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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION P2:16

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
LONG ISLAND LIGHTING COMPANY)	Docket Nos. 50-322-1 (OL)
(Shoreham Nuclear Power Station,)	50-322-OL-4
Unit 1))	(Low Power)

NRC STAFF RESPONSE TO MOTION OF
SUFFOLK COUNTY AND STATE OF NEW YORK FOR
LEAVE TO FILE CONTENTION ON FINANCIAL QUALIFICATIONS

I. INTRODUCTION

On July 3, 1984, Suffolk County and the State of New York filed a motion for leave to file a contention on LILCO's financial qualifications to operate Shoreham. To the extent that such a contention is barred by the Commission's Statement of Policy on Financial Qualifications (49 Fed. Reg. 24111 (June 12, 1984)), the County and State seek a waiver pursuant to 10 C.F.R. § 2.758(b) of the Commission's regulations barring such review. Finally, Intervenors seek to have the matter certified to the Commission if their motion is denied. For the reasons presented below, the Staff opposes the motion and submits that it should be denied.

ii. DISCUSSION

As the County and State recognize, their financial qualification contention must meet the standards for late-filed contentions. See

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Memorandum in Support of Motion ("Memorandum") at 24 et seq. The standards governing late-filed contentions are set forth in 10 C.F.R. § 2.714(a). That Section requires a balancing of the following factors:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Intervenors attempt to address these factors in their Memorandum. According to the County and State, all but the fifth factor (delay) favor admission of the contention. The Staff disagrees. As will be seen, both the delay and good cause factors weigh heavily against admission of the contention. Where, as here, the proceeding is in its final stages, these factors are of critical importance.

A. Good Cause

Good cause is an especially important factor; where good cause is found, the showing needed by a proponent of a late contention on the other factors is lessened. Conversely, where no good cause is found, the burden on the proponent concerning the other factors is much greater. See, e.g., Duke Power Company (Perkins Station, Units 1, 2 and 3), ALAB-431, 6 NRC 460, 462 (1977); Metropolitan Edison Company (Three Mile Island Station, Unit 2), ALAB-384, 5 NRC 612, 615-616 (1977). As basis for their contention that LILCO lacks the financial

qualifications to safely operate and decommission the Shoreham facility, the State and County allege a general deterioration of LILCO's financial condition and point to two additional threats to the company's financial future: the possibility that LILCO's debts arising from the construction of the Nine Mile Point, Unit 2 may be called in and the possibility that the New York State Public Service Commission might rule that a large portion of the Shoreham construction costs are attributable to mismanagement and may not be included in the rate base. See, e.g., Contention at 2; Memorandum at 11-15. Intervenors assert that this information was contained in four documents of recent vintage: LILCO's 10-K, 8-K, and 10-Q filings before the Securities and Exchange Commission (dated, respectively, March 30, 1984; February 21, 1984; and May 15, 1984); and a "Position Paper" submitted by LILCO to the Governor of New York on May 31st. Memorandum at 4-5.

In analyzing the good cause factor, it is important to keep in mind the Commission's ruling of last year in Catawba.^{1/} In that case, the Commission dealt with the question of the admissibility of late contentions based on recently issued documents.^{2/} The Commission held that proponents of contentions are required "to diligently uncover and apply all publicly available information to the prompt formulation of contentions." The unavailability of a document "does not establish

1/ Duke Power Company, et al. (Catawba Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

2/ While Catawba dealt specifically with licensing-related documents, its holding would apply with at least equal force to contentions based upon nonlicensing-related documents.

good cause for filing a contention late if information was available early enough to provide the basis for the timely filing of that contention." 17 NRC at 1048. The plain teaching of Catawba is that "intervenors are expected to raise issues as early as possible." Id. at 1050.

Intervenors rely heavily in their motion on the May 31st "Position Paper." It is patently clear, however, that the information upon which Intervenors rely to support their contention was available well before the end of May, and indeed well before any of the documents they cite in their Memorandum. LILCO's deteriorating financial condition and difficulty in raising funds has been public knowledge since well before the first of this year. Intervenors make much of the fact that, having defaulted on its obligations for Nine Mile Point, LILCO is at the mercy of creditors who can, in any thirty-day period, accelerate the remainder of LILCO's obligations for that facility. The default itself took place on February 9th of this year; given the press attention it received, it is inconceivable that the County and State were not aware of it at that time. Similarly, the Staff of the New York State Public Service Commission recommended that a substantial portion of the Shoreham costs not be included in the rate base on February 10th. The County is a party to the rate proceeding in which such announcement was made; the Public Service Commission is an arm of the State government. Thus both the State and County had substantial knowledge of the basic information upon which their financial qualifications contention is based by February 10th, close to five months before they filed their contention.

Conceivably, there are additional tidbits of information in the documents pointed to by Intervenors in their filing.^{3/} The holding in Catawba, however, is that untimely contentions be filed as early as possible. Here, although Intervenors were aware of LILCO's financial difficulties for some time, they waited to file a contention until the eve of the low power hearings and late in the stages of the ongoing operating licensing proceeding. Given the advanced nature of this proceeding, Intervenors should have been especially diligent in bringing new matters to the attention of the Boards as early as possible. Yet they waited until admission of this contention would necessarily affect the schedule of the low power hearing, and perhaps the schedule of the full power hearing as well. Under the circumstances, there was no good cause to wait until July 3rd to file a contention based upon information largely available five months earlier.

B. Other Means to Protect Petitioners' Interests

Petitioners assert that there exist no means to protect their interests other than litigation of their financial qualifications contention. Memorandum at 30-31. The Staff does not contest that there may be no other comparable means to protect Petitioners' interest in stopping operation of the Shoreham facility, although it does note that there are several other public forums currently considering the financial condition of LILCO.

^{3/} In this connection, it is also well to note that the 10-K and 8-K filings were available more than three and four months before Intervenors filed the instant motion.

C. Development of a Sound Record

The Staff concedes this factor weighs in favor of admission of the contention.

D. Representation by Other Parties

The Staff concedes this factor weighs in favor of admission of the contention.

E. Delay

As mentioned earlier, this proceeding is in its final stages. Admission of a new contention at this stage would seriously disrupt the low power hearing and could well affect the timing of hearing the remaining issues in the full power proceeding. Where, as here, the submission of the contention is at the eleventh hour, the delay factor must be weighed heavily against the Petitioners.

F. Balancing the Factors

Petitioners in their Memorandum concede that delay weighs against admission of their contention. They argue, however, that the safety significance of the issues raised in the contention nonetheless warrant its admission. Memorandum at 32-33. As we have shown, both the delay

and good cause factors weigh heavily against admission of the contention. While the other factors may support admission, they cannot be controlling. The integrity of the Commission's adjudicatory process demands that petitioners not "remain on the sidelines," but instead submit contentions as soon as possible. Catawba, CLI-83-19, supra; see also, South Carolina Electric and Gas Company (Virgil C. Summer Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981). As to the potential safety significance of the contention, two matters need to be said. As the Appeal Board pointed out in Summer, ALAB-642, supra, where a petitioner believes it important to litigate an issue, for that very reason a petitioner should be expected to file its petition in a timely manner. 13 NRC at 895. Second, no operating license (or low power license) may issue until the NRC staff has made the findings specified in 10 C.F.R. § 50.57. If in fact a safety significant matter is not litigated before a licensing board, the Staff must still find that issuance of a license "will not be inimical to * * * the health and safety of the public." Summer, supra, 13 NRC at 895, citing 10 C.F.R. § 50.57. However, where as here a petitioner fails to submit a contention in a timely manner and instead waits until the admission of the contention would perforce delay the proceeding, admission of the contention should be denied.

G. Petitioner's Waiver Request

Because the contention is fatally late, the Board need not determine a waiver pursuant to 10 C.F.R. § 2.758 is either required or appropriate.

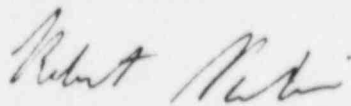
H. Certification to the Commission

In the event that their contention is rejected, Intervenors seek to have the matter directly certified to the Commission. As grounds for such directed certification, the State and County argue without amplification that "[p]rompt Commission review of such denial is necessary to prevent detriment to the public interest and additional delay and expense." Memorandum at 34. As a general matter, directed certification is to be resorted to only in exceptional circumstances. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-382, 5 NRC 603 (1977). There are no such exceptional circumstances in this case that warrant Commission involvement at this time. Intervenors do not explain how the public interest will be harmed if interlocutory review is denied. Nor is it clear what Intervenors mean by "delay and expense" and how (if at all) the "delay and expense" in this case would be different than in any other case where a ruling detrimental to a party is issued. Intervenors having failed to show that exceptional circumstances exist, their request for directed certification should be denied.

III. CONCLUSION

For the reasons given above, Intervenors' Motion for Leave to File New Contention and for other relied should be denied.

Respectfully submitted,



Robert G. Perlis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 18th day of July, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MOTION OF SUFFOLK COUNTY AND STATE OF NEW YORK FOR LEAVE TO FILE CONTENTION ON FINANCIAL QUALIFICATIONS" 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 internalmail system, this 18th day of July, 1984:

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