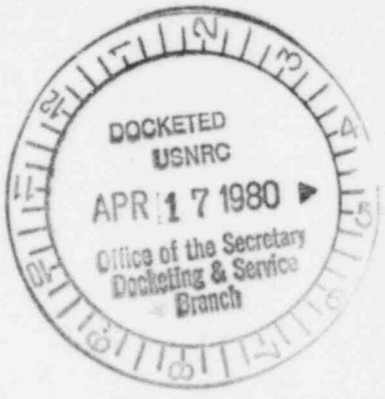
4/15/80



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

APPLICANT'S REPLY TO SOC PLEADING OF APRIL 3, 1980

I.

On April 3, 1980, the Shoreham Opponents Coalition (SOC) submitted a document entitled "Response of the Shoreham Opponents Coalition (SOC) to Board Order Dated March 5, 1980" (SOC Response). SOC's pleading (1) presents certain material responsive to the Board Order of March 5, (2) requests a special prehearing conference under 10 CFR § 2.751a, and (3) seeks to reargue certain issues already decided by the Board. Some reply seems appropriate to SOC's request for a prehearing conference and to its attempt to raise anew already resolved issues.

II.

Part VII of the SOC Response requests the Board to convene a special prehearing conference. SOC would have the conference reconsider those contentions dismissed by the Board

and reconsider the Board's decision that no supplemental FES is needed. See SOC Response at 15-16. A conference for these purposes is not warranted. First, in light of the Board's disposal of all contentions except those requiring particularization and SOC's apparent inability to particularize in the near future,[1/] a special prehearing conference at this time would serve no useful particularization purpose. Second, as noted below, no basis exists for reconsideration of issues decided against SOC. In the event the Board decides nonetheless to entertain SOC's Response as if it were a motion for reconsideration, ordering a conference would amount to granting a motion for oral argument on the reconsideration request -- an extraordinary step for which no predicate exists in the present circumstances. See 10 CFR § 2.730(d). SOC's reconsideration claims do not present issues justifying any such time-consuming, expensive procedure.

III.

SOC, in its response to the Board Order of March 5, 1980, has gratuitously included a commentary on the validity

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1/ The Applicant will be delighted to join SOC and the NRC Staff in efforts to particularize SOC's claims if and when there is reason to believe that the process will produce meaningful results. In our judgment, inadequate grounds for such belief exists as to the SOC/NRC gatherings held to date and scheduled for this week. Past experience in the Shoreham and Jamesport proceedings indicates, however, that LILCO will go far beyond the second mile to encourage, nurture and staff informal efforts to particularize, when the time and expense involved have a reasonable prospect of bearing fruit.

of those parts of the Board's decision that SOC dislikes. No procedural ground for filing such a commentary is stated. It would be entirely appropriate for the Board to disregard the commentary as an improper filing, as the Board is under no obligation to speculate about what the pleading is supposed to mean. See Kansas Gas and Elec. Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 576 (1975). The NRC Rules of Practice specify the prescribed form for motions, including the requirement to state "with particularity the grounds and the relief sought." 10 CFR § 2.730(b) (emphasis added). In at least one case, the Appeal Board admonished that "we will expect the caption of every future filing in which certain immediate affirmative relief is being requested to make reference to that fact explicitly by adverting to the relief sought and including the word 'motion'." Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-457, 7 NRC 70, 71 (1978). In SOC's pleading, the word "motion" is not only omitted from the caption but it also does not appear anywhere in the text in such a way as to indicate the particular relief requested. Where an intervenor is represented by counsel, failure to meet such basic procedural requirements should be fatal to the pleading. See Wolf Creek, above, 1 NRC at 577 (dismissing vague antitrust contentions drafted by experienced counsel); cf. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-469, 7 NRC 470, 471-72 (1978) (requiring some degree of precision from a layman).

Even if the Board were to accord SOC the special treatment usually reserved for non-legal draftsmen (see, e.g., Public Service Elec. and Gas Co. (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973)) and to deem SOC's pleading to be a motion for reconsideration,[2/] doubt remains about the propriety of entertaining it. Most cases involving motions for reconsideration do not address the threshold criteria that such motions must satisfy. See, e.g., Houston Lighting and Power Co. (South Texas Project, Unit Nos. 1 and 2), ALAB-387, 5 NRC 638 (1977); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-166, 6 AEC 1148 (1973). The Rules of Practice in 10 CFR § 2.771(a), however, do authorize petitions for reconsideration of a "final decision." The question, then, is whether this authorization really is reserved simply to the reconsideration of "final" decisions or whether it may be extended by analogy to other decisions made in NRC proceedings. The precise issue was addressed in Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645 (1974). Intervenors in a construction permit proceeding moved the Licensing Board to reconsider its initial decision in the case. Another party opposed the motion on the ground that § 2.771 limited such petitions to requests for reconsideration

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2/ See Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-370, 5 NRC 131, 132 n.2 (1977) (unauthorized interlocutory appeal may be treated as a motion for reconsideration).

of final decisions. The Appeal Board disagreed, stating:

> Like many procedural rules . . . those of the Commission have evolved over many years, during the course of which they have been modified from time to time to meet specific situations. These changes have perhaps obscured the intendment of section 2.771. In practice, however, it is established that the rule does not preclude a party from petitioning a licensing board to reconsider its initial decision.

Id. at 646. The Appeal Board went on to hold both that § 2.771 was the authority for entertaining the motion to reconsider and that all of § 2.771's requirements were applicable to the reconsideration request. Id. at 648.

Under the rationale of Midland, then, this Board's authority for entertaining a motion for reconsideration would be § 2.771, (see also Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-402, 5 NRC 1182, 1183 n.1 (1977)), and all aspects of § 2.771 would govern the motion. One of these provisions, § 2.771(a), imposes a ten-day time limit on the filing of motions for reconsideration. SOC's pleading falls well beyond this period. SOC offers no explanation for its untimeliness, nor for that matter even asks leave to make the untimely filing. Cf. 10 CFR § 2.711(a). Thus, even if SOC's pleading may be transformed by grace into a motion for reconsideration, it remains unjustifiably out of time.

Procedural defects to one side, SOC's pleading also lacks substantive merit. Its points fall far short of the strong

showing of error that would be required to occasion relief. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619, 620 (1976). Indeed, SOC largely repeats arguments previously tendered to and rejected by the Board. As such, these arguments merit summary denial. Houston Lighting and Power Co. (South Texas Project, Units Nos. 1 and 2), ALAB-387, 5 NRC 638 (1977); see also Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 258 (1978).3/

IV.

The basic tenor of SOC's pleading is well reflected on its tenth page, where "SOC specifically demands the right to present a direct case on all matters raised by the contentions submitted in its January 24, 1980 Petition . . . ." (Emphasis

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3/ SOC says nothing to alter the balance under 10 CFR § 2.714 for those of its contentions found by the Board to lack good cause for their untimely submission. If, however, the Board decides to reconsider its balancing, the Applicant stands ready to elaborate its views on the merits of SOC's arguments, at the Board's request. We do not do so here in light of Appeal Board guidance in Maine Yankee, above:

> [I]t will never be necessary for a party to respond to a petition for reconsideration filed with an Appeal Board unless that Board has specifically requested it to do so. Absent the most extraordinary circumstances, such a petition will not be granted without a request for responses having first been made.

6 AEC at 1150 n.7.

added.) Parties to NRC adjudicatory proceedings may not "demand" anything of the Board. It is particularly inappropriate for people who enter a case over 3-1/2 years late to "demand" that the Board reshape the proceeding in their untimely image. SOC nonetheless comes with many demands and, in the process, ignores the NRC Rules of Practice.

For the reasons stated, SOC's request for a prehearing conference and its apparent desire for reconsideration of certain of the Board's March 5 rulings should be denied.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

W. Taylor Reveley, III

W. Taylor Reveley, III
Anthony F. Earley, Jr.
Hunton & Williams
707 East Main Street
P. O. Box 1535
Richmond, Virginia 23212

Dated: April 15, 1980

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

CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANT'S REPLY TO SOC PLEADING OF APRIL 3, 1980 were served upon the following by first-class mail, postage prepaid, on April 15, 1980:

Elizabeth S. Bowers, Esq.
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Oscar H. Paris
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Frederick J. Shon
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Harold R. Denton, Director
Office of Nuclear Reactor
Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Richard K. Hoefling, Esq.
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Jeffrey C. Cohen, Esq.
New York State Energy Office
Swan Street Building, Core 1
Empire State Plaza
Albany, New York 12223

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

Howard L. Blau, Esq.
217 Newbridge Road
Hicksville, New York 11801

Ralph Shapiro, Esq.
Cammer and Shapiro, P.C.
9 East 40th Street
New York, New York 10016

Irving Like, Esq.
Richard C. Hand, Esq.
Reilly and Like
200 West Main Street
Babylon, New York 11702

Mr. Marc W. Goldsmith
Energy Research Group, Inc.
400-1 Totten Pond Road
Waltham, Massachusetts 02154

Hon. Peter F. Cohalan
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11787

David J. Gilmartin, Esq.
County Attorney
Suffolk County Department
of Law
Veterans Memorial Highway
Hauppauge, New York 11787

Stephen B. Latham, Esq.
Twomey, Latham & Schmitt
33 West Second Street
Post Office Box 398
Riverhead, New York 11901

W. Taylor Reveley, III
Hunton & Williams
707 East Main Street
Post Office Box 1535
Richmond, Virginia 23212

Dated: April 15, 1980