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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Commission

OFFICE OF SECRETARY
DOCKETING & SERVICE
UNIT 1

In the Matter of)	
)	
LONG ISLAND LIGHTING COMPANY)	Docket No. 50-322-OL-4
)	(Low Power)
(Shoreham Nuclear Power Station,)	
Unit 1))	
)	
)	

SUFFOLK COUNTY AND STATE OF NEW YORK MOTION
FOR DIRECTED CERTIFICATION OF JUNE 20
ASLB ORDER GRANTING LILCO'S MOTION IN LIMINE

On June 20, 1984, the ASLB presiding over the proceeding on LILCO's Application for Exemption under 10 CFR Section 50.12(a) (Judges Miller, Bright and Johnson, hereinafter, the "Miller Board") granted a Motion for Protective Order and Motion in Limine, dated June 2, 1984, filed by LILCO (hereinafter, "LILCO Motions"). See Order Granting LILCO's Motion in Limine, dated June 20, 1984 (hereinafter, "ASLB Order"). In the Motions, LILCO sought a ruling "precluding all discovery requests whose relevance is to the issue of security" and "an order in limine that any evidence whose sole materiality is a question of security is inadmissible" in the upcoming proceeding on LILCO's Application for Exemption under 10 CFR Section 50.12(a). LILCO Motions at 1.

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By this Motion, Suffolk County and the State of New York request the Commission to direct the ASLB to certify the ruling on the LILCO Motions to the Commission pursuant to 10 CFR Section 2.718(i) so that the following questions can be answered by the Commission:

Is a showing that a requested exemption to the NRC's regulations will not endanger the common defense and security required in order to obtain an exemption under 10 CFR § 50.12(a)?

Is evidence relating to such a showing by LILCO relevant and admissible in the proceeding to be held on LILCO's Application for Exemption dated May 22, 1984?

For the reasons set forth below, the County and State submit that a prompt review by the Commission of the ASLB Order and a prompt decision as to the questions set forth above is necessary to prevent detriment to the public interest and unusual delay and expense. See 10 CFR Section 2.730(f).1/

1/ The County and State have also filed with the Miller Board a Motion for Referral to the Commission of June 20 Order Granting LILCO's Motion in Limine, pursuant to 10 CFR §2.730(f).

A. The ASJB Order Ignores the Plain Requirements of Section 50.12(a) and the Commission's Orders of May 16 and June 8, 1984

Section 50.12(a) expressly provides that the Commission may grant an exemption from the requirements of the regulations if it determines that the requested exemption "will not endanger . . . the common defense and security." In its Application for Exemption, LILCO states that it:

formally seeks an exemption under § 50.12(a) from that portion of General Design Criteria 17, and from other applicable regulations, if any, requiring that the TDI diesel generators be fully adjudicated prior to conducting the low power testing described in LILCO's March 20 motion. . . .

Application for Exemption, May 22, 1984, at 4.

The purpose of the proceeding before the Miller Board is to compile and analyze a factual record relating to "the determinations to be made under 10 CFR 50.12(a)" and for the ASLB to make the initial determinations based on that record. Commission's Order of May 16, 1984 (CLI-84-8) at 2. Moreover, in its Order of June 8, 1984, the Commission stated: "Finally, it is for the Licensing Board to address in the first instance the 'common defense and security' showing required under 10 C.F.R. 50.12(a)." June 8 Commission Order at 2-3 (emphasis added).

Clearly, the Miller Board's ruling that discovery and evidence relating to the security showing required of LILCO in this proceeding are irrelevant and inadmissible conflicts with the plain words of Section 50.12(a) and with the Commission's prior orders. This conflict can only be corrected by prompt Commission action.^{2/}

B. The ASLB Order Ignores the Fact that the NRC Staff's SER on LILCO's Low Power License Request Discusses Security Issues

Supplement No. 5 of the SER, dated April 1984, contains the NRC Staff's evaluation of LILCO's March 20, 1984 Supplemental Motion for Low Power Operating License. SSER, Supp. 5, at 1-7 and 1-8. The Staff evaluation expressly considers and discusses security issues relating to LILCO's low power license request. See SSER, Supp. 5, at 13-2 through 13-4, Attachment 1 hereto. The Staff states, among other things, that:

^{2/} The County and State note that LILCO has not even attempted to make the common defense and security "showing" required under Section 50.12(a). Instead, in its May 22 Application for Exemption, LILCO failed to proffer anything of substance related to security, choosing rather to characterize the Commission's May 16 Order as not requiring consideration of security issues. See Application for Exemption, p. 15, note 10. LILCO's characterization of the Commission's May 16 Order is erroneous, and the Commission's June 8 Order makes it certain that LILCO's failure to make the security "showing" expressly required by the terms of Section 50.12(a) will require rejection of LILCO's Application for Exemption.

specific items of concern are the protection of emergency power sources required for safe shutdown and the availability of emergency power for operation of the security system.

Id. at 13-2. Further, the Staff's low power testimony (which the Staff apparently intends to resubmit at the ASLB hearing starting July 30, 1984) expressly concerns security issues. See Testimony of Charles Gaskin, Attachment 2 hereto.

The April 1984 SER did not address the showings required under Section 50.12(a) since LILCO's Application for Exemption had not as yet been filed. Clearly, however, the Staff has acknowledged that LILCO's proposed alternate AC power source configuration raises specific concerns relating to security that had not been addressed in previous SERs and of course have not been analyzed in the Section 50.12(a) context. It further indicates the necessity for addressing security issues in the proceeding before the Miller Board for reasons in addition to the plain requirement of Section 50.12(a). Thus, in ruling that security matters are irrelevant and inadmissible in the proceeding before it, the Miller Board has not only ignored the requirements of Section 50.12(a), but also the opinion of the NRC Staff that the impact upon security of LILCO's proposed alternate source of AC power is both a relevant and necessary

consideration in evaluating the LILCO proposal. The conflict between the ASLB Order and the NRC Staff's belief that security is relevant to the low power proceeding can only be resolved by a prompt Commission review of the ASLB Order.

C. The ASLB Order Improperly Relies Upon a Security Settlement Agreement filed in November 1982.

In the ASLB Order, the Miller Board stated that its order "is based upon the record before us regarding a prior security settlement agreement entered into by Suffolk County on November 24, 1982." ASLB Order at 2. The ASLB stated, without any discussion of the contents or relevance of the referenced agreement, that because the agreement had been signed, approved, and embodied in a 1982 Order, "issues in regard to security no longer exist in this proceeding." ASLB Order at 3.

This aspect of the ASLB Order is without any basis in fact or in law. First, although the Board stated that its ruling was "based upon the record before" it, in fact, to the knowledge of the County and State, there is no record before the Miller Board relating either to security or to the referenced agreement. The County and the State have repeatedly requested that the requisite Part 73 procedures be established so that the pertinent safeguards information relating to security,

including matters relating to the referenced agreement, can be properly addressed. All such requests have been ignored. Accordingly, and in the absence of the appropriate safeguards procedures, the County and State have not provided the Miller Board with any "record" relating to security or to the referenced security agreement (which includes safeguards information). To the County's and State's knowledge, other than the discussion in the SSER described above (which was apparently ignored by the ASLB), the following statements by counsel for LILCO and for the County and State, constitute the only information relating to the referenced agreement that has been provided to the Miller Board:

In the Motions, LILCO counsel asserted the following:

[T]here is in effect an all-encompassing Final Security Settlement Agreement for Shoreham signed by LILCO, Suffolk County and the NRC Staff. This Agreement, dated November 22, 1982, and classified as Safeguards Information, applies to all aspects of the operation of Shoreham without qualification or exemption. The Agreement was arrived at in complete settlement of all security-related contentions raised by Suffolk County in this proceeding. It was ratified on December 3, 1982 by the Atomic Safety and Licensing Board which had been constituted to try the security issues raised by SC. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), Memorandum and Order Canceling Hearing, Approving Final Security Agreement, and Terminating Proceeding (Dec. 3, 1982)

(unpublished). Not only did the Agreement resolve all existing security contentions, it also contains mechanisms for resolving security-related aspects of future changes in plant design.

LILCO Motions at 4-5.

Counsel for Suffolk County and New York responded as follows:

LILCO's argument that the so-called "all encompassing Final Security Settlement Agreement" makes the security issue immaterial here (LILCO Motion, p. 4) is a mischaracterization of what that Agreement covers and a circumvention of Section 50.12. The Agreement covers the matters there addressed by the parties. Those matters included the Part 73 design basis threat with respect to the onsite emergency power system configuration then proposed by LILCO. Since then, LILCO has proposed an entirely new emergency power system. The vulnerabilities of this system must be considered under Section 50.12 and under Part 73 as well. Further, since the new AC power configuration clearly changes the bases for the prior settlement, the issues considered therein are clearly now revived and LILCO's compliance with Section 73.55 when preparing to operate in the new AC power configuration is a critical unresolved issue. (The County again reiterates its often repeated request that the NRC establish the requisite Part 73 procedures so that the necessary safeguards information can be properly addressed.)

Suffolk County and State of New York Opposition to LILCO Motion

for Protective Order and Motion in Limine, dated June 14, 1984, at 4-5.

Thus, the Miller Board has no "record" before it, or any other apparent basis for making rulings concerning the contents or relevance of the referenced agreement. Indeed, the Board's own refusal to establish the necessary safeguards procedures has precluded the parties from putting into the record any substantive information concerning that agreement.

Second, the referenced 1982 agreement does not address the security matters presented by LILCO's proposal to operate Shoreham with its alternate AC power source configuration, since that proposal did not come into being until March of 1984. At the very least, the applicability of particular provisions in the referenced agreement to the issues raised for the first time by LILCO's March 1984 Supplemental Motion for Low Power License and its May 1984 Application for Exemption involves complicated questions of fact which can only be addressed through the presentation of evidence by both sides.

Third, both the existence of the referenced agreement, and the lack of a new security-related contention in the current proceeding,^{3/} are simply irrelevant here because Section

^{3/} Although the relevance to its ruling is not explained or discussed by the Board, the final sentence of the ASLB

(Footnote cont'd next page)

50.12(a) imposes an independent obligation upon LILCO to demonstrate that the granting of the exemption it seeks will not endanger the common defense and security. The prior security agreement was premised on Part 73; nothing therein was designed to constitute any resolution of a yet-to-be-filed exemption application under Section 50.12(a). Thus, even assuming that the 1982 security agreement was comprehensive, it only applied to the Part 73 contentions and issues. It could not and did not relate in any way to the security showing required by the express words of Section 50.12(a). Thus, the Miller Board's reliance upon the referenced agreement is without basis and deprives the County and State of their right to a hearing on the question presented by LILCO's request for an exemption under Section 50.12(a).^{4/}

(Footnote cont'd from previous page)

Order states "It has also been held that an application for a low-power license 'does not open the proceeding for a new round of contentions.'" ASLB Order at 3 (footnote omitted).

^{4/} New York State submits that the ASLB Order is also clearly erroneous, with respect to New York State, in relying upon the 1982 agreement because the State was not an active participant in the NRC proceeding at the time the agreement was entered into.

D. A Prompt Commission Ruling is Necessary to Prevent Detriment to the Public Interest and Unusual Delay and Expense

The question whether LILCO's proposed method of operation of the Shoreham plant, without having complied with the NRC's regulations, would endanger the common defense and security is of paramount importance to the public interest. The significance of the issue has been recognized by the Commission both in its express requirement of a security showing in connection with an application for exemption and in the recent orders issued with specific reference to LILCO's Application. Clearly, the public has a vital interest in the common defense and security, and in having the NRC determine whether that security is endangered by LILCO's proposal to operate Shoreham in a manner that fails to comply with the NRC's safety regulations.

As noted above, the State and County believe that in ruling that security issues are irrelevant and inadmissible, the ASLB Order conflicts with Commission regulations and orders. The Miller Board has in effect stated that it intends to render a determination on LILCO's Exemption Application and its motion for a low power license without ever considering the ramifications upon the security of the public of LILCO's proposed plant configuration and mode of operation. We submit

that no reasonable person would suggest that a refusal to address the question whether LILCO's proposed mode of operation would endanger the common defense or security, or delay in addressing that question, is in the public interest. To the contrary, the County and State submit that the public interest can only be served here by the prompt intervention of the Commission to clarify, for the benefit of the Miller Board and the parties, the applicability of the common defense and security requirement in Section 50.12(a) to LILCO's Application for Exemption.

In addition, the proceeding on LILCO's Application for Exemption is moving at a rapid pace. According to the schedule set by the Miller Board, discovery ended June 29, testimony must be filed July 16, and the hearing is to begin July 30. If the ASLB Order is permitted to stand without review by the Commission, an incomplete factual record will be compiled in the proceeding because the Section 50.12(a) common defense and security requirement has been ruled to be irrelevant and evidence relating thereto has been ruled inadmissible. Accordingly, if the proceeding were to continue based on the ASLB Order, when the Commission ultimately reviews the Miller Board's initial determination on LILCO's Exemption Application (see May 16 Order at 3), it will find the record incomplete and additional


hearings would then be required. Such a piecemeal approach to litigation is not in the public interest, and results only in unnecessary expense and delay in achieving an ultimate resolution.

E. Conclusion

For the foregoing reasons, the Commission should direct the Miller Board to certify to the Commission the June 20 ASLB Order Granting LILCO's Motion in Limine.

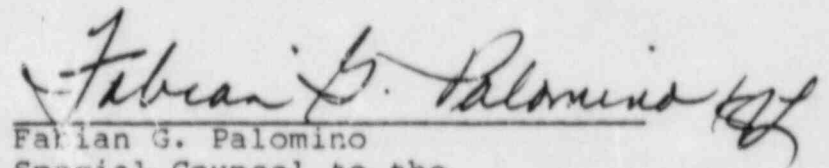
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Dated: July 3, 1984