

RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
)
LONG ISLAND LIGHTING COMPANY)
)
(Shoreham Nuclear Power Station,)
Unit 1))

Docket No. 50-322

MOTION OF THE
SHOREHAM OPPONENTS COALITION (SOC)
FOR RECONSIDERATION OF BOARD'S
DISMISSAL OF CERTAIN REGULATORY
GUIDES CONTAINED IN SOC'S CONTENTION 19



Pursuant to 10 CFR Part 2.730(b), SOC submits this motion for reconsideration and admission of certain Regulatory Guides dismissed from Contention 19 by the Board in its Memorandum and Order dated July 7, 1981. Based upon its review of that Order, SOC believes that the Board has significantly misunderstood the nature of the parties' (LILCO, NRC Staff and SOC) negotiations on Contention 19 and the nature of the issue which those parties asked the Board to determine in its July 7, 1981 Order. SOC further believes that the Regulatory Guides excluded by the Board in its July 7, 1981 Order have been excluded arbitrarily (see discussion in Section III., infra). Accordingly, SOC asks the Board to reconsider its exclusion of those Regulatory Guides and to admit each of them for further discovery and final particularization as part of SOC's Contention 19.

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I. THE ISSUE PRESENTED TO THE BOARD

As noted by SOC in its "Motion...for Acceptance of Particularized Contention 19" (March 18, 1981), and the responses of Staff (April 7th) and LILCO (April 2nd), a series of informal discovery sessions among those parties over approximately a nine-month period has lead to a resolution and withdrawal of about 100 of the 145 Regulatory Guides which were the original focus of Contention 19. SOC further stated its belief that a number of the remaining Regulatory Guides would ultimately be resolved in similar fashion (see SOC Motion at page 3) after additional informal discovery and meetings among the parties.

However, the parties could not agree on the scope of Contention 19 (i.e., were each of the remaining 46 Regulatory Guides "recent" within the meaning of the Board's March 5, 1981 Order). Accordingly, SOC, Staff and LILCO agreed that it would be most efficient for the Board to determine whether SOC's interpretation or Staff's or LILCO's interpretation of the term "recent" in the Board's original March 5, 1980 Order was correct so that the parties could complete the discovery process with an understanding of the ultimate scope of the contention. As described by LILCO at pp. 3-4 of its Reply to SOC's March 18, 1981 Motion on Contention 19:

"As indicated by SOC, the parties proceeded to have a number of meetings over several months to work out an acceptable contention. Those meetings did succeed in reducing the number of regulatory guides in dispute but it became clear that agreement could not be reached on the scope of the contention envisioned by the Board. The parties decided to set their differences aside, particularize a contention and then present it to the Board for resolution of the disputed issue." (emphasis added)

Thus, a review of the responses by Staff and Applicant makes it clear that the parties desired a resolution "of the disputed issue" by the Board before investing substantial additional time in further discovery and unnecessary particularization. In view of the Board's decision that SOC's interpretation of the term "recent" was correct (Board's Memorandum and Order at page 5), it therefore follows that each of the Regulatory Guides submitted by SOC in its March 18th Motion should have been admitted for further discovery and subsequent particularization.

By dismissing some of the Regulatory Guides on grounds that the parties themselves had worked hard to resolve, the Board has seriously undermined confidence in the informal discovery process.

II. ADEQUACY OF PARTICULARIZATION

At page 6 of its Memorandum and Order dated July 7, 1981, the Board admonished SOC for failing to particularize a number of Regulatory Guides by offering more specific technical bases and a clearer nexus to Shoreham. In the pages that followed, the Board

excluded certain Regulatory Guides from Contention 19 where it determined that a certain degree of specificity and nexus to the Shoreham were lacking. We believe the Board has fundamentally misunderstood the reasons why the parties submitted Contention 19 to the Board in the form and at the time that it did and that accordingly, the Board's rejection of certain Regulatory Guides is in error.

As previously noted, the parties jointly agreed to refrain from further informal discovery on the remaining 46 Regulatory Guides until they received guidance from the Board as to which Regulatory Guides were deemed by the Board to be "recent". As noted in the SOC March 18, 1981 Motion as well as in the replies of Staff (see page 4 of Staff's Reply dated April 7, 1981) and LILCO (see page 1 of LILCO Reply dated April 2, 1981), the parties were in agreement that the version of Contention 19 submitted to the Board by SOC on March 18, 1981 was adequately particularized and Shoreham-specific. As stated by Staff at page 4 of its Reply,

"The Staff is generally of the view that SOC, as required by the Board, has adequately specified in Attachment A which Regulatory Guides it believes have not been met for Shoreham and why it believes they should be met." (Emphasis in original)

It is, therefore, unfortunate that the Board has chosen to criticize SOC for a lack of specificity when in fact, SOC, Staff and LILCO had agreed that the contention submitted on March 18th was adequately particularized and the parties desired further guidance from the Board on the meaning of "recent" before investing additional time in discovery and particularization.

Throughout this proceeding, the Board and the parties have encouraged the use of informal discovery in the belief that it was a more efficient means of resolving the parties' disputes and that it was more responsive to the spirit of a quick resolution of the issues of concern to each party. SOC believes that this process has been beneficial, but the Board's rejection of certain contentions for failure to adequately particularize would penalize SOC for relying on that informal process.

SOC is mindful of the fact that, in the words of the Board, "the hour is late", and that parties must be provided with contentions of specific particularity so that they can learn what issues are contested and what evidence will be needed to meet those issues (see Board Memorandum and Order dated July 7, 1981 at page 6). However, SOC feels that the Board's concerns are being misapplied in this instance. SOC fully intends to state contentions with sufficient particularity so that they may be efficiently litigated at hearings and where it fails to do so, other parties will be quick to move for summary disposition. In addition to summary disposition, the Board has indicated that it will provide a final, brief period for discovery and particularization prior to hearings. Each of SOC's Regulatory Guide contentions ultimately must be shepherded through that procedural minefield and SOC is confident that the Board will be satisfied with the level of particularization when that time has arrived. Unfortunately, the Board's July 7, 1981 Order has truncated that entire process, contrary to the spirit of informal discovery reached by the parties and contrary to the spirit of answering the important questions raised by Contention 19.

At page 6 of its Order, the Board also cited the need of parties to know the precise issues to be litigated so that they can prepare to meet those issues. However, with regard to Contention 19 and in order to meet the test set forth in the River Bend decision (In the Matter of Gulf State Utilities Company, ALAB-444, 6 NRC 760, 771 et seq, 1977), SOC must be permitted to discover certain facts from Applicant and Staff in order to determine the nature of Applicant's compliance with the Regulatory Guides and the basis for Staff's acceptance of any alternate measures proposed by the Applicant. The Board's Order on Contention 19 would preclude SOC from discovering the facts necessary to state its contention with the specificity desired by the Board. If SOC cannot meet that test after it has discovered the necessary facts, SOC is certain that either Staff or LILCO, or both, will move quickly for summary disposition where appropriate.

III. THE BOARD'S EXCLUSION OF CERTAIN REGULATORY GUIDES FROM CONTENTION 19 WAS ARBITRARY

SOC has reviewed and compared the Board's reasoning in excluding certain Regulatory Guides from Contention 19 while admitting others. SOC has been unable to discern any consistency to the Board's rationale for excluding some while admitting others. For example, a review of the Board's rulings on subparts A, B and D (pages 8-9 of the Board's July 7, 1981 Order) reveals

little, if any, difference in SOC's presentation of the contention, yet the Board rejected A and D while admitting B, with the caveat that SOC would show why B was "necessary to safety" at the hearings.

Similar arguments can be made based upon a review of the Board's decisions on subparts G, I and K. The Board's ruling on subpart L poses another problem. The Board denied SOC the right to reparticularize this contention since the pertinent information has been available since July, 1980 and SOC has had "sufficient time to complete this contention" (Board Order at page 12). However, the Board apparently ignored the fact that the parties have been engaged in informal discovery since that period of time and subpart L was submitted to the Board to determine if the Board deemed it "recent" within the meaning of its March 5th, 1980 Order so that the parties would invest the time needed to discover certain facts and frame a more particularized contention. The Board's attention is further directed to subparts P, R, S, T, X and Y, as further representative examples of what SOC feels is an inconsistency or arbitrariness in the Board's exclusion of certain Regulatory Guides from Contention 19.

We would finally note that with regard to subpart FF, the Board performed its own examination of the Regulatory Guide in order to determine that that subpart was admissible. Had the Board chosen to apply this reasoning to any number of other

Regulatory Guides, the result would have been the same-- admission of the Regulatory Guide in question.

From the outset of its intervention in this proceeding, SOC has strongly believed, and the Board has agreed, that an examination of the design and construction of Shoreham, measured against the standards and goals of recent regulatory guides, was a critical issue in these proceedings. The parties have voluntarily made substantial progress in accomplishing that goal and it is unfortunate that the Board should terminate that process. SOC, Staff and LILCO met in Washington, D.C. on July 27 and 28 to resume the informal discovery process and SOC intends to continue in that fashion so long as it proves to be useful for all concerned. Should the Board agree with SOC and admit those Regulatory Guides excluded by the Board by its July 7th Order, SOC will expeditiously attempt to obtain what remaining facts are needed to particularize or resolve the remaining 46 regulatory guides well in advance of the commencement of hearings.^{1/} In view of the importance of Contention 19 and the fact that the parties have made such progress in voluntarily resolving their concerns, it is unfortunate that the Board's Order will prevent the parties from reaching the merits of Contention 19 in its entirety.

1/ Since the Board's ruling SOC has been advised that the first Shoreham SER supplement and the ACRS review have been substantially delayed, at least until September, and hearings are not scheduled to begin until January of 1982. It would thus appear that the parties have ample time to complete discovery and particularization of Contention 19 and to submit summary disposition motions where appropriate, well in advance of those hearings.

CONCLUSION

For the foregoing reasons, SOC respectfully requests that the Board reconsider and admit those Regulatory Guides dismissed from Contention 19 by its Order dated July 7, 1981 and that it admit Contention 19 as filed by SOC in its Motion dated March 18, 1981.

Respectfully submitted,

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Dated: July 30, 1981