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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)	)	

SUFFOLK COUNTY AND STATE OF NEW YORK
PETITION FOR REVIEW

Pursuant to 10 CFR §2.786(b), Suffolk County and the State of New York seek Commission review of portions of ALAB-800 (February 21, 1985). Contrary to the explicit guidance set forth in 10 CFR § 2.764(g) and CLI-85-1, the Appeal Board refused to consider critical issues raised by the County/State appeal of the Miller Board's October 29, 1984 Initial Decision. The Appeal Board, therefore, barred the State and County from appellate review, a violation of 10 CFR § 2.762. The Commission should grant this Petition to halt this flagrant violation of NRC regulatory requirements.

I. The Portion of ALAB-800 of Which Review is Sought

ALAB-800 was the Appeal Board's decision on the appeal of Suffolk County and the State of New York from the Miller Licensing Board's October 29, 1984 Initial Decision. The Appeal Board stated that "all of the substantial issues presented by the appeal fell into one of three areas":

(1) the meaning and scope of both (a) the phrase "otherwise in the public interest" contained in 10 CFR § 50.12(a) and (b) the standard for a grant of an exemption under Section 50.12(a) set forth in CLI-84-8, . . .;

(2) the meaning and scope of the Commission's directive in CLI-84-8 that facility operation utilizing the substitute AC electric power system be "as safe as" that operation would have been with a "fully qualified" onsite AC power source; and

(3) the applicability to the substitute AC electric power system of the physical security provisions of 10 CFR Part 73.

ALAB-800, at 2-3 (footnotes omitted).

In Section I of ALAB-800, the Appeal Board purported to address issues 1 and 2. It affirmed the Miller Board's resolution of the public interest, exigent circumstances, and "as safe as" issues, on the basis that the Commission's February 12, 1985 immediate effectiveness decision (CLI-85-1) "totally foreclosed" any Appeal Board finding of Miller Board error on those issues. ALAB-800, at 5-9. Suffolk County and the State of New York seek Commission review of this portion of ALAB-800.1/

1/ LILCO has sought review of the remainder of ALAB-800 dealing with the security issue. The State and County will respond to LILCO's review petition in a separate pleading.

II. Proceedings Before the Appeal Board

When briefs were filed with the Appeal Board, CLI-85-1 had not yet been issued. Accordingly, the impact of that decision upon the pending appeal was not addressed by the parties in their briefs. The issue was raised sua sponte by the Appeal Board. During oral argument on February 11, 1985 before the Appeal Board, LILCO's counsel referred to a comment made by Commissioner Bernthal during the February 8 argument before the Commission. The Appeal Board Chairman stated:

> I speak just for myself, that the whole immediate effectiveness process gives me a great deal of concern and I am frank to state that this case illustrates it.
>
> As you well know, the Commission's immediate effectiveness rule provides that -- nothing it says in connection with an immediate effectiveness review is to be taken into account by an Appeal Board, unless the Commission specifically so provides.
>
> I don't know what was said before the Commission. No member of this panel or of its staff attended that soiree Friday afternoon, and deliberately did so and if the Commission is going to act I don't know what we are going to do. But what Commissioner Bernthal said may be very interesting but I don't know we are even going to pay very much attention to what the Commission says.

Transcript of February 11, 1985 oral argument, at 61-62 (Rosenthal).2/

2/ Similarly, at a January 8, 1985 Commission meeting, Judge Rosenthal stated:

> [T]he Appeal Board has pending before it the appeal of Suffolk County and the State of New York from that October 29 decision of the Miller Licensing Board.

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The Appeal Board's sua sponte raising of the matter of the impact

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> . . .
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> Now, the only reason I mention all of this is that it looks to me, as I noted in the conversation I had with the General Counsel's Office this morning that the principal issues that are before the Appeal Board on that appeal are the very same issues that the Commission has indicated are the pivotal questions in its immediate effectiveness determination.
>
> I am fully aware of the fact that the Immediate Effectiveness Rule says that unless the Commission indicates otherwise, what it says or determines on an immediate effectivness review is to have no bearing on the Appeal Board's deliberations in connection with an appeal. . . .
>
> With due respect, I think in this instance, since the Commission has gone to the great length it has in identifying the issues which it sees as pivotal in the decision on immediate effectiveness, it is going to be very difficult for the Appeal Board to give full recognition to that admonition.
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> CHAIRMAN PALLADINO: What's the bottom line there?
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> MR. ROSENTHAL: The bottom -- well, I just want the Commission to bear that in mind when it renders its immediate effectiveness decision. I just want it to bear in mind that at least up to this point what it has said is, the critical issues are the critical issues or the principal issues that have been presented by the appeal.
>
> Now, when the Commission renders its decision on immediate effectiveness, whatever discussion it may have -- I don't know which way it is going and I don't know what it is going to say -- but I think it ought to bear that consideration in mind. That's the only bottom line.

Transcript of January 8, 1985 Commission meeting, at 37-39 (Rosenthal).

of the Commission's immediate effectiveness decision upon the Appeal Board's decision on the merits of Intervenors' appeal meets the requirement that the matters raised in this Petition were raised before the Appeal Board. See 10 CFR §§2.786(b)(2)(ii) and (b)(4)(iii).

III. The Appeal Board's Affirmance of the Miller Board's Rulings is Erroneous and Deprives the State and County of Their Right to Appellate Review

In ALAB-800, the Appeal Board flatly refused to obey a clear Commission directive contained CLI-85-1, wherein the Commission expressly stated:

> The foregoing is entirely without prejudice to pending appeals before the Atomic Safety and Licensing Appeal Board. Moreover, the grant of the exemption, and authorization of Phases III and IV of low power testing, is entirely without prejudice to ongoing reviews and hearings relating to low or full power authorization.

CLI-85-01 at 6 (emphasis supplied).

The Appeal Board's violation of a clear Commission directive is even more serious since the Commission had expressly considered whether the Appeal Board was to be influenced by the contents of CLI-85-1. Thus, prior to the Commission's vote adopting CLI-85-1, the General Counsel's Office focussed the Commissioners' attention upon the language quoted above. Mr. Malsch stated:

> I had wanted to indicate one additional thing to call to your attention. We provide specifically here on page 6 that this is without, everything the Commission says here, is without prejudice of pending appeals before the Appeal Board.

> This matter was argued orally before the Appeal Board yesterday and the Commission does have a choice as to whether certain of its views expressed in its order should or should not be binding on the Appeal Board during appeals. Now, we have taken the view here, and the order specifically provides, that none of this is binding on the Appeal Board. But that's an issue the Commission should be aware of. And we discuss it in the paper before you.

Transcript of February 12, 1985 Commission meeting, at 11.1-12 (Malsch) (emphasis supplied).3/ The Commission then voted to adopt the language contained in CLI-85-1.

Finally, not only had the Commission expressly considered -- and decided against -- instructing the Appeal Board to take into account any of its immediate effectiveness comments, but the Commission's review which led to the February 12 Order clearly was not the full review of the merits of Intervenors' appeal to which Intervenors are entitled under Sections 2.762 and 2.770. The Commission itself has repeatedly characterized its review as "limited." See, e.g., CLI-85-01 at 3, and the following statements which were made by the NRC in its February 20, 1985 brief to the U.S. Court of Appeals:

3/ In response to Mr. Malsch's statement, Commissioner Bernthal stated:

> Now, the Appeal Board has just heard the arguments, I guess yesterday, that deal with the legal merits of this proceeding and they will make a determination on those arguments and that's their job.

Id. at 16 (Bernthal).

> Like all of its immediate effectiveness reviews, the Commission's February 12 Order is not a full-blown review of the merits of the October 29 licensing decision. To the contrary, it is a more limited review, in the nature of a decision whether to grant or deny a stay of a licensing decision. . . . Although deciding not to stay the low-power license granted to LILCO, in accordance with its normal NRC practice and regulations, the Commission did so without prejudice to the ongoing administrative appeal, before the Appeal Board, of the Licensing Board's October 29 decision. . . .
>
> . . .
>
> [T]he NRC's February 12 effectiveness order . . . was not a full-blown review of the Licensing Board exemption ruling. To the contrary, it was specifically made without prejudice to the normal agency review process. The narrow issue which the Commission resolved in its February 12 Order was, in effect, whether it should stay the issuance of LILCO's low-power license which the Licensing Board authorized in its October 29 decision.
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> . . .
>
> The Miller Board's October 29 decision . . . is pending before the Commission's Atomic Safety and Licensing Appeal Board. If the October 29 decision is erroneous, the Appeal Board will reverse it and order such action as is appropriate to cure the errors. If, on the other hand, the Appeal Board concludes that there is no error, then petitioners will be able to request a Commission merits review of the Miller Board decision.

Respondent United States Nuclear Regulatory Commission's Opposition to Emergency Motion for Stay at 9, 38, 52 (citations omitted; most emphasis supplied).

Therefore, the Appeal Board's decision with respect to the public interest, exigent circumstances, and "as safe as" issues plainly flies in the

face of the clear Commission directive, the Commission's own interpretations of its directive, and the plain language of 10 CFR § 2.764(g). The result was to deprive Intervenors of their right to full appellate review of the merits of the Miller Board's exemption decision.4/

4/ The Appeal Board's attempts to distinguish this case from every other case -- in which it is obliged "to respect and obey Commission directives" (ALAB-800 at 5) -- are totally without basis; further, such rationalizations must be rejected outright in view of the explicit NRC directive that the Appeal Board ignore CLI-85-1.

a. The Appeal Board asserts that if the Commission reaches or announces "a conclusion on an essentially factual issue in the course of its immediate effectiveness review," it sees "no impediment to an Appeal Board passing independent judgment on the same factual issue and, possibly, reaching a different conclusion in its appellate decision." ALAB-800, at 5-6. Clearly, the portions of CLI-85-1 upon which the Appeal Board relies involved conclusions on many factual issues concerning whether the exemption was in the public interest, whether exigent circumstances existed to justify an exemption, and whether LILCO's proposed low power operation would be as safe as operation with a qualified onsite power source. Thus, by the Appeal Board's own reasoning, there is no impediment to its review of those same factual issues and its rendering an independent appellate decision. The Commission directed it to do exactly that.

b. The Appeal Board asserts that "with regard to a legal issue turning upon the interpretation and application of Constitutional or statutory provisions, there might well be similar warrant for a fresh look by an Appeal Board even if the immediate effectiveness determination had addressed the issue." Id. at 6. Again, the situation presented in this case is identical to that referenced by the Appeal Board: the public interest, exigent circumstances, and "as safe as" issues presented to the Appeal Board involved, among other things, serious Constitutional violations and violations of Section 189(a) of the Atomic Energy Act. Thus, by the Appeal Board's own reasoning, the Commission's comments on those issues are no bar to a "fresh look" at those issues by the Appeal Board as mandated by the Commission.

c. The Appeal Board asserts that this case presents "a quite different situation" because "in large measure the substantial issues presented by the intervenors' appeal turn upon the determination as to

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IV. The Petition for Review Must be Granted

Clearly, the referenced portions of ALAB-800 require Commission review and reversal. First, the Appeal Board's decision to "affirm without further discussion the Licensing Board's ultimate resolution of the intervenors' public interest and 'as safe as' claims," even though the Appeal Board was "not necessarily in agreement with everything that the Board said or did in connection with the claims," (ALAB-800 at 8-9), clearly deprived Intervenors of the administrative appellate review of the merits of the Miller Board's decision to which they are entitled. Second, the Appeal Board's conclusion that "it would defy all reason for us to do anything other than to accept and apply the Commission's determinations" (id. at 7) must be rejected. It amounts to nothing but an assertion that the Appeal Board is wiser than the Commission, that the Commission's directive and its regulations are unreasonable, and that the Commission cannot have intended its directive to be taken seriously.

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> the meaning and scope of the terms of either a Commission regulation . . . or a Commission opinion" and "these same issues were not merely considered by the Commission in its immediate effectiveness review, but resolved." Id. at 6-7. Obviously, the same is true with respect to any immediate effectiveness review of a licensing board initial decision: any such decision would deal with contested issues concerning compliance with Commission regulations and/or Commission interpretations of its regulations. In any effectiveness decision, therefore, the Commission would necessarily both "consider" and "resolve" -- to the same preliminary, nonbinding extent it did in CLI-85-1 -- questions involving the Commission's regulations and opinions.

Furthermore, this case presents unique legal, factual and procedural issues involving an unprecedented exemption from GDC 17, and the public's interest in permitting a nuclear plant to be contaminated, in the absence of regulatory compliance, when it is likely that full power operation will never be authorized. The exemption proceeding, and the portions of ALAB-800 at issue here, thus involve important matters affecting the public's health and safety, the Commission's procedures, and the public's interest.

In order to provide the State and County, and the public they represent, with the due process guaranteed by the Commission's own regulations, and to enforce compliance with CLI-85-1 and 10 CFR §2.764(g), the Commission must: (1) reverse the Appeal Board's decision on the public interest, exigent circumstances, and "as safe as" issues; and (2) order the Appeal Board to conduct a full appellate review of the Miller Board's decision.

Respectfully submitted,

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Dated: March 8, 1985

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of Suffolk County and State of New York Petition for Review have been served on the following this 8th day of March, 1985 by U.S. mail, first class, except as otherwise noted.

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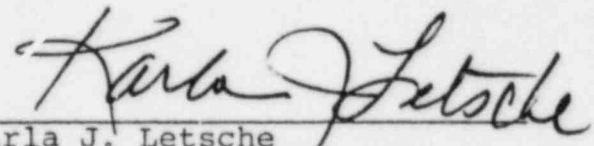

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* By Hand

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