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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 REPLY COMMENTS PURSUANT TO COMMISSION'S JANUARY 7 ORDER

By Order dated January 7, 1985, the Commission invited the parties to respond to the November 29, 1984 comments filed by other parties concerning "whether the [Miller] Board's October 29, 1984 Initial Decision was a correct application of the criteria in the May 16 Order." Suffolk County and the State of New York jointly submit these Reply Comments in accordance with the January 7 Order.

The Miller Board did not correctly apply the criteria of the May 16 Order. The NRC Staff and LILCO in their November 29 comments avoid any detailed consideration of those May 16 criteria; we can understand why, since the Miller Board's Decision reflects a flagrant misapplication of those criteria.

What is particularly troublesome is that the Staff and LILCO have asserted that the Miller Board carefully applied the May 16 criteria. For example, the Staff states that "the [Miller] Board was (with minor exceptions) correct in its

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application of the criteria set forth in CLI-84-8 to the facts of this case." Staff Comments at 2. And the Staff talks with approval about the Miller Board's "common sense approach" to those criteria. Id. at 3. LILCO asserts that the Miller Board "meticulously followed [CLI-84-8] both in format and substance" (LILCO Comments at 1, emphasis supplied) and that "there can be little doubt that the Board scrupulously followed the standards established by CLI-84-8." Id. at 12 (emphasis supplied).

It is time to put such fantasy to rest. There was nothing scrupulous or meticulous about the Miller Board's conduct of the exemption proceeding. Rather, from the time the Miller Board was appointed in March 1984 right through its Decision, the Miller Board "distinguished" itself in only one way: it ran roughshod over the rights of Suffolk County and the State of New York.

An overriding criterion of the May 16 Order was that "[t]he Licensing Board shall conduct the proceeding on the modified application in accordance with the Commission's rules." It is evident why this normally self-evident criterion had to be expressly articulated in this case. During April 1984, the Miller Board had conducted the proceeding in such a manner that a federal district court, for the first time in history, restrained an ongoing NRC proceeding because of due process violations. Two Commissioners wanted the Miller Board replaced. CLI-84-8 (views of Commissioners Gilinsky and Asselstine). By 3-2 vote, however, the Miller Board was retained, with the "compromise" apparently being the NRC's extraordinary directive that the Board "follow the rules."

It is preposterous now to suggest that the Miller Board followed the NRC's rules. For example:

-- The Miller Board repeatedly refused to admit County and State evidence on issues articulated in CLI-84-8, while admitting LILCO and Staff evidence on precisely the same issues. The Miller Board then relied on that one-sided evidence in its October 29 Decision. See County/State Nov. 29 Comments at 7, 10-19.

-- The Miller Board made factual findings on the adequacy of LILCO's security plan to protect the alternate AC power system despite its refusal to hold a hearing on the County/State security contentions. Such findings where there is no evidentiary record clearly must be summarily reversed. Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-580, 11 NRC 227 (1980); see County/State Nov. 29 Comments at 27-30.

-- The Miller Board found that the "as safe as" standard was satisfied, despite the fact that "there is unquestionably a lesser margin of safety provided by LILCO's alternate power system." Decision at 24. Thus, the Miller Board clearly applied a "safe enough" standard, in violation of the Commission's straightforward requirement that the exemption could not be authorized on such a basis. The Board's "safe enough" standard would undercut the bases for the low power emergency planning rule. 10 C.F.R. § 50.47(d). See County/State Nov. 29 Comments at 27-30.

-- The Miller Board found that public interest factors weighed in favor of granting the exemption, despite the fact that the representatives of the public's interest, the State of New York and Suffolk County governments, had urged forcefully that an exemption would harm the public interest. Indeed, it could not possibly be in the public interest to operate Shoreham with no safety grade emergency power when the uncontroverted evidence established that Shoreham's electrical output is not needed for at least 10 years. See County/State Nov. 29 Comments at 16, 22-23.

In their November 29 comments, the Staff and LILCO largely ignored the foregoing errors, as well as the host of other errors set forth in the County/State November 29 comments. Indeed, instead of addressing these errors, LILCO addressed a total strawman -- whether the Commission should issue a stay. However, the question of a stay is not before the Commission and could not be until such time as the Miller Board's decision were itself effective. Rather, as articulated clearly in the NRC's November 19 Order, the only question to be addressed here is whether the Miller Board correctly applied the criteria of CLI-84-8.1/

In accordance with the NRC's January 7 Order, we now reply further to the LILCO and Staff November 29 comments. We demonstrate below that the LILCO/Staff comments are largely predicated upon false characterizations of the Miller Board's decision, are largely irrelevant, and serve only to obscure the central imperative that the Commission has no choice but to reverse summarily the Miller Board's decision.

I. LILCO Comments About the Gravity of the Substantive Issues

LILCO argues that "the authorization of the low power license for Shoreham is not of sufficient gravity to support a stay" because "the Commission's regulations expressly exclude low power licenses from immediate effectiveness

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1/ Since LILCO's November 29 comments did not address the issue raised by the NRC in its November 19 Order, the NRC should disregard those LILCO comments.

review." LILCO Comments at 3. Aside from improperly attempting to convert the NRC's review into a "stay" inquiry, LILCO misstates the law. LILCO seeks an exemption from the Commission's regulations because LILCO cannot comply with GDC-17. The Commission, not any licensing board, must grant or deny LILCO's exemption request.2/ Thus, LILCO is incorrect when it asserts that "it is not the Commission's function . . . to conduct a full review of the merits of the Board's factual findings." LILCO Comments at 8. Indeed, in this exemption proceeding it is exclusively the Commission's duty to rule on the merits. That duty is all the more important in the instant situation where the Commission's review will be directed at egregious errors of the Miller Board.3/

2/ See Southern California Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-77-35, 5 NRC 1290 (1977). Section 50.12 states that "the Commission may . . . grant such exemptions 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 are otherwise in the public interest." (emphasis supplied).

3/ Furthermore, LILCO's characterization of "the substantive issue" presented by the Miller Board decision is wrong. The question is not the "generic judgment" cited by LILCO that low power licenses need not be stayed, nor is it just the risk to the public health and safety that would be posed by operation with LILCO's alternate AC power proposal. LILCO Comments at 3. The Decision also poses the issues whether the public interest favors the grant of an exemption, whether LILCO has demonstrated the existence of the extraordinary circumstances required by the Commission's May 16 Order to justify an exemption, whether the State and County, representatives of the public, were denied their fundamental due process rights to a fair hearing, and whether there is any justification for allowing an unneeded nuclear plant to operate when it does not comply with important safety regulations. LILCO's comments concerning the "gravity" of the issue ignore these matters.

II. LILCO and Staff Unsupportable Comments Concerning the Miller Board's Resolution of Substantive Issues

LILCO asserts that "there is little likelihood that the pertinent substantive issues were not correctly resolved" by the Miller Board because "the Commission has been involved extensively in this exemption proceeding almost from its inception." LILCO Comments at 3. The Staff makes similar statements. Staff Comments at 2. There is no factual basis for these conclusory assertions, and LILCO's non-sequitur (and the Staff's similar ones) that the Miller Board "reached factual findings and legal conclusions in accordance with" the Commission's guidance is plainly erroneous and fanciful too. LILCO Comments at 3. Indeed, the Miller Board ignored and/or incorrectly applied the Commission's orders and regulations with respect to each of the determinations which the Miller Board was required to make in ruling upon LILCO's exemption application. We address these errors and the LILCO/Staff comments below.

A. Miller Board Errors Relating to the Required Security Determination

LILCO mischaracterizes the Commission's guidance on security, stating that the May 16 Order "[i]mplicitly recogniz[ed] that the common defense and security was not an issue." LILCO comments at 4.[4/] The May 16 Order did no such thing,

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4/ In its November 29 comments, the Staff completely ignores the security issue raised by the May 16 Order and confirmed by the Commission's July 18 and August 20 Orders. In similar fashion, LILCO asserts that "the Commission's November 19 Order excluded the merits of security issues from the scope of permitted comments." LILCO Comments at 4, n.2. That Order does no such thing, nor could it be so construed since the Miller Board's decision includes findings of fact and legal conclusions on security issues.

"implicitly" or otherwise. Indeed, the Order recognized the need for a security finding by quoting Section 50.12(a) (including the requirement that an exemption may be granted if the Commission determines that it "will not endanger . . . the common defense and security") and by stating that LILCO "should modify its application for low-power operation to address the determinations to be made under 10 CFR 50.12(a)." Moreover, as LILCO was forced to acknowledge (LILCO Comments at 4, n.2), the Commission's July 18 Order expressly recognized that physical security issues are pertinent to the granting of an exemption, and that the parties "were to be afforded the opportunity to raise new contentions" on that subject. NRC July 18 Memorandum and Order at 2-3.

Suffolk County and the State of New York submitted detailed security contentions, characterized by the Miller Board as follows:

> A pervasive issue throughout the proffered revised security contentions was whether LILCO's power "enhancement" equipment should be treated as "vital," thus located in "vital areas" under NRC regulations . . . .
>
> The Intervenors also argued that the "change in configuration" wrought by the addition of the enhancements created new or different vulnerabilities for the site.

Decision at 20. The Miller Board's September 19 Order rejected the proposed security contentions. Its action was apparently premised largely on the fact that the NRC Staff supported some of the security contentions and that the Staff had requested LILCO to amend its security plan in ways alleged in the contentions to be necessary. The Miller Board rejected the Staff's position on the substantive

safety and security question raised in the contentions, characterizing its action as "overruling" the Staff's position "as a matter of law" pursuant to 10 CFR § 2.717(b). September 19 Order at 7; see Decision at 20.

The Board's more detailed rulings on the security contentions are contained in the restricted version of the Miller Board's September 19 Order. Due to the safeguards data involved, we will not in this filing be more specific. However, we urge the Commission to review that Order -- particularly pages 4-7 -- which will reveal the Miller Board's alleged bases for its rulings.5/ We submit that the Commission will have no choice after reading that Order but to agree that the Board did not "follow the rules" and had no rational basis for denying Intervenors' contentions.6/

Furthermore, despite its refusal even to consider the merits of Intervenors' security issues, much less to obtain evidence on those issues, the Miller

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5/ The Commission also should review the safeguarded transcript of the September 14, 1984 Miller Board Conference of Counsel. It documents again in glaring detail the Miller Board's incapability of dealing fairly with the issues.

6/ The Board's rulings concerning the individual contentions themselves (Restricted Sept. 19 Order at 12-19), were also clearly erroneous. Those rulings are: (a) reiterations of the erroneous "conclusion of law" discussed in the text above; (b) findings on the merits of the contentions, based solely upon representations made by LILCO's counsel, and improper in the context of ruling on the admissibility of contentions; (c) distortions or misstatements of the contentions themselves, which are readily apparent upon reading the contentions; or (d) misapplications of Commission precedent concerning the basis and specificity requirements for admissible contentions. See, e.g., Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

Board nonetheless purported to make "findings of fact" concerning the adequacy of LILCO's physical security arrangements -- the very issue raised in the County/State security contentions. Thus, the Board "found":

> Placement of additional equipment outside of and a reasonable distance from the Shoreham Plant's vital areas, does not impair nor impact upon established security procedures for protection of the vital areas;
>
> The need for security of emergency AC power systems during low-power is diminished;
>
> In the posture of a request for exemption from certain regulations for purpose of low-power testing, emergency AC power sources need not be protected as "vital" equipment;
>
> LILCO's security arrangements provide reasonable assurance that its emergency power enhancements will be protected during the occurrence of a security-related event.

Decision at 76-77. There is no evidence whatsoever in the factual record that even relates to these findings, let alone evidence which supports them. Indeed, the Miller Board decision does not even purport to cite an evidentiary basis in the record in support of the foregoing "findings." Therefore, from a legal standpoint, the Board's findings are but whimsical conclusions which underscore the lack of basis for the Decision.

Given the language of Section 50.12(a) and the Commission's July 18 Memorandum and Order, the Miller Board was required to make security findings. To do so, lawfully, meant that there had to be factual evidence in the record. There was none, however, because the Board rejected the County and State's security contentions and refused to permit the introduction of any evidence on the

security issues. Thus, nothing of a factual nature stated by the Miller Board is legally supportable. Indeed, the Miller Board's rulings and so-called "findings" concerning LILCO's security provisions were not only incorrect, but constitute a flagrant and prejudicial violation of Intervenors' right to a hearing on this matter which is central and material to an exemption decision. See Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-580, 11 NRC 227 (1980) (Board could not make security findings where the security plan itself was not even in the record). See also Union of Concerned Scientists v. Nuclear Regulatory Comm., 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 53 U.S.L.W. 3475 (January 8, 1985) (Atomic Energy Act guarantees right to a hearing on material issues).

B. Miller Board Errors Related to Public Interest Finding

We do not here repeat the discussion of the Miller Board's exclusion of County and State evidence concerning the economic and financial disadvantages which would result from granting the exemption, and the Board's admission of LILCO's evidence concerning alleged economic and financial benefits of granting the exemption, which is set forth at pages 12-14 of our November 29 Comments. However, the following reply comments concerning the public interest are necessary.

First, LILCO's comments about the alleged economic benefits of granting the exemption purportedly "found" by the Miller Board[7/] are of a nature that is

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7/ LILCO states that "the Board also found that financial hardships arose from having a physically completed, otherwise acceptable nuclear facility stand-

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irrelevant to the legal standards for granting an exemption. The so-called economic "benefits" claimed by LILCO would only be achieved if and when Shoreham begins full power operation.8/ Thus, the asserted "benefits" relied upon by the Miller Board do not result from the conduct of low power testing, which is what would be authorized by the exemption.9/

The Miller Board's findings, as commented upon by LILCO, underscore the prejudice of the Miller Board's refusal to receive the County's testimony on the

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ing unused and non-productive because of substantial licensing delays," and "that potentially reaching commercial operation earlier could result in an economic benefit to LILCO's customers . . . ." LILCO Comments at 10-11.

8/ LILCO's witnesses acknowledged that reducing dependence on foreign oil cannot occur until after a full power license is issued, the plant has been tied into the LILCO grid, and it begins to produce electricity (see, e.g., Tr. 1235-36, 1249-50, 1330), and that the alleged ratepayer "benefit" which, according to LILCO, would be received in 1997 from beginning commercial operation three months earlier than would be possible without an exemption, can only occur after commercial full power operation begins and Shoreham goes into the rate base. See, e.g., Tr. 1372, 1405-10.

9/ LILCO is disingenuous in asserting that "the County's evidence . . . did not address the effect of this low power license on alleviating [LILCO's financial] difficulties." LILCO Comments, n.4. The alleviation of LILCO's financial difficulties is not an issue presented by the public interest criterion of Section 50.12(a). Nor was such alleviation the subject of the "economic benefits" which LILCO alleged might occur as a result of a grant of the exemption. All such discussion went to purported benefits to LILCO's customers, since such individuals constitute the public. LILCO's private financial interests, and any potential signal to the capital markets which could result from favorable Commission action, are improper subjects for consideration. See County/State Nov. 29 Comments at 14, n.12. See Power Reactor Devel. Co. v. International Union of Electrical, Radio & Machine Workers, 367 U.S. 396, 415 (1961).

substantial financial and economic harm to the public that would result from the grant of an exemption under the assumption that is the converse of LILCO's -- i.e., that there would never be full power operation of Shoreham. This testimony was critical to evaluating the "public interest" aspects of LILCO's exemption request. At LILCO's urging (Tr. 2122-23), however, the Miller Board refused to let such evidence into the record. The Board's rulings concerning alleged financial and economic hardships thus rely only upon LILCO's testimony and LILCO's one-sided assumption that Shoreham will operate at full power. This embrace and reliance by the Board upon only LILCO's side of the issue, to the exclusion of evidence submitted by the governmental representatives of the public, was an error.

Second, LILCO's assertion (Comments at 11, n.4) that "after weighing the evidence, viewing the witnesses and assessing their credibility, the Board rejected much" of the County's witnesses' economic analysis, is a gross misrepresentation. Although certain County evidence disputing LILCO's calculations of the so-called ratepayer "benefit" was admitted by the Board (albeit ignored in its Decision), much public interest testimony submitted by the County and the State was never admitted into evidence. Furthermore, although LILCO characterizes the Board's striking of the County's evidence as "proper" (id.), LILCO provides no legal or other basis to support that naked conclusion.

LILCO was permitted to submit testimony concerning LILCO's view of the public interest. At LILCO's urging, the Miller Board refused to admit evidence

submitted by the elected representatives of the public -- the Governor of New York and Suffolk County -- that explained in detail why it is not in the public interest to grant an exemption to LILCO. See Tr. 2122-23, 2145-48, 2902-03. Public servants are in a far better position to advise the NRC regarding where the public interest lies than LILCO. Indeed, the Commission itself has stated:

> 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 before U.S. Court of Appeals in Diablo Canyon case, page 34. Surely, the views of the chief elected representatives of New York State and Suffolk County should be accorded no less stature.

Third, LILCO's bald assertion that "the Licensing Board has already considered and evaluated public interest factors" (LILCO Comments at 14) is false.10/

10/ The "public interest" is mentioned only twice in the Decision: in the one-sentence "conclusion of law" (paragraph 6 on page 104), and in a six-sentence section under "Exigent Circumstances" which is headed "Public Interest in Adherence to Regulations." However, the discussion in that section 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. For that matter, it also makes no reference to any LILCO evidence concerning the alleged public interest. Thus, this portion of the Decision is merely a reiteration of the Board's public health and safety findings. The Miller Board's conclusion, without citation to any evidence, that "there is minimal public interest in strict and mechanical adherence to the regulation" (Decision at 68-69), violates Connecticut Yankee Atomic Power Co., 2 AEC 393 (1964), and has no evidentiary basis whatsoever. In fact, the Miller Board never even considered the interest of the public concerning LILCO's exemption request. It considered only the one-sided "evidence" which dealt with LILCO's private interests in signalling the capital markets and in obtaining a full power license.

The Miller Board's "conclusion" that LILCO's exemption application "meets the 'otherwise in the public interest' provision of 10 CFR 50.12(a)," is based solely upon the Board's finding that the exemption application meets the exigent circumstances test enunciated by the Commission. Decision at 104, ¶ 6. There is no supporting Commission precedent, nor did the Board cite any, for the Miller Board's tortured reasoning that meeting an exigent circumstances test satisfies the wholly separate Section 50.12(a) requirement that an exemption "otherwise" be "in the public interest." Indeed, this action by the Miller Board directly contradicts the Commission's May 16 Order, in which the Commission made clear that the exigent circumstances finding represents a threshold that an exemption applicant must meet separate from, and in addition to, the requirements set forth in Section 50.12(a). See 19 NRC at 1156, n.3.11/

Fourth, the public interest clearly does not favor an exemption to allow contamination of a facility which is not needed. On this issue, there is no dispute: electricity output equal to Shoreham's will not be needed for at least 10 years. Thus, the uncontradicted evidence of record -- the consensus conclusion of the State of New York's Marburger Commission -- was as follows:

> The projections for Long Island's future electrical energy needs on which the Shoreham construction schedule was originally based were obviously overestimates. The Panel is persuaded that ample LILCO generating capacity currently exists

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11/ The Miller Board's treatment of the public interest finding required under Section 50.12(a) also violates Connecticut Yankee Atomic Power Co., 2 AEC 393 (1964), which held that the public interest determination "constitutes a distinct and separate aspect" of an exemption decision.

> to satisfy probable demand for at least the next decade, and probably longer. Such estimates are of course subject to the same uncertainties that cause the original projections to be so wrong. But at this time, it is difficult to see how the demand for electricity could be so great as to require a Shoreham-size plant within a decade or more.

Suffolk County Ex. LP-20, at 37.12/

Commission precedent makes clear that the need for a facility's power is a relevant criterion to be considered in decisions on exemption requests. See U.S. 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). Thus, the undisputed lack of need for Shoreham's power is a conclusive reason for denying the exemption. Indeed, it cannot be argued that the public interest favors a rush to contaminate Shoreham, and deprive the public's representatives of their due process rights to a fair hearing, in circumstances where the electric power output of the facility is plainly not needed in the near future.

Finally, the State and County also refer the Commision to the letter dated October 11, 1984, from President Reagan (copy attached). This statement of

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12/ In its January 7 Order, the Commission declined to consider the affidavit submitted December 5, 1984 by the County and State. This, of course, means that the Commission also must ignore the LILCO affidavit filed December 12, 1985. Thus, the only evidence regarding the need for Shoreham's power upon which the Commission may rely is that described above which is in the evidentiary record. The evidence clearly is that there is no need for Shoreham's power.

Administration policy not favoring the imposition of federal authority over State and local objections, is also relevant to the public interest.

C. Miller Board Errors Relating to Exigent Circumstances Finding

LILCO asserts that "the Licensing Board conducted an extensive inquiry into the existence of the exigent circumstances pursuant to the Commission's guidance." LILCO Comments at 9. LILCO neglects to mention that the "extensive inquiry" was limited to evidence presented by LILCO. See County/State Nov. 29 Comments at 10-12. Similarly, LILCO's reference to the Miller Board's finding "that LILCO had made a good faith effort to comply with GDC-17" (LILCO Comments at 11), ignores the Miller Board's inexplicable refusal to consider the County's evidence on precisely the same subject.13/ It is clear that the Miller Board's exigent circumstances finding resulted only from the Board's violation of the County and State's right to present evidence on this critical issue identified in the Commission's May 16 Order. The Commission cannot condone this prejudicial action by the Miller Board, which was taken at LILCO's request. See Tr. 2370-85.

13/ The Miller Board purported to identify grounds for striking the County's evidence, but a review of Judge Miller's statements documents the lack of any rational basis for the ruling. Indeed, as with the security issues (see discussion supra), the Commission should read Judge Miller's statements which demonstrate in the clearest terms possible that the Board did not adhere to the Commission's admonition to "follow the rules." See Tr. 2385-89.

Similarly, LILCO's citation of the Miller Board's "finding" that "the licensing proceedings themselves have imposed unusually heavy financial and economic hardships upon LILCO" (LILCO Comments at 11), ignores the erroneous nature of that Board ruling. See County/State Nov. 29 Comments 23-25. 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. Even the Staff, which has sided with LILCO on almost every aspect of this proceeding, agreed that the Board erred. Staff Comments at 8. The Miller Board's heavy reliance upon LILCO's irrelevant whining about the NRC licensing process in finding the existence of "exigent circumstances" is clear error which the Commission must reverse.

LILCO also cites the Miller Board's "finding" that the regulations have not been consistently applied by the NRC Staff. However, whatever the Staff may have done with respect to other plants prior, or even subsequent to, CLI-84-8, and whether such actions were right or wrong, cannot change the Commission's ruling that LILCO must meet the criteria enunciated in the May 16 Order. See County/State Nov. 29 Comments at 25-26. The Miller Board's "finding" that allegedly "inconsistent" Staff practices constitute an exigent circumstance that justifies LILCO's exemption request flies in the face of the Commission's May 16 Order.

D. Miller Board Errors Relating to the "As Safe As" Determination

The major portions of the LILCO and Staff comments deal with the "as safe as" criterion. In those Comments, however, LILCO and the Staff not only mischaracterize the evidence submitted by Intervenors that was admitted by the Licensing Board, but also ignore the erroneous Miller Board rulings: (1) the Board denied admission of relevant and significant evidence submitted by Suffolk County; (2) the Board ignored the Commission's May 16 Order defining the "as safe as" criterion; and (3) the Board rendered Section 50.47(d) inapplicable to Shoreham.14/

First, the County testimony which was denied admission by the Miller Board demonstrated that operation of Shoreham with the alternate AC power configuration would be quantifiably less safe than low power operation with a fully qualified AC power system. See County/State Nov. 29 Comments at 17-18 and Attachment 7. The Miller Board had no basis for refusing to admit this testimony.15/

14/ LILCO's characterization of Intervenors' proffered evidence also must be corrected. LILCO asserts that "Intervenors' sole factual contention was that each component of the alternate power system ought to be compared individually with the TDI diesels and subjected individually to a single failure analysis." LILCO Comments at 8. LILCO ignores facts: (1) one major item of County evidence discussing a system rather than a component comparison was denied admission by the Board at LILCO's request; and (2) much of the County's evidence that was admitted (but ignored by the Board in its Decision and by LILCO in its comments) goes directly to a functional and systemic comparison of safety margins. See discussion infra.

15/ The Board's assertion that a probabilistic risk assessment is not "a proper method to be used in this proceeding" (Tr. 2858) is wrong. PRAs have been required by the Staff in some proceedings (see, e.g., Tr. 2857), and the PRA performed by LILCO has been reviewed by the Staff and was considered by

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Indeed, although LILCO asserts that there was "abundant factual predicate supporting the [Miller Board's] 'as safe as' finding" (LILCO Comments at 8), LILCO ignores that the Miller Board improperly interpreted and applied the Commission's standard. In ignoring the submitted evidence that low power operation under the exemption configuration proposed by LILCO would be seven times less safe than low power operation with a qualified AC power system (County/State Nov. 29 Comments at 17-18), the Miller Board made a mockery of the exemption proceeding. In addition, the Miller Board ignored the obvious reduction in safety, set forth in the evidence that was admitted, that would result from low power operation with the proposed alternate configuration. Thus, the Miller Board agreed that "there is unquestionably a lesser margin of safety provided by LILCO's alternate power system" (Decision at 24, emphasis added), thereby establishing that LILCO does not satisfy the Commission's straightforward "as safe as" standard.16/

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the Brenner Board and the Appeal Board in ALAB-788. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, Oct. 31, 1984 (Slip op. at 42-48). While there may be no requirement to perform PRA analyses, there is no bar to the use of probabilistic data, if available, to evaluate the relative safety of operation in different configurations. See, e.g., Letter dated June 15, 1984 from Nunzio J. Palladino to the Honorable Edward J. Markey and attachments thereto.

16/ Similarly, the Board found that "It is, of course, obvious that a fully qualified system would have an established and documented higher resistance to seismic events than does the system proposed by LILCO . . .," (id., at 52), again establishing that operation with LILCO's alternate configuration inherently provides a lesser margin of safety.

The Miller Board rejected as irrelevant the fact that a qualified AC power 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 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 under LILCO's alternate configuration 30 minutes of that time (as opposed to 15 seconds) could be necessary before any power is available -- or before it is even known by plant personnel that power will not be available. See id. at 23-25. In their comments, LILCO and the Staff stress the importance of the 55 minute time period available to restore power during low power operation. However, they, like the Miller Board, ignore the significance of the fact that the margin of safety of operating Shoreham with the alternate configuration is far less than with a qualified AC power system.

The Commission did not set a standard of whether operation with the alternate configuration would, in the judgment of the Board, be safe enough, nor did the Commission instruct the Miller Board to come up with a definition of how much safety, in its opinion, is "enough." Rather, the Commission, mindful of the impact of the exemption request on 10 C.F.R. § 50.47(d), instructed the Miller Board to determine whether operation with the alternate configuration would be as safe as operation would have been with fully qualified TDI diesels. A reduction in the margin of safety, or a reduction in 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. Plainly, however, the Miller Board did exactly that.

As a result of its distortion and misapplication of the "as safe as" standard, the Miller Board ignored the following facts set forth in Suffolk County's expert testimony, which document a real reduction in safety that would result from operation with the alternate configuration as compared to that with a qualified configuration:17/

> 1. The alternate configuration contains only two power sources, whereas the qualified configuration contains three; clearly, there is less redundancy and a reduced margin of safety with the alternate configuration.
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> 2. Portions of the two-part 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. In contrast, each of the three qualified diesels is an independent power source, physically isolated from the other two and is fully indepenent of off-site power. The alternate system's vulnerability to single failures, and its vulnerability to a common mode failure of the offsite system, represents a substantially reduced margin of safety as compared to a qualified system.
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> 3. One-half of LILCO's alternate configuration -- the 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. In contrast, each of the three qualified diesels meets the single failure criterion. Again, the vulnerability of one-half the alternate system to disabling single failures makes the margin of safety and defense in depth protection substantially less than that available with three single-failure-proof power sources.
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> 4. Operation of the alternate configuration requires many manual operations, in several different locations both inside and outside plant buildings, giving rise to many

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17/ All these facts, with citations to the record, were set forth in the County and State Findings submitted to the Miller Board on August 31, 1984.

opportunities for human error. In contrast, a qualified system is fully automatic. The reliance upon human operators to perform properly and rapidly in the event of a station blackout, reduces the margin of safety from that available with a fully automatic emergency power system.

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. A reduced resistance to seismic events and a likelihood of failure in an SSE, means that there is a smaller margin of safety of operation with the alternate configuration.

6. The alternate configuration has essentially no local fire detection or extinguishing systems, and there is a potential for fire and explosion because of the EMDs' battery starting system and poor ventilation. In addition, the abnormal condition alarms associated with the alternate configuration are not annunciated in the control room. In contrast, a qualified system includes both fixed fire detection and extinguishing systems for each generator, no battery system, and a comprehensive alarm system which is annunciated in the control room. There is a substantial reduction in safety margins, as compared to those present with a fully qualified system, if necessary equipment, such as that in the alternate configuration, is vulnerable to fire which may not be detected or extinguished, and if information concerning the abnormal status of necessary equipment is not immediately available to the plant operators.

Clearly, the Miller Board applied a "safe enough" rationale of its own invention in reaching its "as safe as" conclusion. This is reminiscent of the "harmonizing" that went on with 10 CFR § 50.57(c) and GDC-17 prior to the May 16 Order. Therefore, the Miller Board's as safe as finding was plainly incorrect and flatly disregarded the Commission's May 16 Order.

Finally, the Decision, if upheld by the Commission, would render 10 CFR § 50.47(d) inapplicable to Shoreham, and the Commission could not lawfully issue

a low power license to LILCO unless there were a fully approved and implemented offsite emergency plan for Shoreham. As the Commission knows, there is no such plan; therefore, no low power license may be issued to LILCO.

The Miller Board's decision has thus created for the Commission two mutually exclusive options:

-- Rule that the "as safe as" standard has not been met because there is a lesser margin of safety for low power operation using the alternate power configuration, as the Board in fact found and as the evidence established; or

-- Rule (contrary to the evidence of record) that a harmonized "as safe as" standard has been met but, in light of the existing "lesser margin of safety" found by the Board, that Section 50.47(d) of the regulations cannot now be met. By this ruling, Shoreham would not be eligible to operate at low power unless there were a fully approved and implemented offsite emergency plan.

The Commission's "as safe as" standard does not represent a casual formulation of words; rather, that standard was a debated and deliberate requirement. The standard was adopted because if operation at low power with the alternate AC power configuration were not as safe as operation with fully qualified diesels, then the rationale underlying Section 50.47(d) would not be present. Thus, there would be no basis for permitting low power operation of Shoreham without an approved offsite emergency plan.

The Commission adopted Section 50.47(d) in July 1982. See 47 Fed. Reg. 30,232 (1982). There were three bases for the Commission's decision to permit low power operation in the absence of an approved and implemented offsite

emergency plan: (1) lower fission product inventory during low power operation; (2) reduction in the required capacity of systems designed to mitigate the consequences of accidents as compared to the required capacities at full power operation; and (3) more time available to react to a low power accident. Id. at 30,233.

In establishing the "as safe as" standard, the Commissioners were concerned that the second factor would be undermined if low power operation with the alternate AC power configuration were not as safe as low power operation with a fully qualified emergency AC power system. The Commissioners first expressed this concern at the Commission's April 23 Shoreham meeting. The Commission discussed the Miller Board's intention in ruling on LILCO's March 20, 1984 low power proposal to compare the safety of LILCO's proposed low power operation using the alternate AC power configuration, with the safety of full power operation using a fully qualified AC power system. The Commissioners expressed concern that if a lesser degree of safety were permitted for low power operation with the alternate AC power configuration than is normally present during low power operation with a qualified emergency power system (i e., because the low power risk was found to be the same as the full power risk), the rationale for Section 50.47(d) would be undercut because the assumption of a lower risk during low power operation would no longer be valid. See April 23 Transcript at 12-13, 30-32, 38, 44-45, 68 (Commissioner Gilinsky); id. at 12-13, 30-32, 38, 44- 45, 51 (Commissioner Asselstine); id. at 13-14, 40-41, 51, 67 (Commissioner Bernthal). See also id. at 12-13, 38-40, 44-45 (Commission Staff comments); id. at 31-32, 51 (Chairman Palladino). But see id. at 45 (Roberts).18/ This

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18/ The rationale for the Commissioners' concern was as follows: the capacity of mitigating systems such as emergency diesel generators ("EDGs") is sized

(Footnote cont'd next page)

concern was expressed by the Commission in its April 30 Order:

> The [Miller] Board's [April 6] Order states that if public protection at low power operation without the diesel generators required for full power operation is equivalent to (or greater than) the protection afforded to the public at full power operation with such approved generators, then LILCO's motion for low power authorization should be granted. In these circumstances, what justification is there for waiving the emergency preparedness requirements applicable to full power operation?

NRC April 30 Order at 2.

The "as safe as" standard in the Commission's May 16 Order was designed to address the Commission's concern that no GDC-17 exemption for low power operation have the effect of eliminating the basis for application of Section 50.47(d). For example, the General Counsel stated that the position of the Miller Board and the Staff prior to the May 16 Order -- that the level of safety for low power operation only need be equivalent to that associated with full power operation in full compliance with the regulations -- would have "obliterated the distinction between the safety risks at low power as opposed to full power, and thereby defeated the customary basis for defeating court injunctions

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> for full power; at low power, fully qualified EDGs have over-capacity, thus compensating for lack of an approved offsite emergency plan; if there were no fully qualified EDGs and no alternate system as safe as fully qualified EDGs, there would be no compensation for lack of the offsite emergency plan; thus, the basis for applying 10 C.F.R. § 50.47(d) would be lacking. E.g., April 23 Tr. at 44, 46-47.

against low power, and the basis for the rule requiring no finding regarding offsite emergency planning for low power." SECY-84-290A, July 24, 1984, at 16, n. 2. The General Counsel indicated that the "as safe as" standard was designed to avoid that result. Id. In the discussion of SECY-84-290A on July 25, 1984, the Commissioners appear to have agreed with the General Counsel.19/

19/ Although the transcript has a "disclaimer" concerning its citation, we bring it to the Commission's attention as a reminder of the Commission's intentions when it adopted the "as safe as" standard in CLI-84-8:

> MR. MALSCH: The Commission has in the past justified low power operating licenses on the ground that they present a level of risk which is substantially less than the level of risk associated with full power operation.
>
> And that, indeed, is a basis for exempting a number of full power licenses from certain requirements such as requirement for off-site emergency planning and other kinds of requirements. I know there wasn't any in the regulations.
>
> Now the concern in low power licensing cases is that if you simply adopt a no undue risk standard for low power licenses, then it becomes ambiguous as to whether the low power license you end up with is clearly less risky, substantially less risky, than full power, or not.
>
> And I think that led the Commission, in the interest of maintaining the argument that there was a substantially lesser level of risk associated with low power licenses and therefore maintaining the distinction in its regulations between requirements that apply to low power and requirements that apply to full power, that led the Commission, I think, to adopt the as-safe-as requirement.
>
> Now that doesn't mean, you know, substantially as-safe-as or as-safe-as something to diminuous variation might not do the trick.
>
> But I do think that to simply adopt a no undue risk argument does present this kind of difficulty for low power license.

(Footnote cont'd next page)

In sum, therefore, the "as safe as" standard was necessary to preserve the applicability of 10 C.F.R. § 50.47(d). If the level of safety for low power operation of Shoreham were reduced under the alternate AC power configuration, there would be no basis to permit low power operation without an approved and implemented offsite emergency plan.

In the face of the admitted reduced margin of safety of LILCO's proposed low power operation, 10 C.F.R. § 50.47(d) cannot be applied to Shoreham. Accordingly, if the Commission were now to approve the GDC-17 exemption (despite the gross errors of the Miller Board), the Commission would have to rule that Shoreham is ineligible for a low power license unless an offsite emergency plan is fully approved and implemented.

(Footnote cont'd from previous page)

> COMMISSIONER ASSELSTINE: You're exactly right. That was a key element in the Commission's discussion.
>
> COMMISSIONER BERNTHAL: In the end, that was precisely the standard that at least some of us, I think, applied in Grand Gulf.
>
> And in my judgment, for the sake of argument, you surely want to argue as-safe-as. That means there are compensating measures.
>
> Saying something is safe enough, that is, if there is the absence of any compensating measure, is a horse of a different color.

July 25 Discussion of Commission Practice in Granting Exemptions, 48-51.

III. Conclusion

One final point needs to be stressed. LILCO has argued that even if errors existed in the Miller Board's decision, correction of those errors would not be prejudiced by plant operation, and that there are no public interest factors commending a stay of Phases III and IV. LILCO Comments at 13-14.

It is disingenuous for LILCO to suggest that Phases III and IV could proceed without prejudicing the rights of the County and State. It is obvious that the County/State appeal of the Miller Board decision would be rendered essentially moot if the Phase III and IV testing program were begun, much less completed, prior to rendering a decision on the merits of the County/State appeal.

There is no interest whatsoever, other than LILCO's private one, that could possibly favor a Commission action to rubberstamp the Miller Board's decision shutting out the public without a full review of the facts and the record of the Miller Board's conduct. This Commission is responsible to the public, whom it is supposed to serve. It must recognize the interests of the public by thoroughly reviewing and summarily reversing the Miller Board decision.

Finally, the State and County hereby reiterate their pending request that the Commission hold oral argument on this matter. There is great public benefit to be gained by the Commission addressing the views of the parties openly and personally. The public record is now filled with letters from elected officials and other citizens supporting such oral argument. The Commission has no legitimate reason to hide.

Respectfully submitted,

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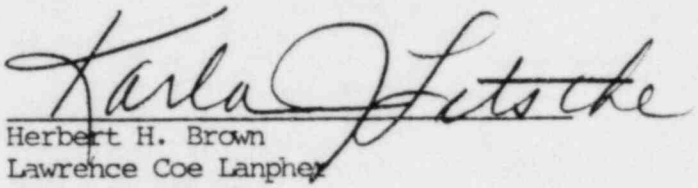

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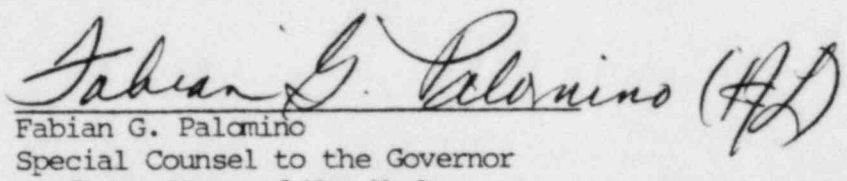

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January 14, 1985

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 Kadzik'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

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY AND STATE OF NEW YORK REPLY COMMENTS PURSUANT TO COMMISSION'S JANUARY 7 ORDER, dated January 14, 1985, have been served on the following this 14th day of January 1985 by U.S. mail, first class, except as otherwise indicated.

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