

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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OFFICE OF SECRETARY
NUCLEAR REGULATORY COMMISSION

_____)
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 NEW YORK STATE OPPOSITION TO
LILCO'S MOTION FOR DIRECTED CERTIFICATION OF THE
LICENSING BOARD'S JULY 24, 1984 ORDER GRANTING IN
PART AND DENYING IN PART LILCO'S MOTIONS FOR SUMMARY
DISPOSITION OF PHASE I AND PHASE II LOW POWER TESTING

On August 2, 1984, LILCO filed with the Commission a Motion for Directed Certification of the Licensing Board's July 24 Order which granted in part and denied in part LILCO's motions for summary disposition of Phases I and II of LILCO's low power license request. For the reasons discussed below, the County and State submit that the Commission should deny LILCO's Motion.

In essence, LILCO's Motion for Directed Certification is an attempt to reargue for the third time the exemption issue which LILCO has already argued -- and lost -- first before the Commission, and then before the Licensing Board, as evidenced by the July 24 Order. Phase I and Phase II represent the first two stages of LILCO's proposed four stage low power testing program, which is the subject of LILCO's application for a low power operating license. The Commission has already ruled in its May 16,

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1984 Order (CLI-84-8) that because Shoreham admittedly does not have a qualified source of onsite emergency power, LILCO must demonstrate its entitlement to an exemption from GDC 17 and other applicable regulations before it may obtain a low power license. In requesting summary disposition with respect to the first half of its low power test program, without even addressing the determinations which the Commission ruled must be made in order to obtain an exemption under 10 CFR § 50.12(a), LILCO simply ignores the Commission's May 16 Order. Thus, the Licensing Board was correct in stating in the July 24 Order that in light of the Commission's May 16 Order the Board "does not have the power or jurisdiction to grant LILCO's motion for summary disposition of Phases I and II of its low-power testing program" because:

In its motion LILCO did not seek summary disposition of its exemption request, nor did it even address the factual issues involved therein. Accordingly, the ultimate issues involved in Phase I and II activities cannot be disposed of summarily, and that portion of the summary disposition motion is denied.

July 24 Order at 9, 10 (emphasis added).

In addition, following the rejection by the Commission and the Licensing Board of the request made in LILCO's Motion for Directed Certification, the Licensing Board convened -- and has since completed -- an evidentiary hearing on the non-security aspects of LILCO's exemption request. There is, therefore, no basis for the Commission now to inject itself into the resolution of the very legal and factual issues on which the Commission instructed the Licensing Board to hold hearings and on which hearings have already been held. The proper posture at this time is

for the Commission to await the Licensing Board's findings and initial decision on LILCO's exemption request, and then to exercise the review function which the Commission established in its May 16 Order.

The Commission's May 16 Order Is Clear

Contrary to LILCO's assertion that the Commission's May 16 Order is ambiguous (see Motion for Directed Certification at 5-6), the Order is clear on its face, and its meaning was applied in the Licensing Board's July 24 Order. Indeed, there can be no doubt that the Commission's May 16 Order requires that LILCO must first obtain an exemption from applicable General Design Criteria, including expressly GDC 17, before its low power operation proposal, or the first half of it, may be granted.

First, the Commission's May 16 Order, in the Commission's words, was:

On the applicability of the General Design Criteria (particularly GDC 17) to the proposal of the Lory Island Lighting Company (applicant) to operate the Shoreham facility at low power.

May 16 Commission Order at 1 (emphasis added). The LILCO "proposal" with which the Order dealt was that contained in LILCO's Supplemental Motion for Low Power Operating License, dated March 22, 1984, which, in turn, included a description of the four phase "low power testing program" which is also the subject of LILCO's May 22 Application for Exemption. Thus, the LILCO proposal which was the subject of the May 16 Commission Order included Phase I and Phase II, which in turn were, and still are, the subject of

LILCO's summary disposition motions. Accordingly, the rulings contained in that Order necessarily applied to Phases I and II.

Second, the Commission stated that its May 16 Order was based upon "the oral arguments and written submissions of the parties." May 16 Order at 1. LILCO filed with the Commission the following "written submissions" relating to its Low Power Motion:

1. LILCO's Response to various Suffolk County/New York State Requests Dated April 16 and Received April 17, 1984, dated April 19, 1984.
2. LILCO's Comments in Response to the Commission's Order of April 30th, dated May 4, 1984.
3. LILCO's Motion for Summary Disposition on Phase I Low Power Testing, dated May 4, 1984.
4. Motion for Summary Disposition on Phase II Low Power Testing, dated May 4, 1984.
5. Letter to Chairman Palladino from Anthony F. Earley, Jr., dated May 4, 1984, with copies to the other Commissioners.

With the exception of Item 5, every one of LILCO's written submissions to the Commission explicitly discussed Phase I and Phase II as integral parts of LILCO's low power motion. See, e.g., April 19 submission at 10; May 4 "Comments" at 26-27, 33-36; both of the May 4 Summary Disposition Motions in toto.

Similarly, during the May 7 oral argument before the Commission, LILCO's counsel discussed Phase I and Phase II at considerable length in arguing that no exemption from GDC was required prior to the issuance of a low power license to perform Phase I and Phase II activities. For example, the following statements were made to the Commission by LILCO's counsel:

- GDC-17 states that the AC power systems that are available, have to provide sufficient capacity and capability to assure that the

specified acceptable fuel design limits and design conditions of the reactor coolant pressure boundary are not exceeded, as a result of the anticipated operational occurrences, and two, that the core is cool and that the containment integrity and other vital functions are maintained in the event of postulated accidents.

LILCO has that capacity and its proof has shown that, indeed, for Phases 1 and 2, no such capacity is even needed in this case because no AC power is required to ensure the public health and safety. But for all the phases, Phases 1, 2, 3, and 4, of the low power program that LILCO outlines in its supplemental motion, for all those phases LILCO will prove, and indeed has proved in the hearings, that it has the capacity to provide these assurances. (Rolfe, Tr. 9-10.)

-- We meet [GDC 17] in light of its application to [a] low power license. We do not have an onsite power system strictly speaking. However, in order to apply GDC-17 at this level of operation, you have to take into consideration the meaning of 50.57(c). And what LILCO says is that in interpreting the regulation for low power licensing, one ought to look at the level of operation intended and interpret the regulation, the General Design Criterion, accordingly

We meet it, sir, in that the functions prescribed in GDC-17, the safety functions listed there, are met. (Rolfe, Tr. 15.)

-- LILCO . . . demonstrates that in Phases 1 and 2 you don't need any AC power and in Phases 3 and 4 that there is sufficient AC power available and that it can be restored well within the time parameters for the limiting event and the Loss Of Coolant Accident. And that's the method in which LILCO approaches that and provides the technical justification to show that the public protection will be equivalent to or greater than that [at] full power operation. (Rolfe, Tr. 22.)

-- [F]or Phases 1 and 2 there is no risk to public health and safety because there is no need for AC power And for those reasons, LILCO asks that the Commission rule now and grant its motions for summary disposition for

Phases 1 and 2. (Rolfe, Tr. 24; emphasis added.)

-- [Offsite emergency planning is] not an important ingredient here because the level of protection afforded by LILCO during this operation at five percent power is equivalent to what you would have in a plant that did have onsite diesels. And let me hasten to add that again, this is only an important issue for Phases 3 and 4 because in Phases 1 and 2 you don't need any AC power. (Rolfe, Tr. 32.)

-- We've been after those four phases from the beginning. And we pointed out, from the beginning, that Phase 1 ain't Phase 4, in effect. It's a pale shadow of Phase 4. So we are, in fact, interested in all four phases. We would like to get the ones that can be gotten quickly as quickly as we can get them, but [what] we are suggesting in the papers that we filed with you on the 30th is the following: that as to Phases 1 and 2, we proceed by summary disposition. If the summary disposition is granted, then there's no need for further hearings. If it's not granted, then obviously whatever remains must go to hearing

Commissioner, we are very interested in getting Phase 1, even, if that's all we can get, soon. But you have pending before you, summary disposition papers on Phases 1 and 2 We hope you all will act on them, but as to the first two phases we strongly believe they can be resolved by affidavit. And if they can't be wholly resolved by affidavit, we believe that process ought to focus what the remaining issues are and they, then, can go back for evidentiary hearings.

So yes, we want all four phases, and we think that the lower numbered phases should be easier to obtain, given the facts than the higher numbered phases

We are asking that the four phases be looked at separately, if that's necessary. (Reveley Tr. 47-49.)

The Commission rejected LILCO's express arguments that no exemption from GDC 17 was necessary for Phases I or II of its low power testing proposal. It stated:

After reviewing the oral arguments and written submissions of the parties, the Commission has determined that 10 C.F.R. 50.57(c) should not be read to make General Design Criteria inapplicable to low-power operation.

May 16 Order at 1. The Commission stated further:

[T]he applicant made clear at the May 7 oral argument its intent to seek an exemption under 10 C.F.R. 50.12(a). If it intends to follow that course, the applicant should modify its application to address the determinations to be made under 10 C.F.R. 50.12(a).

May 16 order at 2 (emphasis added). The "application" referenced by the Commission necessarily meant the items submitted by LILCO for the Commission's consideration -- that is, LILCO's Supplemental Motion for Low Power Operating License, and LILCO's summary disposition motions on Phase I and Phase II.

Thus, the Commission's rulings that GDC 17 is applicable to LILCO's low power proposal, and that LILCO must address in a modified application for a low power license the determinations which must be made in granting an exemption from regulatory requirements under 10 C.F.R. § 50.12, covered Phase I and Phase II of LILCO's proposal.

The Commission did not indicate any intent to limit its ruling on the requirement for an exemption to only portions of LILCO's low power license application. Indeed, LILCO had expressly requested the Commission to rule that it could obtain a license for Phase I and Phase II activities without having first

obtained an exemption by having submitted to the Commission its motions for summary disposition on Phase I and Phase II, and by its counsel's statements during oral argument cited above. However, the Commission did not grant LILCO's summary disposition motions, and did not limit or restrict the applicability of its May 16 ruling on LILCO's need for an exemption to only portions of the proposed low power test program which is the subject of LILCO's requested low power license.

Thus, the Commission's May 16 Order is clear in requiring LILCO to seek a Section 50.12 exemption from the requirements of GDC 17, and the Licensing Board properly read the Commission's Order in its July 24 Order denying summary disposition with respect to the portion of LILCO's low power license application represented by Phases I and II.

Furthermore, as noted above, pursuant to the Commission's May 16 Order, the Licensing Board has already conducted an evidentiary hearing on the non-security aspects of LILCO's Application for Exemption.^{1/} Thus, no useful purpose would be served if the Commission now were to direct certification concerning summary disposition of a portion of the exemption issue, since the legal issue has already been ruled on by both the Commission and the Licensing Board, and the factual issues have been heard by the Board in evidentiary hearings. Accordingly, Suffolk County and

^{1/} Closing arguments have not yet taken place but have been scheduled by the Licensing Board.

New York State submit that LILCO's request for directed certification should be denied.

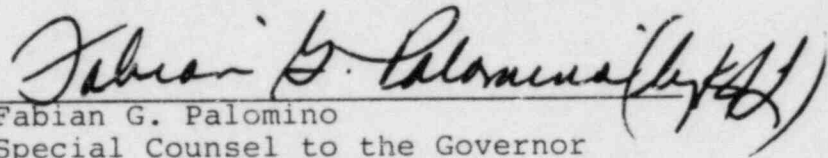
Respectfully submitted,

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