. at 51) is inexplicable, and clearly erroneous. What could be more relevant to findings under the "as safe as" criterion than a discussion of the vulnerabilities and inferiorities of such equipment?

Despite its refusal to consider the County's testimony, the Miller Board found that operation with the alternate AC power configuration "provides a comparable level of protection as a fully-qualified system would and thus meets the 'as safe as' standard set by the Commission in CLI-84-8." Id. at 55 (emphasis added). See also id. at 102. In addition, the Miller Board apparently interpreted the "as safe as" standard as requiring "a comparable level of protection." Id. at 27. Clearly, in reaching its "as safe as" -- or "comparability" -- conclusion without even considering the County evidence concerning the precise comparison mandated by the Commission, the Board erred, and denied Intervenors a hearing on an issue central to the exemption request. Indeed, in ignoring evidence that low power operation under the exemption would be seven times less safe than with a qualified AC power system, the Miller Board made a mockery of the entire proceeding.

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> Suffolk County's testimony was devoted almost exclusively to showing that each unit in the enhanced system (the gas turbine and the EMDs) was either inferior to the qualified system or, in the case of the EMDs, that the potential existed for a single failure which would disable all four of them.

Id. at 50-51. Such characterizations of the County's testimony are in fact a reflection only of the Board's own erroneous evidentiary ruling.

E. Denial of Hearing on Security Issues Arising from Proposed Changes in AC Power Configuration and Applicable to Low Power Operation and Findings of Fact Without any Basis in Evidentiary Record

The Commission has recognized that physical security issues are pertinent to the granting of an exemption. See NRC Memorandum and Order, July 18, 1984 at 2-3, and n.1. That Order was issued in response to the County/State motion for directed certification of a June 20, 1984 Miller Board Order which precluded Intervenors from raising any physical security issues. The Commission later stated that in issuing its July 18 Order, it had "specifically considered the full text of the 1982 settlement agreement" between LILCO and Suffolk County relating to LILCO's then existing security plan. NRC Memorandum and Order dated August 20, 1984 at 2. The Commission also recognized that LILCO's exemption application "represent[ed] a new development in this proceeding, and it raise[d] some new issues not heretofore considered." July 18 Memorandum and Order at 2. The Commission held that the parties "were to be afforded the opportunity to raise new contentions, so long as they were responsive to new issues raised by LILCO's exemption request, relevant to the exemption application and decision criteria cited and explained in the May 16, 1984 Order, and reasonably specific and otherwise capable of on-the-record litigation." Id. at 2-3.

Suffolk County and the State of New York submitted seven detailed contentions concerning the security issues raised by LILCO's exemption proposal. Due to safeguards considerations, we do not discuss the details of those contentions in this pleading, but instead refer the Commission to the Suffolk County and State of New York Reply to LILCO Security Filing dated August 28, 1984. On

September 19, the Miller Board denied admission to all the proposed security contentions, despite the fact that the Staff had agreed that certain of the contentions were both admissible for litigation and raised legitimate substantive concerns with which the NRC Staff agreed. See, e.g., Tr. S-81, S-133, S-144-48, S-190-91, S-195. This Miller Board ruling was also made in the face of LILCO's admission that the existing physical security plan had never been modified to take into account the configuration changes proposed for low power operation. See e.g., Tr. S-10, S-70.

Despite its refusal even to consider specifically identified security issues, much less to obtain evidence on those issues, the Miller Board nonetheless had the audacity to make factual findings concerning the alleged adequacy of LILCO's physical security arrangements. See October 29 Decision at 76-77, Findings 21-25.18/ Such baseless findings are further evidence of the Miller Board's incapability of conducting a fair proceeding.

Of course, given the language of Section 50.12(a) and the Commission's July 18 Order, security findings are necessary in ruling upon LILCO's exemption request, particularly in view of the security vulnerabilities created by LILCO's alternate AC power configuration. The Miller Board's findings relating to security, however, are clearly without any factual basis in the evidentiary record. Moreover, if the County and State had been permitted to present evidence, the

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18/ One of these findings purports to rely upon LILCO and Staff representations made after the Board had improperly rejected the proposed contentions. The remainder have no stated basis whatsoever.

baseless assertions in the Miller Board's Decision would have been proven false. Thus, the Miller Board's findings 22, 23 and 24 track, in some respects almost verbatim, the contentions proposed by the State and County, which were rejected by the Miller Board. Its subsequent purported "findings of fact" on the precise issues the Intervenors sought to litigate, is so outrageous that it practically defies belief. Thus, in addition to the error embodied in the Board's September 19 Order denying admission of the security contentions, the Miller Board's subsequent issuance of so-called "findings" concerning the alleged adequacy of LILCO's security provisions also constitutes an additional and even more prejudicial violation of Intervenors' due process rights.

F. Failure to Consider Evidence Concerning Whether There is a Need for the Electric Power to be Provided by Shoreham

The Miller Board refused to admit New York testimony which established that there is no need for Shoreham's power for at least 10 years and perhaps longer. Commission precedent makes clear, however, that need for the power is relevant to decisions on exemption requests. See United States Department of Energy (Clinch River Breeder Reactor Plant), CLI-83-1, 17 NRC 1, 4 (1983); Washington Public Power Supply System (WPPSS Nuclear Projects Nos. 3 and 5), CLI-77-11, 5 NRC 719 (1977).19/ In direct conflict with this legal authority, however, the

19/ The Miller Board appears to acknowledge the significance of this fact by its citation of Shearon Harris II, CLI-74-22, 7 AEC 938 (1974), which it quoted as holding that "the timely satisfaction of public needs by reducing unanticipated delays in the realization of facility benefits . . . constitute[s] exigent circumstances." October 29 Decision at 58.

Miller Board struck the New York testimony on the question of the need for electric power, ruling that such testimony was irrelevant. See Tr. 2903. The Board's refusal to consider whether there is any need for the power to be supplied by Shoreham was clearly erroneous.

The fact that Shoreham's power is not needed totally obviates the need for the unprecedented rush to license Shoreham by means that violate the parties' constitutional rights and defy logic and reason. Because there is no need for Shoreham's electricity, there is no need to dispense with the requirement that LILCO comply with safety regulations. Moreover, the only logical and reasonable course of action -- resolving the uncertainties relating to emergency planning before any contamination of the reactor -- can be followed without any adverse impact on the provision of electricity to Long Island. The Commission has no choice but to recognize this plain and obvious fact: no interests other than LILCO's private ones will be served by tolerating or approving the illegal actions of the Miller Board or by granting the exemption.

G. Improper Reliance Upon Evidence Concerning the Length and Costs to LILCO of the Shoreham Licensing Proceeding

LILCO's evidence concerning the alleged existence of exigent circumstances to justify an exemption included testimony concerning the length and costs of the NRC licensing proceeding. Intervenors moved to strike as irrelevant this testimony (Tr. 1715-31), in which LILCO (a) complains that the Shoreham proceeding has lasted for several years, (b) alleges that the Staff has imposed extra and technically unjustified burdens on LILCO, and (c) complains that LILCO has had to expend a great deal of resources in pursuing its quest for a license. See Tr. 1680-92. The Staff agreed that this testimony was irrelevant. Tr. 1693.

There is no indication in any Commission precedent that such evidence (even if believed) would support an exemption. Nonetheless, the Miller Board relied heavily upon this LILCO testimony in its October 29 Decision:

> The costs of unusually heavy and protracted litigation may also properly be considered in evaluating financial or economic hardship as an equity in this exemption proceeding. . . . It is beside the point to argue that such litigation is permitted under NRC regulations. Although not illegal, such interminable litigation has resulted in great expense to LILCO, both in terms of time and resources. . . .
>
> The unusually heavy financial and economic hardships associated with the very protracted Shoreham licensing proceedings constitute a significant equity, which we hold can reasonably be held to amount to exceptional circumstances in the context of granting a low power exemption.

October 29 Decision at 62-63 (emphasis added). See also id., at 59-60. There is no legal, factual, or logical basis for the Board's conclusion that LILCO's litigation costs constitute exigent circumstances which justify an exemption from compliance with important safety regulations.[20] The Board's reliance upon LILCO's clearly irrelevant testimony, as well as its consideration only of the

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20/ The Staff and the Commission's Licensing Boards are required to make findings concerning the safety of a nuclear plant, and undertake whatever reviews are necessary to enable them to make the requisite findings. The fact that in the case of Shoreham extensive Staff review and hearings have been necessary to make the findings required under the regulations does not constitute the kind of "exigent circumstances" which justifies an exemption or the issuance of a license.

alleged financial and economic hardships borne by LILCO and its refusal even to consider those put forth by the State and the County which would be borne by the public, constitutes clear error.

H. Improper Consideration of Prior Staff Practices as Basis for Finding Exigent Circumstances to Support Exemption

In "weighing the equities" and determining that exigent circumstances exist, the Miller Board considered prior Staff practices in permitting the issuance of licenses despite noncompliance with safety regulations. See October 29 Decision at 63-66. The information apparently relied upon by the Miller Board concerning such prior Staff practices is not in the evidentiary record and was never available to be cross-examined. Nor did Intervenors have any opportunity to challenge the relevance, similarity or applicability to the facts at issue in this proceeding of the information apparently relied upon by the Miller Board. The Miller Board's reliance upon such extra-record information is clearly erroneous, and constitutes yet another example of its flagrant abuse of due process.

Further, the Miller Board's suggestion that the Staff's behavior in situations involving other utilities or regulations somehow justifies the issuance of a license in the face of LILCO's non-compliance at issue here, whether on the basis of a "constitutional equal protection" theory, or for the sake of "consistency," is patently absurd. This Commission has ruled expressly on how LILCO's noncompliance with the Commission's regulations must be handled. Whatever the Staff may have done prior, or even subsequent, to the Commission's Shoreham rulings with respect to other plants, and whether such actions were right or wrong, cannot change the Commission's ruling that LILCO must meet the Section 50.12 standards as enunciated in the May 16 Order. The Board's finding that allegedly "inconsistent" Staff practices constitute an exigent circumstance that justifies the exemption request is clearly erroneous.

I. Improper Consideration of Offsite Power System

The Miller Board discusses what it terms the "reliability of LILCO's normal off-site power system." October 29 Decision at 40-46, 82-85. After discussing various aspects of LILCO's off-site AC power system, the Board concludes that it is "unlikely that power would be unavailable to either the NSST or the RSST from normal off-site sources." Id. at 46.

However, this exemption proceeding exists because LILCO does not have an on-site electric power system. The Miller Board was instructed by the Commission to consider whether LILCO's alternate configuration would result in low power operation that would be as safe as that available with a fully qualified on-site power system. LILCO's offsite power system is irrelevant. Rather, the entire focus of this proceeding was to be not on LILCO's normal offsite power system which is a constant on both sides of the comparison mandated by the Commission; the focus was to be the reliability and capability of LILCO's proposed alternate configuration (the gas turbine and EMDs) as compared to a fully qualified on-site system. Thus, to compare the relative safety of operation with a qualified on-site system and with LILCO's proposed alternate configuration, it must be assumed that the off-site system is not functioning. See also, GDC 17.

The Miller Board's speculation about the adequacy of LILCO's off-site system and whether a loss of off-site power would be likely was irrelevant and clearly erroneous.

J. Other Errors Relating to "As Safe As" Finding

1. Improperly Changing the Legal Standards Set Forth by the Commission

In its May 16 Order, the Commission established the exemption requirements which LILCO must satisfy, including that LILCO must demonstrate "that, at the power levels for which it seeks authorization to operate, operation would be as safe under the conditions proposed by it, as operation would have been under a fully qualified on-site AC power source." CLI-84-8, at 2-3. The foregoing standard was binding upon the Miller Board. However, throughout the proceeding, the Miller Board discussed at length, particularly with the Staff, whether the standard articulated by the Commission means what it says or whether it means something else, such as "substantially as safe as," or "a comparable level of safety." See Tr. 3027 et seq. The Board appears to adopt the Staff view that "as safe as" means "a comparable level of protection." See October 29 Decision at 27.

The Board's deviation from the Commission's standard was improper. An allegedly "comparable level" of safety is not the same as being "as safe." The Commission's standard calls for a direct comparison of the two AC power configurations -- the alternate system versus the fully qualified system. If the safety provided by operation with the alternate system does not fully measure up to that provided by operation with a fully qualified system, then the exemption must be denied. The Miller Board's reliance upon a "comparable level of safety" standard violates the Commission's May 16 Order.

This error is significantly prejudicial for several reasons. First, the use of a "comparable safety" standard permitted the Miller Board to ignore the obvious reduction in safety that would result from low power operation with the alternate configuration. See subsection (2) below. Thus, the Miller Board admitted that "there is unquestionably a lesser margin of safety provided by LILCO's alternate power system," thereby establishing that LILCO does not satisfy the Commission's "as safe as" standard. October 29 Decision at 24.21/

Clearly, the Miller Board blatantly ignored the standard set by this Commission: the Commission did not set a standard of whether operation with the alternate configuration would be safe enough; rather, operation with the alternate configuration must be as safe as operation would have been with fully qualified TDI diesels. A reduction in the margin of safety, and a reduction in

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21/ The Miller Board also rejected as irrelevant the fact that a qualified system could provide emergency power to safety loads within 15 seconds, whereas the alternate configuration could not supply power for a minimum of several, but up to 30, minutes. The Board thus found that since there are at least 55 minutes to restore power before core damage results during low power operation, it is not significant that 30 minutes of that time (as opposed to 15 seconds) could be necessary before any power is available under LILCO's alternate configuration. See id. at 23-25. The Board's assertion that "there is no need to consider the relative merits of the two systems per se, because for the purpose of the exemption request, it is only necessary to establish that the enhanced system is capable of performing its intended function" (id. at 52), is another example of the Board's improper application of the standard set by the Commission.

the defense in depth protection which is central to the NRC's licensing concept, cannot be ignored under the Commission's as safe as standard.

Second, the Board's alteration of the Commission's standard constitutes another of the Miller Board's pattern of violations of the parties' fundamental rights. To require the parties to litigate the case according to one standard -- that set by the Commission -- and then to decide it according to a different standard -- the Miller Board's clearly erroneous one -- contravenes the federal constitutional guarantee of procedural due process and Commission precedents.22/ Due process requires that parties be given fair notice of any changes to regulatory requirements and that litigation must proceed according to standards articulated beforehand, not those created after the fact to justify a decision in favor of one party rather than another.

2. Failure to Consider Factual Evidence Concerning the Safety of Operation With the Alternate Configuration

We set forth in summary fashion below, particular facts, upon which Suffolk County submitted expert testimony which document a real reduction in safety to be provided by the alternate configuration as compared to a qualified configuration, each of which was ignored by the Miller Board in reaching its "as safe as" conclusion (all these facts are set forth in the County and State August 31 submittals (Attachment 3)):23/

22/ Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 186 (1978); Niagara Mohawk Power Co. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 353-55 (1977); Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-82-30, 15 NRC 771, 781-82 (1982).

23/ The Decision did acknowledge that at least some of the facts were presented by the County; however, th Miller Board inexplicably concluded that

(Footnote cont'd next page)

1. The alternate configuration contains only two nonsafety-related power sources, whereas the qualified configuration contains three fully safety-related power sources.

2. Portions of the alternate configuration share common elements with the off-site power system and also share common features with each other, thus making the alternate system subject to single failures; each of the three qualified diesels is a completely independent power source that is physically isolated from each of the other two and is fully independent of off-site power sources.

3. One-half of LILCO's alternate configuration -- the four EMD diesels -- is subject to single failures that would disable the entire set of diesels because the four units share a common fuel system, a common starting system, common output cables and common controls; each of the three qualified diesels meets the single failure criterion.

4. The alternate configuration requires many manual operations in different areas both inside and outside plant buildings, giving rise to opportunities for human error; a qualified system is fully automatic.

5. The alternate configuration is vulnerable to seismic events and is likely to fail in an SSE; a fully qualified system is designed to withstand the SSE.

6. The alternate configuration has essentially no local fire detection or extinguishing systems and the abnormal condition alarms associated with the alternate configuration are not annunciated in the control room; a qualified system includes both fixed fire detection and extinguishing systems for each generator, and a comprehensive alarm system which is annunciated in the control room.

7. At least 16 additional technical specification requirements and 9 license conditions must be imposed before operation with the alternate configuration would be acceptable to the Staff; none of these requirements or conditions would be needed with a qualified source of AC power.

(Footnote cont'd from previous page)

operation with the alternate configuration would be as safe as operation with a qualified system in the face of the clear evidence to the contrary which we list above.

Respectfully submitted,

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November 29, 1984

ATTACHMENT 1

THE WHITE HOUSE

WASHINGTON

October 11, 1984

Dear Bill:

I want you to know of my appreciation for your continuing contributions to and support for my Administration. Your leadership and courage have been determining factors in the progress we have made in the last few years.

On a matter of particular concern to you and the people of Eastern Long Island, I wish to repeat Secretary Hodel's assurance to you that this Administration does not favor the imposition of Federal Government authority over the objections of state and local governments in matters regarding the adequacy of an emergency evacuation plan for a nuclear power plant such as Shoreham. Your concern for the safety of the people of Long Island is paramount and shared by the Secretary and me.

Thank you again for your support. I look forward to working with you in the years ahead.

Sincerely,

Ronald Reagan

The Honorable William Carney
House of Representatives
Washington, D.C. 20515

ATTACHMENT 2

Introduced by Legislator(s) Blass, Foley, LaBua, Prospect

SENSE OF THE LEGISLATURE RESOLUTION REITERATING SUFFOLK COUNTY'S OPPOSITION TO LILCO'S SHOREHAM NUCLEAR POWER PLANT

SENSE 3

WHEREAS, the Nuclear Regulatory Commission is considering Lilco's request to operate the Shoreham Nuclear Power Plant at lower power levels up to 5%; and

WHEREAS, Suffolk County has determined in Resolution 111-1983 that in recognition of the impossibility of evacuating or otherwise protecting the health, welfare, and safety of the citizens of Suffolk County in the event of a serious nuclear accident at the Shoreham plant, the County will not adopt or implement a radiological emergency plan for Shoreham; and

WHEREAS, the Governor acting on behalf of the State of New York has determined not to impose a radiological emergency plan on Suffolk County or otherwise to act in a manner inconsistent with the determination of Suffolk County; and

WHEREAS, Suffolk County and New York State has asserted to the Nuclear Regulatory Commission in the pending licensing proceedings that both governments oppose the licensing of Shoreham, including operation of Shoreham at low power; and

WHEREAS, the low power operation of Shoreham would contaminate the plant while there is no reasonable basis on which to believe the plant should ever operate at commercial power levels; and

WHEREAS, the cost of cleaning up such contamination of the Shoreham plant following lower power operation would be well in excess of $100 million; and

WHEREAS, the quantity of electricity which Shoreham represents will not be needed for at least a decade and, therefore, there is no reason for the Nuclear Regulatory Commission to make a precipitous decision concerning low power operation at Shoreham; and

WHEREAS, the President of the United States wrote on October 11, 1984, that "...this Administration does not favor the imposition of federal government authority over the objections of state and local governments in matters regarding the adequacy of an emergency evacuation plan for a nuclear power plant such as Shoreham;" and

WHEREAS, any action by the Nuclear Regulatory Commission to license Shoreham to operate at low power levels would constitute the imposition of federal government authority over the objections of Suffolk County and the State of New York; and

WHEREAS, such action by the Nuclear Regulatory Commission would be in derogation of the comity and cooperation the federal government should show with respect to this issue, which is a matter of particular local and state concern; now, therefore, be it

RESOLVED, that Suffolk County hereby reiterates its opposition to the operation of the Shoreham plant at any and all power levels; and be it further

RESOLVED, that Suffolk County hereby urges the Nuclear Regulatory Commission to deny Lilco's pending request to operate Shoreham at low power levels up to 5%; and be it further

RESOLVED, that the clerk of the County Legislature promptly transmit a copy of this resolution to the Chairman and Commissioners of the Nuclear Regulatory Commission and to other officials of the federal administration and Congress as appropriate.

DATED: 11/27/84