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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '84 JUN -5 P2:33

BEFORE THE COMMISSION

OFFICE OF SECRETARY
GENERAL INVESTIGATION
DIVISION

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

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

NRC STAFF RESPONSE TO SUFFOLK COUNTY'S
AND THE STATE OF NEW YORK'S REQUESTS FOR
CLARIFICATION OF THE COMMISSION'S ORDER OF MAY 16,
1984 AND THOSE PARTIES' JOINT REQUEST FOR PROMPT
CLARIFICATION OF THE POSTURE OF THIS PROCEEDING

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June 5, 1984

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NUCLEAR REGULATORY COMMISSION

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I. INTRODUCTION

On May 16, 1984, the Commission issued an Order in this proceeding (CLI-84-8) that: vacated (to the extent it was inconsistent with CLI-84-8) the Licensing Board's Order of April 6, 1984 calling for a hearing on LILCO's application for a low power license; held that GDC 17 is applicable to low power operation; set forth the standards to be applied in this proceeding for any exemptions that may be requested from GDC 17 pursuant to 10 C.F.R. § 50.12(a); and established a schedule to be followed by the Licensing Board in "resuming the hearing." Suffolk County filed a Request for Clarification of CLI-84-8 on May 21, 1984; the State of New York filed a similar request the next day. On May 30, 1984, the County and State filed a Joint Request for Prompt Clarification of the Posture of this Proceeding. The Staff herein responds to all three Requests for Clarification.

II. DISCUSSION

Suffolk County's Request for Clarification raised five issues, all of which are directed towards the schedule set out in CLI-84-8. The State joined in the County's Request, and raised an additional objection to treating the hearing as a "resumed" one. The Staff deals with each aspect of those Requests seriatim.

Suffolk County's first issue deals with whether an exemption hearing would be "new in all ways", or whether the exemption hearing would pick up where the earlier hearing left off. The County contends the earlier hearing was premised upon an entirely different legal framework and was rendered void ab initio by the Commission's Order of April 30. The County therefore asks the Commission to make clear that the exemption hearing will not be a "resumed" one.

The Staff opposes this request. In the first place, nowhere in its Order of April 30 did the Commission state that it was voiding the hearing ab initio; all the Commission did was vacate the schedule established by the Licensing Board. Moreover, while an exemption hearing may be cast in a different legal framework than the earlier hearing, it seems highly probable that many of the factual issues involved will be identical to those involved in the earlier hearing. Suffolk County points to no reason why evidence developed on the record through both written testimony and one and one half days of cross-examination should be discarded. While the Staff would not object to any party's attempt to supplement the record developed at the earlier hearing, there is no

reason (other than that of delaying the proceeding) to cover the same material again.

The County's second request asks the Commission to instruct the Licensing Board to be flexible and sensitive to the situation as it develops in its establishment of a schedule. It is not clear exactly what the County would have the Commission do in this regard. LILCO has filed its exemption request (dated May 22, 1984), and the Licensing Board has now established a schedule for resuming the hearing (Order of May 31, 1984). The Board's schedule follows the guidance provided by the Commission in CLI-84-8. The Staff believes this schedule to be fair and equitable. If Suffolk County believes at any time that the schedule needs to be amended, it rests upon that party to file a timely motion and demonstrate with some particularity why the schedule as devised by the Commission and Licensing Board cannot be met. All the County has provided in its request is a vague hint that the schedule may need to be amended to reflect future developments. While no schedule should ever be viewed as totally inflexible, the Staff suggests that the schedule for this proceeding should not be amended absent a strong demonstration of good cause by any party requesting an amendment. The County's request for clarification does not even attempt to make such a demonstration.

The County's third request is that the schedule should not begin to run until a finding is made that LILCO's exemption application is sufficiently complete. The County voices a fear that the application may contain insufficient information to permit the County to go forward with discovery.

Two comments are in order here. First, all the parties have been aware for some time now as to the technical issues involved in this proceeding. Second, LILCO's exemption application has been filed. If the County can demonstrate that it lacks sufficient information to begin meaningful discovery, it should do so. Until such a demonstration is made, the proceeding should go forward. There is simply no reason to require the Board, in the absence of a motion by a party pointing to specific inadequacies in the application that render discovery meaningless, to make a preliminary judgment on the sufficiency of the application.

The County's fourth request asks that time be provided to the parties to dispose summarily of the exemption application. Such time already exists; indeed LILCO has filed motions seeking partial summary disposition for Phases I and II of its application. If the County believes the exemption request can be disposed of on legal (or factual) grounds without a hearing, it can file a timely motion for summary disposition under 10 C.F.R. § 2.749. Again, however, Suffolk County has not shown why the possibility of summary disposition should affect the schedule set forth in CLI-84-8.

In its fifth request, the County once again raises the issue of security matters,^{1/} asserting that treatment of such issues would

^{1/} The County has previously alluded to security issues a number of times. See, e.g., Suffolk County's Preliminary Views on Scheduling Regarding LILCO's New Motion, dated March 26, 1984, p. 5; Oral Argument of April 4, 1984, Tr. 122; Joint Response of Suffolk County and the State of New York to the Commission's Order of April 30, 1984, dated May 4, 1984, pp. 8, 11, 26, 36.

necessarily have an impact on the hearing schedule. Security issues have, to date, not been injected into this proceeding. Nonetheless, if during either discovery or hearing questions are raised which require safeguards treatment, this matter can be dealt with at that time. There is simply no reason to amend the schedule now because of an issue that has yet to become a part of the proceeding.

All of the County's requests ask the Commission to delay the proceeding; none of the requests provides sufficient information to justify the delay. The County's Request for Clarification should therefore be denied.

In its Request for Clarification, the State of New York (as well as joining in the County's Request) points out that an exemption hearing cannot be treated as "resumed" because counsel for the State did not participate in the prior hearing. The State makes clear that its counsel appeared at the earlier hearing, entered a continuing objection, and departed. The Staff has already addressed the question of whether the information covered in the first hearing needs to be repeated a second time (see pp. 2-3, supra). All that needs to be added here is that the State voluntarily declined to participate or cross-examine witnesses at the first hearing. Whatever consequences flow from that decision must be borne by the State; the State is not entitled to demand that the material explored at the first hearing be covered a second time merely because the State chose not to participate the first time around.

Finally, in their Joint Request for Clarification of May 30, the County and State asked for:

1) clarification of CLI-84-8 as requested in their pleadings of May 22nd and May 23rd;

2) the dismissal of LILCO's summary disposition motions for Phases I and II or the briefing by the parties of whether the Commission has the authority to issue a license for fuel loading without operation; and

3) the establishment of a time for filing motions for the disposition as a matter of law of LILCO's exemption application.

Joint Request at 2. The first and third issues have already been dealt with herein; no new material is contained in the May 30th filing that warrants a change in the Staff's position. As to the assertion that LILCO's Motions for Summary Disposition are unlawful and should be stricken, it should be pointed out that the Licensing Board on May 30, 1984^{2/} directed the parties to respond to those motions within twenty days of their filing (May 22, 1984). There is simply no need for Commission involvement or clarification at this time. If the County and State believe that the motions are deficient for either legal or factual reasons, they can attempt to so demonstrate in their responses to the motions. The Licensing Board has in essence provided them with the briefing schedule they desire. There is no need (and no reason) to establish separate response times, one for any legal issues that may be raised by LILCO's Motions and another for the factual ones. Once again

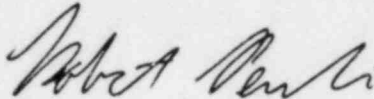
^{2/} "Order Denying LILCO's Motion for Expedited Responses to Summary Disposition Motions."

the County and State are seeking to delay the proceeding when the issues they are attempting to raise can be dealt with in the existing schedule established by the Commission and Licensing Board. The Joint Request should be denied.

III. CONCLUSION

For the reasons discussed herein, the Staff submits that all the Requests for Clarification should be denied.

Respectfully submitted,



Robert G. Perlis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 5th day of June, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO SUFFOLK COUNTY'S AND THE STATE OF NEW YORK'S REQUESTS FOR CLARIFICATION OF THE COMMISSION'S ORDER OF MAY 16, 1984 AND THOSE PARTIES' JOINT REQUEST FOR PROMPT CLARIFICATION OF THE POSTURE OF THIS PROCEEDING" 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 5th day of June, 1984:

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