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LILCO, November 2, 1984

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)	)	
	)	

LONG ISLAND LIGHTING COMPANY'S OPPOSITION
TO REQUEST FOR WRITTEN BRIEFS AND ORAL ARGUMENTS

On September 5, 1984, the Atomic Safety and Licensing Board for low power ordered that "LILCO should be permitted to conduct fuel loading and low power testing as proposed in Phases I and II, and it is so ordered." Order Reconsidering Summary Disposition of Phase I and Phase II Low Power Testing, at 10 (September 5 Order). On September 7, the Commission solicited all parties' views concerning the September 5 Order. LILCO, Suffolk County, New York State and the Staff responded on September 14. The immediate effectiveness of that Order awaits the Commission's action.

On October 29, 1984, the Licensing Board issued its Initial Decision, authorizing a low power license for Phases III and IV of LILCO's proposed low power testing and reaffirming its earlier order with respect to Phases I and II. Suffolk County and New York State now seek to exploit the issuance of this Initial Decision as a lever to reopen briefing

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of the Board's September 5 Order and to further delay the Commission's immediate effectiveness review, by requesting two weeks to file additional briefs on all phases of the low power proceeding followed by opportunity for reply and oral argument. Request of Suffolk County and New York State To Present Written Briefs and Oral Arguments on the Licensing Board's Low Power Decision (November 2, 1984) (Joint Request). The Joint Request is procedurally improper and substantively unnecessary, and seeks to reopen issues already decided by this Commission. LILCO opposes it.

I. A Phase I and II License Need Not Await Further Proceedings

Not surprisingly, the Intervenors request that the Commission not act on the Licensing Board's September 5 Order concerning Phases I and II pending a briefing of all four phases. Totally incorrectly, however, they argue that the September 5 Order "has been overtaken and subsumed" by the October 29 Initial Decision. (Joint Request p. 2).

No reason for further delay or additional briefing concerning Phases I and II exists. The Licensing Board authorized a Phase I and II license almost two months ago. The parties promptly submitted extensive views to the Commission on September 14. The Initial Decision raises no new issues concerning these two phases, and Intervenors fail to point to

any such allegedly new material. Indeed, as the Licensing Board itself stated, the Initial Decision merely "reaffirms the findings and conclusions contained in [the Board's] Orders of July 24 and September 5, 1984." (Initial Decision p. 31). Thus, Phases I and II remain ripe for decision now without further briefing or delay.

I. Briefs on Phases III and IV Are Inappropriate and Unnecessary

Intervenors ask that the "Commission request the parties to focus on alleged errors of the Licensing Board in failing to apply correctly the exemption provisions of Section 50.12(a), failing to comply with the Commission's May 16 and July 18 Orders, and failing to confront the arguments of the parties and the evidence upon which arguments were premised." (Joint Request pp. 1-2). This extremely broad request confuses an immediate effectiveness review with the full appellate review normally conducted by the Appeal Board.

Immediate effectiveness reviews are limited in scope. Significantly, for low power licenses, they are expressly unnecessary.[1] 10 CFR §§ 2.764(b), (f). Although the Commission has mandated such a review in this case, its scope

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1 Indeed, the regulations presume that there will be no immediate effectiveness review of licenses authorizing only fuel loading and operation up to 5% power; the Commission's only reservation is an omnibus restatement of its inherent authority "to step in at an earlier time," § 2.764(f)(2)(i).

should reflect the relative safety significance of a low power license. Clearly, the scope of the review should not exceed the bounds set forth in § 2.764(f)(2). The purpose of such a review is not to substitute the Commission for the Appeal Board. Rather, it is simply "to determine whether to stay the effectiveness of the decision." § 2.764(f)(2)(i). In making that determination, the regulation offers the following guidance:

> An operating license decision will be stayed by the Commission insofar as it authorizes other than fuel loading and low power testing, if it determines that it is in the public interest to do so, based on a consideration of the gravity of the substantive issue, the likelihood that it has been resolved correctly below, the degree to which correct resolution of the issue would be prejudiced by operation pending review, and other relevant public interest factors.

10 CFR § 2.764(f)(2)(i). These considerations are appropriate for a stay. However, they are not the considerations which the Intervenors seek to brief. Indeed, intervenors identify no substantive issue beyond a rehash of their long-rejected argument that a low power license should never issue, given the alleged uncertainties in this case.

As already noted, the usual low power license case does not require an immediate effectiveness review. Here one has been ordered because an exemption request is involved.

Thus, the review, if any, should focus on whether the Board below has properly followed the Commission's guidance for the conduct of this exemption proceeding. The likelihood that this guidance has been followed and that the issues have been resolved properly is apparent from the extensive record below. The number of evidentiary hearing days involved on just this one issue -- nine days -- is more than the totality of hearings in some cases. The Licensing Board's 106-page Initial Decision, supplementing its September 5 Order, is quite detailed. On its face, it addresses all the issues unique to this exemption proceeding -- the so-called "as safe as" standard and exigent circumstances.

Once the Commission is satisfied that the broad outlines of its guidance for the proceeding have been followed, it should leave further review to the appellate process. Obviously, an immediate effectivenss review does not contemplate that the Commission, at this stage, will review the factual record below in detail on every conceivable issue which the County or State may raise. Moreover, since the Commission provided guidance to the Licensing Board as the proceedings progressed, the opportunity for erroneous application of the Commission's regulations is greatly reduced. Consequently, there is ample reason for the Commission to dispense with the opportunity for comment on Phases III and IV as contemplated by § 2.764(f)(2)(ii).

Nonetheless, if comments are to be filed, § 2.764 specifically requires them to be brief, to be received within ten days of the Board decision and to pertain solely to the immediate effectiveness issue. No extensive briefing is contemplated, nor should any be permitted, concerning "alleged errors of the Licensing Board."

III. It Is Unnecessary to Revisit Whether Any Low Power License Should Ever Issue for Shoreham

Relying on an extra-judicial letter written in the heat of a political campaign, the Intervenors apparently hope to convert the immediate effectiveness review into a reconsideration of the Commission's 1983 decision that any uncertainties surrounding the prospects for a full power license should not affect the issuance of a low power license. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-83-17, 17 NRC 1032 (1983). In short, the Intervenors seek to raise issues not considered by the Licensing Board because they were foreclosed by a previous Commission ruling on the identical question. Ad nauseam attempts to relitigate issues finally decided should be dealt with swiftly. Since no reason is given as to why this issue should be resolved differently in 1984 than it was in 1983, the Commission should not let its processes be manipulated to suit the dilatory tactics of intervenors.

IV. Conclusion

The Joint Request should be denied. No additional briefing is necessary on any issues; no oral argument is contemplated by the regulations. Instead, the Commission should expressly dispense with any opportunity for comment. If, however, any briefing is permitted, (1) it should be limited to Phases III and IV with no further delay of the Commission's consideration of Phases I and II; (2) it should be completed within the ten-day time frame suggested in § 2.764(f)(2); and (3) it should be limited to the question of whether a stay should be granted.

Respectfully submitted,

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DATED: November 2, 1984

CERTIFICATE OF SERVICE

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(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL-4 (Low Power)

I hereby certify that copies of LONG ISLAND LIGHTING COMPANY'S OPPOSITION TO REQUEST FOR WRITTEN BRIEFS AND ORAL ARGUMENTS were served this date upon the following by U.S. mail, first-class, postage prepaid or by hand (as indicated by one asterisk) or by Federal Express (as indicated by two asterisks).

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