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LILCO, December 5, 1984

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)	)	

LILCO'S OPPOSITION TO
SUFFOLK COUNTY PETITION FOR REVIEW

On November 20, 1984, Suffolk County petitioned the Commission to review the Appeal Board's decision in this case, ALAB-788. Suffolk County Petition for Review of ALAB-788 (Petition).1/ LILCO opposes the County's requests and urges the Commission to deny the petition.

Commission review of an Appeal Board decision is a matter of discretion reserved for important questions of fact, law or policy. 10 CFR

1/ The Petition also requested the Commission to reconsider a decision it rendered six months ago, CLI-84-9, 19 NRC 1323 (1984). Petition at 1. The Commission's decision, issued on June 5 in response to a certification by the Appeal Board, ALAB-769, 19 NRC 995 (1984), addressed the question whether "some form of environmental evaluation under NEPA [was] required as a precondition to issuance of a license for low power operation," and answered it in the negative. CLI-84-9, 19 NRC at 1326. Indeed, the Commission noted that it had earlier rejected a related County argument that no low power license be granted for Shoreham before final resolution of emergency planning issues. Id. at 1327. The County's request for reconsideration of CLI-84-9 is grossly out of time. Under § 2.771, petitions for reconsideration must be filed within 10 days of the date of the decision. The County offers no explanation for its delay. The request for reconsideration also lacks substantive basis. The County offers no reason why the Commission should revisit an issue that it explicitly and carefully considered. The request makes no attempt to address, as required by the Rules of Practice at § 2.771(b), the respects in which the final decision is claimed to be erroneous, the grounds for the petition, and the relief sought.

add: Gorn
J. Goldberg
OCA

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§ 2.786(b)(1), (4). Petitions for review should not ordinarily be granted on matters of law or policy

> unless it appears the case involves an important matter that could significantly affect the . . . public health and safety . . . , involves an important procedural issue, or otherwise raises important questions of public policy . . . .

10 CFR § 2.786(b)(4)(i) (emphasis added). Similarly high standards exist where matters of fact are involved:

> A petition for review of matters of fact will not be granted unless it appears that the Atomic Safety and Licensing Appeal Board has resolved a factual issue necessary for decision in a clearly erroneous manner contrary to the resolution of that same issue by the Atomic Safety and Licensing Board;

10 CFR § 2.786(b)(4)(ii) (emphasis added). Thus, by implication, petitions for review are not to be granted where, as here, the Appeal Board has resolved factual issues consistent with the Licensing Board's determination.2/ The County has also consistently failed to establish the importance of the issues presented by it, contrary to the requirements of § 2.786(b).

A. Quality Assurance for Non-Safety Related Equipment (Petition at 1-2)

The County provides inadequate basis for Commission review of the Appeal Board's conclusion that LILCO applied adequate quality assurance measures to non-safety related equipment. First, to the extent the County argues that, as a legal matter, GDC 1 requires a comprehensive "QA program" for equipment

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2/ Not only is this result consistent with the caveat concerning a "contrary" result, it is also consistent with the "clearly erroneous" standard. Where two separate adjudicatory boards have reached consistent factual conclusions, it is difficult to conclude they are "clearly erroneous."

which is important to safety but not safety related, the matter has already been resolved by the Commission. In CLI-84-9, the Commission concluded that

> whether any piece of equipment has a function "important to safety" is to be determined on the basis of a particularized showing of clearly identified safety concerns for the specific equipment, and the requirements of General Design Criterion 1 (GDC 1) must be tailored to the identified safety concerns.

CLI-84-9, 19 NRC at 1325. Thus, contrary to the County's claim, the regulations do not mandate a systematic QA program of the sort envisioned by the County for non-safety related equipment. See ALAB-788 at 29. Second, as a factual matter, the adequacy of LILCO's quality measures for non-safety related equipment is not appropriate for Commission review. See § 2.786(b)(4)(ii). Both the Licensing Board and the Appeal Board agreed: LILCO applied quality assurance and quality standards commensurate with the functions of the equipment in question.3/ ALAB-788 at 20-32; LBP-83-57, 18 NRC 445, 546, 563-65 (1983).

Third, no significant safety issue exists. The County, given more than ample opportunity, has failed to show on the record or in its petition that any specific equipment at Shoreham has been subject to inadequate quality assurance.

3/ Footnote 2 of the County's petition is blatantly misleading. First, the County claims, without citation to the record, that "repeated requests" were made for LILCO to place its construction site inspection manual on the record. The only "requests" were the excuses of SC's own witnesses, who tried to defend their ignorance of non-safety related QA by claiming that they had never seen the document in question. E.g., Tr. 16,004-05 (Hubbard). Second, the County seems to suggest that the construction site inspection manual was the sum total of non-safety related quality assurance for Shoreham. To the contrary, it was only a part of the efforts of LILCO and its contractors to ensure adequate quality assurance for non-safety related equipment. E.g., LBP-83-57, Unpublished Findings of Fact at 599-601 (J-375 to -384), 603-05 (J-389 to -395), 613-19 (J-421 to -437).

B. Compliance With 10 CFR Part 50, Appendix B, Criterion 18 (Petition at 2-3)

The County's claim that LILCO has failed to comply with Criterion 18 because it does not use statistical methodology in conducting QA audits is unsupported by the facts or law. Both the Licensing and Appeal Boards correctly found on the merits that LILCO's QA audit program provided reasonable assurance of no undue risk to the public health and safety. See ALAB-788 at 65-66; 18 NRC at 584-86. Thus, this subject is not an appropriate subject for Commission review under § 2.786(b)(4)(ii). Similarly, both Boards agreed that Criterion 18 does not require the methodological rigidity sought by the County. ALAB-788 at 64-65; 18 NRC at 584, 611, 619. As the record reflects, (i) statistical methods have not been demonstrated to be feasible for use in Appendix B audit programs, 18 NRC at 618-19, and (ii) the nuclear industry and the NRC Staff do not use such methods in audit programs. Id. at 611. The County seeks an unwarranted sharp departure from past NRC and industry interpretation and practice more akin to a petition for rulemaking than to a petition for review.

C. Specific QA Issues

1. SC Erroneously Claims All QA Deficiencies Are Significant (Petition at 3-5)

Suffolk County seeks review of the Appeal Board's factual finding, agreeing with the Licensing Board, that none of the quality assurance deficiencies discussed in the Shoreham record had any safety significance.

The County's claim is meritless. First, the assertion that "all QA deficiencies are significant" (Petition at 4) defies common sense. Some

deficiencies are significant and some are not. Both the Appeal and Licensing Boards held that, in general, LILCO's were of the latter variety. ALAB-788 at 66-86; 18 NRC at 580-81, 586-97. Second, SC's arguments are contrary to the express language of Appendix B. Among others, Criterion XVI recognizes that deficiencies will occur and expressly distinguishes between those that are significant and those that are not. Third, the Appeal Board's finding that LILCO had complied with the NRC's regulations despite the existence of deficiencies is consistent with NRC precedent. QA programs need not be perfect; they only need to provide reasonable assurance of no undue risk. See ALAB-788 at 67 (quoting Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983)); see also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1345 (1983).

Finally, the County has failed to allege that any specific QA deficiency has safety significance. The Licensing Board repeatedly urged the County to put its best case forward, ALAB-788 at 87, but no valid safety concerns were ever identified in over 55 days of evidentiary hearings. The Petition is similarly devoid of specific safety allegations. These factors all warrant denial of the Petition.

2. SC's Procedural Claims Are Unpersuasive (Petition at 5-6)

The County alleges procedural error because its witnesses were not permitted to introduce testimony on an NRC inspection report. Petition at 5-6. In context, the claim is palpably absurd.4/ As the massive QA litigation drew

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4/ As noted above, fifty-five hearing days were devoted to SC's QA/QC contentions generating almost 10,000 pages of transcript. County cross-examination of LILCO witnesses consumed over seven weeks.

to a close, the County attempted to add yet another inspection report to the hundreds of inspection and audit reports already on the QA record. ALAB-788 at 93-94. While the Board, over LILCO's objections, permitted admission of these inspection results, it limited new testimony to those parties with first-hand knowledge of the inspection. The County's witnesses had none. ALAB-788 at 93 (quoting Tr. 19,334-35 (Brenner)). The Licensing Board concluded that County testimony on the subject would not be useful because the County's counsel had represented that its witnesses only "wished to outline areas for exploration rather than introduce new, affirmative expert analysis." ALAB-788 at 95. The Appeal Board agreed finding also that the County had failed to show that the exclusion of testimony was prejudicial in any way. Id. The present Petition makes no arguments not already rejected below and provides no basis for Commission review.

D. Systems Interaction

1. SC Erroneously Attacks LILCO's Methodology (Petition at 6-7)

To support its argument that the Appeal Board's factual conclusion concerning LILCO's systems interaction methodology is clearly erroneous, the County points only to one interaction (the "Michelson concern") that LILCO allegedly failed to identify. Petition at 6. But the County concedes that "GE and apparently LILCO had identified this problem . . . . " Id. Thus the example fails to support the conclusion that the Appeal Board's decision was clearly erroneous.5/ Moreover, since the Appeal Board's conclusion was

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5/ In effect, the County merely disagrees with LILCO's resolution of the Michelson concern. As the record reflects, however, the NRC Staff, the Licensing Board and the Appeal Board agree that the Michelson concern presented no safety hazard. ALAB-788 at 50-52.

consistent with the Licensing Board decision, 10 CFR § 2.786(b)(4)(ii) commends denial of the petition.

2. The County's USI A-17 Claim Is Incorrect (Petition at 7)

The County claims (Petition at 7) that the Appeal Board's systems interaction conclusions are clearly erroneous under the North Anna standard, ALAB-491, 8 NRC 245, 247-48 (1978), because insufficient progress has been made in resolving generic unresolved safety issue A-17 (systems interaction). The Appeal Board, however, held that its North Anna decision was not applicable here where the unresolved safety issue did not involve an identified safety concern but was, rather, confirmatory.6/ ALAB-788 at 54-55. Moreover, both the Licensing and Appeal Boards agreed that systems interaction had been adequately addressed for Shoreham through LILCO's many systems interaction studies. E.g., ALAB-788 at 54; 18 NRC at 553. The County has also failed to allege any specific safety concern with systems interaction at Shoreham. Thus, the Appeal Board decision is neither clearly erroneous nor inconsistent with the Licensing Board's findings and review is thus barred by 2.786(b)(4)(ii).

E. The Appeal Board Properly Vacated the License Condition on Important to Safety (Petition at 7-8)

Although the Appeal Board vacated the Licensing Board's license condition concerning the definition of important to safety, its decision is correct.

6/ Confirmatory status is an acceptable basis for resolving a USI. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-81-21, 14 NRC 107, 118 (1981).

The Appeal Board's action is consistent with the guidance provided by the Commission in CLI-84-9. See 19 NRC at 1325. As ALAB-788 reflects, the guidance issued after the Licensing Board's decision obviated any need to impose a license condition.7/ ALAB-788 at 32-36.

F. Evidentiary Depositions (Petition at 8-9)

The only Emergency Planning matter raised with any specificity by Suffolk County concerns the Licensing Board's proposal, after soliciting the parties' views, to use publicly held evidentiary depositions, supplemented by live cross-examination before the Board on selected matters of substance and demeanor, as the basis for interrogating prefiled testimony in Phase I of the Emergency Planning issues.8/ LBP-82-107, 16 NRC 1667 (1982). When Suffolk County refused to participate in the Board's intended procedure, the Board held the County, after notice, in default and dismissed its "Phase I" contentions. LBP-82-115, 16 NRC 1923 (1982).

Citing no authority more specific than § 189 of the Atomic Energy Act and "the norm and practice of NRC proceedings," Suffolk County asserts here, as before the Appeal Board,9/ that the use of these depositions, supplemented by hearings, violated Intervenors' due process rights. Petition at 8.10/

7/ Imposition of a license condition that may be inconsistent with CLI-84-9 is inappropriate given the potential for rulemaking on the subject. See 19 NRC at 1325; see also Utility Safety Classification Group Petition for Rulemaking (October 30, 1984).

8/ For the history of events leading to this division of issues, see ALAB-788 at 137-40.

9/ The pertinent portion of Suffolk County's Petition (pp. 8-9) is only a slightly condensed version of its Brief in Support of Appeal of Licensing Board Partial Initial Decision (December 23, 1983) at 96-98.

10/ While Suffolk County asks the Commission to order hearings as a remedy, it does not complain that dismissal of contentions was an improper remedy for

(footnote continued)

Suffolk County's complaint does not merit Commission review. Nothing cited by the County suggests the unlawfulness of evidentiary depositions, either absolutely or in the context of enhancing the efficient conduct of an already lengthy and complex proceeding. To the contrary, ample authority cited by both the Licensing Board and the Appeal Board supports the conclusion that neither the Atomic Energy Act nor the APA rigidly prescribes any particular form of hearing so long as full and true disclosure of the facts is permitted and parties are not prejudiced. As the Appeal Board put it in finding the Licensing Board's position "unassailable":

> The County's argument regarding the Board's proposed procedure has a single theme -- i.e., that section 189 of the Atomic Energy Act, 42 USC § 2239, provides parties with an opportunity for a hearing and such hearing must be an oral presentation before a Licensing Board. The County's brief is wholly bereft of authority to support its position. The Board's decision, on the other hand, is thoughtful and well documented.
>
> As the Board notes, section 189 does not in terms specify the nature of the hearings that must be held. But section 181 of the Act, 42 USC § 2231, brings into play the procedural ground rules established by the Administrative Procedure Act (APA), 5 USC § 551 et seq. . . . [T]he APA expressly authorizes agencies in licensing cases such as this to adopt procedures for the submission of all or part of the evidence in written form as long as the parties are not prejudiced. The right to submit rebuttal evidence and conduct cross-examination, moreover, is not unlimited; it is bounded by a need for a full and true disclosure of the facts.

ALAB-788 at 141-142 (footnotes omitted).

(footnote continued)

default. Rather, its complaint is directed to the use of the procedure proposed by the Licensing Board and to the finding that it was in default for refusal to go forward under that procedure.

Suffolk County has made no showing of actual prejudice, but only the "most generalized, undocumented claim" which ignores the fact that

> The Board was committed to review the evidentiary depositions carefully and take such procedural steps (including oral cross-examination as were necessary to ensure full development of the record and a fair and thorough resolution of any matters the County wished ultimately to raise.

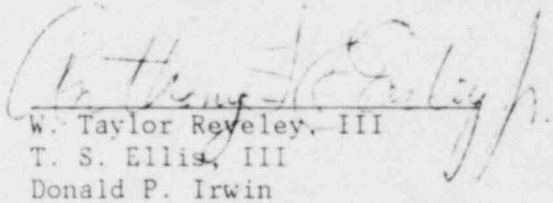
ALAB-788 at 142-143. Indeed, the County's refusal to participate in the hearings prevented any demonstration whatever of impediments to full and fair disclosure or other arguable prejudice, and, in the Appeal Board's words, "deprives its argument on appeal of any substance." ALAB-788 at 143. The issue does not merit review under § 2.786(b)(i).

Conclusion

The Petition for Review should be denied.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY



W. Taylor Reveley, III
T. S. Ellis, III
Donald P. Irwin
Anthony F. Earley, Jr.

Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

DATED: December 5, 1984

LILCO, December 5, 1984

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO's Opposition to Suffolk County Petition for Review were served this date upon the following by U.S. mail, first-class, postage prepaid.

Chairman Nunzio J. Palladino
United States Nuclear
Regulatory Commission
1717 H Street
Washington, DC 20555

Commissioner James K. Asselstine
United States Nuclear
Regulatory Commission
1717 H Street, N.W.
Washington, DC 20555

Commissioner Frederick M. Bernthal
United States Nuclear
Regulatory Commission
1717 H Street, N.W.
Washington, DC 20555

Commissioner Thomas M. Roberts
United States Nuclear
Regulatory Commission
1717 H Street, N.W.
Washington, DC 20555

Commissioner Lando W. Zech, Jr.
United States Nuclear
Regulatory Commission
1717 H Street, N.W.
Washington, DC 20555

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing
Appeal Board
United States Nuclear
Regulatory Commission
Washington, D.C. 20555

Judge Gary J. Edles
Atomic Safety and Licensing
Appeal Board
United States Nuclear
Regulatory Commission
Washington, D.C. 20555

Judge Howard A. Wilber
Atomic Safety and Licensing
Appeal Board
United States Nuclear
Regulatory Commission
Washington, D.C. 20555

Judge Lawrence Brenner
Chairman, Atomic Safety
and Licensing Board
United States Nuclear
Regulatory Commission
Washington, DC 20555

Judge Peter A. Morris
Atomic Safety and Licensing
Board
United States Nuclear
Regulatory Commission
Washington, DC 20555

Judge George A. Ferguson
Atomic Safety and Licensing
Board
School of Engineering
Howard University
2300 6th Street, N.W.
Washington, D.C. 20059

Eleanor L. Frucci, Esq.
Atomic Safety and Licensing
Board
United States Nuclear
Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing
Board Panel
United States Nuclear
Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
United States Nuclear
Regulatory Commission
Washington, D.C. 20555

Edwin J. Reis, Esq.
Bernard M. Bordenick, Esq.
Office of the Executive
Legal Director
United States Nuclear
Regulatory Commission
Washington, DC 20555

Herbert H. Brown, Esq.
Alan R. Dynner, Esq.
Lawrence Coe Lanpher, Esq.
Kirkpatrick & Lockhart
8th Floor
1900 M Street, N.W.
Washington, DC 20036

Fabian Palomino, Esq.
Special Counsel to the Governor
Executive Chamber, Room 229
State Capitol
Albany, NY 12224

James B. Dougherty, Esq.
3045 Porter Street
Washington, DC 20008

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

Stephen B. Latham, Esq.
John F. Shea, Esq.
Twomey, Latham & Shea
33 West Second Street
Riverhead, NY 11901

The Honorable Peter Cohalan
Suffolk County Executive
County Executive/
Legislative Building
Veterans Memorial Highway
Hauppauge, NY 11788

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

Docketing and Service
Branch (3)
Office of the Secretary
United States Nuclear
Regulatory Commission
Washington, DC 20555

Anthony F. Earley, Jr.

Hunton & Williams
Post Office Box 1535
Richmond, Virginia 23212

DATED: December 5, 1984