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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Alan S. Rosenthal
Dr. W. Reed Johnson

March 4, 1988
(ALAB-888)

In the Matter of	
LONG ISLAND LIGHTING COMPANY	Docket No. 50-322-OL-6 (Emergency Planning)
(Shoreham Nuclear Power Station, Unit 1)	

E. Thomas Boyle, Hauppauge, New York, and Herbert H. Brown, Lawrence Coe Lanpher, and Karla J. Letsche, Washington, D.C., for intervenor Suffolk County; Fabian G. Palomino and Richard J. Zahnleuter, Albany, New York, for intervenor State of New York; and Stephen B. Latham, Riverhead, New York, for intervenor Town of Southampton.

Donald P. Irwin, Lee B. Zeugin, and David S. Harlow, Richmond, Virginia, for applicant Long Island Lighting Company.

Edwin J. Reis for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

Intervenors Suffolk County, the State of New York, and the Town of Southampton (hereinafter, "the Governments") jointly move for leave to file an interlocutory appeal[1] from

[1] The Commission's Rules of Practice prohibit "interlocutory appeals." 10 C.F.R. § 2.730(f). As the Governments should be aware by now (see, e.g., ALAB-780, 20 NRC 378 (1984)), the proper vehicle for seeking interlocutory review of a licensing board decision is a
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the Licensing Board's January 7, 1988, memorandum and order in the "OL-6" phase of this operating license proceeding. See LBP-88-1, 27 NRC ___. In that decision, the Board gave permission to applicant Long Island Lighting Company (LILCO) to pursue its request to operate the Shoreham nuclear power facility at a 25 percent power level under NRC regulations codified at 10 C.F.R. §§ 50.57(c) and 50.47(c)(1). The Governments claim that the Board's order not only is erroneous, but also so fundamentally affects the structure of this proceeding that interlocutory review is necessary. LILCO and the NRC staff oppose the motion. As explained below, the Governments' arguments are not persuasive, and we therefore deny their motion.

A. Construction at Shoreham is complete, but numerous contested issues concerning offsite emergency planning for the facility remain unresolved. Despite these outstanding issues, Shoreham holds a low-power license pursuant to 10 C.F.R. § 50.47(d), authorizing operation up to five percent of rated power. In April 1987, LILCO asked the Commission to increase its authorized power level to 25 percent. The Commission denied the motion but permitted LILCO to "refile

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motion or petition for "directed certification" pursuant to 10 C.F.R. §§ 2.718(i), 2.785(b)(1). Notwithstanding the incorrect characterization of their motion, however, the Governments address the proper legal criteria for a petition for directed certification. See infra p. 5.

its request under [10 C.F.R.] § 50.57(c) with the Licensing Board when and if it believes that some useful purpose would be served thereby." CLI-87-4, 25 NRC 882, 883 (1987). LILCO refiled its request last July, and the Licensing Board subsequently called for fuller briefing by all the parties of the various issues raised by that motion. See Memorandum of October 6, 1987 (unpublished).

After consideration of the numerous pleadings before it (including the Governments' opposition), the Licensing Board decided that LILCO's motion was properly filed under 10 C.F.R. § 50.57(c). LBP-88-1, 27 NRC at ___, ___ (slip opinion at 6, 14). That regulation permits applicants to move for an operating license authorizing low-power testing (one percent of full power) and "further operations short of full power operation," while the hearing on full-power licensing is still pending. Section 50.57(c) also gives other parties with contentions "relevant to the activity to be authorized" the right to be heard, and directs the Board to make certain findings required by section 50.57(a) -- e.g., reasonable assurance that the activities authorized can be conducted in compliance with the agency's regulations and without endangering the public health and safety -- prior to ruling on the motion.

The Licensing Board further agreed with LILCO that another regulation, 10 C.F.R. § 50.47(c)(1), embodies the appropriate standard against which LILCO's 25 percent power

request should be measured. LBP-88-1, 27 NRC at ___, ___, ___ (slip opinion at 6, 12, 14). That provision states that, when an applicant fails to meet the NRC's emergency planning standards set out in 10 C.F.R. § 50.47(b), it

> will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation.

10 C.F.R. § 50.47(c)(1) (1987).[2] In so ruling, the Licensing Board also concluded that "no exemption from the [emergency planning] regulations is needed as urged by the Governments." LBP-88-1, 27 NRC at ___ (slip opinion at 6). The Board thus determined that it would entertain LILCO's motion for operation at 25 percent power. It noted, however, the opposing parties' right to be heard and the difficult task that lies ahead for LILCO if it is to succeed ultimately with its motion. Id. at ___, ___ (slip opinion at 6-7, 14). The Board also solicited the parties' further views on whether a separate licensing board, special master, alternate board member, or technical interrogator should be used for the consideration of LILCO's motion. Id. at ___, ___, ___ (slip opinion at 10-12, 14-15, 16).

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[2] The Commission recently amended this section of the emergency planning regulations, but the particular language (Footnote Continued)

B. As the Governments' motion acknowledges, we grant requests for interlocutory review infrequently, and then only upon a showing that the challenged ruling either threatens to cause immediate and irreparable harm, or "'affects the basic structure of the proceeding in a pervasive or unusual manner.'" Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367, 370 (1981) (citing Public Service Electric and Gas Co. (Salem Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980)). The Governments rely on the latter criterion and suggest essentially two reasons why the Licensing Board's order has a pervasive or unusual effect on the basic structure of this proceeding. First, in their view, because LILCO's 25 percent power request is effectively a challenge to the Commission's emergency planning regulations and the generic assumptions underlying them, the Board cannot entertain the motion in the absence of either an "exemption" request under 10 C.F.R. § 50.12(a) or a "waiver" request under 10 C.F.R. § 2.758(b).[3] In other words, the Governments' complaint is

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at issue here was not changed. See 52 Fed. Reg. 42,078, 42,085-86 (1987).

[3] Under 10 C.F.R. § 50.12(a), the Commission may grant exemptions from regulations in 10 C.F.R. Part 50 upon a showing of at least one of six identified "special circumstances." The exemptions should also be "[a]uthorized by law, [should] not present an undue risk to the public
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that the Board does not intend to evaluate LILCO's motion in accordance with all the regulatory standards that the Governments believe pertain here. Second, the Governments contend that the Board's ruling dramatically changes the issues in this proceeding, by permitting LILCO to attack the underlying assumptions of the emergency planning regulations.[4]

As a separate argument, the Governments claim that we should intercede and review the Board's ruling now because it has important generic implications for many other cases. In this connection, they cite our decision in Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464-65 (1982), rev'd in part on other grounds, CLI-83-19, 17 NRC 1041 (1983), where we reviewed a ruling referred to us by a licensing board that concerned an interpretation of the Commission's Rules of Practice.

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health and safety, and [should be] consistent with the common defense and security." 10 C.F.R. § 2.758(b) provides a mechanism for a party to an adjudication to petition the Commission for the waiver of any specified Commission rule or regulation. It requires a showing that "special circumstances . . . are such that application of the rule or regulation . . . would not serve the purpose for which the rule or regulation was adopted."

[4] LILCO apparently hopes to prove that the risks from operation at 25 percent power are substantially less than at full-power operation, and that therefore any deficiencies in the emergency plan for Shoreham are not significant for operation at that reduced power level. See LBP-88-1, 27 NRC at __ (slip opinion at 7).

As both LILCO and the staff contend, the Governments misunderstand and overstate the significance of the Licensing Board's order.[5] The Licensing Board's order simply authorizes the filing of LILCO's motion to operate at 25 percent power -- an action clearly permitted under 10 C.F.R. § 50.57(c). As such, it adds new issues to the proceeding, not unlike a board's admission of new contentions. We have long held, however, that the mere expansion of issues rarely, if ever, affects the basic structure of a proceeding in a pervasive or unusual way so as to warrant our interlocutory review. See, e.g., ALAB-861, 25 NRC 129, 135 (1987); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1757 (1982); Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 552 (1981). The Governments do not convincingly explain why the addition of the 25 percent power issues here is distinguishable from these past cases.[6]

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[5] Although it is certainly not evidence of record upon which we would or could rely, we note that even one of the counsel for Suffolk County has stated (if quoted accurately) that the Board's decision "'shouldn't have much significance read into it.'" Inside N.R.C., January 18, 1988, at 12.

[6] The staff correctly points out that the Board's determination to entertain LILCO's 25 percent power motion does not end or affect those other parts of this proceeding concerned with whether LILCO's emergency plan conforms to

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We have also found that a board's use of parallel hearings to consider such additional issues does not provide a basis for a grant of directed certification (see supra note 1 and p. 5). Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21 (1987).

Further, the Board's order does not decide the merits of the motion, and it preserves the Governments' right to be heard thereon. See South Texas, 13 NRC at 372 (no pervasive or unusual effect on proceeding where board's specification of issues for hearing is not a final ruling and parties remain free to litigate their issues). To be sure, the Board did determine that 10 C.F.R. § 50.47(c)(1) provides the appropriate standard against which LILCO's motion will be measured -- thus rejecting the Governments' argument that LILCO must seek an exemption under 10 C.F.R. § 50.12(a) as well. But again, as we have repeatedly stressed, unique or even erroneous licensing board interpretations and applications of Commission regulations generally cannot be said to "alter[] the very shape of the ongoing adjudication" so fundamentally as to require our intercession before judgment on the merits. Cleveland Electric Illuminating Co.

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the NRC's regulations for full-power operation. NRC Staff Response (February 8, 1988) at 7-8.

(Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982). See also id., ALAB-706, 16 NRC at 1756-58.[7] This is particularly true in this case, where the Licensing Board has expressed reservations about LILCO's ultimate chance of success on the merits of its 25 percent power motion. See LBP-88-1, 27 NRC at ___, ___ (slip opinion at 6-7, 13).

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[7] We do not reach the merits of the Governments' objection to the Licensing Board's ruling. But the following excerpt from the Statement of Consideration for the Commission's 1985 amendment to 10 C.F.R. § 50.12(a) -- not cited by the Licensing Board or any of the parties -- casts considerable doubt on the Governments' position that LILCO must seek an exemption under section 50.12(a) as well as satisfy the standards of section 50.47(c)(1):

> On a related point, the relationship between the general exemption criteria in § 50.12(a) and other provisions in Part 50 that contain specific exemption criteria or alternative methods of compliance, the Commission would emphasize that § 50.12(a) is the exemption provision that applies generally to the provisions of 10 CFR Part 50. If another regulation in Part 50 provides for specific exemption relief, or for alternative methods of compliance, the criteria of the specific regulation are the appropriate considerations. If the exemption criteria in the specific regulation are met, the rule has been complied with, and no exemption under § 50.12(a) is necessary. It is only in those cases where the specific exemption or alternative compliance criteria cannot be satisfied, that the application of the general criteria in § 50.12(a) will be appropriate. If the specific exemption criteria, or the alternative methods of compliance, can be satisfied, there is no need to also satisfy the criteria of § 50.12(a).

50 Fed. Reg. 50,764, 50,775 (1985) (emphasis in original).

Only where a board's interpretation of a regulation is "of patent, immediate, and large significance to the administration of not merely that specific proceeding but, as well, the numerous other operating license proceedings then under way or at the threshold of commencement" have we conducted interlocutory review. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 376-77 (1983). See Catawba, 16 NRC at 464-65. See also Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 474-75 (1985). The Governments, however, totally fail to support their claim that the Licensing Board's ruling at issue here has "significant generic implications" for "many other cases." Governments' Motion (January 21, 1988) at 11.[8]

The Governments have therefore failed to show that the Licensing Board's ruling in LBP-88-1, 27 NRC ___, authorizing the filing of LILCO's motion for 25 percent power operation, has a pervasive or unusual effect on this adjudication, so as to warrant interlocutory review.

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[8] Indeed, we are aware of only one other proceeding (Seabrook) where the relationship of sections 50.57(c), 50.47(c)(1), and 50.12(a) could arise. But even there, applicants do not yet have a low-power (five percent) license, thus, any request for a higher power level is purely a matter of speculation at this point. (The only other pending operating license proceeding involves the Comanche Peak facility, but emergency planning is not a contested issue there.)

Accordingly, the Governments' Motion for Leave to File Interlocutory Appeal is denied.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board