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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

ATOMIC SAFETY AND LICENSING BOARD '91 FEB 21 AIO:13

Before Administrative Judges:

Morton B. Margulies, Chairman  
Dr. George G. Ferguson  
Dr. Jerry R. Kline

OFFICE OF SECRETARY  
NUCLEAR REGULATORY COMMISSION

SERVED FEB 21 1991

In the Matter of	)	Docket No. 50-322-OLA
	)	
LONG ISLAND LIGHTING COMPANY	)	ASLBP No. 91-621-01-OLA
	)	(Confirmatory Order
(Shoreham Nuclear Power	)	Modification, Security
Station, Unit 1)	)	Plan Amendment and Emergency
	)	Preparedness Amendment)
	)	
	)	February 20, 1991

MEMORANDUM AND ORDER  
(Ruling On Petitioners Application For A Stay And Licensee's  
Motion To Dismiss the Application As Moot)

On January 23, 1991, pursuant to 10 CFR 2.788, Petitioners Shoreham Wading River Central School District and Scientists and Engineers for Secure Energy filed a joint application to stay the Board's Order in LBP-91-1, 33 NRC \_\_\_ (January 8, 1991). The Order gave Petitioners 20 days to amend their petitions to intervene in the captioned matters on the grounds that Petitioners had failed to establish standing under 10 CFR 2.714(a)(2).

The grounds for Petitioners' stay request are that it would be a waste of the participants' resources to amend and to respond to the amendments to the petitions until after the Commission has issued its decision on reconsideration of CLI-90-08, 32 NRC 201

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(1990) and the Commission had decided the appeal of the Board's Order.

Under the provisions of 10 CFR 2.788(d), parties are given ten days to file an answer and an additional five days if they had been served by mail (10 CFR 2.710). The certificate of service for the application for a stay stated that it was served by mail. Thus, the parties were allowed by the regulations to file answers by February 7, 1991.

In compliance with the Board's January 8 Order, Petitioners' filed, on February 4, 1991, amendments to their petitions.

LILCO, on February 5, 1991 filed a motion to dismiss the application for a stay on the ground that Petitioners filing of the amended petitions rendered moot their request for a stay.

NRC Staff, in a February 7, 1991 response to the application for a stay and LILCO's motion, also concluded that the filing of the amended petitions rendered the application moot. Staff requested that the Board deny Petitioners' stay application and grant LILCO's motion to dismiss.

Petitioners on February 14, 1991, served a joint response to the LILCO motion to dismiss. They argue that their application for a stay is not moot.

Petitioners contend that they had no alternative but to file an amended petition on or before February 4, 1991. As a cause for their situation, they state that Staff failed to file any opposition until after the time for filing amendments elapsed and

the Board failed to act on Petitioners' motion until after the time for filing amendments to the petitions passed.

Petitioners' assert that the application for a stay is not moot. They believe that the granting of the application could still prevent the waste of Commission (both ASLB and NRC Staff) and licensee resources. Further, it would allow Petitioners to additionally amend their petitions pursuant to the Commission's decision on Petitioners' appeal of LBP-91-01. Also, it would require only a single response by LILCO and Staff to the amended petitions, and a single review by the Board.

#### Discussion

Petitioners' predicament of having to file their amended petitions by February 4, 1991 in advance of the time for the parties to respond to the application for a stay and not have the Board act on the application until after the time for filing amendments to the petitions passed, is wholly one of Petitioners' making.

Staff's filing of its response on February 7, 1991 was in accordance with the time limitation in the regulations and therefore entirely proper. Had Petitioners wished to have Staff's response made prior to the February 4 filing date, they could have filed their application for a stay earlier than they did and accomplished that purpose. It was their choice not to do so.

The Board acted in accordance with the Rules of Practice and its responsibilities in waiting for the parties to respond to the

application, within the time prescribed by the regulations, before deciding the matter. Petitioners never requested the Board to grant Petitioners a temporary stay to preserve the status quo without waiting for filing of any answer, as provided for in 10 CFR 2.788(g). No extension of time was requested of the Board as is permitted under 10 CFR 2.711(a). Again, it was Petitioners' choice not to do so.

Petitioners should not attribute their own dereliction to others. It is not expected that this will occur again.

Petitioners' application for a stay was rendered moot when it filed the amended petitions on February 4, 1991. The purpose of the January 23, 1991 application was to forestall the February 4, 1991 filing of amended petitions until after specified action by the Commission. When Petitioners made their filings on February 4, in advance of the Commission action, it complied with the Board Order and there was nothing to forestall. The application for a stay became moot.

Petitioners' arguments that the matter is not moot are not persuasive. The claim that granting the application for a stay would permit Petitioners the ability to further amend their petitions to intervene following the Commission's decision on Petitioners' appeal of LBP-91-01 does not hold up to scrutiny.

The Commission's decision on the appeal would provide no reasons for Petitioners to again amend the petitions. If the Commission denied Petitioners' appeal there would be no reason to permit Petitioners to again amend the petitions. If the



Commission granted Petitioners' appeal, it would be on the established record before the Board and there would be no reason to add to it. The claimed need for the Petitioners to amend their petitions after the Commission decision is fallacious.

The altruistic claim that granting the application for a stay will benefit the other parties by cutting their workload apparently is not shared by them for they oppose the application, requesting either that it be denied or dismissed. Petitioners' argument championing the alleged interests of the other participants is not convincing.

The application for a stay of the Board's Order in LBP-91-01 is moot and therefore denied.

The denial of Petitioners' application for a stay disposes of the application request. This renders moot LILCO's February 5, 1991 motion to dismiss the application for a stay and it is therefore denied.

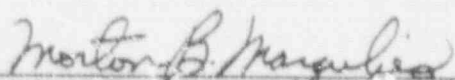
#### ORDER

Based upon all of the foregoing, it is hereby ordered that:

(1) Petitioners' application for a stay of the Board's Order of January 8, 1991 is denied; and

(2) Licensee's motion to dismiss Petitioners' application  
for a stay is denied.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

  
Morton B. Margulies, Chairman  
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland  
February 20, 1991

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station)

Docket No. (s) 50-352-DLA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing M&O (RULING ON PETITIONERS...) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this  
21 day of February 1991.

*Patty Henderson*  
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