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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles
Howard A. Wilber

October 5, 1984
(ALAB-787)

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

Martin Bradley Ashare, Hauppauge, New York, and Herbert H. Brown and Lawrence Coe Lanpher, Washington, D.C., for the intervenor Suffolk County, New York.

Fabian G. Palomino, Albany, New York, for the intervenor State of New York.

MEMORANDUM AND ORDER

Before us is a notice of appeal filed on October 1, 1984, by intervenors Suffolk County and the State of New York from a September 19, 1984 unpublished order of the Licensing Board in the low-power phase of this operating license proceeding. In that order, the Board denied certain revised contentions advanced by those intervenors that were addressed to the physical security of the Shoreham facility.

The notice of appeal set forth the intervenors' uncertainty respecting whether (1) given "the current procedural posture of this proceeding," such a notice was necessary at this time; and (2) if so, it should have been filed with us or, instead, the Commission. We have examined

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those questions in reverse order. For the reasons that follow, we conclude that the Commission has not divested us of jurisdiction to review the Licensing Board's disposition of the intervenors' physical security contentions. We further conclude, however, that the appeal must be dismissed as premature.

1. On more than one recent occasion, the Commission has undertaken to review directly (i.e., without intermediate Appeal Board consideration) Licensing Board action in this low-power phase of the proceeding. In CLI-84-8,[1] for example, the Commission reversed a Licensing Board order to the extent that the order held that General Design Criterion 17 was not applicable to low-power Shoreham operation.[2] In that connection, the Commission took note of the fact that the applicant had expressed an intent to seek an exemption under 10 CFR 50.12(a) from the GDC 17 requirements. It added that any Licensing Board decision authorizing the grant of such an exemption "shall not become

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[1] 19 NRC 1154 (1984).

[2] That Criterion, found in 10 CFR Part 50, Appendix A, is concerned with the availability of onsite and offsite electric power systems for nuclear generating facilities.

effective until the Commission has conducted an immediate effectiveness review."[3]

Thereafter, in an unpublished July 18 memorandum and order entered on the intervenors' motion for directed certification of a June 20 Licensing Board order, the Commission provided guidance to that Board with respect to the standard governing the admission of new contentions in the adjudication of the applicant's exemption request.[4] Still later, in CLI-84-16,[5] the Commission established a briefing schedule for its review of a Licensing Board order entered two days earlier with respect to the first two portions of the applicant's low-power testing program.

In none of these orders, however, did the Commission announce that it was removing us entirely from the appellate review chain. That being so, we see no warrant for the Licensing Board's transmission of its September 19 order "directly to the Commission for appropriate action." The

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[3] CLI-84-8, supra, 19 NRC at 1156. The procedure for immediate effectiveness reviews of licensing board initial decisions is detailed in 10 CFR 2.764. Normally, the Commission does not undertake such a review in an operating license proceeding unless the initial decision authorizes facility operation at greater than five percent of rated power. See 10 CFR 2.764(f)(1).

[4] On August 20, the Commission denied the applicant's motion for reconsideration of its July 18 order.

[5] 20 NRC ___ (September 7, 1984).

Board took that step because it believed the order to be within at least the "spirit" of "the Commission's reserved jurisdiction in CLI-84-8."[6] But, as noted above, all that the Commission "reserved" in CLI-84-8 was its conduct of an immediate effectiveness review of any Section 50.12(a) exemption that the Licensing Board might grant to the applicant. It is clear from the terms of 10 CFR 2.764(g) that Commission immediate effectiveness reviews have no bearing upon the exercise by an appeal board of the general appellate review authority in 10 CFR Part 50 proceedings that is conferred by 10 CFR 2.785(a). Rather, if the Commission desires to preclude or to limit the exercise of that authority in a particular Part 50 proceeding, it must -- and does -- say so expressly.[7]

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[6] September 19 order at 4.

[7] For example, when the Commission instituted the special Part 50 proceeding concerned with the restart of Unit 1 of the Three Mile Island facility, it explicitly reserved to itself all authority to dispose of appeals from licensing board decisions. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147 (1979). Subsequently, the Commission determined that the length and complexity of the record developed before the Licensing Board dictated that initial appeals on the merits be heard by an appeal board. CLI-81-19, 14 NRC 304, 305 (1981). At the same time, however, the Commission decided to reserve for itself any decision that would authorize the restart of Unit 1. Accordingly, in so many words it stripped the Appeal Board of the power to consider applications for a stay pending appeal of any Licensing Board decision in the proceeding. CLI-81-34, 14 NRC 1097, 1098 (1981).

2. The September 19 order is plainly interlocutory. Its sole effect is to preclude the litigation of intervenors' physical security contentions in the low-power phase of the proceeding. It neither concludes the phase nor disposes of a major segment of it.[8] Similarly, it does not terminate the participational rights of either Suffolk County or New York.[9] In the circumstances, the Rules of Practice bar an appeal from the September 19 order at this time.[10] Instead, the intervenors "must await the Licensing Board's initial decision before presenting [their] grievance for appellate consideration."[11]

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[8] See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074-75 (1983), quoting from Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975).

[9] Ibid. By way of contrast, see Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-784, 20 NRC ___ (September 13, 1984), in which the Licensing Board's dismissal of an intervenor's sole contention had the necessary effect of bringing to an end the participation of that party in the proceeding.

[10] 10 CFR 2.730(f); Seabrook, supra, 17 NRC at 1075.

[11] Seabrook, supra, 17 NRC at 1075, citing Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309, 310-11 (1981).

Appeal dismissed.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board