

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commissioners:

Kenneth M. Carr, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick

_____)	
In the Matter of)	Docket No. 50-322-OLA
LONG ISLAND LIGHTING COMPANY)	ASLBP No. 91-621-01-OLA
(Material License No.)	December 5, 1990
35-17178-01, EA No. 89-223))	(Notice of Appeal)
_____)	

SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT
AND
SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC.
BRIEF
IN SUPPORT OF
THE APPEAL OF
THE ASLBP MEMORANDUM AND ORDER OF NOVEMBER 19, 1990

The Shoreham-Wading River Central School District and Scientists and Engineers for Secure Energy, Inc. ("Appellants") hereby provide the Commission with their brief in support of the above-captioned appeal, setting out the basis of the Commission's jurisdiction, a summary of argument, argument supplemental to the motion itself addressing the Order at issue, and a conclusion.

JURISDICTION

The Commission has jurisdiction to review the Atomic Safety and Licensing Board Panel's ("ASLBP") Order of November 19, 1990 in the above-captioned matter ("Order") pursuant to 10 C.F.R. § 2.714a(a) as "an order of the presiding officer or the

atomic safety and licensing board designated to rule on petitions for leave to intervene and/or requests for hearing." See 55 Fed. Reg. 42944, 42945 col. 2 (October 24, 1990) (redirecting appellate jurisdiction from the Atomic Safety and Licensing Appeal Board to the Commission itself).

SUMMARY OF ARGUMENT

Appellants argue that the Restraining Order and Other Relief requested in their motion is both appropriate and necessary for the reasons stated in that motion (incorporated by reference herein) and that the refusal of such relief by the ASLBP constitutes arbitrary and capricious action which is also an abuse of discretion. For all of these reasons, the Commission should vacate the Order and remand to the Atomic Safety and Licensing Board with instructions to issue the Orders requested.^{1/}

^{1/} Appellants also suggest that insofar as their motion requested orders that would have prevented the visit by Commissioner Curtiss and his meetings with officials of the Long Island Lighting Company ("LILCO"), the Long Island Power Authority ("LIPA") and others on November 13, 1990, that issue is now moot, because the visit occurred. However, orders restricting the licensee and related persons (e.g., LIPA) from further contacts with the U.S. Nuclear Regulatory Commission ("NRC") adjudicatory personnel after the date of issuance of such order are still vital matters at issue.

ARGUMENT

In its Order, the ASLBP held that:

it is apparent to the Board that all of the relief requested by the Petitioners in the motion is beyond the jurisdiction of the Board, the motion being misdirected.

The Board rejects the motion at this time because of the patent lack of jurisdiction of the subject matter. It is done now without awaiting responses to the motion by the others parties to avoid undue delay should Petitioners seek to refile within the Commission.

Order at 8. The Board explained that: "These issues raised by Petitioners go far beyond the authority delegated by the Commission to the Board which was to review and resolve the six petitions to intervene and to hold hearings in regard to the subject amendments to the Shoreham operating license." Order at 9.

Recognizing that it is within the Board's jurisdiction "to afford due process to parties appearing before it," the Board alleged that the issues raised by Appellants "are of another sort" saying that Appellants were raising "the question whether the Licensee as well as the Commission and its staff are acting in accordance with the law and whether they should be enjoined to comply." Order at 9-10. The Board found that in order to answer that question "an inquiry of a primary nature would have to be conducted to determine whether there was a failure to follow the law and that relier was warranted."

Appellants take strong issue with this analysis. There is no need to conduct "an inquiry of a primary nature" as to whether the licensee, and the Commission and/or its staff were acting in accordance with law. Such an orders are justified as a merely prophylactic measures to protect Appellants, regardless of whether wrongdoing has previously occurred. Thus, the inquiry posited by the Board is not necessary and the Board's conclusion that: "The Commission has not delegated to the Board any authority to conduct an independent inquiry of the type necessary to satisfy Petitioners' request" is irrelevant.^{2/} Order at 10.

The request by Appellants was not an expansion of the "subject matter" committed to the Board's decision, but rather was a motion for relief of a procedural nature. Therefore, the ASLEP's reliance Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 is misplaced. Order at 10.

In their motion, Appellants also requested that LILCO, LIPA and the Power Authority of the State of New York ("NYPA") should be required to serve copies of all written communications

^{2/} Even if the Commission should find that an independent inquiry would be necessary to satisfy Petitioners' request, the presiding officer has the requisite authority to conduct such a proceeding. The Commission's regulations grant the presiding officer "all powers necessary" to fulfill his "duty to conduct a fair and impartial hearing according to law" including the power to "regulate . . . the conduct of the participants," to "dispose of procedural requests or similar matters," and to "take any other actions consistent with the Act, this Chapter, and Sections 551-558 of Title 5 of the United States Code." 10 C.F.R. § 2.718(e), (f) & (m) (1990).

with the NRC with respect to any all aspects of the overall proposal to decommission Shoreham on Appellants' counsel. Motion at 11. And Appellants requested that the order require LILCO, LIPA and NYPA also to give Appellants not less than 14 days notice advance of any meeting to be held between those persons and any NRC personnel relating to Docket No. 50-322. The Licensing Board's Order makes no findings of fact and offers no conclusions of law for not granting that relief in particular. Insofar as that relief was denied without the requisite findings and conclusions, the decision must be set aside as unlawful since it is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and without observance of procedures required by law. 5 U.S.C. § 706(2)(A)&(D).

Finally, if the Commission upholds the ASLBP determination that: "Being a subordinate adjudicatory body without plenary jurisdiction, the relief Petitioners seek is beyond the scope of our authority" (Order at 11) and that the relief should have been requested from the Commission itself,^{3/} the Commission should then determine that the presiding officer's failure to certify the question to the Commission for its determination pursuant to 10 C.F.R. § 2.718(i) constituted an abuse of discretion. 5 U.S.C. § 706(2)(A); Statement of Policy

^{3/} The Order's involved discussion of various matters before the Commission and matters before the ASLBP itself may support a finding that both bodies have concurrent jurisdiction to grant the requested orders. Order at 11. But that discussion does not support the ASLBP's conclusion that it lacks jurisdiction.

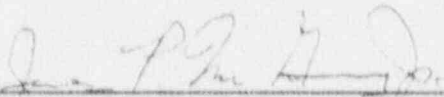
on Conduct of Licensing Proceedings, at Para III.F. (46 Fed. Reg. 28533, May 27, 1981) ("Board should promptly refer or certify the matter").

CONCLUSION

WHEREFORE, the Commission should vacate the ASLBP Memorandum and Order of November 19, 1990 in the above-captioned matter and remand to the Licensing Board with instructions to grant the relief requested.

Respectfully submitted,

December 5, 1990



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of)

LONG ISLAND LIGHTING COMPANY)

(Shoreham Nuclear Power Station,
Unit 1))

Docket No. 50-322-OLA

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DOCKETING & SERVICE
BRANCH

ASLBP No. 91-621-01-OLA

CERTIFICATE OF SERVICE

I hereby certify that copies of the Notice of Appeal and accompanying Brief in support of the Appeal from the ASLBP Memorandum and Order of November 19, 1990 were served upon the following by first-class mail, postage prepaid on this 5th day of December, 1990:

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