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LILCO, September 5, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COLLECTED
'85 SEP -9 A10.50

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,) Proceeding)
Unit 1))

LILCO'S NOTICE OF APPEAL OF AUGUST 26, 1985
CONCLUDING PARTIAL INITIAL DECISION

LILCO, pursuant to 10 CFR § 2.762, notes the following exceptions to the Atomic Safety and Licensing Board's Concluding Partial Initial Decision on Emergency Planning, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), 22 NRC ____ (slip op. Aug. 26, 1985).

A. Relocation Center

The first three exceptions address the Licensing Board's findings on relocation centers, particularly the Board's apparent conclusion that LILCO is required by NRC regulations to be able to monitor all inhabitants of the ten-mile plume exposure pathway EPZ within 12 hours, slip op. at 9-10:

1. LILCO excepts to the Board's determination that "LILCO's failure to plan for those of the general population who seek only monitoring and processing constitutes a defect in the Plan," slip op. at 10.

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2. LILCO excepts to the Licensing Board's determination that "LILCO must provide more detail concerning the size of the areas and available facilities, and how that relates to the number of people that must be processed" and that "LILCO's time estimate for monitoring must fall somewhere within the range contemplated by NUREG-0654, Section II.J.12" Slip op. at 12-13.

3. LILCO excepts to the Licensing Board's finding that "procedures for completing registration forms for uncontaminated individuals and for maintenance of evacuee monitoring records should be specified in the Plan," slip op. at 15.

B. Coordination with State and County

At pages 26-36 of its August 26 decision the Licensing Board repeats in summary fashion its basic findings on the LILCO offsite emergency plan. LILCO's remaining two exceptions have to do with aspects of the issue whether state and local governments can, by their participation or nonparticipation, reserve for themselves the decision whether there will be emergency planning, and thus an operating license, for a nuclear plant:

4. LILCO excepts to the Licensing Board's finding that, with respect to the "shadow phenomenon," the "lack of assurance of integrated action between the State and local government and the utility constitutes a substantive deficiency in the Plan" and "diminishes the Board's confidence that public health and safety could be protected as well by LILCO acting alone as with State and local governments." Slip op. at 30.

5. Finally, LILCO excepts to the Licensing Board's finding that the absence of participation by the State and County in emergency planning produces a lack of coordination that itself constitutes a "fatal defect" in a utility plan, totally apart from the issue of a utility's legal authority to implement an otherwise acceptable plan. Slip op. at 26, 29-30, 31, 33-34. The Licensing Board found that "the refusal of the State and County to participate in emergency planning creates situations in which the LILCO Plan can be made unworkable at any time," and thus renders the Plan incapable of meeting NRC regulations. Slip op. at 31. The fact that the State and County "have chosen to operate on independent courses during an emergency at Shoreham . . . sets the stage," in the Licensing Board's view, "for the dissemination of conflicting and confusing information, even if unintended," slip op. at 33-34.^{1/}

^{1/} The Licensing Board repeatedly refers to the Commission's regulations as "provid[ing] for," "call[ing] for," or "contemplat[ing]" given types of cooperation between a utility and multiple levels of government, slip op. at 29-30. What the Licensing Board really means, though it does not say so, is that in its view such types of cooperation are required. The unavoidable result of this argument, contrary to the Commission's Shoreham decision, CLI-83-13 (see slip op. at 27), is to restrict a "utility plan" to those circumstances where those roles fulfilled by a utility -- however major or minor -- are limited to those specifically agreed upon in advance with both state and local governments. In short, the Licensing Board's "coordination" argument reads a utility plan out of the law as surely as the garden-variety "legal authority" argument whenever a utility and relevant governments are not in complete agreement about the scope and substance of the utility's intended functions -- i.e., in all circumstances except where there is a conventionally coordinated plan. It also destroys a "realism" argument premised on commitments by governments to respond in a real emergency though not necessarily to cooperate in detailed planning beforehand.

With respect to exceptions 4 and 5, LILCO believes that the issues have already been covered in the briefing and argument of LILCO's pending appeal of Contentions 1-10 and 92. It is true that the Licensing Board has, in its August 26 decision, elaborated on the issues now on appeal. For example, the August 26 decision removes any doubt that the Licensing Board views a guarantee of participation by state and local governments as a requirement of NRC regulations. The August 26 decision also makes clearer the Board's view of the "coordination" issue: that is, the Board's presumption that in a real emergency the action of the state or local government might actually interfere with emergency response efforts -- that the governments would take action but might be unwilling or unable to make use of the planning base laid in advance by LILCO, the Red Cross, and others relied on in the LILCO Plan.

LILCO does not believe that further briefing on issues 4 and 5 is necessary. The "coordination" issue,^{2/} which, as

^{2/} The "coordination" issue is the issue whether the State and County governments, assuming they responded in a real emergency, could do so effectively despite their preemergency nonparticipation. Although the coordination issue, as such, was not raised by the contentions (except for coordination with the State alone, raised by Contention 92), its outlines have been made clearer with the August 26 decision. LILCO has proved (1) that the LILCO Plan is a sound one; (2) that State and County governments would respond in a real emergency; and (3) that they would respond to the best of their ability. (Indeed, the last two of these propositions are undisputed.) The "coordination" issue, as the Licensing Board develops it in the two PID's, is that the State and County governments would in a real emergency be (a) unable or (b) unwilling to follow the LILCO Plan and would therefore in effect sabotage the emergency response, even without intending to. LILCO's position is that

(footnote continued)

noted,^{3/} was not raised until after the evidentiary hearings at least insofar as coordination with the County is concerned, has been addressed in LILCO's Brief on Contentions 1-10, Nov. 19, 1984, at 42-66. The related factual proposition, that the governments would refuse to take advantage of a sound emergency plan (indeed the only such plan in existence), is addressed in LILCO's brief of June 3, 1985,^{4/} at 45-46, 68-70, and in its reply brief of July 24, 1985,^{5/} at 4. In those briefs LILCO pointed out that, if the Commission determines that an otherwise adequate emergency plan is feasible, the State and County can be expected to provide the coordinated participation needed

(footnote continued)

the Board's presumption (b) is logically inconsistent with proven fact (3) recited above (that the governments would respond to the best of their ability). As for presumption (a), LILCO maintains that it can be disproven by evidence, that it was not timely raised so that it could be addressed by evidence, that much of LILCO's evidence bearing on it was stricken, and that LILCO's effort to address it based on the remaining evidence (in LILCO's November 19, 1984 Brief on Contentions 1-10) was excluded or ignored by the Licensing Board. Assuming that the issue had been timely raised and evidence presented, LILCO's position is that having a fully functioning, trained and drilled utility organization (LERO) that (1) is capable of responding to an emergency without state and local governmental help and (2) is trained to incorporate state or local officials as available, is adequate emergency preparedness.

^{3/} LILCO's Brief Supporting its Position on Appeal from the "Partial Initial Decision on Emergency Planning" of April 17, 1985, June 3, 1985, at 47.

^{4/} LILCO's Brief Supporting its Position on Appeal from the "Partial Initial Decision on Emergency Planning" of April 17, 1985.

^{5/} LILCO's Reply Brief on the Legal Authority, Conflict of Interest, and State Plan Issues.

to make the plan successful. This is all the Commission's law in this case requires. CLI-85-12, 21 NRC _____, slip op. at 4 (June 20, 1985).

Thus, LILCO does not ask for further briefing on exceptions 4 and 5, based on its view that no new issues about "coordination" are raised by the August 26 PID. If the Appeal Board concludes that additional briefs would be useful, of course, LILCO will make whatever additional submissions are requested, and suggests that any such submissions be expedited ahead of briefing on exceptions 1 through 3.^{6/}

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^{6/} If the "coordination" issue is as fatal to LILCO's case as the two PID's suggest, further evidentiary hearings will be necessary, to satisfy due process if nothing else. The coordination issue was raised, by and large, by the Licensing Board only after the hearings, and it is clearly an issue that is susceptible to factual proof. If additional hearings on the issue are held, LILCO asks that they be held by the Appeal Board in order to save time, since this is a case in which the nuclear plant is constructed and, indeed, operating under a 5% power license. Cf. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-529, 9 NRC 153 (1979) (Appeal Board conducted an evidentiary hearing on issues it had raised sua sponte). In addition, any concerns regarding implementation are more appropriately addressed in the graded exercise. Cf. 10 C.F.R. Part 50, Appen. E, Sec. IV.F, 49 Fed. Reg. 27733 (July 6, 1984).

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO'S NOTICE OF APPEAL were served this date upon the following by first-class mail, postage prepaid or, as indicated by an asterisk, by hand, or as indicated by two asterisks, by Federal Express.

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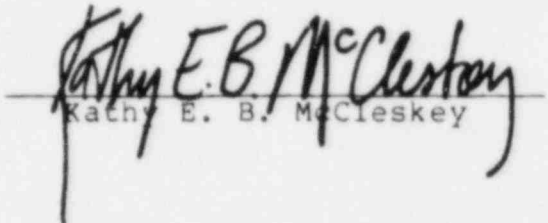
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