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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-4 (Low Power)
	)	
(Shoreham Nuclear Power Station, Unit 1)	)	

NRC STAFF RESPONSE TO SUFFOLK COUNTY
AND STATE OF NEW YORK MOTION FOR STAY

Robert G. Perlis
Counsel for NRC Staff

June 19, 1985

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On June 14, 1985, the Licensing Board presiding over the Shoreham TDI diesel hearing issued a partial initial decision (LBP-85-18) holding that the TDI diesels are adequate for nuclear service at least until the first refueling outage. With this decision, the Board found that all the issues in controversy related to the issuance of a low power operating license had been resolved in favor of issuance of such a license and therefore authorized the Director of Nuclear Reactor Regulation to issue a license for operation of Shoreham at up to 5% of rated power upon making the requisite findings set forth in 10 CFR § 50.57(a). LBP-85-18, slip op. at 1, 116. According to the Commission's regulations, the authorization of issuance of a low power license becomes immediately effective without an immediate effectiveness review by the Commission. 10 CFR § 2.764(f).

On June 17, 1985, a joint stay motion was filed by Suffolk County [1/] and the State of New York. The County and State request in their motion that the Appeal Board stay issuance of a low power license for Shoreham pending Appeal Board review of any appeal of LBP-85-18 those parties might file or, in the alternative, pending completion of the review by the United States Court of Appeals of an appeal taken by the State and County of the Commission's refusal to order preparation of a supplemental environmental impact statement (EIS) for Shoreham. Also on June 17th, the Chairman of the Appeal Board issued an Order temporarily staying the effectiveness of LBP-85-18 and directing expedited responses to the joint stay motion. Pursuant to that Order, the Staff herein responds to the State and County motion for stay and, for the reasons presented below, submits that the motion must be denied.

I. STANDARDS FOR A STAY

Stay requests are governed by Section 2.788(e) of the Commission's regulations. Pursuant to that Section, a determination as to whether an otherwise effective order should be stayed depends on :

(a) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(b) Whether the party will be irreparably injured unless a stay is granted;

1/ The motion for stay was filed by the law firm of Kirkpatrick & Lockhart for the County. The Suffolk County Attorney has previously notified the Commission that Kirkpatrick & Lockhart no longer represents the County and that the County Attorney's office would now represent the County in all proceedings before the NRC. For purposes of this pleading only, the Staff has assumed that Kirkpatrick & Lockhart speaks for the County.

(c) Whether the granting of a stay would harm other parties; and

(d) Where the public interest lies.

In applying the four factors considered by the Commission in ruling on stay requests, particular emphasis is given to the showing by the moving party of irreparable injury and probability of success on the merits. Pacific Gas and Electric Company (Diablo Canyon Plant, Units 1 and 2), CLI-84-13, 20 NRC 267 (1984). Of these factors, both the Commission and the Appeal Board have stated that the question as to whether irreparable injury will be incurred by the moving party in the absence of a stay is the most important. Alabama Power Company (Farley Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981); Philadelphia Electric Company (Limerick Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984). The moving party has the burden of showing that the balancing of the factors favors the grant of a stay. Farley, supra, 14 NRC at 795. In the instant case, the State and County have completely failed to demonstrate that they are entitled to a stay.

II. THE MERITS OF THE STAY MOTION

A. Strong Showing of Prevailing on the Merits

The first factor to be considered is whether the State and County have made a strong showing that they are likely to prevail on the merits. At issue is whether the Licensing Board correctly decided LBP-85-18 and whether a low power operating license should now be issued. In their stay request, Intervenors have not made any showing whatsoever (much less

the strong showing required by the regulations) that their appeal will be successful on either issue.

Intervenors devote one cursory paragraph (starting at page 6) to the merits of the Licensing Board's June 14th decision. In that paragraph, Intervenors assert (without any specificity whatsoever) that the Licensing Board erroneously interpreted the requirements of GDC-17 and erroneously interpreted the single failure criterion. The Licensing Board issued a lengthy, detailed decision after more than forty hearing days. The Staff submits that the Licensing Board correctly interpreted the requirements of GDC-17 and the single failure criterion and will respond to any specific allegations of error at the appropriate time. In moving for a stay, the Appeal Board has previously held that more is necessary than an unsupported allegation of error:

> In arguing that there is a "strong likelihood" that they will prevail on the merits of their appeals, the intervenors cite a number of assertedly incorrect Licensing Board rulings and actions, both substantive and procedural. Although intervenors are emphatic in the statement of their belief that serious error has been committed, virtually all of their scatter-gun charges are put before us in the most cursory form. In any event, none is supported by enough analysis to comprise the required strong showing that one or more of the three partial initial decisions likely will be reversed in response to the intervenors' appeals.

Duke Power Company (Catawba Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1632-33 (1984) (emphasis in original, footnote omitted).

It is also worth noting that the Appeal Board in Catawba specifically recognized that stay motions are limited to ten pages. The Appeal Board therefore suggested that a stay movant concentrate upon those purported errors deemed of particular gravity. In this case,

Intervenors arrogated unto themselves an additional ten pages for their motion, 2/ yet failed to focus on any alleged Licensing Board errors. Under the circumstances, Intervenors have clearly failed to make the requisite "strong" showing that any appeal they file on LBP-85-18 would likely be successful on the merits.

The State and County devote the bulk of their "success on the merits" argument to their oft-repeated charge that the Commission has violated the National Environmental Policy Act by not requiring a supplementation of the Shoreham EIS. As the County and State make clear in their motion, their charge that the NRC has violated NEPA by not requiring a supplemental EIS has been made numerous times. See Motion at 3, note 2. Intervenors neglect to point out, however, that the Commission has twice addressed this very issue. In CLI-84-9, the Commission squarely held that a supplemental EIS need not be prepared to address the necessarily speculative issue of whether a full power license for Shoreham will ever issue. 19 NRC 1323 (June 5, 1984). In response to numerous requests to reconsider CLI-84-9, the Commission reaffirmed its position on April 18, 1985. See Letter of April 18, 1985 from Chilk to Brown and Lanpher. In light of the Commission's direct holding that supplementation of the EIS is not required, any argument to the contrary

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2/ The Staff notes in passing that Intervenors have continued to assume that they are entitled to twice the authorized page limits. The Commission permitted this practice (after the fact) once; the Commission did not in its January 7th Order cited by Intervenors indicate that Intervenors were authorized to continually exceed the limits specified in the regulations.

brought before the Appeal Board must be dismissed. [3/] Thus the State and County have failed to make any showing at all that their appellate arguments will be successful on the merits.

B. Irreparable Harm

As noted above, a showing of irreparable harm is a critical factor in determining whether a stay should be granted. In its discussion of this factor, Intervenors' motion is telling for what it fails to say. The State and County do not allege that operation of Shoreham at 5% of rated power will pose any danger to the residents of Suffolk County or New York State, nor do they assert that low power operation will have a significant adverse impact (or in fact any adverse impact) upon the environment. Instead, Intervenors claim that the potential mooting of their appeal constitutes irreparable harm and that "there is a strong presumption that an injunction should issue when NEPA has been violated." These arguments fall far short of demonstrating irreparable harm.

3/ The Commission's NEPA rulings were based upon the Commission's refusal to speculate on whether a full power license will issue when considering the issuance of a low power license. The State and County in their motion address this issue as if it is now beyond dispute that a full power license will never issue. This is simply not the case. While a state court and a licensing board have held that LILCO lacks the legal authority to implement its emergency plan by itself, no appellate courts have yet addressed this issue. Moreover, those decisions only address the issue of LILCO implementing a plan on its own; they do not address possible County, State, or Federal participation. Indeed, the recent events involving the issuance of Suffolk County Executive Order 85-1 underscore the wisdom of the Commission's decision not to immerse itself into the ever-changing, speculative question of whether a full power license will issue in order to determine whether a low power license should issue.

Intervenors cite a number of cases [4/] for the proposition that the potential mooting of an appeal in and of itself constitutes irreparable harm justifying a stay. None of these cases, however, holds that mooting of an appeal, without more, constitutes irreparable harm.

In Scripps Howard, the Supreme Court found that reviewing courts had the authority to stay FCC orders. In so doing, the Court noted that "it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong." 316 U.S. at 9 (emphasis added). The appellant in Scripps Howard argued that enforcement of the FCC order in question would deprive a substantial number of radio listeners of the only local regional non-network service available to them. Id., 316 U.S. at 5. In Zenith, the court found irreparable injury from the abnegation of effective judicial review and harm to a "strong congressionally recognized competitive interest." 710 F.2d at 810. In Capital Transit Co., the court granted an injunction not just because of the potential mootness of an appeal, but also because the appellant was a government entity charged with the responsibility of investigating matters directly related to the action sought to be enjoined. The court granted the injunction in order to allow the investigation to take place. 214 F.2d at 245-46. Although Lower Alloways was primarily an exhaustion case, the

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4/ Scripps-Howard, Inc. v. FCC, 316 U,S, 4 (1942); Zenith Radio Corp. v. U.S., 710 F.2d 806 (Fed. Cir. 1983); Public Utilities Comm. v. Capital Transit Co., 214 F.2d 242 (D.C. Cir. 1954); Twp. of Lower Alloways Creek v. NRC, 481 F. Supp 443 (D.N.J. 1979); Unpublished Appeal Board decision in Shoreham of May 24, 1984.

court found that where the plaintiff had raised health and safety issues and administrative appellate review would come after issuance of a proposed license amendment, irreparable injury could be shown. 481 F. Supp. at 451-453. Finally, in the LILCO case, the Appeal Board found that FEMA would suffer irreparable harm if the documents in question were publicly disclosed. Slip op. at 7-8.

Thus in each case cited, the question of a stay revolved around mooting of an appeal and some allegation of serious harm if a stay were not granted. In no case cited did a court find that the mooting of an appeal alone constituted irreparable harm; in this case, Intervenors have failed to even allege any serious harm if a stay does not issue.

In support of their argument that a NEPA violation constitutes irreparable harm, Intervenors cite Realty Income Trust v. Eckerd, 564 F.2d 447, 456 (D.C. Cir. 1977). In that case, the Court had made a finding that an EIS should have been prepared for a construction project and that a NEPA violation had in fact occurred. 564 F.2d at 452-55. The Court did not intimate that mere allegation of a NEPA violation could justify issuance of a stay. 564 F.2d at 452-55. 5/ In the instant case, no NEPA violation has been shown. (See note 3, supra).

Even if the State and County were correct in their assertion that a NEPA violation has occurred (and the Staff submits they are not correct), it does not automatically follow that an injunction should issue. While a violation of NEPA can warrant injunctive relief, courts have held that

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5/ The Court in Realty Income then balanced various equities and determined that no injunctive relief was warranted in that case.

NEPA violations do not automatically warrant such relief. See, e.g., NRDC v. NRC, 606 F.2d 1261 (D.C. Cir. 1979); Essex County Preservation Association v. Campbell, 536 F.2d 956 (1st Cir. 1976). In any balancing of equities in this case, the utter failure of the State and County to show any serious environmental injury associated with the alleged NEPA violation militates against grant of the stay request. In sum, Intervenors have fatally failed to demonstrate that they will suffer any irreparable injury if a stay is not granted.

C. Injury to Other Parties

The Staff believes the issue of whether any party might be harmed if a stay is granted is, in the circumstances of this case, best addressed by LILCO.

D. Public Interest

Intervenors claim that the public interest lies in favor of granting a stay. In part, Intervenors base this upon their repeated assertion of a NEPA violation; the Staff has previously addressed this issue. Intervenors other argument in this regard is the assertion that, as representatives of the public, their interpretation of what lies in the public interest is entitled to great weight. The Commission has already made clear that the State and County's views on the public interest are not conclusive. CLI-85-1, 21 NRC 275, 278, fn. 2 (1985). Moreover, the Commission has previously determined in this case that a low power license should be issued when the requirements for such issuance are met; the Commission has made it plain that speculation on the eventual issuance of a full power license should not affect the issuance of a low power license. CLI-85-1, supra, 21 NRC at 278-279; CLI-83-17, 17 NRC 1032 (1983). Indeed, the Commission has found that reliance on such

speculation for public interest determination purposes would render the Commission's low power licensing authority moot. CLI-85-1, supra, 21 NRC at 279. Inasmuch as LILCO has satisfied the requirements for issuance of a low power license, the Commission's rulings indicate that it would not be in the public interest to stay the issuance of such a license because of speculation centering around the issuance of a full power license. This is especially so given the Intervenors' failure to demonstrate any irreparable harm if a low power license is issued.

III. STAY PENDING JUDICIAL REVIEW

For the reasons presented above, the Staff submits that the State and County have failed to demonstrate that they are entitled to a stay. The Staff therefore sees no reason to grant a stay pending judicial review of their appeal.

IV. CONCLUSION

The State and County have failed to make any showing that their appeal will succeed on the merits, and they have failed to demonstrate any irreparable injury if a stay is not granted. Their stay request must therefore be denied.

Respectfully submitted,

Robert G. Perlis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 4th day of June, 1985

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO SUFFOLK COUNTY AND STATE OF NEW YORK MOTION FOR STAY" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk, by hand delivery, this 19th day of June, 1985.

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