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LILCO, December 19, 1990

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

LILCO'S OPPOSITION TO PETITIONERS' APPEAL FROM THE LICENSING BOARD'S NOVEMBER 19 ORDER

I. Introduction

On December 5, 1990, Petitioners Shoreham-Wading River Central School District and Scientists and Engineers for Secure Energy, Inc. submitted what they styled as a notice of appeal, ostensibly filed "[p]ursuant to 10 C.F.R. § 2.714a," from the Licensing Board's November 19, 1990 Memorandum and Order (November 19 Order) rejecting Petitioners' request for a restraining order and other relief. Accompanying Petitioners' notice of appeal was a six-page supporting brief (together, the December 5 pleading).

Long Island Lighting Company (LILCO) opposes Petitioners' December 5 pleading. Petitioners may not proceed under 10 C.F.R. § 2.714a, which pertains solely to appeals from Licensing Board

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decisions granting or denying petitions for intervention and requests for hearing. What Petitioners actually are seeking here is interlocutory review of the November 19 Order, but they have not addressed -- much less satisfied -- the standards for obtaining such review under the Commission's Rules of Practice.

Moreover, even if Petitioners had satisfied the standards for obtaining interlocutory review, they have failed to demonstrate that the Board's November 19 Order should be reversed. To the contrary, the Board's ruling that it did not have jurisdiction to consider Petitioners' request for a restraining order and other relief is clearly correct.

II. Background

On November 9, 1990, Petitioners filed with the Licensing Board established to rule on six pending intervention petitions[1/] a "Motion for Restraining Order and Other Relief" (November 9 Motion), in which they requested the Board to issue an "immediately effective order" that would have (1) enjoined Commissioner Curtiss' imminent visit to the Shoreham facility

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1/ The Licensing Board, chaired by Judge Margulies, had been appointed on October 18, 1990 by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel "pursuant to the provisions of a Memorandum and Order issued by the Commission on October 17, 1990." 55 Fed. Reg. 43,058 (Oct. 25, 1990). In its October 17 ruling, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-90-08, 32 NRC __ (Oct. 17, 1990), the Commission forwarded to the Board Petitioners' six hearing requests, with instructions to review and resolve the requests consistent with the guidance the Commission had provided concerning the applicability of the National Environmental Policy Act to Shoreham's decommissioning.

(scheduled for November 13), and (2) granted other, longer-term relief.[2/] Petitioners filed their November 9 Motion after the close of business on Friday, November 9, without giving prior notice either to LILCO or the Licensing Board.

On November 12, 1990, LILCO filed its "Opposition to Emergency Aspects of Motion for Restraining Order and Other Relief by Petitioners for Intervention (November 12 Opposition). In its Opposition, LILCO addressed only the "emergency" issues raised by the November 9 Motion, as Commissioner Curtiss' visit to Shoreham was scheduled for the following day. LILCO stated that the Board should "summarily deny Petitioners' emergency request that this Board enjoin Commissioner Curtiss' intended site visit tomorrow," arguing, inter alia, that (1) the Commissioner's visit was not within the scope of the issues remanded to the Board by the Commission in CLI-90-08, and (2) Petitioners had artificially created a "pseudo-emergency situation" by waiting until the last moment to seek the relief requested. November 12 Opposition at 2-3.

[2/] Specifically, Petitioners sought a order from the Board (1) restraining LILCO and interested persons not party to the Shoreham proceeding from meeting and communicating with any NRC adjudicatory personnel; (2) requiring the restrained persons to submit memoranda describing all Shoreham-related contacts they had had with NRC adjudicatory personnel since July 14, 1989; (3) requiring the restrained persons to provide Petitioners with copies of certain Shoreham-related papers submitted to the Commission after July 14, 1989; and (4) requiring the restrained persons to provide Petitioners with 14 days notice of all upcoming meetings between LILCO personnel and NRC personnel regarding Shoreham.

On the afternoon of November 12, counsel for Petitioners sent counsel for LILCO a telefaxed letter, in which counsel for Petitioners related the results of a phone conversation he had had earlier that morning with the Licensing Board chairman. Petitioners' counsel stated that the Board chairman had denied Petitioners' request for an order restraining Commissioner Curtiss' visit to Shoreham, on the basis that the motion was "untimely."

On November 19, the Licensing Board issued the order that is the subject of the instant appeal. After relating the events that had led the Board chairman the week before to deny as untimely the request for an order prohibiting Commissioner Curtiss' site visit the Board rejected the remainder of Petitioners' request for relief "because of the patent lack of jurisdiction of the subject matter." November 19 Order at 8. In so ruling, the Board noted that the

> 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.

November 19 Order at 9.

The Board, recognizing that the "matter of assuring a fair hearing is a requisite of all adjudicatory hearings," noted that "it is within this Board's jurisdiction to afford due process to parties appearing before it." Id. at 9-10. But, the Board continued, "those issues that Petitioners raise are of another sort." Id. at 10. Such issues "raise the question of 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." Id. The answer to that question, the Board observed, would require the conduct of an "inquiry of a primary nature." Id. The Commission, however, had not "delegated to the Board any authority to conduct an independent inquiry of a type necessary to satisfy Petitioners' request." Id. Given long-settled principles of agency law establishing that the Board is a "subordinate body without plenary jurisdiction," the Board concluded that the "relief Petitioners seek is beyond the scope of our authority." Id. at 11.

In denying Petitioners' November 9 Motion, the Board noted that an "unanswered question is why Petitioners filed its petition for relief with this Board and not with the Commission, the holder of plenary authority." November 19 Order at 11.[3/] Explaining why it ruled on the remainder of Petitioners' request without awaiting responses from LILCO and the NRC Staff, the Board stated that it was "done now . . . to avoid undue delay should Petitioners seek to refile within the Commission." Id. at 8.

[3/] In this regard, the Board pointed out that

> [i]t would not appear that the conduct of the Commission and staff complained of by Petitioners would affect the proceedings before the Commission any differently than that before this Board, yet that forum was never chosen.

November 19 Order at 11.

On December 5, 1990, Petitioners, ignoring the Board's suggestion that they might refile their motion with the Commission, instead submitted the instant appeal. As explained below, it should be denied.

III. Discussion

Petitioners' appeal should be rejected. The Licensing Board was correct in its conclusion that it lacked jurisdiction to grant the relief that Petitioners have requested.

Additionally, Petitioners have improperly invoked 10 C.F.R. § 2.714a in pursuing what they erroneously characterize as an "appeal" of the Board's November 19 Order. In truth, the December 5 pleading is an impermissible attempt to gain interlocutory review of the Board's November 19 Order and should be dismissed outright on that basis. Petitioners' pleading being misfiled, they have not even addressed -- much less attempted to demonstrate that they satisfy -- the standards for obtaining directed certification under NRC practice.

A. The Board Correctly Concluded that the Relief Requested by Petitioners Was Beyond its Authority

Petitioners advance three reasons why the Board's November 19 Order should be reversed. None are persuasive.

First, Petitioners take "strong issue" with the Board's determination that, in order to act on Petitioners' request, it would need first to conduct an "inquiry of a primary nature." December 5 pleading at 4. According to Petitioners, there is no

need to conduct any such inquiry, and the relief requested is "justified as a merely prophylactic measure to protect [Petitioners], regardless of whether wrongdoing has previously occurred." Id.

Petitioners cite no authority for the assertion that issuance of a restraining order is appropriate in the absence of any showing of improper communication between the NRC and LILCO. Nor do Petitioners confront the important point made by the Board that the "Commission and its staff communicate with licensees in more than the single role as adjudicators." November 19 Order at 10. As the Board notes, the Commission is "responsible for the agency's technical program in addition to adjudication," Id. Differentiating between these two fundamentally different types of contacts in determining how to impose a restraining order restricting Staff-LILCO communications would indeed require the sort of "primary inquiry" that the Board properly concluded it had no authority to conduct.

Second, Petitioners allege that the Board failed to make any supporting findings of fact or reach any conclusions of law in denying Petitioners' request that they be served all papers filed by LILCO, the Long Island Power Authority (LIPA) and/or the New York Power Authority (NYPA) with the NRC, and that they be given at least 14 days notice of any meetings between the NRC and LILCO, LIPA, and/or NYPA. December 5 pleading at 4-5. According to Petitioners, this failure mandates that the November 19 Order be set aside as "unlawful." Id. at 5.

Petitioners have simply misread the Board's Order. A fair reading of the Order indicates that, in discussing its lack of authority to grant the relief that Petitioners had requested, the Board was referring to all the various elements of the requested relief. For instance, in characterizing generally the relief that Petitioners were seeking, the Board stated that "[i]n essence, . . . Petitioners' motion inextricably involves behavior of NRC officials with that of the Licensee," adding that, "[a]s a consequence, Petitioners seek to restrain any future violations and to obtain reports of contacts that may evidence any violations." November 19 Order at 9. Plainly, the Board here had in mind Petitioners' request that they be served with all papers exchanged between LILCO and the Staff and that they be provided advance notice of any scheduled meetings.

Finally, Petitioners complain that, after determining that it lacked authority to act, the Board should have "certif[ied] the question to the Commission for its determination pursuant to 10 C.F.R. § 2.718(i)." December 5 pleading at 5. Citing the Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981), as authority, Petitioners assert that the Board's failure to so certify "constituted an abuse of discretion." Id.

Petitioners err. In the first place, as the Statement of Policy makes evident, the Board cannot plausibly be said to have abused its discretion in declining to certify its ruling to the Commission. In relevant part, the Statement of Policy provides:

> If a significant legal or policy question is presented on which Commission guidance is needed, a board should promptly refer or certify the matter to the Atomic Safety and Licensing Appeal Board or the Commission. A board should exercise its best judgment to try to anticipate crucial issues which may require such guidance so that the reference or certification can be made and the response received without holding up the proceeding.

CLI-81-8, 13 NRC at 456-57. The Board, having found that its lack of jurisdiction over the matters presented by Petitioners' November 9 Motion was "patent," appropriately declined to refer the question to the Commission. No "significant legal or policy question" is presented by the November 9 Motion, and resolution of the matter required only the most straightforward application of NRC precedent.

Moreover, Petitioners' complaint that the Board should have certified the matter to the Commission rings particularly hollow given that, inexplicably, Petitioners themselves have thus far declined to request such certification.[4/] As the Board noted, an "unanswered question is why Petitioners filed its petition for relief with this Board and not with the Commission." November 9 Order at 11. This question has become all the more baffling in light of Petitioners' strange insistence in pursuing an obviously invalid § 2.714a "appeal."

4/ In this regard, if and when Petitioners seek to refile with the Commission their motion for a restraining order and other relief, LILCO will address the merits of Petitioners' request. In the meantime, suffice it to say that Petitioners' allegations are without basis and misconstrue the NRC's restrictions on ex parte communications. See 10 C.F.R. § 2.780.

B. Petitioners Are Pursuing an Improper Interlocutory Appeal

In addition to being wrong on the merits, Petitioners' December 5 pleading should be rejected as an improper attempt to obtain interlocutory review of the Board's November 19 Order. As shown below, Petitioners may not proceed under 10 C.F.R. § 2.714a, but, instead, must satisfy the standards for discretionary interlocutory review (i.e., directed certification) under § 2.718. Petitioners have not and cannot satisfy those standards.

1. Petitioners Cannot Proceed under 10 C.F.R. § 2.714a

In their December 5 pleading, Petitioners assert that the Commission

> has jurisdiction to review the Atomic Safety and Licensing Board Panel's ("ASLBP") Order of November 19, 1990 . . . 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."

December 5 pleading at 1-2.

Petitioners have badly misconstrued the meaning and purpose of § 2.714a. As the section's plain language makes evident,[5/]

[5/] In relevant part, § 2.714a provides:

> (a) Notwithstanding the provisions of § 2.730(f), an order of the presiding officer or the atomic safety and licensing board

(continued...)

this provision is the avenue by which a person may take an appeal from a decision by the Licensing Board either granting or denying a petition for intervention or request for hearing. It is not a mechanism by which a petitioner may obtain interlocutory review of any other sort of order or ruling by the Licensing Board. See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-898, 28 NRC 27 (1988);[6] see also Philadel-

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[5] (...continued)

> designated to rule on petitions for leave to intervene and/or requests for hearing may be appealed, in accordance with the provisions of this section . . . within ten (10) days after service of the order . . . . No other appeals from rulings on petitions and/or requests for hearing shall be allowed.
>
> . . . .
>
> (b) An order wholly denying a petition for leave to intervene and/or request for a hearing is appealable by the petitioner on the question whether the petition and/or hearing request should have been granted in whole or in part.
>
> (c) An order granting a petition for leave to intervene and/or request for a hearing is appealable by a party other than the petitioner on the question whether the petition and/or the request for a hearing should have been wholly denied.

10 C.F.R. § 2.714a(a)-(c).

[6] In Seabrook, the Appeal Board was faced with an appeal of the Licensing Board's rejection of a "suggestion of mootness" filed by intervenors with respect to certain environmental qualification issues in the Seabrook operating license proceeding. The Licensing Board had ruled that, contrary to the intervenors' position, those issues were not yet moot. Claiming an "entitlement to appeal" under § 2.714a, the intervenors sought

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phia Electric Co. (Limerick Generating Station, Units 1 and 2), 19 NRC 1020, 1075 (1984); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-621, 12 NRC 578, 579 (1980); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-585, 11 NRC 469, 470 (1980).

Thus, Petitioners cannot invoke § 2.714a to pursue an appeal of the November 19 Order. Instead, Petitioners should have requested directed certification of the Board's ruling pursuant to 10 C.F.R. § 2.718 and then tried to demonstrate that their request met the applicable standards for directed certification. As shown below, however, even if Petitioners had pursued the

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6/ (...continued)
"immediate appellate examination of this result." ALAB-896, 26 NRC at 29. The Appeal Board rejected the intervenors' attempt to proceed under § 2.714a, stating:

> It scarcely could be more obvious that the provisions of 10 C.F.R. 2.714a have no application in the circumstances of this case. As the single exception to the general proscription against interlocutory appeals contained elsewhere in the Commission's Rules of Practice, section 2.714a permits an appeal, on certain limited and precisely defined questions, from an order on a petition for leave to intervene in a proceeding. . . . The Licensing Board ruling here under attack has nothing at all to do with the grant or denial of the . . . intervention petition -- which was filed and acted upon many years ago. Nor, as it happens, does the ruling bear upon the [intervenors] right to participate in this operating license proceeding. . . . In short, the absolute condition precedent to the resort to section 2.714a is simply not present.

28 NRC at 30 (footnotes omitted).

correct procedural course, they still would not have met the standards for directed certification.

2. Petitioners Have Not Met the Standards for Directed Certification

With the single exception, noted above, of the appeal from a grant or total denial of a petition to intervene, interlocutory appeals are prohibited by NRC regulation.[7] See, e.g., Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-370, 5 NRC 131 (1977). The only permissible way one may seek to obtain interlocutory appellate review is by requesting "directed certification" pursuant to 10 C.F.R. § 2.718(i).

The standards for directed certification are high. As stated by the Appeal Board:

> Almost with exception in recent times, we have undertaken discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner.

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434 (1989), quoting Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). Petitioners could not have met either prong of this so-called "Marble Hill standard," even if they had tried.

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[7] Specifically, 10 C.F.R. § 2.730(f) provides, in pertinent part, that "[n]o interlocutory appeal may be taken to the Commission from a ruling of the presiding officer."

First, in their November 9 Motion, Petitioners do not claim that a restraining order or any of the other relief they request is necessary to protect them from "immediate and serious irreparable" injury. Rather, Petitioners state that such relief is needed

> to secure adherence to . . . the Commission's ex parte rules and . . . the Government in the Sunshine Act, . . . [and] also . . . to protect Petitioners' due process rights under the Constitution and to . . . avoid the appearance of giving preferential treatment to any person, losing complete independence or impartiality, making a government decision outside official channels and/or affecting adversely the confidence of the public in the integrity of the government.

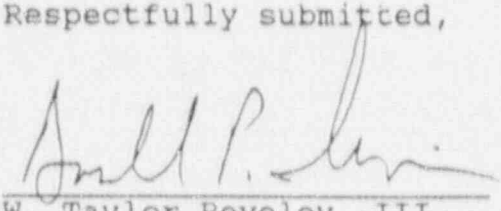
November 9 Motion at 3. Even if these claims were true (and they are not), Petitioners' concerns do not rise to the level of a threatened injury that is "immediate," "serious," or "irreparable." Petitioners themselves do not even allege as much.

Second, it is evident that Petitioners could not plausibly argue that the Board's denial of their November 9 Motion has affected the "basic structure" of the Shoreham in a "pervasive" or "unusual" manner. To the contrary, the immediate practical effect of the Board's ruling has been to maintain the status quo with respect to the NRC Staff's practice in dealing with LILCO, Petitioners, and other interested persons such as LIPA and NYPA.

IV. Conclusion

For the reasons given above, Petitioners' December 5 appeal should be denied.

Respectfully submitted,



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DATED: December 19, 1990

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CERTIFICATE OF SERVICE

I hereby certify that copies of LILCO'S OPPOSITION TO PETITIONERS' APPEAL FROM THE LICENSING BOARD'S NOVEMBER 19 ORDER were served this date upon the following by Federal Express, as indicated by an asterisk, or by first-class mail, postage prepaid.

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DATED: December 19, 1990