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September 10, 1984

The Honorable Nunzio J. Palladino
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

50-322 OL-4

Dear Chairman Palladino:

On May 16, 1984 the Commission issued an order in the Shoreham proceeding which has subsequently created some confusion within the NRC and the nuclear industry with respect to the NRC's 10 C.F.R. § 50.12 exemption process. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC ____ (slip op., May 16, 1984). On behalf of Duke Power Company, we respectfully submit our comments on the exemption process in light of the Shoreham decision and subsequent discussions.[1]/

The NRC Staff, as reflected in SECY-84-290, "Need and Standard for Exemptions" (July 17, 1984), initially interpreted CLI-84-8 to alter broadly the NRC's § 50.12 exemption process. In our opinion, there is no reason the Staff's past exemption practice should be altered by either the Shoreham decision or through changes to the exemption regulation. The Staff in the past has recognized the need for flexibility in the regulatory process. This flexibility would not be possible if the Commission were to adopt a rigid exemption approach such as is implied by Shoreham. We recognize that the Commission has already voted to limit CLI-84-8 to the Shoreham facts. However, as discussed below, it is not entirely clear that the Staff has done this. Moreover, we offer our comments in view of the Commission's announced intent to reevaluate the exemption regulation.

1. Background

To justify an exemption from GDC 17 for low power operation in Shoreham, the Commission stated that the applicant should show (1) the "exigent circumstances" that favor the granting of an exemption under § 50.12(a), and (2) the basis for concluding that, at low power, operation would be "as safe" under the

1/Arkansas Power and Light Company, Mississippi Power and Light Company, and New York Power Authority also subscribe to these comments.

conditions proposed as it would be with full compliance with the GDC. Shoreham, CLI-84-8, slip op. at 2-3. This decision appeared to both raise the threshold for the grant of § 50.12 exemptions and to increase the number of situations in which requests are necessary. In fact, the NRC Staff did so interpret Shoreham in a number of cases. For example, prior to issuing a license for fuel load for Duke's Catawba plant, the Staff required Duke either to demonstrate compliance with each regulatory requirement for a full power operating license or to request a specific exemption from such requirement.

At the request of the NRC Staff, a public Commission meeting was held on July 25, 1984 at which the Staff sought clarification of the exemption requirements in view of the Shoreham order. See SECY-84-290. This meeting was a positive step toward eliminating the unnecessary confusion caused by Shoreham. By a four-to-one vote the Commission decided that the Staff should limit CLI-84-8 to the facts of that case and continue to follow its past practice with respect to exemption requests. The effect of that direction to the Staff is to return the standard for the grant of an exemption to "no undue risk" and "good cause". Similarly, former Staff practice of utilizing license conditions rather than explicit exemption requests should be reinstated. It is not clear, however, that the Staff has in fact returned to its prior practice in this latter regard.

In addition, the Commission at the July 25 meeting agreed to undertake a long term evaluation of the entire exemption process and directed that the Staff prepare a discussion paper within 30 days. The Commission also requested a short staff response in 7 days to proposals by Commissioner Asselstine which in effect would apply and amplify the Shoreham tests for exemptions in all cases. Because we consider this to be a significant issue, we urge consideration of our comments. We have reviewed the Staff's 7-day response related to Commissioner Asselstine's proposals dated August 2, 1984. Our comments on the proposals and the Staff's August 2 response are included herein.

2. The Standards to be Applied to Exemption Requests

We begin by addressing the standards by which exemption requests will be evaluated, because it is in this context that the Shoreham decision has the greatest implications. In CLI-84-8 the Commission required that LILCO, in a request for an exemption from GDC 17 under § 50.12(a), address (as LILCO proposed):

> 1. The "exigent circumstances" that favor the granting of an exemption under 10 C.F.R. 50.12(a) should it be able to demonstrate that, in spite of its non-compliance with GDC 17, the health and safety of the public would be protected. [Footnote omitted.]

> 2. Its basis for concluding that, at the power levels for which it seeks authorization to operate, operation would be as safe under the conditions proposed by it, as operation would have been with a fully qualified on-site A/C power source.

Shoreham, CLI-84-8, slip op. at 2-3. As pointed out by the Staff in SECY-84-290, these standards exceed by a substantial margin prior requirements for exemption requests. We, however, perceive no reason for an alteration of the prior Staff standards. The Commission was correct in its July 25th decision to limit applicability of CLI-84-8 to Shoreham. In considering the future of the exemption process, however, we wish to emphasize several points.

a. Exigent Circumstances

First, "exigent circumstances" should not be a necessary component of the showing required for a § 50.12(a) exemption. Exigent circumstances have been and should be required only for § 50.12(b) exemptions related to construction activities which precede issuance of a construction permit. Such an "exigency" test cannot by definition be met in many instances during the operating life of a plant where exemptions are sought on an interim schedular basis rather than a permanent technical basis. A request from an applicant or a licensee for an interim (schedular) exemption can be premised only on economic or logistical arguments and the lack of safety significance of compliance with the regulation for the particular short term situation. Exigent circumstances, as understood for example in the context of the Sholly regulations, may not exist. The Commission must recognize this, and its system must be able to distinguish between these matters. Application of the Shoreham § 50.12 "exigent circumstances" standard fails to do so.

The Commission, in Shoreham, did allude to an appropriate standard for § 50.12(a) exemptions:

> The Commission regards the use of the exemption authority under 10 C.F.R. 50.12 as extraordinary. This method of relief has previously been made available by the Commission only in the presence of exceptional circumstances. See, United States Department of Energy, et al. (Clinch River Breeder Reactor Plant), CLI-83-1, 17 NRC 1, 4-6 and cases cited therein (1983). A finding of exceptional circumstances is a discretionary administrative finding which governs the availability of an exemption. A reasoned exercise of such discretion should take into account the equities of each situation. The

> equities include the stage of the facility's life, any financial or economic hardships, any internal inconsistencies in the regulation, the applicant's good-faith effort to comply with the regulation from which an exemption is sought, the public interest in adherence to the Commission's regulations, and the safety significance of the issues involved.
> Of course, these equities do not apply to the requisite findings on public health and safety and common defense and security.

Shoreham, CLI-84-8, slip op. at 2-3, fn. 3. This Commission footnote stresses that in judging an exemption request, a balancing of all of the equities of each situation is appropriate. This standard allows the Commission necessary flexibility in applying the exemption standard and is consistent with the wide discretion allowed the Commission by law in evaluating exemption requests as stressed by the Office of General Counsel in SECY-84-290A. Without adding excess language to the exemption regulation, this balancing concept can be established by use of a "good cause" test rather than an "exigency" test.

The NRC has appropriately applied equitable standards in other contexts. For example, 10 C.F.R. § 2.788 governing requests for stays pending intra-agency review, adopts the equitable balancing test of Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). The presiding officer is granted the discretion to weigh the arguments on a case-by-case basis in order to determine where the equities of the situation lie. See e.g., Portland General Electric Co. (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, 69 (1979). Similarly, a flexible test for "good cause" is used in ruling on petitions for late intervention in licensing proceedings. 10 C.F.R. § 2.714(a)(1). What constitutes good cause in any given case will depend directly upon the facts and equities of that case. See e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 396-99 (1983). There is no reason a similar equitable test cannot be applied by the Staff in evaluating exemption requests under § 50.12 (a).

b. As Safe As

Our second point related to exemption standards is that the Staff's traditional standard for exemptions, requiring a showing of "no undue risk", is appropriate and should be continued. It can be applied without modification to both interim (schedular) and life-of-plant (technical) exemption requests. It correctly allows for an evaluation of overall plant conditions that will exist during the time the exemption will be in effect. This

evaluation includes a review of the purpose of the regulation, the extent to which alternative measures or compensatory measures achieve that purpose, operating conditions (e.g., power level), and the length of time for which the exemption will be needed. Such a standard provides the Staff with necessary regulatory flexibility to effectively deal with the technical merits of each exemption request. Such a standard would also minimize Staff interpretive difficulties because the Staff has been applying the standard for a long time and can draw from its exemption experience.

The Commissioners discussed modifications to the Shoreham "as safe as" standard at the July 25th meeting. These modifications are apparently intended to eliminate the problems created by the Shoreham standard which never existed with the "no undue risk" standard. This strikes us as traveling a rather roundabout route only to return to the start. For example, the Commission considered recognizing a "de minimis" concept in the standard, or to make it a "substantially as safe as" test. The Commission therein correctly recognizes that the "as safe as" test was overly stringent and could not be met for many exemption requests (especially schedular but also full-term ones). However, such a problem never existed under a "no undue risk" standard. We believe that the existing "no undue risk" standard is appropriate and urge that it be continued.

3. The Situations in Which Exemptions are Required

As an outgrowth of the Shoreham decision, the Commission also appeared to be reevaluating the types of situations in which the exemption process would be invoked. The Staff originally interpreted CLI-84-8, as expressed in SECY-84-290, to require explicit exemptions in many cases where traditionally license conditions or technical specifications with limiting conditions on operation have sufficed. For example, the Staff's interpretation would require an exemption request if spent fuel pool cooling will not be available until the first refueling outage. The rigid interpretation ignores the technical reality that there is no need for the spent fuel pool cooling until after the first cycle of operation. The Staff, in its more flexible prior practice, would have handled this situation with a license condition that pool cooling be available by the first refueling outage. We believe the rigid Shoreham interpretation of the exemption process is improper, and that in considering the future of the exemption process the Commission should address the scope of that process as well as the standards to be applied.

In this context we again do not see any compelling need to change the prior Staff practice. The Commission appears to regard exemptions as extraordinary measures justified only in exceptional circumstances. United States Department of Energy, et al. (Clinch River Breeder Reactor Plant), CLI-83-1, 17 NRC 1, 4-6; Long Island Lighting Co. (Shoreham Nuclear Power Station,

Unit 1), CLI-84-8, 19 NRC ____, slip op. at 2-3, fn. 3 (May 16, 1984). However, such will not be the case if the Shoreham approach as originally interpreted by the NRC Staff is followed. Under that approach explicit exemptions are required to justify short-term (schedular) exemptions for both near term operating license (NTOL) facilities and operating plants.

a. NTOL Facilities

Routinely, under prior practice, license conditions would be required instead of exemptions to allow an NTOL to receive a low power license. The license conditions schedule full regulatory compliance at some later time consistent with public health and safety. Although not reviewed under the § 50.12 process, the Staff applies a standard equivalent to the "no undue risk" test discussed above. Therefore, this approach provides the same level of public protection as an exemption approach, is more flexible, and allows for full consideration of the technical realities of short term operation.

Many of the instances in which the NRC Staff has been requiring requests for exemptions since CLI-84-8 and since the July 25th meeting involve Staff interpretations of Appendices to Part 50 (often quite recently changed interpretations). Some of the provisions in Appendices to Part 50 were originally intended to serve as guidance documents rather than hard and fast requirements, or to be interpreted in construction permits as design objectives and not as prerequisites to 10 C.F.R. § 50.57 findings. Where compliance with a regulation or GDC for low power operation makes no technical sense, or presents no undue risk, an exemption request should not be necessary. A license condition approach prevents unnecessary exemption paperwork and potential licensing delays, and appropriately reserves the exemption process for extraordinary cases.

b. Operating Reactors

Perhaps in recognition of the fact that interim schedule exemptions for operating plants could not meet the Shoreham exemption standard, the Commission, at the July 25th meeting, discussed the idea of eliminating such schedular exemptions for operating reactors from the § 50.12 process. The Office of General Counsel (OGC) proposed instead that violations of schedule requirements be treated as enforcement matters. Under this scheme, a notice of violation would issue for a failure to meet the schedule, and appropriate enforcement actions would follow depending upon the safety significance of the violation. SECY-84-290A, at 20-23, 27.

We believe the OGC approach is undesirable. For the reasons discussed above, we agree that interim schedular exemptions should not be held to a standard higher than the present "no undue risk" standard. However, this reason alone does not

justify creating an awkward exception to the exemption process. The OGC approach presents a rather peculiar, indirect means for licensees to obtain necessary and often relatively routine interim extensions of time for compliance with regulatory requirements. Consider, for example, a case in which a periodic offsite emergency planning exercise must be held a month or two late because a state or local government cannot participate until that time. Initiation of enforcement action and a decision not to prosecute or to issue a pro forma notice of violation would be an inefficient, after-the-fact, process for granting what is in effect an exemption.

Such notices of violation may also have financial and public relations implications for nuclear utilities. The violations may be subject to financial reporting obligations and may create an unwarranted perception of high investment risk in the financial community. In terms of the public perceptions, the OGC approach would have the further disadvantage of turning routine matters, where no undue safety risk is involved, into enforcement matters which by their very nature cast the licensee under the cloud of an appearance of guilt.

4. Conclusion

In conclusion, we believe that the Commission should re-examine and clarify the complete exemption process in light of the Shoreham decision. The Commission should reaffirm the Staff's existing, clear standard for both short-term (schedular) and long-term (technical) exemption requests. Further, the Commission should not expand the process to include situations presently handled by license conditions. Nevertheless, if the exemption process is altered, it should include standards that are clear and consistently applied to all exemption requests, and a format that does not create unnecessary enforcement action.

Sincerely,

J. Michael McGarry, III

cc: Commissioner James K. Asselstine
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