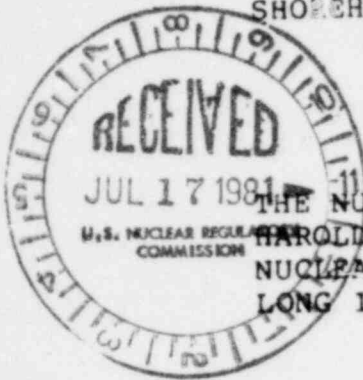


UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

7/13/81



SHOREHAM OPPONENTS COALITION,

Petitioner,

-against-

THE NUCLEAR REGULATORY COMMISSION,
HAROLD DENTON AS THE DIRECTOR OF
NUCLEAR REACTOR REGULATION, AND THE
LONG ISLAND LIGHTING COMPANY,

Respondents.

SUPPLEMENTAL AFFIDAVIT
IN SUPPORT OF PETITION
FOR EXTRAORDINARY
INJUNCTIVE RELIEF
PENDENTE LITE PURSUANT
TO THE ALL WRITS ACT

STATE OF NEW YORK)

ss.:

COUNTY OF SUFFOLK)



STEPHEN B. LATHAM, being duly sworn, deposes and says:

I am a member of the firm of Twomey Latham & Schmitt, attorneys for the Shoreham Opponents Coalition ("SOC"), petitioner herein. Since the filing of SOC's petition with this Court, there have been certain developments at the agency level, which petitioner wants to bring to the Court's attention.

The Nature of the Petition Before this Court

SOC has petitioned this court for injunctive relief pending judicial review of agency action by federal

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respondents. More specifically, SOC has applied to the federal respondents for a) a hearing on the Long Island Lighting Company's request for an extension to its construction permit for a nuclear reactor at Shoreham, New York, and b) a proceeding to determine whether the existing permit should be modified, suspended or revoked. SOC's petition described a set of issues which it proposed to raise in both the hearing on the construction permit extension and the proceeding requested by SOC to determine whether the existing permit should be modified, suspended or revoked.

SOC had filed applications with the Nuclear Regulatory Commission ("NRC") on December 31, 1980 and January 23, 1981. Thereafter, LILCO filed two responses in opposition to SOC's requests. LILCO continued construction under an automatic extension of its NRC permit. After receiving no action from federal respondents, SOC wrote again to the NRC on April 14, 1981, demanding a ruling on its applications. On June 18, 1981, after two more months of inaction by federal respondents and continued construction by LILCO, SOC filed its petition with this Court seeking injunctive relief pendente lite and also filed an action for mandamus in the United States District Court seeking an order directing the federal respondents to rule on SOC's applications before the NRC.

Subsequent Developments Below

On July 7, 1981, SOC received copies of two NRC documents prepared on June 26, 1981 in response to SOC's petition before the agency. Copies are submitted herewith as Attachments 1 and 2.

The first of these documents is a memorandum from the NRC's Executive Director to the Commissioners ("SECY 81-395"). The Executive Director, on behalf of the NRC Staff, recommended that SOC's request for a hearing on LILCO's request for a construction permit extension be referred to the Atomic Safety and Licensing Board ("ASLB"), which is considering LILCO's operating license application. The memorandum further recommends that, after yet another opportunity for the Applicant and Staff to respond to SOC's six month old hearing request, the ASLB should be instructed that, if SOC's request meets certain criteria, the hearing on the construction permit extension should be granted but deferred and consolidated with the proceeding on LILCO's application for an operating license (Attachment 1, page 2).

NRC Staff has projected that hearings on the operating license will not be scheduled until January, 1982, one year

after SOC's request for a hearing on the construction permit extension. (Letter of H. Denton, NRC, to W. Uhl, LILCO, dated March 13, 1981.)

The NRC memorandum states that now, because of SOC's federal court litigation concerning its petition to the NRC, "early action [on SOC's request for a hearing] is appropriate" (Attachment 1, page 3).

The second NRC document is a "Director's Decision Under 10 CFR 2.206" denying SOC's December 31, 1980 and January 23, 1981 requests for a proceeding to determine whether the LILCO construction permit should be modified, suspended or revoked. The decision states in part that

"Even where unresolved safety questions are raised after issuance of the construction permit, institution of proceedings to suspend the permit is not required, because permitting continued construction of the plant despite unresolved safety questions does not of itself pose any danger to the public health and safety." (Attachment 2, page 4.)

Implicit in the decision's reasoning is that a proceeding would never be instituted to modify, suspend or revoke a construction permit, despite the specific provision of NRC regulations establishing such relief, since construction work does not endanger the public.

The brief decision by the Director would normally become a final NRC order until 25 days after the date of issuance. However, on July 7, 1981, the Commission extended its period for review of the Director's decision until August 4, 1981 (Attachment 3). Thus, the order will not become reviewable until August 4, 1981.

Reasons For Granting The Writ

The petitioner, SOC, will not repeat the reasons and citations of authority for granting the requested relief which are set forth in the original petition. The documents recently issued by the NRC have not changed the situation described in SOC's application to this Court.

The belated ruling by the Director of Nuclear Reactor Regulation on SOC's petition under 10 CFR Section 2.206 will finally become reviewable by this Court in August. However, construction of the Shoreham plant under the old construction permit continues apace while the NRC drags out even further its response to SOC's request for the statutorily required hearing on LILCO's application for a construction permit extension. See 42 U.S.C. Section 2239; Sholly v. NRC, _____ F2d _____; 15 ERC 1231 (D.C. Cir., 1980); reh. denied, No.

80-1784 (March 4, 1981) (en banc), cert. granted _____ U.S. _____, 49 U.S.L.W. 3882 (May 26, 1981).

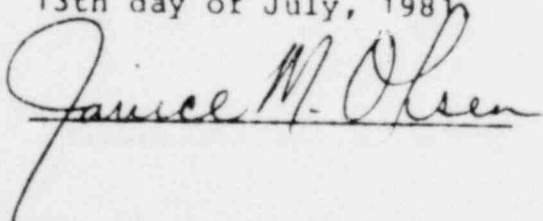
SOC believes that, at a minimum, its request for a proceeding should have been granted under 10 CFR Section 2.206 to investigate whether the construction permit should be modified, revoked or suspended. SOC will seek review of that decision, which denies all relief under 10 CFR Section 2.206, after the order becomes final.

More important, the NRC's ongoing failure to take any action on SOC's request for a hearing on the construction permit extension currently deprives petitioner of due process and, as expedited construction proceeds toward completion, the NRC's continuing failure to act causes further irreparable injury to petitioner's right to due process.

A hearing on LILCO's application for an extension to its permit will be meaningless once remaining construction has been completed in whole or substantial part. At that point, this Court's review of final agency action on any of SOC's requests would be a moot exercise. For the foregoing reasons and those stated in the petition for injunctive and other relief, the petition should be granted.


Stephen B. Latham

Sworn to before me this
13th day of July, 1981



JANICE M. OLSEN
NOTARY PUBLIC, State of New York
No. 52 1527177, Suffolk County
Term Expires March 30, 19 82



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

June 29, 1981

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In the Matter of
Long Island Lighting Company
(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322

Gentlemen:

Enclosed find copies of the following NRC Staff documents which were prepared in response to the "Petition of the Shoreham Opponents Coalition (SOC) to Institute Proceedings on Whether Good Cause Exists to Extend the Completion Date of the Shoreham Nuclear Power Station, Unit 1."

1. Director's Decision Under 10 C.F.R. 2.206 (77-81-9)
2. SECY 81-395

Since you already have copies of Enclosures 1 and 2 to SECY 81-395, I have not forwarded additional copies. Enclosure 3 to SECY 81-395 is the Director's Decision, a copy of which is enclosed.

Sincerely,

Bernard M. Bordenick

Bernard M. Bordenick
Counsel for NRC Staff

Enclosures:
As Stated

cc: (w/enclosures)
See Page 2

ATTACHMENT 1

dup of 81-7614218

cc: Louis J. Carter
Dr. Oscar H. Paris
Mr. Frederick J. Shon
Edward M. Barrett, Esq.
Jeffrey L. Futter, Esq.
Ralph Shapiro, Esq.
Howard L. Blau, Esq.
Jeffrey Cohen, Esq.
Irving Like, Esq.
Energy Research Group, Inc.
Joel Blau, Esq.
David H. Gilmartin, Esq.
Atomic Safety and Licensing
Board Panel
Docketing and Service Section
Mr. J. P. Novarro
MHB Technical Associates
Hon. Peter Cohalan
Ezra I. Bialik, Esq.
Atomic Safety and Licensing
Appeal Board

June 26, 1981

For: The Commissioners

From: William J. Dircks
Executive Director for Operations

Subject: Disposition of Petition Of The Shoreham Opponents Coalition (SOC) To Institute Proceedings On Whether Good Cause Exists To Extend The Completion Date Of The Shoreham Nuclear Power Station, Unit 1

Purpose: This paper: (1) transmits a Director's decision denying a request made pursuant to 10 C.F.R. 2.206 to suspend the Shoreham Nuclear Power Station, Unit 1 construction permit pending a hearing on Permittee's application to extend the latest completion date specified in the construction permit, and (2) requests a Commission decision on the SOC request for a hearing.

Issue: Whether, and if so under what circumstances, SOC's request for a hearing should be granted.

Discussion and Recommendation: Long Island Lighting Company is the holder of a construction permit issued on April 14, 1973, for construction of the Shoreham Nuclear Power Station, Unit 1. This facility is presently under construction (approximately 87% complete) on the north shore of Long Island in the Town of Brookhaven, Suffolk County, New York.

On November 26, 1980, the Applicant timely requested an extension of the latest completion date (from December 31, 1980, to March 31, 1983). Applicant asserted that construction has been delayed by the following events beyond its control:

CONTACT:
J. Wilson/B. Bordenick/S. Burns, NRR/OELD
28408/28648/27268

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1. New regulatory requirements.
2. Evolving Interpretation of Existing Regulatory Requirements.
3. Late Delivery of Equipment.
4. Unexpected Difficulties in Completion of Required Plant Modifications.

On January 23, 1981, SOC filed with the Director, Nuclear Reactor Regulation, a document entitled "Petition of the Shoreham Opponents Coalition (SOC) to Institute Proceedings on Whether Good Cause Exists to Extend the Completion Date of the Shoreham Nuclear Power Station, Unit 1." (Enclosure 1). The Petition asks for a hearing on the Applicant's construction permit extension request. Additionally, it seeks to have "the Shoreham construction permit . . . suspended" and then "revoked" or "in the alternative re-issue(d) . . . subject to . . . conditions. . . ." Applicant on February 4 and February 27, 1981 responded to the Petition setting forth its opposition to the SOC requests (Enclosure 2). The staff later determined to hold the petition in abeyance when Applicant and SOC undertook discussions for purposes of reaching a settlement of SOC's intervention as to the OL application. These settlement discussions subsequently proved fruitless. For the reasons set forth in the Director's Denial of the suspension or revocation aspects of the petition (Enclosure 3), the petition has been denied as to the 10 C.F.R. 2.206 aspects. With respect to SOC's request for a hearing on the construction permit extension, the staff recommends that this request be referred to the Atomic Safety and Licensing Board (ASLB) which is considering the operating license application to which SOC has been admitted as a late intervenor. After an opportunity for the Applicant and the staff to respond to the SOC hearing request, the ASLB should be instructed that, if it finds that the petition meets the requirements of 10 C.F.R. 2.714, the two proceedings (on the CP extension and on OL issues) should be consolidated for hearing. The use of this procedure will conserve staff and Licensing Board resources and avoid the possibility of separate hearings being conducted concurrently.

Scheduling:

On June 17, 1981, SOC filed a "Complaint for Declaratory Relief and for Writ of Mandamus" in the United States District Court for the Eastern District of New York and a

"Petition for Extraordinary Injunctive Relief Pendente Lite Pursuant to the All Writs Act" in the United States Court of Appeals for the Second Circuit. Both suits involve the SOC Petition discussed in this paper. Accordingly, early action is appropriate.



William J. Dircks
Executive Director for Operations

Enclosures:

1. Petition Of The Shoreham Opponents
Coalition (SOC) To Institute
Proceedings On Whether Good Cause
Exists To Extend The Completion
Date Of The Shoreham Nuclear Power
Station - Unit 1
2. Permittee's Responses To SOC Pleading
Of January 23, 1981
3. Director's Decision Under 10 C.F.R. 2.206

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION
Harold R. Denton, Director

In the Matter of)	Docket No. 50-322
)	
LONG ISLAND LIGHTING COMPANY)	(10 C.F.R. 2.206)
(Shoreham Nuclear Power)	
Station, Unit 1)		

DIRECTOR'S DECISION UNDER 10 C.F.R. 2.206

In filings dated December 31, 1980, and January 23, 1981, the Shoreham Opponents Coalition (SOC) requested pursuant to section 189 of the Atomic Energy Act of 1954, as amended, and 10 C.F.R. 2.206 of the NRC's Rules of Practice that the Director of Nuclear Reactor Regulation institute a proceeding to determine whether good cause exists to extend the construction permit for the Shoreham Nuclear Power Station, Unit 1. SOC also requested "that, to protect public health and safety, the Shoreham construction permit be suspended pending the outcome of the hearing [on the construction permit extension]." Petition at 1 (Jan. 23, 1981). The Long Island Lighting Company (LILCO) had requested on November 26, 1980, an extension of Construction Permit No. CPPR-95 to March 31, 1983. ^{1/} By separate memorandum, the NRC staff has made recommendations to the Commission with respect to SOC's request for a hearing on the extension

^{1/} See Attachment A to Petition (Jan. 23, 1981). The construction permit would have expired on December 31, 1980. Under 10 C.F.R. 2.109, which derives from section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), the permit remains in effect until the application for its renewal has been finally determined.

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of the construction permit. ^{2/} The remainder of this decision is concerned with SOC's request that I suspend construction of the Shoreham facility pending the outcome of the proceeding on extension of the construction permit.

SOC claims that suspension of the permit should be ordered "to protect public health and safety". At no point in the petition does SOC give reasons why public health and safety would be threatened imminently if permit suspension were not ordered. To be sure, SOC lists a number of matters which it believes should be considered in connection with the application for permit extension. ^{3/} These matters concern, however, primarily issues that go to the question of whether LILCO should be granted an operating license for the Shoreham plant. Whether or not these matters are litigable in a proceeding on permit extension, they do not reveal any threat to public health and safety that stems from the facility's construction. Rather, SOC

^{2/} A copy of this memorandum has been served with this decision on SOC and LILCO. SOC's petition lists a number of items which SOC believes should be litigated in a hearing on the construction permit extension or should be imposed as conditions on any permit extension. Because SOC has requested that these matters be litigated in the permit extension proceeding, the Staff will respond to these matters in the proceeding on permit extension, not under 10 C.F.R. 2.206. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-6 (May 8, 1981).

^{3/} In part, the petition styles these matters as arguments for "revocation" of the construction permit. Petition at 4-20 (Jan. 23, 1981). However, SOC wants these matters litigated in the construction permit proceeding. If these matters are litigable in that proceeding and if SOC's views prevail, extension would be denied and thereby the permit would be terminated.

has alleged only that operation of the facility would be unsafe or environmentally unsound, because of the facility's siting, the risk of severe accidents, and the need for additional safety systems and analyses. Thus, the petition does not raise allegations that might provide a basis for suspension, perhaps even immediate suspension, of construction: e.g., construction of the facility has been improper under existing requirements or implementation of the quality assurance program has been inadequate. ^{4/}

The only nexus between any of the matters raised by SOC and its request for immediate suspension of the permit is SOC's request that suspension of the permit be ordered pending a determination of the feasibility of evacuation after a severe accident during operation of the facility. ^{5/} SOC's citation to a recent Appeal Board decision is inapposite as a basis for SOC's request. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 569-70 (1980). The Bailly decision suggests only that it may be appropriate to consider site suitability contentions in a proceeding on construction permit extension, not that suspension of construction pending resolution of such issues in the permit extension proceeding is appropriate. The feasibility of evacuation, as it relates to emergency planning, is relevant to the assessment of whether the plant should operate. Although that issue must be resolved

^{4/} See Proposed General Statement of Policy and Procedure for Enforcement Actions, § IV.C., 45 Fed. Reg. 66,754, 66,757 (Oct. 7, 1980).

^{5/} Petition at 20 (Jan. 23, 1981).

before operation of the facility, evacuation considerations pose no imminent threat to public health and safety that would warrant immediate suspension of construction.

Suspension of construction is not mandated, therefore, by law or Commission policy. As noted above, a construction permit or any other Commission license generally remains effective under a timely application for renewal until the Commission has finally determined the application. ^{6/} The permittee pursues construction work under a construction permit at its own risk pending approval of permit extension or of the application to operate the plant. ^{7/} Even where unresolved safety questions are raised after issuance of the construction permit, institution of proceedings to suspend the permit is not required, because "permitting continued construction of the plant despite unresolved safety questions does not of itself pose any danger to the public health and safety". ^{8/}

Before LILCO may receive an operating license, it will be required to do anything necessary to ensure safe operation of the plant. The cost or difficulty associated with implementing needed actions to ensure safety are not relevant consideration to this agency. The safety standards which an applicant must meet to obtain an operating license are unconditional. ^{9/}

^{6/} 10 CFR 2.109; 5 U.S.C. 558(c).

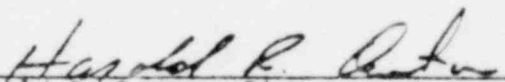
^{7/} see Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers, 367 U.S. 396 (1961).

^{8/} Porter County Chapter of the Izaak Walton League, Inc. v. NRC, 606 F.2d 1363, 1369 (D.C. Cir. 1979).

^{9/} Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-623, 12 NRC 670, 677-73 (1980).

To the extent that SOC has raised matters which require resolution before an extension of the construction permit is granted or before an operating license is issued, these matters will be given appropriate consideration in those proceedings. I do not find further consideration of these matters appropriate at this time under 10 C.F.R. 2.206. ^{10/}

As SOC's petition does not provide an adequate basis for immediate suspension of construction, SOC's petition to suspend is denied. The remaining matters in the petition concerning SOC's request under section 189 of the Atomic Energy Act for a hearing on permit extension are before the Commission for action. A copy of this decision will be filed with the Secretary for the Commission's review in accordance with 10 C.F.R. 2.206(c). In accordance with 10 C.F.R. 2.206(c), this decision will constitute the final action of the Commission 25 days after the date of issuance, unless the Commission on its own motion institutes review of this decision within that time.


Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Dated in Bethesda, Maryland
this 26th day of June, 1981

^{10/} See Pacific Gas & Electric Co., (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-6 (May 8, 1981), affirming DD-81-3, Pt. I (March 26, 1981); Commonwealth Edison Co. (Byron Station, Units 1 & 2), DD-81-5, Slip Op. at 2-4 (May 7, 1981).