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LILCO, May 13, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-3
	)	(Emergency Planning
(Shoreham Nuclear Power Station, Unit 1)	)	Proceeding)
	)	

LILCO'S RESPONSE TO INTERVENORS' REQUEST FOR AN EXTENSION OF TIME AND PAGE LIMITS, INCLUDING A MOTION FOR REFERRAL TO THE COMMISSION OR, ALTERNATIVELY, SEVERANCE AND EXPEDITED REVIEW OF LEGAL AUTHORITY ISSUES

On May 2, ten days after public issuance of the Licensing Board's Partial Initial Decision on Emergency Planning Issues, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC ___ (slip op. April 17, 1985) (hereinafter PID), LILCO filed a Notice of Appeal with this Appeal Board, in accordance with the Commission's rules of practice. LILCO indicated that its appeal would be limited to a narrow group of legal-authority-related issues consisting of ten "legal authority" contentions (Contentions 1-10) and two inextricably related contentions: conflict of interest (Contention 11) and lack of state plan (Contention 92). Six days later, the Intervenors, having obtained an informal ruling regarding filing deadlines, served their Notice of Appeal. The

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Intervenors' subsequent Motion for Adjustment of Brief Filing Requirements indicates that their appeal will cover the broad range of factual issues decided adversely to them by the Licensing Board, and requests substantial extensions of both page and time limitations normally applicable. LILCO submits this response to the Intervenors' motion pursuant to the Appeal Board's telephonic order of May 8.1/

LILCO strongly believes that the decision on the contentions listed in its Notice of Appeal should be resolved dispositively on the fastest possible track. These contentions raise a distinct, and bounded, set of issues of major policy significance; their pendency permeates the ultimate resolution of this case. However, these issues are also discrete and, while weighty, are not extensively record-based like the factual issues being raised by the Intervenors.

Therefore, as explained more fully below, LILCO would not object to an extension of the time and page limitations for briefing of factual issues as long as the legal issues raised

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1/ The Appeal Board also ordered that this filing include information on the status of Cuomo v. LILCO in the Supreme Court of the State of New York. On April 26, 1985, LILCO noticed its appeal from Judge Geiler's March 25, 1985 Partial Declaratory Judgment on the state law issues. No briefing or hearing dates have yet been set. Still pending before Judge Geiler are (1) LILCO's motion to stay further consideration of the preemption issue and (2) Suffolk County and New York State's motion for summary judgment on the preemption issue. The parties are finalizing a briefing schedule this week on those motions that would result in oral argument on the motions during the week of June 10.

by LILCO's Notice of Appeal are severed for briefing on a separate, expedited schedule, preferably by referral to the Commission pursuant to 10 C.F.R. § 2.785(d).

I. Referral to the Commission

LILCO requests that this Board sever the issues raised on LILCO's appeal of the Board's decision on Contentions 1-11 and 92, and send those issues directly to the Commission for immediate review.

A. Severance

There are 16 groups of contentions decided in the Licensing Board's April 17 Partial Initial Decision on Emergency Planning, involving determinations on about 70 contentions, some containing several parts. LILCO has appealed only those portions of the decision dealing with (1) Contentions 1-10 on the "legal authority" issues (PID at 386-426), (2) Contention 11 on conflict of interest (PID at 51-63), and (3) Contention 92 on the existence of a state plan for Shoreham (PID at 367-71). These issues raise primarily a question of law regarding the legality of a utility-implemented emergency plan and involve interpretation of NRC regulations and guidance governing such a plan. The Intervenors, on the other hand, have noted their appeal of, in all likelihood, dozens of factual issues decided in LILCO's favor. The legal issues appealed by LILCO are different in kind from the factual issues appealed by the Intervenors, and so can be conveniently grouped and dealt with separately.

In addition, Contentions 1-11 and 92 involve discrete questions of law that can be decided fairly quickly due to the limited issues involved2/ and the extensive briefing completed by the parties previously. The Intervenors, on the other hand, have indicated that preparing their appeal of the factual issues "is certain to be a complex and time-consuming task," in part due to the size of the record and in part the number of issues they intend to appeal, including not only determinations in the PID on every major issue litigated but pretrial rulings as well. Suffolk County and State of New York Motion for Adjustment of Brief Filing Requirements at 2-4. Resolution of those issues will require review of an extensive record and may take quite some time to complete.

Finally, as discussed in more detail below, the legal issues are of obvious significance to this proceeding and NRC licensees generally, while the factual issues appealed are the more usual emergency planning issues of transportation, communication, brochures, equipment, and so forth.

Therefore, because they are fundamentally questions of law that can be decided quickly and are of obvious significance to this licensing proceeding, LILCO requests that the Appeal Board sever review of the Licensing Board's decision on

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2/ An analysis of the Margulies Board's decision on Contentions 1-11 and 92 will require a limited review of certain portions of the record, but the determination against LILCO on those contentions is grounded primarily in arguments of law, not fact.

Contentions 1-11 and 92 from review of the remainder of the Board's decision appealed by the parties.

B. Immediate Commission Review

1. Prompt Action is Needed

LILCO requests that the Appeal Board refer the Licensing Board's decision on Contentions 1-11 and 92 directly to the Commission pursuant to 10 C.F.R. § 2.785(d). The Licensing Board's decision on Contentions 1-11 and 92 raises questions of law regarding the interpretation of the Atomic Energy Act, 10 C.F.R. § 50.47, NUREG-0654, the NRC Authorization Acts, and the doctrine of preemption in the field of radiological health and safety. The legality of a utility plan such as the one LILCO has submitted is clearly a "major or novel question of law" that must ultimately be decided by the Commission, see 10 C.F.R. § 2.785(d), and that will have a pervasive effect upon this proceeding. Cf. Houston Power & Lighting Co. (Allens Creek Station), ALAB-635, 13 NRC 309, 310 (1981). See also 10 C.F.R. § 2.786(b)(4)(i).

Equally important, the availability of a utility plan such as LILCO's to enable an applicant to meet NRC requirements for emergency plans despite state and local government refusal to participate in such plans raises a major and novel question of policy that affects all nuclear plants now operating or under construction. Again, such a question must ultimately be

decided by the Commission. See 10 C.F.R. § 2.785(d). The difficulties being encountered by licensees and applicants where governmental entities delay or refuse to participate in emergency planning have been well-documented. See, e.g., "Further Actions Needed to Improve Emergency Preparedness Around Nuclear Power Plants, GAO/RCED-84-43," August 1, 1984, at ii-iii, 10-11. The Licensing Board's decision on the legality of the LILCO plan has far-reaching implications for all nuclear power plants.

The importance of this issue to the nuclear industry, and Shoreham in particular, justifies prompt action by the Commission. If utility emergency plans are legal, the Commission should so hold as soon as is feasible, thereby enabling Shoreham to get a FEMA exercise scheduled for its emergency plan (nine months have already passed since hearings on that plan ended) and thereby eliminating a growing source of disruption and delay for the industry as a whole. If the NRC thinks utility emergency plans are per se illegal, then, again, the sooner the Commission so opines the better, so that responsible entities can get on with finding other means of overcoming difficulties created by state and local refusal to help with emergency planning.3/

3/ The Appeal Board referred the Brenner Board's ruling on Suffolk County's motion to terminate this proceeding, see Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608 (1983), without addressing the issues.

(footnote continued)

2. The Decision Affects All Nuclear Plants

The Licensing Board concluded that LILCO does not derive police powers as a matter of federal law and therefore does not have the legal authority to implement the emergency plan it prepared in response to federal requirements, in the face of opposition from Suffolk County and New York State. That holding cannot be limited to the admittedly unusual circumstances facing LILCO at Shoreham. The holding is categorical: in the emergency planning area, utilities do not derive authority from existing federal statutes to override garden-variety state law police-power restrictions. Further, the state law restrictions relied on by the Licensing Board are not of a type unique to Suffolk County or Long Island or New York but are universally applicable. While Intervenors' "legal authority" contentions cite various New York State and Suffolk County statutes and ordinances, the Licensing Board did not rely on these specific provisions. Rather, like the New York State court ruling on the legality of LILCO's exercise of emergency planning powers as a matter of New York State law (Cuomo

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(footnote continued)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), Docket No. 50- 322(OL), Appeal Board Order dated April 26, 1983 (unpublished). In addition, the Commission has considered utility planning at Indian Point. See, e.g., Consolidated Edison Co. (Indian Point, Unit 2), CLI-82-38, 16 NRC 1698 (1982).

v. LILCO, Supreme Court of the State of New York, Suffolk County, Consol. Index No. 84-4615, Memorandum by Geiler, J.S.C., dated February 20, 1985), the Licensing Board based its conclusions sweepingly on an asserted absence of police powers vested in utilities.

The decision is thus a far-reaching one: the common law of all states confers on the states and their localities, in varying proportions, traditional "police powers." Thus even without reliance on specific statutory provisions comparable to those recited in Contentions 1-10 (those, too, are common types of statutes), any utility owning a nuclear power plant can be denied a license or compelled to cease operation if the state and local governments with jurisdiction over its EPZ refuse to cooperate with it. This is so regardless of the specific facts of emergency planning for the plant: at Shoreham all aspects of emergency planning except those clearly involving state or local legal authority issues (i.e., those LILCO is appealing) were found totally acceptable or readily remediable.

As the Margulies Licensing Board's decision stands, an emergency plan is insufficient, no matter what its merits, if state and local governments refuse to participate in it and object on legal authority grounds to the utility's implementing it.4/ That conclusion gives state and local governments the

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4/ An emergency plan may be insufficient even if a state merely remains silent. As noted above, traditional "police

(footnote continued)

opportunity to exercise a veto over nuclear power plant operation with respect to matters within the scope of the NRC's safety regulations. It is a profoundly far-reaching decision.

3. The Decision Contradicts NRC Law and Policy

Finally, the Licensing Board's decision on Contentions 1-11 and 92 flies in the face of the Commission's previous decision in this proceeding to allow LILCO to go forward with a utility plan to meet NRC emergency planning requirements. The Licensing Board has found that the guidance of NUREG-0654, providing for an "integrated approach" to the development of response plans, "cannot be met in this case where the State refuses to participate in planning or to commit to respond in an emergency. The Board does not have reasonable assurance that an integrated or coordinated emergency response that included the State would occur." PID at 369. The Licensing Board goes on to explain that the NRC's regulations do not allow for a plan that does not meet the NUREG-0654 guidance of state, local and licensee coordination, as follows:

(footnote continued)

powers" reside with all state and local governments, and statutes similar to those cited against LILCO in New York occur in most other jurisdictions. An applicant asserting authority to implement a plan would be violating those laws under the Margulies Board's decision.

> Suffolk County notes correctly that there is no provision in the NRC case law, regulations, or guidance that provides for the situation that now confronts us, wherein both the State and local governments refuse to participate in planning for an emergency and also refuse to commit to respond to an emergency at Shoreham. I.F. 783. The Board concludes that the provisions of 10 CFR 50.47(c)(1) for adequate interim compensating measures were not intended to stretch as far as LILCO urges in this case where no participation whatever from State and local authorities can be counted on. NUREG-0654 counsels that reviewers can find that an adequate state of emergency preparedness exists if weaknesses in one organization are identified but compensated in another organization. NUREG-0654 at 24. However the term "weakness" in that context applies to specific weaknesses regarding elements of the implementing guidance. We cannot read that language to apply to total withdrawal of State and county support from emergency planning and preparedness.

PID at 369-70 (emphasis added). And the Licensing Board determined that state police power is not preempted by the Atomic Energy Act. Thus, the Licensing Board found that, as a matter of law, a utility plan is not adequate where a state and county refuse to participate in emergency planning. If that is the law, it could have, and LILCO is confident would have, been articulated by the Commission two years ago, before it set in motion this protracted proceeding over Suffolk County's strenuous objection. But it was not.

In 1983, after Suffolk County announced it would no longer participate in emergency planning and LILCO declared that it would go forward under § 50.47(c)(1) and the NRC

Authorization Acts with a utility plan, Suffolk County moved to terminate this licensing proceeding on the grounds that no offsite emergency plan could be adequate under NRC regulations as a matter of law if there was no government participating in that plan.5/ In response to the County's argument that a government plan must be included for adequate preparedness under NUREG-0654, and NRC regulations, the Brenner Board ruled as follows:

> The County therefore apparently reads NUREG-0654's contemplated allocation of emergency planning responsibilities between the utility and state and local governments as being incorporated by reference as part of the regulatory requirements of Section 50.47(b).
>
> We disagree. . . .
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> In the absence of other evidence, adherence to NUREG-0654 may be sufficient to demonstrate compliance with the regulatory requirements of 10 CFR § 50.47(b). However, such adherence is not required, because regulatory guides are not

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5/ The Licensing Board dealing with emergency planning matters for Shoreham has changed several times. The Board that denied Suffolk County's motion to terminate was composed of Lawrence Brenner, Chairman; Dr. James H. Carpenter; and Dr. Peter A. Morris (the Brenner Board). On May 11, 1983, a new Board was impaneled to hear the offsite emergency planning issues, composed of James A. Laurenson, Chairman; Dr. Jerry R. Kline; and Dr. M. Stanley Livingston, with Dr. Livingston subsequently replaced by Mr. Frederick J. Shon (the Laurenson Board). Following the close of the hearings, Mr. Laurenson left the Commission and was replaced by Morton B. Margulies as Chairman (the Margulies Board). The changes of personnel hearing the emergency planning issues over the last three years has made it more difficult for the Boards to keep abreast of the background of emergency planning for Shoreham and the history of this proceeding, and may have contributed to the inconsistent rulings on utility plans.

> intended to serve as substitutes for regulations. . . . Therefore, it is inappropriate to rely on NUREG-0654 to determine the essential requirements of these regulations.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 615-17 (1983). In reaching this decision, the Brenner Board assumed, for purposes of the decision, that there would be no local government participation in the plan contemplated by LILCO and that the state would not compensate for this lack of local participation. Id. at 613-14. In addition, in response to Suffolk County's arguments that NRC regulations, including § 50.47(a), (b), and (c)(1), do not contemplate a utility plan in the absence of any governmental participation whatsoever, the Brenner Board ruled as follows:

> In the view of the County, the Commission was both aware of the possibility that state and local government action might prevent the operation of a nuclear plant and explicitly determined that the decision of how best to protect the public, including the possibility of plant shutdowns "should be left to the State and local governmental authorities." [Citation omitted.]
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> We agree with the County that the Commission was most certainly aware of the possibility that as a factual matter, state or local government action or inaction might prevent the operation of a nuclear plant. However, we do not believe that the Commission intended to grant state or local governments legal authority to regulate nuclear power, other than the power to develop, if they choose to, offsite radiological emergency response plans based on NRC promulgated guidelines.

> As noted by the County [citation omitted], the NRC Staff stated in SECY-80-275 [citation omitted] that both the Staff and the Commission were aware that the proposed rule potentially gave a "third party defacto (sic) veto power" to state and local government authorities. However, as noted by LILCO [citation omitted], a "de facto veto power" means only that in the absence of a state or local government plan, a utility might not be able to demonstrate factually the existence of sufficient emergency response capability to entitle it to the issuance of an operating license; no "de jure veto power" was given to State or local governments by the proposed rule, making issuance of an operating license impossible as a matter of law in the absence of a state or local government sponsored plan. . . .
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> . . . .
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> In our view, the Commission clearly contemplated the possibility of considering a utility sponsored offsite emergency plan under Section 50.47(c)(1) if a state or local government determined that it would not adopt or implement a plan of its own. . . .

Id. at 624-25 (emphasis in original). The Brenner Board's decision was affirmed by the Commission, ruling that the NRC "is obligated to consider a utility plan submitted [under § 50.47(c)(1)] in the absence of State and local government approved plans and has the ultimate authority to determine whether such a submission is sufficient to meet the prerequisites for the issuance of an operating license," and that "the licensee will bear the burden of showing that its plan can meet all applicable regulatory standards." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-83-13, 17 NRC 741, 743 (1983) (emphasis added).

In addition, after LILCO submitted its plan to the NRC, the Intervenors asked the Laurenson Board not to consider it on the ground that no government was involved in the LILCO plan and that the NRC regulations under which the Commission permitted LILCO to submit its utility plan never contemplated a plan without a government. The Laurenson Board not only soundly rejected this argument, stating that Suffolk County's "attempt[] to circumvent the specific language of CLI-83-13 by alleging that perhaps the Commission believed that the LILCO Plan would substitute 'other governmental entities' for the County" was "nonsense," but refused to certify the issue to the Commission. Memorandum and Order dated August 30, 1983 (unpublished). The Margulies Board's decision on Contentions 1-11 and 92 directly contradicts these previous decisions by the Commission and the Brenner and Laurenson Boards.

The Margulies Board's decision that a utility-only plan is not legal abrogates the Commission's decision reached two years ago to allow the plan to go forward. What is more, if the question of the legality of a utility plan is resolved against LILCO simply by a state and county opposing a plan and invoking the language of 10 C.F.R. § 50.47(c)(1), NUREG-0654, and the police power inherent in every state government, the Commission could have said so two years ago. It did not. Instead, as a result of the Commission's decision, the parties embarked on hearings on LILCO's emergency plan involving more than 70 issues, with 86 witnesses testifying for 79 days of

hearings on about 7,000 pages of written pre-filed testimony, producing over 15,000 pages of transcript. The result is a decision overwhelmingly in LILCO's favor on factual issues. If utilities cannot do emergency planning where state and local governments refuse to plan and oppose the utility's plan, the licensing effort on the LILCO plan, which was specifically authorized by the Commission, has been, in retrospect, an exercise in futility. The Commission's decision in 1983 allowing the NRC to go forward on LILCO's plan cannot have meant that LILCO had the right to have its plan considered but, due to its very nature, never stand a chance of its being approved.

II. Expedited Review by the Appeal Board

If the Appeal Board determines not to refer the issues in Contentions 1-11 and 92 directly to the Commission for review, LILCO requests that the Appeal Board sever these issues from any other issues that may be appealed by the parties, and determine them on an expedited basis. As previously stated, they are different in kind from the numerous factual issues that may be appealed by the other parties, and they involve major and novel issues of law and policy that have a pervasive effect on this proceeding and on emergency planning at other nuclear plants. They therefore should be reviewed promptly so that the inevitable appeals can commence. To that end, LILCO requests that the Appeal Board sever the legal issues appealed by LILCO from the factual issues appealed by the Intervenors,

and adhere to the time limitations in 10 C.F.R. § 2.762 for briefing the issues raised in Contentions 1-11 and 92. LILCO further requests that it be given seven days from the receipt of the Staff's filing to reply to the Intervenors' and Staff's response to LILCO's brief on the legal issues.6/

LILCO opposes the Intervenors' request for additional time in which to brief issues, unless the legal issues are severed as requested above. If the legal issues are treated separately, either by referral to the Commission or on a separate track by the Appeal Board, LILCO will agree to the Intervenors' request to file a joint appellant brief on July 3, but only if a similar extension is granted (to August 28, 1985) for filing LILCO's response. LILCO, of course, would not object to commensurate extensions for the Staff. But if the legal issues appealed by LILCO are not severed from consideration of factual issues, LILCO urges strict adherence to the time limits in the regulations.

As to page limits, LILCO urges the Appeal Board to establish a 100-page limit for briefs from each party on the factual issues, and a 70-page limit for briefs on the legal authority issues, with the Intervenors to be considered one party for purposes of page limits.

6/ LILCO is mindful that the usual procedure does not provide for replies and allows the Staff to file last. Because of the importance and novelty of the legal issues, and because the Staff opposes LILCO in its legal authority arguments, LILCO requests that it be allowed to respond both to the Staff and the Intervenors' pleadings and that it be allowed to file last. LILCO requests a 20-page limit for its reply.

Conclusion

For the reasons stated above, LILCO requests that the Appeal Board (1) sever the issues raised in Contentions 1-11 and 92 from other issues that may be appealed by the parties in this proceeding, (2) refer the Licensing Board's decision on Contentions 1-11 and 92 directly to the Commission, or (3) alternatively, determine those issues separately and expeditiously. LILCO opposes an extension of time for filing briefs unless the legal issues appealed are severed from the factual issues. LILCO requests a 100-page limit for briefs on factual issues and a 70-page limit on legal issues, with a 20-page reply by LILCO to the Intervenors' and Staff's briefs on legal issues.

Respectfully submitted,

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DATED: May 13, 1985

LILCO, May 13, 1985

CERTIFICATE OF SERVICE

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL-4 (Low Power)

I hereby certify that copies of LILCO'S RESPONSE TO INTERVENORS' REQUEST FOR AN EXTENSION OF TIME AND PAGE LIMITS, INCLUDING A MOTION FOR REFERRAL TO THE COMMISSION OR, ALTERNATIVELY, SEVERANCE AND EXPEDITED REVIEW OF LEGAL AUTHORITY ISSUES 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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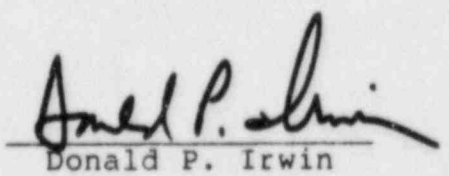

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DATED: May 13, 1985