UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

SUFFOLK COUNTY AND STATE OF NEW YORK
MOTION FOR STAY OF LOW POWER LICENSE

On Friday, June 14, 1985, the Atomic Safety and Licensing Board issued a decision (LBP-85-18) in which it authorized issuance of a license permitting operation of Shoreham at up to 5% of rated power. Yesterday, the Appeal Board denied a stay request filed by Suffolk County and the State of New York but continued an interim stay in effect to permit the filing of this stay motion with the Commission. See ALAB-810. We demonstrate below that the 10 CFR §2.788(e) stay criteria are met.[1]

I. PROBABILITY OF SUCCESS ON THE MERITS

The NRC violated NEPA by authorizing low power operation of Shoreham without having supplemented its 1977 EIS. The EIS was premised upon the assumption that full power operation of Shoreham would occur, and the NRC

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[1] The Commission should refer to the County/State stay motion before the Appeal Board, filed June 17, and ALAB-810 for details regarding the stay request filed with the Appeal Board.

concluded that the environmental impacts and costs of Shoreham operation were outweighed by one benefit: the generation of electricity. In 1983, however, it became reasonably foreseeable that LILCO could not satisfy the NRC's emergency planning requirements and, therefore, that Shoreham could not be licensed to operate at full power. Thus, from that time on, it was foreseeable that the environmental costs of low power operation would not be offset by any benefits. This significantly changed circumstance required the NRC to supplement the EIS before deciding whether to issue a license which authorized only low power operation of Shoreham.

The NRC's NEPA violation is made even more clear cut by recent court and ASLB decisions. First, on February 20, 1985, the New York State Supreme Court held that LILCO lacks legal authority under the Constitution and laws of the State of New York to implement the offsite emergency response plan it had proposed as the basis for its full power license application.[2] Second, on March 18, 1985, the U.S. District Court for the Eastern District of New York ruled that Suffolk County's determination not to adopt or implement an emergency plan for Shoreham was rational and reasonable, and was not preempted by federal law as LILCO had argued.[3] Third, on April 17, 1985, the Licensing Board charged with review of LILCO's proposed emergency plan ruled that "the LILCO Plan cannot and will not be implemented as required by regulation."[4] This ruling, which flowed from the Board's conclusion "that the activities [LILCO] seeks to perform . . . are unlawful," (PID at 426), constitutes an absolute bar to the issuance of a full power operating license for Shoreham.

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[2] Cuomo v. LILCO, No. 84-1264, slip op. (N.Y. Sup. Ct. Feb. 20, 1985).

[3] Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, No. CV-83-4966, slip op. (E.D.N.Y. March 18, 1985).

[4] Partial Initial Decision on Emergency Planning, LBP-85-12, April 17, 1985, at 426.

These consistent and conclusive findings make clear that there is no basis for the NRC to persist in its view that the denial of a full power license for the Shoreham plant is "too speculative" or "uncertain" to merit consideration.[5]

In failing to prepare a supplemental EIS, the NRC violated each of its legal duties under NEPA.[6] The NRC failed to identify, much less to balance, the costs and benefits attributable to low power operation that is not followed by full power operation. In fact, there are no benefits; there are only substantial and irreversible environmental costs.[7] The NRC also failed to consider in an EIS an alternative to authorizing low power operation which is compellingly reasonable: to decline to authorize low power operation of

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[5] See, also, NRC Staff Response to Suffolk County and State of New York Petition for Reconsideration of CLI-85-1 (May 13, 1985) at 17-18 ("[T]he recent decisions make it far less speculative that a full power license will not issue in the near future"). Further, the Brenner Board in its June 14 PID states that at this point in time, the NRC's licensing board "has effectively found against LILCO" on emergency planning issues. See LBP-85-18, at 5. Moreover, the recent action of Suffolk County Executive Cohalan in issuing Executive Order 1-1985 does nothing to change the NRC's obligations under NEPA. That Order was "rescinded, annulled and set aside" in a June 10, 1985 Order of the New York Supreme Court (entered in In re the Town of Southampton v. Cohalan, No. 85-10520) based upon the Court's finding that Cohalan's actions were beyond his authority and in violation of County law, and that the policy and position of Suffolk County concerning Shoreham is as stated in the duly enacted resolutions of the Legislature.

[6] E.g., Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 97 (1983); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1123, 1128 (D.C. Cir. 1971); Scientists Institute for Public Information v. AEC, 481 F.2d 1079, 1092 (D.C. Cir. 1973); Alaska v. Andrus, 580 F.2d 465, 473-74 (D.C. Cir.), vacated in part on other grounds, 439 U.S. 922 (1978); Conservation Law Foundation v. Watt, 560 F. Supp. 561, 571 (D. Mass.) aff'd, 716 F.2d 946 (1st Cir. 1983).

[7] See Affidavit of Dale G. Bridenbaugh and Gregory C. Minor, Attachment 1 hereto. See also the affidavit filed by Messrs. Bridenbaugh and Minor in support of the County/State Petition for Reconsideration of CLI-85-1, dated May 7, 1985. Even if the Commission were to speculate that there are benefits of low power operation standing alone, it would need to consider those purported benefits in an EIS prepared in accordance with NEPA -- that is, any such alleged benefits would have to be weighed against the undeniable costs of low power operation.

Shoreham unless and until LILCO demonstrates that it can satisfy the NRC's emergency preparedness regulations. Finally, the cost-benefit balance in the 1977 EIS has been substantially undercut by the fact that Shoreham will likely never be licensed to operate at power levels at which electricity can be generated.

In addition, the license should be stayed pending review by the Appeal Board of the administrative appeal the County and State intend to file with respect to the substance of the June 14 ASLB Partial Initial Decision.[8]

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

The irreparable injury standard is satisfied here. First, if the stay is not granted, the pending County/State appeal in the U.S. Court of Appeals will be effectively mooted by commencement of Phase III/IV testing prior to a decision on the merits of the appeal. See NRC Staff Response to Petitions for Review of ALAB-800 (March 18, 1985) at 8 ("the Staff fails to see how issuance of a license could do anything other than moot the very issue involved [in the appeal]"). Although the merits of County/State appeal of the NEPA issue will be fully briefed in the Court of Appeals by July 1, 1985, clearly, any judicial decision reversing the NRC can have no meaningful effect unless a stay is

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[8] Time and space constraints do not permit us to enumerate in detail here the specifics of the issues to be appealed, but, in summary, they involve serious substantive and procedural violations resulting from the Board's handling of the Transamerica Delaval, Inc. ("TDI") diesel litigation. Major errors of the Brenner Board included inter alia, the following: the Board erroneously interpreted the requirements of GDC 17 and arbitrarily excluded evidence proferred by the County and State which would have demonstrated that GDC 17 requires a maximum permitted emergency diesel generator load high enough to absorb loads above the maximum emergency service load added by possible operator errors; the Board also erroneously applied the single failure criterion of GDC 17 to permit the use of inadequately sized emergency diesel generators.

granted, because an irreversible change in the status quo, and irreversible adverse environmental impacts including substantial irradiation of fuel and reactor components will have occurred.[9] Indeed, the Phase III/IV testing may be entirely completed prior to review on the merits unless a stay is granted. Contrary to the Appeal Board's statement in ALAB-810 (at p.6), the potential mooting of an appeal constitutes irreparable harm justifying a stay,[10] and here, in addition, irreparable and unnecessary environmental damage would also occur.

Second, there is a strong presumption that an injunction should issue when NEPA has been violated. See Realty Income Trust v. Eckerd, 564 F.2d 447, 456 (D.C. Cir. 1977). The repeated NRC refusal to take the "hard look" mandated by NEPA eliminates any doubt regarding the balance of equities in this case.

III. THE GRANT OF A STAY WILL NOT HARM LILCO

A stay could harm LILCO only if it impacted the timing of Shoreham's full power ascension (assuming, arguendo, that a full power license eventually were issued). Such impact is not possible here: even if the emergency planning ASLB decision were to be reversed -- merely the first of several prerequisites to the Commission's even considering the issuance of a full power license -- such a reversal, plus achievement of all the other prerequisites to full power

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[9] See Affidavit of Dale G. Bridenbaugh and Gregory C. Minor, Attachment 1 hereto, at 5-11, 15-16.

[10] 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). See also, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB Memorandum and Order, slip op. (May 24, 1984) at 7-8 (FEMA irreparably harmed if appeal mooted by denial of stay).

authorization, clearly could not occur until well into 1986.[11] Thus, the grant of a stay cannot result in any delay of the plant's ultimate operation, since such operation, if it ever is authorized, could only take place far in the future.[12]

Furthermore, other alleged "harms" which in the past have been asserted by LILCO cannot support a denial of the stay.[13] First, as the NRC Staff stated in rejecting LILCO's arguments on this matter:

> LILCO also included an affidavit from John Leonard explaining how delay would prejudice LILCO. Much of this prejudice flows from the delay in proceeding to Phases III and IV after having completed testing at Phases I and II. If this affidavit is being offered to justify reauthorization of the license, the short answer is found in the Commission's Order of November 21, 1984 (CLI-84-21) authorizing issuance of a license for Phases I and II. The Commission there indicated that issuance of a license for Phases I and II was without prejudice to any later decisions. (Order at 6). In proceeding with operation at Phases I and II, LILCO proceeded at its own risk that later licenses might not issue.

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[11] The following events/decisions must occur, and all must be resolved in LILCO's favor, before a full power license could be issued: a reversal of the April 17 ASLB Emergency Planning PID (the Appeal Board argument on the legal authority issues is scheduled for August 12, 1985); a reversal of the New York Supreme Court's Feb. 20, 1985 decision; and a decision on recently reopened emergency planning relocation center issues. In addition, and only after the occurrence of these events, the following are also prerequisites to issuance of a full power license: the conduct of an emergency planning exercise (it normally takes 120 days for FEMA to prepare for an exercise once scheduled, and several months to prepare and submit findings to the NRC); a hearing regarding the adequacy/outcome of the exercise, assuming an exercise is held; a decision on the exercise litigation; and a 30-day immediate effectiveness review.

[12] The County and State intend to ask the Court of Appeals to expedite its decision on the merits of the County/State appeal. Based upon events related to the recent Court of Appeals Diablo Canyon decision, an expedited schedule in this case may result in a judicial decision on the merits before the end of 1985.

[13] See, e.g., Affidavit of John D. Leonard, Jr. filed with LILCO's Petition for Review of ALAB-800 (March 4, 1985).

Response to Petitions for Review of ALAB-800 (March 18, 1985) at 8, n.5. Thus, it was LILCO's decision to risk the incurrence of such costs, and they cannot be asserted as "equities" to support a denial of a stay.[14] Second, there are few, if any, "testing" benefits to be gained from Phases III and IV that would not have to be repeated if and when full power operation were authorized.[15]

IV. THE PUBLIC INTEREST FAVORS ISSUANCE OF A STAY

The public interest does not favor a rush to substantially contaminate Shoreham and moot parties' appeal rights in the face of serious legal issues. The Commission has steadfastly refused to acknowledge that what it originally labelled as "speculation" has now been confirmed in federal court, state court, and by its own licensing board. The NRC's NEPA violation is a serious issue which merits meaningful judicial review; however, without a stay, judicial review would be meaningless. There is no need to conduct Phase III/IV testing at this time because LILCO's inability to satisfy the NRC's emergency planning regulations operates as a bar to issuance of a full power license.[16]

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[14] Not only did LILCO choose to risk the delay or non-issuance of a Phase III/IV license, but the alleged "costs" of delay -- e.g., need to purchase new neutron sources, and loss of personnel -- have already been incurred and were solely the result of the Appeal Board's vacation of the February 12 license authorization. Therefore, such "costs" cannot be attributed to a stay, nor can they be considered as equities weighing against the grant of a stay. In addition, as noted in the Affidavit of Dale G. Bridenbaugh and Gregory C. Minor dated March 15, 1985, which was attached to the Suffolk County and State of New York Response to LILCO's Petition for Review of ALAB-800 (March 18, 1985), the costs alleged by LILCO are substantially overstated.

[15] See Affidavit of Dale G. Bridenbaugh and Gregory C. Minor, Attachment 1 hereto, at 11-15.

[16] See also NRC Staff Response to Suffolk County and State of New York Petition for Reconsideration of CLI-85-1 (May 13, 1985) at 18 ("it is clear that the benefits of low power operation stem from preparing the plant for eventual full power operation . . . . The recent [court and NRC] decisions . . . indicate

(footnote continued)

Accordingly, there is no countervailing interest to outweigh that of the public.

Second, both Suffolk County and New York have urged that the public interest requires, at a bare minimum, maintenance of the status quo. The NRC's own practice requires that in considering where the public interest lies, great weight should be given to the views of the State and County who represent the people and the public's interest.[17] There is no conceivable public interest in permitting the further contamination of a plant that will never produce electricity or any other benefit to the public. The application of the "great weight" rule requires, at a minimum, the maintenance of the status quo for the period necessary to allow the merits of the State/County appeal to be decided.

V. AT A MINIMUM, THE LICENSE SHOULD BE STAYED TO PERMIT COURT OF APPEALS REVIEW OF THE COUNTY/STATE STAY MOTION AS PROVIDED IN THE COURT'S RULES

Even if the Commission were to find that the traditional stay criteria are not satisfied and therefore refuses to stay the license to permit administrative, or even judicial review of the merits of the County/State appeals -- a decision we submit would be clearly erroneous -- at the very least, the Commission must recognize the County's and State's right to judicial redress on the question of the stay itself. LILCO was prepared to commence Phase III/IV operations on the morning of June 20, 1985, and according to NRC counsel, the Staff was prepared to issue the license on June 19. Since license

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that there may well be little or no benefit to low power testing at the present time [and] . . . at this stage [it] . . . would appear to have no real value.")

[17] See Respondent U.S. Nuclear Regulatory Commission's Opposition to Emergency Motion for Stay, November 10, 1983, at 34, filed in San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984).

issuance and operation with its resulting substantial irradiation and contamination are imminent, without some kind of stay -- at least on an interim basis -- even the Court will have no opportunity to act to protect the rights of the State and County, other than on an ex parte emergency basis. Therefore, even if the Commission decides to deny this stay motion on the merits, at a minimum, the Commission should stay the license for the time necessary to permit the Court of Appeals to act upon the County's and State's Emergency Stay Motion.

The D.C. Circuit looks with disfavor on Emergency Motions seeking a decision in seven days or less. See D.C. Cir. Rule 6(j). Indeed, under the D.C. Circuit rules, there is normally a 7-day period for filing responses to motions and then a 3-day period thereafter for filing a reply. D.C. Cir. Rule 6(b) and (c).

Shoreham low power testing is not on any "critical path" toward any later operation of the plant. Therefore, there is no justification for the Commission to refuse to stay the license -- as it has in most other contested cases where court appeals are expected -- so that the normal Court of Appeals briefing schedule for motions can be followed. Accordingly, we suggest that the Commission, at a minimum, stay the license for two weeks following its rulilng. This would permit the Court of Appeals' normal briefing rules to apply, and provide three days for a Court ruling.

By staying the license for two weeks, the NRC would allow careful judicial consideration of the views of all parties on the Emergency Motion. There is no public benefit to be gained from, nor is it seemly for the NRC to

be, preventing the Court from having the time period it customarily requires for such consideration.

Respectfully submitted,

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