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July 24, 1984

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'84 JUL 26 P2:34

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF GENERAL
DOCKETING & SERVICE
BRANCH

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

Docket No. 50-322-OL-4
(Low Power)

NRC STAFF RESPONSE TO SUFFOLK COUNTY
MOTION IN LIMINE ON THE ADMISSIBILITY
OF EVIDENCE RELATING TO PUBLIC INTEREST

I. INTRODUCTION

On July 9, 1984, Suffolk County filed a Motion in Limine on the admissibility of evidence relating to the "public interest" standard of 10 C.F.R. § 50.12(a). The Staff herein responds to the County's Motion.

II. DISCUSSION

The County's Motion in Limine seeks a ruling from the Board that evidence related to LILCO's financial condition is relevant to the "public interest" finding required to be made pursuant to 10 C.F.R. § 50.12(a). The County argues that the evidence it would proffer would show that the public interest would be harmed if the requested exemption were granted. Specifically, the County claims it would show that the Company will lack the financial resources to safely operate the plant during low power operation and that the granting of an exemption would

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adversely affect LILCO's ability to continue to provide current services to its customers. Motion at 11-12.

A week after the County filed its Motion, the County filed its direct testimony. Included in this later filing was the testimony of Michael Dirmeier and Jamshed Madan. The testimony of Messrs. Dirmeier and Madan is addressed, inter alia, to the effect of a granting of the exemption upon the public interest. See Testimony at 5. The County has thus filed the testimony for which it sought an in limine ruling on admissibility. Rather than address the hypothetical matters raised in the Motion, the Staff believes it more profitable to examine the actual proffered testimony to resolve admissibility questions.

The testimony of Messrs. Dirmeier and Madan can be divided into three portions. The first (pages 5-21) addresses the economic benefits alleged by LILCO to result from the grant of the exemption. The second (pages 21-42) addresses the financial health of LILCO during low power. The third (pages 42-47) deals with the financial impact of low power operation without subsequent full power operation. The Staff deals with each portion seriatim.

The Staff does not quarrel with the relevance of the testimony challenging the economic benefits of low power operation. Assuming its authors are found qualified to support such testimony (a matter the Staff does not address herein), the Staff would not object to its admissibility.

As to the second portion of the testimony, the Staff concedes that testimony showing that the operation of Shoreham at low power would be

unsafe would be relevant in this proceeding.^{1/} The second portion of the testimony purports to demonstrate that granting an exemption might adversely affect the public health and safety because of LILCO's weakened financial condition. Pages 21-42 focus on LILCO's financial condition, but this portion of the testimony utterly fails to establish any causal connection between the utility's financial condition and the public health and safety. Indeed, the only attempt to establish a nexus between financial hardship and an adverse effect on the public health and safety at low power is the following cursory exchange (at pp. 27-28):

- Q. What are the public interest ramifications of having a utility with little or no cash engaging in low power testing of a nuclear reactor?
- A. LILCO's current situation raises the clear potential that if LILCO were granted a low power license, it might have significant difficulty in paying for items which are necessary for safe operation. In our view, the public interest is not served by licensing a plant where such a potential exists.

Nowhere does the testimony identify the "items which are necessary for safe operation" that it is alleged LILCO will be unable to acquire. Nowhere does the testimony provide any factual support for the baseless assertion that safe operation at low power will be affected in any way by the financial condition of the utility. This skeletal (at best) treatment of the impact on safety of low power operation combined with alleged financial hardships renders the second portion of the Dirmeier and Madan testimony void of any probative value. Thus even if this

^{1/} Such testimony would certainly be relevant to the question of whether the grant of the exemption would "endanger life or property", in addition to any relevance it might have to the "public interest" standard. See 10 C.F.R. § 50.12(a).

testimony were deemed relevant, it should be excluded because its probative value is clearly outweighed by the delay and waste of time that would be incurred by its consideration at hearing. See Rule 403 of the Federal Rules of Evidence.^{2/}

The testimony similarly fails to support the assertion that granting of the exemption would be harmful to LILCO's customers because of its effect on LILCO's ability to provide service. Only in one sentence (on page 42) does the testimony address the actual impact on LILCO's customers; we are provided with nothing but the conclusory statement that "low power operation at an early date in the midst of the financial crisis would lead to more nuclear expenditures and less resources to be spent for customer service." The testimony does not attempt to indicate what additional expenditures (if any) will be incurred as a result of low power operation, or how (if at all) "customer service" will be harmed. Whether or not the area of "customer service" is relevant to the public interest standards of NRC regulations (a matter of which there is some doubt), the failure of this testimony to establish any connection between low power operation and a deleterious effect on customer service renders this portion of the testimony inadmissible as being without probative value.

^{2/} Rule 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Finally, the testimony seeks to demonstrate that the grant of an exemption would have an adverse economic impact if full power operation never occurs. The Commission has previously ruled in the Shoreham operating license proceeding that speculation on whether offsite planning issues could be resolved should not affect the issuance of a low power license (CLI-83-17, 17 NRC 1032 (1983)) and that "the pendency of a contested issue related to full-power operation may not be considered as changed circumstances for the purposes of NEPA" (CLI-84-9, 19 NRC ____ (June 5, 1984)).^{3/} The Staff submits that similar reasoning should be applied to an exemption request; the Board should focus on the activities to be authorized by the exemption and not indulge in speculation as to whether a full power license will ultimately issue. Following the Commission's reasoning in CLI-83-17 and CLI-84-9, testimony addressed to whether a full power license will ultimately issue or the effects of the grant of an exemption should such a license not ultimately issue should be excluded as not relevant.

III. CONCLUSION

The Staff believes the Board should not address the County's Motion in Limine in a hypothetical vacuum, but should focus instead on the

^{3/} In CLI-84-9, the Commission noted that "uncertainty about the ultimate disposition of contested offsite emergency planning issues is too speculative to be cognizable as a changed circumstance." The Commission also noted that controversy over offsite planning is not distinguishable "from controversy over other contested full-power issues." Slip Op. at 6.

testimony proffered by the County on the "public interest" question. For the reasons given above, the Staff believes that portions of that testimony are relevant, and that portions should not be admitted into evidence.

Respectfully submitted,



Robert G. Perlis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 24th day of July, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO SUFFOLK COUNTY MOTION IN LIMINE ON THE ADMISSIBILITY OF EVIDENCE RELATING TO PUBLIC INTEREST" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 24th day of July, 1984:

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