876

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF VIEWS ON WHETHER THE LICENSING BOARD'S ORDER OF SEPTEMBER 5, 1984 MAY SERVE AS THE BASIS FOR ISSUANCE OF A LICENSE FOR PHASES I AND II OF LILCO'S LOW POWER TESTING PROGRAM

Robert G. Perlis
Counsel for NRC Staff

September 14, 1984

DS07

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF VIEWS ON WHETHER THE LICENSING BOARD'S ORDER OF SEPTEMBER 5, 1984 MAY SERVE AS THE BASIS FOR ISSUANCE OF A LICENSE FOR PHASES I AND II OF LILCO'S LOW POWER TESTING PROGRAM

Robert G. Perlis
Counsel for NRC Staff

September 14, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF VIEWS ON WHETHER THE LICENSING BOARD'S ORDER OF SEPTEMBER 5, 1984 MAY SERVE AS THE BASIS FOR ISSUANCE OF A LICENSE FOR PHASES I AND II OF LILCO'S LOW POWER TESTING PROGRAM

I. INTRODUCTION

On September 5, 1984, the Licensing Board presiding over LILCO's application for a low power license issued an Order reconsidering its earlier partial denial of LILCO's motion for summary disposition of Phases I and II of its low power application and granting the motions in their entirety. On September 7th, the Commission issued an Order (CLI-84-16) requesting the parties' views on whether the Licensing Board's grant of summary disposition may serve as the basis for issuance of an operating license for Phases I and II. The Staff herein provides its views on that subject.

II. BACKGROUND

LILCO filed its Supplemental Motion for a Low Power Operating License on March 20, 1984. That Motion requests pursuant to 10 C.F.R. § 50.57(c) a low power operating license (up to 5% power) for Shoreham in advance of the conclusion of litigation addressing the adequacy of

Shoreham's onsite emergency diesel generators.[1/] To provide emergency power for low power operation, LILCO proposed to rely on two supplemental power sources: four mobile diesel generators and one gas turbine.

After hearing oral argument on May 7, 1984, the Commission issued an Order (CLI-84-8) on May 16th holding that General Design Criterion 17 of Appendix A to 10 C.F.R. Part 50 was applicable to low power operation and that, in the circumstances of this proceeding, LILCO would either have to demonstrate compliance with GDC 17 or receive an exemption pursuant to 10 C.F.R. § 50.12(a) before a low power license could issue.[2/] The Commission in its Order did not appear to differentiate between any of the four phases of operation identified in LILCO's low power motion. On May 22nd, LILCO filed its Application for Exemption; hearings were held on that application in late July and early August. Concurrent with the filing of its Application for Exemption, LILCO filed Motions for Summary Disposition of Phases I and II of its March 20th

---

1/ The requested license would cover four phases of low power operation: fuel loading and precriticality testing (Phase I); cold criticality testing at essentially ambient temperature and pressure with the power level reaching .001% of rated power (Phase II); reactor heatup and pressurization with the power level reaching 1% of rated power (Phase III); and testing at power levels up to 5% of rated power (Phase IV).

2/ GDC 17 requires, inter alia, both an onsite and an offsite power source. LILCO had previously made it clear that it did not consider the gas turbine or four new (EMD) diesels to be "onsite" power sources for purposes of GDC 17. Oral Argument of April 4, 1984, Tr. 44. Because LILCO concededly did not have an onsite AC power system other than its original (TDI) diesels, (which are involved in the full power litigation and cannot be relied upon for low power licensing), LILCO's alternate configuration of the gas turbine and four EMD's could not meet the literal requirements of GDC 17 (which requires both an onsite and offsite power source).

Supplemental Motion for a Low Power Operating License. As basis for summary disposition, LILCO argued that no AC power is needed during Phases I and II to ensure that the core remain adequately cooled and that even if LILCO's onsite emergency diesel generators (the subject of remaining litigation before the Licensing Board) were assumed to fail to operate, the requirements of GDC 17 would be met during Phases I and II.

On July 24, 1984, the Licensing Board issued an Order granting in part and denying in part LILCO's motion for summary disposition. The Board found as uncontroverted fact that there was no technical need for emergency AC power sources during Phases I and II (July 24th Order at 10-14). Nonetheless, the Board interpreted CLI-84-8 as requiring that the GDC 17 requirements "be completely satisfied even for fuel loading and precriticality testing" and that therefore no license could issue without an exemption (Id. at 10).

On August 2, 1984, LILCO moved for directed certification of the Board's July 24th Order. Subsequently, the Board issued its September 5th Order reconsidering its earlier ruling and granting summary disposition of Phase I and II. As basis for its reconsideration, the Licensing Board, noting the "rich diversity" of views on CLI-84-8, concluded that its earlier interpretation of CLI-84-8 which was similar to the conclusion urged upon the Board by the Staff[3/] was in fact incorrect. The Board also expressed its concern that LILCO was being treated differently than other utilities similarly situated. Based on its earlier factual findings, the

---

3/ See NRC Staff Response of June 13, 1984 to LILCO's Motion for Summary Disposition, p. 4.

Board therefore concluded that summary dispositon of Phases I and II could be granted. (Board Order of September 5th at 7-8). In accordance with CLI-84-8, the Board referred its ruling to the Commission. The Commission thereupon issued CLI-84-16 requesting the views of the parties on the effect of the Licensing Board's recent Order.

III. THE BOARD'S ORDER AS BASIS FOR LICENSE ISSUANCE

A. The Board's Order

Although the Licensing Board did not so state explicitly, the Staff believes that the Licensing Board intended by issuance of its September 5th Order to authorize the grant of an operating license for Phases I and II (see Order at 10). The Staff believes there are two questions that must be resolved before the grant of such a license could be authorized. First, does LILCO require an exemption from GDC 17 in order to get a license for Phases I and II? Second, how is the Board's Order affected by the low power security proceeding currently before the same Board?

The issue of the need for an exemption is central to the Board's Order. The facts of this case are uncontroverted; there is no technical need for backup AC power at the site during Phases I and II. LILCO has also conceded that Shoreham does not now (for purposes of GDC 17) have an adequate "onsite" AC power source (if an onsite power source is needed to provide power). In CLI-84-8, the Commission held that GDC 17 (which requires an "onsite" power source) was applicable to low power. In responding to LILCO's motions for summary disposition, the Staff took the position that CLI-84-8 stands for the proposition that GDC 17 applies at all power levels, and that to gain a license for any level an applicant must

either demonstrate compliance with the regulation or seek an exemption. In granting summary disposition, the Board must have disagreed and found that GDC 17 in fact does not apply to Phases I and II.[4/]

The Staff has previously requested guidance from the Commission on the effect of CLI-84-8 upon the grant of exemptions.[5/] The Staff believes additional guidance would be helpful for the situation posed by LILCO's summary disposition motions. Specifically, given the Board's finding (uncontroverted by any party) that there is no technical need for backup AC power sources during Phases I and II, should CLI-84-8 be interpreted as nonetheless requiring that an applicant either demonstrate compliance with GDC 17 or qualify for an exemption? Or should CLI-84-8 be read as permitting a finding that GDC 17 is inapplicable at power levels where no backup AC power is technically needed?[6/]

4/ The Board does not expressly address this issue. However, LILCO did not seek summary disposition of the "exigent circumstances" portion of its exemption request, nor did the Board make the exemption findings required either by CLI-84-8 or 10 C.F.R. § 50.12(a). Under the circumstances, the Board's Order must be read as indicating that GDC 17 does not apply to Phases I and II.

5/ The Commission discussed this matter with the Staff in an open meeting on July 25, 1984, and provided guidance thereafter in a Memorandum from Samuel Chilk to William Dircks dated July 27, 1984.

6/ This question has a generic import beyond that of the present case. In its August 17, 1984 Response to LILCO's Motion for Directed Certification of the Licensing Board's July 24th Order, the Staff pointed out that a similar situation was confronted in the Catawba licensing proceeding. Staff Response at 5, note 4. The Board in its September 5th Order may have misapprehended the Staff's reference to Catawba. Catawba was not treated differently than Shoreham; in Catawba the Staff determined that an exemption from GDC 17 was necessary for fuel loading and precriticality testing and that the Catawba application satisfied the standards for exemptions set forth in CLI-84-8. See NUREG-0954, Catawba SSER 3, July 1984, at 8-1 through 8-3. The purpose of the Staff's reference to Catawba was solely to point out that the applicability of the general design criteria to fuel loading activities was an issue that affected more plants than just Shoreham.

If the Commission adopts the former position, LILCO would still need an exemption and the Board's Order could not only not serve as a basis for license issuance but would have to be partially reversed as well (since the Board did not make findings on all the exemption standards set forth in CLI-84-8). If on the other hand the Commission agrees with the Board that GDC 17 does not apply to Phases I and II, the Order would serve as a partial decision on Phases I and II, resolving all issues other than security ones.

As indicated earlier, there is an ongoing security proceeding involved with low power operation.[7/] The Board did not address security issues in its September 5th Order. At the present time, security contentions have been filed and a Board ruling on their admissibility is pending. While some of the pending contentions may not be relevant to Phases I and II, some of the proffered contentions relate to all phases of low power operation. Until all contentions relevant to operation at Phases I and II are resolved, issues remain before the Licensing Board which must be addressed before that Board can authorize issuance of an operating license for Phases I and II. Under the circumstances, the Order of September 5th must be viewed as a partial decision, and not a final one resolving all contested issues related to Phases I and II.[8/]

7/ See Commission Order of July 18, 1984.

8/ It should be pointed out that the contested issues before the Licensing Board are not the only issues that need to be resolved before an operating license for Phases I and II can be issued. In the course of its review of the Shoreham application, the Staff has identified a number of items (unrelated to the hearing process) that must be satisfactorily resolved before a license for Phases I and II can issue.

IV. STANDARDS FOR A STAY

The Commission in CLI-84-16 specifically asked the parties to discuss the standards for a stay set forth in 10 C.F.R. § 2.788(e). That section states:

> (e) In determining whether to grant or deny an application for a stay, the Commission, Atomic Safety and Licensing Appeal Board, or presiding officer will consider:
>
> (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
> (2) Whether the party will be irreparably injured unless a stay is granted;
> (3) Whether the granting of a stay would harm other parties; and
> (4) Where the public interest lies.

The Staff believes consideration of a stay at this time is premature. First, as detailed above, the Staff does not believe that an operating license for Phases I and II can be issued at this time. That being the case, no party could today be irreparably harmed (or affected at all) by the grant or denial of a stay. Second, it is clear from the regulation that the proponent of a stay carries a burden in demonstrating that a stay should be granted. In this case, no stay request has as yet been filed. It is somewhat difficult to address the standards for a stay in the absence of any such request. Nonetheless, the Staff submits the following views:

A. Prevailing on the Merits

The Staff believes that the Licensing Board's resolution of the technical issues for Phases I and II was both correct and uncontroverted. As to the correct interpretation of CLI-84-8, the Staff has previously taken the position that that Order holds that GDC 17 is applicable to

all levels of power operation. As noted above, the Staff believes Commission guidance on this issue would be helpful. The nature of any such guidance would determine whether a stay request involving a challenge to the Board's interpretation of CLI-84-8 might be successful on the merits. Inasmuch as no party attempted below to controvert the material facts adopted by the Licensing Board, any party seeking to challenge those findings now should be deemed to have waived its right to do so. In any event, the Staff believes the Board was clearly correct in its evaluation of the technical need for backup power at Phases I and II.

B. Irreparable Injury

As mentioned, if no license has been authorized to issue, a stay proponent could not demonstrate any injury, let alone irreparable injury. Even if a license were authorized, the facts adopted by the Board demonstrate that operation at Phases I and II poses no threat to the public health and safety. Under those circumstances, it is difficult to conceive that a stay proponent could demonstrate that it would be irreparably injured if a stay were denied.

C. Harm to Other Parties

Until a license could be issued, the grant of a stay could not harm any other party. If a license were to issue but for a stay, the license applicant would presumably be harmed to some extent by the grant of a stay. The extent of such harm would be best addressed by the license applicant.

D. Public Interest

Until such time as a request for a stay (with supporting argument) is made, it is simply not possible to determine whether the public interest would favor or disfavor the grant of a stay.

V. CONCLUSION

For the reasons given above, the Staff submits that an operating license for Phases I and II cannot yet be issued and requests that the Commission provide the identified additional guidance on the application of CLI-84-8.

Respectfully submitted,

Robert G. Perlis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 14th day of September, 1984.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF VIEWS ON WHETHER THE LICENSING BOARD'S ORDER OF SEPTEMBER 5, 1984 MAY SERVE AS THE BASIS FOR ISSUANCE OF A LICENSE FOR PHASES I AND II OF LILCO'S LOW POWER TESTING PROGRAM" 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, by deposit in the Nuclear Regulatory Commission's internal mail system this 7th day of September, 1984:

Alan S. Rosenthal, Esq., Chairman*
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Howard A. Wilber*
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Marshall E. Miller, Chairman*
Atomic Safety and Licensing Board
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

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

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

Gary J. Edles, Esq.*
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

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

Honorable Peter Cohalan
Suffolk County Executive
County Executive/ Legislative Building
Veteran's Memorial Highway
Hauppauge, New York 11788

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, Esq.
Robert M. Rolfe, Esq.
Hunton and Williams
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

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

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

Atomic Safety and Licensing
Appeal Board Panel*
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Stephen B. Latham, Esq.
Twomey, Latham & Shea
33 West Second Street
P.O. Box 398
Riverhead, New York 11901

Robert Abrams, Esq.
Peter Bienstock, Esq.
Dept. of Law, State of New York
Two World Trade Center
Room 46-14
New York, NY 10047

Herzel H.E. Plaine, General Counsel*
U.S. Nuclear Regulatory Commission
Washington, D C. 20555

James 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 Off.
Agency Building 2
Empire State Plaza
Albany, New York 12223

Atomic Safety and Licensing
Board Panel*
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Alan R. Dynner, Esq.
Herbert H. Brown, Esq.
Lawrence Coe Lanpher, Esq.
Kirkpatrick, Lockhart, Hill,
Christopher and Phillips
1900 M Street, N. W.
8th Floor
Washington, D. C. 20036

Samuel J. Chilk*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Robert G. Perlis
Counsel for NRC Staff