UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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
MOTION FOR STAY OF MILLER BOARD DECISION

On February 12, 1985, the Commission ruled that the Miller Board's October 29, 1984 Initial Decision ("Decision"), could become effective. Suffolk County and the State of New York move this Board to stay the Miller Board authorization for the grant of an exemption pending a decision on the merits of our appeal by the Appeal Board.

I. THERE IS A STRONG PROBABILITY THAT THE COUNTY AND STATE WILL PREVAIL ON THE MERITS OF THEIR APPEAL

In the County/State Brief submitted on December 11, 1984, the County and State demonstrate that the Decision must be reversed because their due process rights were violated in the proceeding conducted by the Miller Board, and because the Decision violates the Commission's rulings and regulations. Because of these errors, the State and County submit they will prevail on the merits of their appeal.1/

1/ This Board is familiar with the bases for our argument, particularly since the Board heard oral argument on February 11, 1985. Therefore, due to the Section 2.788 page limitation, we only summarize those errors herein.

First, there is no possible basis upon which the Miller Board could have made the public interest findings mandated by Section 50.12(a) (see discussion Section IV, infra) or found that the circumstances of the case were so "extraordinary" (May 16 Order, fn. 3) as to justify a special exemption. Indeed, given the fact that low power testing is nowhere near the "critical path" (assuming this Board uses that concept), there is no circumstance at all that could justify this extraordinary action.

Second, the Miller Board denied due process and a fair hearing to the County and State by refusing to admit evidence submitted by the County and State on the issues identified by Section 50.12(a) and the Commission as being central to a decision on whether to grant an exemption, with accompanying rulings that LILCO and Staff evidence on precisely the same issues was admissible. This denial of the right to submit evidence on critical issues was made even more prejudicial by the Miller Board's subsequent reliance upon the one-sided LILCO and Staff evidence in its Decision. See County/State Brief at 4-14, 16-18, 25-29, 32-36, and Attachments 1-4.

Third, the Miller Board also denied Intervenors' right to a hearing on physical security issues which pertained to both the security and the public health and safety determinations required by Section 50.12(a).2/ The County and State, then supported by the NRC Staff, had submitted focused contentions on why the alternate AC power equipment needed to be treated as "vital equipment."

2/ See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), NRC Memorandum and Order, July 18, 1984 (slip op. at 2-3).

Without legal or factual basis, the Miller Board denied admission of the contentions, thus refusing to permit any evidentiary record to be compiled. Thereafter, in violation of Intervenors' rights, the Miller Board purported to make substantive "findings of fact" -- without any evidentiary record -- on the precise security and safety issues which Intervenors had sought to litigate, including a "finding" that LILCO's new emergency power equipment did not have to be designated or protected as "vital equipment." See County/State Brief at 18-25.

Finally, the Miller Board also misapplied the Commission's May 16 Order in finding that low power operation with the alternate AC power configuration would be as safe as low power operation with a fully qualified power source, despite its admission that with the alternate configuration "there is unquestionably a lesser margin of safety." Decision at 24. In approving the exemption request in light of that finding and other evidence of record that the margin of safety with the alternate configuration would be substantially less than with a qualified system, the Miller Board violated the Commission's May 16 Order and 10 CFR § 50.47(d). See County/State Brief at 36-42.3/

The Miller Board's errors denied Intervenors their due process right to a fair hearing.4/ This Board must find that there is a strong probability that

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3/ See also County/State Brief at 43-62, 14-16, 29-32, and 42-43 for discussion of other Miller Board rulings which violate Commission precedent and regulations.

4/ See, e.g., Morgan v. U.S., 304 U.S. 1 (1938); Ohio Bell Telephone Co. v. Public Utilities Comm., 301 U.S. 292 (1937); ICC v. Louisville & Nashville Ry., 227 U.S. 88 (1912); Union of Concerned Scientists v. NRC, 735 F.2d

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the County and State will prevail on the merits of their appeal.

II. THE COUNTY AND STATE WILL SUFFER IRREPARABLE INJURY IF THE STAY IS DENIED

The irreparable injury standard is satisfied. First, a denial of due process or other deprivation of a constitutional right constitutes irreparable harm per se. No further showing of "harm" is required to support immediate injunctive relief. Cuomo v. NRC, Civ. No. 84-1264 (D.D.C. April 25, 1984) (slip op. at 7).5/ Since the State and County have demonstrated constitutional violations by the Miller Board, the irreparable harm criterion is satisfied here just as the U.S. District Court held it had been in issuing a Temporary Restraining Order to stop the unconstitutional actions of the Miller Board in April 1984.6/

Second, if the stay is not granted, the County/State appeal of the Decision will be rendered moot by the commencement and probable completion of the Phase III/IV testing program prior to an Appeal Board decision on the merits of the appeal. LILCO stated yesterday at a Staff briefing that it will complete Phase

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1437 (D.C. Cir. 1984), cert. denied, 53 U.S.L.W. 3484 (Jan. 8, 1985); Carnation Co. v. Sec. of Labor, 641 F.2d 801 (9th Cir. 1981); Bowden v. McKenna, 600 F.2d 282 (1st Cir.), cert. denied, 444 U.S. 899 (1979).

5/ United Church of the Medical Center v. Medical Center, 689 F.2d 693 (7th Cir. 1982); Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971); Henry v. Greenville Airport Comm., 284 F.2d 631 (4th Cir. 1960); O'Conner v. Mowbray, 504 F. Supp. 139 (D. Nev. 1980).

6/ Further, an agency's failure to follow its own rules, such as the Miller Board did here, constitutes an independent basis for finding a due process violation. See Vitarelli v. Seaton, 359 U.S. 535 (1959); Hupart v. Bd. of Higher Ed., 420 F. Supp. 1087 (S.D.N.Y. 1976).

II today, and thus is ready to begin Phase III. It also stated yesterday that even if problems are experienced during Phases III and IV, it expects to complete all such testing in less than 42 days.7/ Absent a stay, the Phase III/IV testing and inevitable radioactive contamination of the plant will occur. There will be a definite change in the status quo and LILCO will have been permitted to carry out the very activities the County and State have sought to prevent. No subsequent Appeal Board decision would be able to undo that fact; even a decision reversing the Miller Board would have no effect unless a stay is granted. Even the potential mooting of an appeal can constitute irreparable harm justifying a stay.8/ See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB Memorandum and Order, ____ NRC ___ (May 24, 1984) (slip op. at 7-8) (FEMA would be irreparably harmed if appeal mooted by denial of stay).

III. THE GRANT OF A STAY WILL NOT HARM LILCO

The activities to be stayed can be completed in only 23.6 to 42 days. Accordingly, even if Phase III/IV testing were on the critical path toward achievement of full power operation (which it is not), the possible delay in achieving full power would be minor. However, it is clear that a halt to Phase

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7/ Before the Miller Board, LILCO's schedule provided for a total of 23.6 days for Phases III and IV: 6.9 days to complete Phase III, and 16.7 days to complete Phase IV. (SC LP Exhibit 2, and Tr. 767-69, 776, 780 (Gunther)).

8/ Scripps-Howard, Inc. v. FCC, 316 U.S. 4 (1942); Zenith Radio Corp. v. United States, 710 F.2d 806 (Fed. Cir. 1983); Public Utilities Comm. v. Capital Transit Co., 214 F.2d 242 (D.C.Cir. 1954); Township of Lower Alloways Creek v. NRC, 481 F. Supp. 443 (D.N.J. 1979).

III/IV activities sufficient to permit this Board to address the merits of the appeal will have no impact whatsoever on the timing of LILCO's full power ascension assuming, arguendo, that a full power license were eventually issued.

First, assuming an Appeal Board decision on the merits of the appeal were issued in April 1985, and that the decision were in LILCO's favor, LILCO would suffer no harm from a delay of Phase III/IV testing because no full power license likely could be issued before January 1986 (assuming arguendo that LILCO prevails on all full power issues).9/ If Phase III/IV testing were stated in April 1985, there would be ample time between April and December to conduct the Phase III/IV testing. Thus, the grant of a stay would not result in any delay of the plant's ultimate operation, or harm to LILCO.10/

9/ Several proceedings and decisions must be completed, conducted, and resolved in LILCO's favor, before a full power license could be authorized. A Brenner Board decision on TDI diesel issues appears unlikely before May 1985. A Board decision on emergency planning issues which have been litigated so far is not expected before April 1985. No proceedings have yet been scheduled on the new issues raised by LILCO's motion to reopen the record, which was granted. See ASLB Memorandum and Order Granting LILCO's Motion to Reopen Record, Jan. 28, 1985. Further, an emergency planning exercise must be held. The County and State oppose the conduct of an exercise and neither the NRC nor FEMA has agreed even to schedule one. FEMA normally requires 120 days to prepare for an exercise once scheduled and then several months to prepare its findings. If an exercise were held, the County and State would then be entitled to a hearing regarding its adequacy/outcome; time will be required to prepare for the hearing and have a Board decision thereafter. There also must be a decision in the pending State court case challenging LILCO's authority to implement its emergency plan. It appears unlikely that final resolution of all outstanding issues could possibly come before December, 1985. After that, again assuming arguenda all issues were resolved in LILCO's favor, another month must be added for immediate effectiveness review. 10 CFR § 2.764(f)(2)(iii). Thus, the earliest a full power authorization could be issued is January 1986.

10/ In addition, LILCO has stated that there is no problem in halting the low power testing program after it has begun. See, e.g., LILCO's Substitute

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IV. THE PUBLIC INTEREST FAVORS ISSUANCE OF A STAY

In this case the public interest mandates the issuance of a stay. First, the public interest cannot possibly favor a drastic change in the status quo -- contaminating the reactor -- which simply is not needed. It is undisputed that low power testing standing alone produces no benefits and serves no purpose except as a step toward full power operation.11/ The public interest does not favor a rush to contaminate Shoreham and moot parties' appeal rights in the face of serious due process violations, particularly since even if the appeal were decided in LILCO's favor, there would still be a long delay after the activities sought to be stayed were completed before any full power ascension could possibly be authorized.12/

Second, both Suffolk County and New York have urged that the public interest requires, at a minimum, maintenance of the status quo. This Board must give great weight to the views of the State and County. In its brief before the U.S.

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Comments Concerning Immediate Effectiveness of Low Power Initial Decision, November 29, 1984, at 13. Thus, by LILCO's own admission, a stay of Phases III and IV, even though Phases I and II will have been completed, would not be harmful. Further, LILCO should not be heard to complain about issuance of a stay because almost every Miller Board ruling which denied the County and New York due process was made at LILCO's urging. See County/State Brief at 10, 12-13, 16, 18, 24, 25-28, 29, 33.

11/ See NRC Staff Response to County/State Appeal Brief (January 22, 1985), at 35.

12/ That the public interest favors a stay is further manifested by the fact, uncontroverted in the evidentiary record, that electric output from Shoreham is not needed for 10 years. Suffolk County Ex. LP 20, at 37.

Court of Appeals, following the NRC's reinstatement of a license for Diablo Canyon, the Commission, citing the vital interests in nuclear power issues that the Supreme Court of the United States has recognized to rest with the States, argued for the legitimacy of its action by citing the "great weight" it gives to the views of a State government:

> [T]he Supreme Court has noted that the debate over nuclear power is one in which the States have a vital stake. In this case the Governor of California, as representative of the people and the public interest, has indicated in hearings before the NRC 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.[13]

In Diablo, the Governor supported the NRC's action. 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 the granting of the exemption because such actions are not in the public interest. This Board must accord the views of the public's representatives "great weight" here just as the Commission did in pleading before the Court of Appeals. The "great weight" rule requires, at a minimum, maintenance of the status quo for the brief period necessary to allow the merits of the State/County appeal to be decided.

13/ Respondent U.S. Nuclear Regulatory Commission's Opposition to Emergency Motion for Stay, November 10, 1983, filed in San Luis Obispo Mothers for Peace v. NRC (Civ. Action Nos. 81-2035, 83-1073, 81-2034) (D.C. Cir.) at 34 (emphasis supplied, citations omitted).

Third, Section 50.12(a) -- the basis of the license at issue -- expressly requires a determination whether the public interest favors the grant of an exemption to LILCO. However, the Miller Board refused to admit the evidence on that issue which was submitted by the public's representatives; views of the public were essentially shut out by the Miller Board. This makes even more compelling the need for this Board to accord the public interest the weight it deserves in deciding this motion.

Fourth, while granting the stay would harm no one, denying the stay will have a direct impact upon the State, County, and the public they represent. It is they who will have to live with and overcome the environmental and economic costs of permitting contamination of a reactor that may never produce commercial power.

Finally, from the outset of this proceeding, there has been substantial cause for concern whether procedural and substantive rules would be followed. Serious questions were raised about Chairman Palladino's actions, the U.S. District Court issued an injunction to halt the Miller Board's first round of due process violations, and two Commissioners stated that the Miller Board should have been replaced.14/ The improper and prejudicial rulings by the Miller Board continued without abatement, however, despite the District Court injunction. As held in the April 1984 TRO ruling:

14/ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, 1159-61 (Views of Commissioners Gilinsky and Asselstine).

> The public interest is furthered by a careful and full adjudication of LILCO's proposal for a low power license; no benefit can result from an unfair hearing on this proposal.

Cuomo v. NRC, supra, slip op. at 7. Clearly, in light of the unfair hearing which followed that ruling, the public interest once again requires the most careful scrutiny of the Miller Board's actions before any reliance on that Board's Decision.15/

For the foregoing reasons, this Board should maintain the status quo by granting the requested stay.

Respectfully submitted,

Martin Bradley Ashare
Suffolk County Department of Law
Veterans Memorial Highway
Hauppauge, New York 11788

Herbert H. Brown
Lawrence Coe Lanpher
Karla J. Letsche
KIRKPATRICK & LOCKHART
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

Attorneys for Suffolk County

Fabian G. Palomino
Special Counsel to the Governor
of the State of New York

15/ See Union of Concerned Scientists v. NRC, 735 F.2d at 1447; Zenith Radio Corp. v. U.S., 505 F. Supp. 216 (Ct. Int'l Trade 1980); Township of Lower Alloways Creek v. NRC, 481 F. Supp. 443 (D.N.J. 1979).

Executive Chamber, Room 229
Capitol Building
Albany, New York 12224

Attorney for Mario M. Cuomo,
Governor of the State of New York

February 12, 1985

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CERTIFICATE OF SERVICE

I hereby certify that copies of the SUFFOLK COUNTY AND STATE OF NEW YORK MOTION FOR STAY OF MILLER BOARD DECISION, dated February 12, 1985, have been served on the following this 12th day of February 1985 by U.S. mail, first class, except as otherwise indicated.

Judge Marshall E. Miller, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Glenn O. Bright
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Elizabeth B. Johnson
Oak Ridge National Laboratory
P.O. Box X, Building 3500
Oak Ridge, Tennessee 37830

Herzal Plaine, Esq.*
U.S. Nuclear Regulatory Commission
1717 H Street, N.W., 10th Floor
Washington, D.C. 20555

Edwin J. Reis, Esq. *
Bernard M. Bordenick, Esq.
Office of Exec. Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edward M. Barrett, Esq.
Long Island Lighting Company
250 Old Country Road
Mineola, New York 11501

Honorable Peter Cohalan
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

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

W. Taylor Reveley, III, Esq.#
Anthony F. Earley, Jr., Esq.
Robert M. Rolfe, Esq.
Hunton & Williams
707 East Main Street
Richmond, Virginia 23212

Mr. Martin Suubert
c/o Cong. William Carney
1113 Longworth House Office
Building
Washington, D.C. 20515

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Docketing and Service Branch
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Nunzio J. Palladino, Chairman*
U.S. Nuclear Regulatory Commission
Room 1114
1717 H Street, N.W.
Washington, D.C. 20555

Commissioner Lando W. Zech, Jr.*
U.S. Nuclear Regulatory Commission
Room 1113
1717 H Street, N.W.
Washington, D.C. 20555

Commissioner James K. Asselstine*
U.S. Nuclear Regulatory Commission
Room 1136
1717 H Street, N.W.
Washington, D.C. 20555

Alan S. Rosenthal, Chairman*
Mr. Howard A. Wilber
Mr. Gary J. Edles
Atomic Safety and Licensing
Appeal Board
4350 East-West Highway
North Tower, 4th Floor
Bethesda, Maryland 20814

James Dougherty, Esq.
3045 Porter Street, N.W.
Washington, D.C. 20008

Mr. Brian McCaffrey
Long Island Lighting Company
Shoreham Nuclear Power Sta.
P.O. Box 618
North Country Road
Wading River, New York 11792

Jay Dunkleberger, Esq.
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Comm. Frederick M. Bernthal*
U.S. Nuclear Regulatory Comm.
Room 1156
1717 H Street, N.W.
Washington, D.C. 20555

Comm. Thomas M. Roberts*
U.S. Nuclear Regulatory Comm.
Room 1103
1717 H Street, N.W.
Washington, D.C. 20555

Stephen B. Latham, Esq.
John F. Shea, Esq.
Twomey, Latham and Shea
33 West Second Street
Riverhead, New York 11901

Robert M. Rolfe, Esq.*
c/o Richard Goldman
Hunton & Williams
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20036

Lawrence Coe Lanpher

Lawrence Coe Lanpher
KIRKPATRICK & LOCKHART
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

DATE: February 12, 1985

* By Messenger
\# By Federal Express