

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
OF LICENSING & SAFETY

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

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

SUFFOLK COUNTY AND STATE OF NEW YORK MOTION
FOR REFERRAL TO THE COMMISSION OF JUNE 20 ORDER
GRANTING LILCO'S MOTION IN LIMINE

On June 20, 1984, the Board granted a Motion for Protec-
tive 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 inadmissi-
ble" in the upcoming proceeding on LILCO's Application for Ex-
emption under 10 CFR Section 50.12(a). LILCO Motions at 1.

By this Motion, Suffolk County and the State of New York
move this Board to refer the ASLB Order to the Commission

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

1. The ASLB 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 this Board is to compile and analyze a factual record relating to "the determinations to be made under

^{1/} The County and the State have also filed with the Commission a Motion for Directed Certification of June 20 ASLB Order Granting LILCO's Motion in Limine.

10 CFR 50.12(a)" and for the Board 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).

The County and State believe that the Board's ruling in granting the LILCO Motions -- that is, 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. Particularly concerning the Commission's intent in its June 8 Order, only the Commission itself is in a position to advise the Board whether it has correctly interpreted Section 50.12(a) and the Commission's further words related thereto. Accordingly, the Board should refer its Order to the Commission so the apparent conflict can be resolved by prompt Commission action.

2. 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. The Staff states, among other things, that:

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 15-2. The testimony of Staff member Charles Gaskin, originally submitted April 20, 1984, deals expressly with security issues (erroneously, in the view of the County and State).

The April 1984 SER and the Staff's April 20 testimony did not address the showings required under Section 50.12(a) since LILCO's Application for Exemption had not as yet been filed. However, the Staff clearly has acknowledged that LILCO's proposed alternate AC power source configuration, and the proposed operation of the plant with such configuration raises specific

concerns relating to security that had not been addressed in previous SERs. It further indicates the necessity to address security issues in this proceeding, 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 Board has not only misconstrued 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 AC power configuration is both a relevant and necessary consideration in evaluating LILCO's low power license application. In light of this conflict between the Board's Order and the findings of the NRC Staff, a prompt Commission review of the ASLB Order is necessary.

3. The ASLB Order Improperly Relies Upon a Security Settlement Filed in November 1982.

In the ASLB Order, the 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. Without any discussion of the contents or relevance of the referenced agreement, the Board stated 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^d 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 this 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 pertinent safeguards information relating to security, including matters relating to the referenced agreement, can be properly addressed, but all such requests have been ignored. Accordingly, and in the absence of the appropriate safeguards procedures, the County and State have not provided this Board with any "record" relating to security or to the referenced security agreement (which includes safeguards information). Similarly, to the County's and State's knowledge, other than the discussion in the SSER described above, the following statements by LILCO and 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.

In the view of the County and State, this Board has no "record" before it, or any other basis for making any rulings concerning the contents or relevance of the referenced agreement. Further, the Board's own failure 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, the existence of the referenced agreement, and the lack of a new security-related contention in the current proceeding,^{2/} are simply irrelevant here. Section 50.12(b) 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 pertained to LILCO's compliance with Part 73. It had nothing to do with the separate security requirement of Section 50.12(a). Accordingly, in the view of the County and State, the prior agreement cannot preclude the right of Suffolk County and the State to address the security requirement of Section 50.12(a) which became applicable for the first time with LILCO's May 22, 1984 Exemption Application. This issue should be certified to the Commission for its prompt decision.^{3/}

^{2/} Although the relevance to this Board's ruling is not explained or discussed by the Board in its order, the final sentence of the ASLB 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).

^{3/} New York State submits that the ASLB Order is also clearly erroneous, with respect to New York State, in relying upon the 1982 agreement since the State was not an active participant in the NRC proceeding at the time the agreement was entered into.

4. 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 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 Board has in effect stated that it intends to render an initial 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 it is contrary to the public interest to refuse to address the question whether LILCO's proposed mode of operation would endanger the common defense or security, or to delay in achieving a resolution of the issue. Indeed, the County and State submit that the public interest can only be served here by the prompt intervention of the Commission to clarify the applicability of the common defense and security requirement in Section 50.12(a) to LILCO's Application for Exemption.

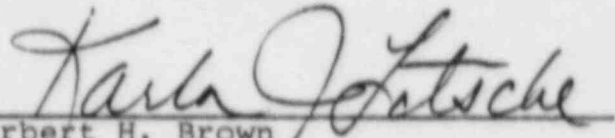
In addition, this proceeding on LILCO's Application for Exemption is moving at a rapid pace. According to the schedule set by the Board, testimony must be filed July 16, and the hearing is to begin July 30. If the ASLB Order is permitted to stand without review by the Commission, an incomplete factual record may be compiled 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 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 in unnecessary expense and delay in achieving an ultimate resolution.

5. Conclusion

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

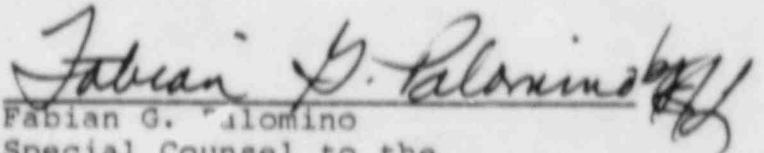
Respectfully submitted,

Martin Bradley Ashare
Suffolk County Department of Law
Veterans Memorial Highway
Hauppauge, New York 11788



Herbert H. Brown
Lawrence Coe Lanpher
Karla J. Letsche
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
1900 M Street, N.W.
Washington, D.C. 20036

Attorneys for Suffolk County



Fabian G. Palomino
Special Counsel to the
Governor of the State of New York
Executive Chamber, Room 229
Capitol Building
Albany, New York 12224

Attorney for MARIO M. CUOMO
Governor of the State of New York

Dated: July 3, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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OFFICE OF GENERAL COUNSEL
DOCKETING & SERVICE
BRANCH

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(Low Power)

CERTIFICATE OF SERVICE

I hereby certify that copies of Suffolk County and State of New York Motion for Referral to the Commission of June 20 Order Granting LILCO's Motion in Limine and Suffolk County and State of New York Motion for Directed Certification of June 20 ASLB Order Granting LILCO's Motion in Limine have been served on the following this 3rd day of July, 1984, by U.S. mail, first class, except as otherwise noted.

** Judge Marshall E. Miller, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

** Edwin Reis, Esq.
Counsel for NRC Staff
Office of the Executive Legal
Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

** Judge Glenn O. Bright
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edward M. Barrett, Esq.
Long Island Lighting Company
250 Old Country Road
Mineola, New York 11501

* Judge Elizabeth B. Johnson
Oak Ridge National Laboratory
P.O. Box X, Building 3500
Oak Ridge, Tennessee 37830

Honorable Peter F. Cohalan
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

** Eleanor L. Frucci, Esq.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

* Fabian Palomino, Esq.
Special Counsel to the Governor
Executive Chamber
Room 229
State Capitol
Albany, New York 12224

* W. Taylor Reveley, III, Esq.
Anthony F. Earley, Jr., Esq.
Robert M. Rolfe, Esq.
Hunton & Williams
P.O. Box 1535
707 East Main Street
Richmond, Virginia 23212

Mr. Martin Suibert
c/o Congressman William Carney
1113 Longworth House Office Bldg.
Washington, D.C. 20515

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

** Nunzio J. Palladino, Chairman
U.S. Nuclear Regulatory
Commission
1717 H Street, N.W., Room 1114
Washington, D.C. 20555

** Commissioner Thomas M. Roberts
U.S. Nuclear Regulatory
Commission
1717 H Street, N.W., Room 1103
Washington, D.C. 20555

** Commissioner Frederick M. Bernthal
U.S. Nuclear Regulatory
Commission
1717 H Street, N.W., Room 1156
Washington, D.C. 20555

James B. Dougherty, Esq.
3045 Porter Street, N.W.
Washington, D.C. 20008

Mr. Brian McCaffrey
Long Island Lighting Company
Shoreham Nuclear Power Station
P.O. Box 618
North Country Road
Wading River, New York 11792

Jay Dunkleberger, Esq.
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Stephen B. Latham, Esq.
John F. Shea, Esq.
Twomey, Latham and Shea
33 West Second Street
Riverhead, New York 11901

Docketing and Service Branch
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

** Commissioner Victor Gilinsky
U.S. Nuclear Regulatory
Commission
1717 H Street, N.W., Room 1113
Washington, D.C. 20555

** Commissioner James K. Asselstine
U.S. Nuclear Regulatory
Commission
1717 H Street, N.W., Room 1149
Washington, D.C. 20555



Karla J. Letsche
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

DATE: July 3, 1984

* By Federal Express
** By hand on 7/5/84