275

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'84 NOV 21 P3:48

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal
Lando W. Zech, Jr.

SERVED NOV 21 1984

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

MEMORANDUM AND ORDER

CLI-84-21

This concerns the request of Long Island Lighting Company (LILCO) for a license authorizing it to engage in fuel loading and low power testing pursuant to 10 CFR § 50.57(c). On September 5, 1984, the Licensing Board designated to hear and decide LILCO's request (the "Exemption Board") granted LILCO's motion for summary disposition of safety issues related to Phases I and II of low power testing (fuel loading and pre-critical and cold-critical testing). When considered along with the Exemption Board's September 19, 1984 Order dismissing physical security contentions, the effect of the Exemption Board's September 5 Order would normally be to permit the NRC staff to issue a

DS02

license for Phases I and II. Of course, staff would also have to resolve any remaining relevant uncontested issues.

In this case, however, two events prevent the Exemption Board's order from becoming immediately effective: the Commission's decision to conduct an immediate effectiveness review[1] and the Appeal Board's October 31, 1984 decision in ALAB-788, which remanded three "minor" issues to the Licensing Board conducting the operating license proceeding (the Brenner Board).[2] For the reasons stated below, we conclude that the Exemption Board's September 5, 1984 order may become effective, but only after the Brenner Board determines in writing, with supporting rationale, that issues remanded to it in ALAB-788 either are not material to Phases I and II of low power operation or that these issues are resolved in favor of LILCO.

---

[1]The Exemption Board referred its decisions to us for our review in light of our statement of May 16, 1984, that "[a]ny initial decision authorizing the grant of an exemption shall not become effective until the Commission has conducted an immediate effectiveness review." CLI-84-8, 19 NRC ___, slip op. at 3.

The instant decision concludes our immediate effectiveness review for Phases I and II. As a separate matter, in an Order of November 19, 1984, we invited the parties to submit to us, by November 29, 1984, their comments concerning the immediate effectiveness of the Exemption Board's October 29, 1984 "Initial Decision" authorizing the grant to LILCO of an exemption from GDC-17 for Phases III and IV.

[2]In Orders of November 2 and 5, 1984, the Brenner Board directed the parties to file comments by November 15 concerning the effect of ALAB-788 on the issuance of a low power license, and on any further actions required of the parties and that Board. On November 20, 1984, the Brenner Board conducted a conference with the parties on these issues, and ruled that the pendency of any remanded issues does not

(Footnote Continued)

The Exemption Board found, based on uncontroverted facts, that no emergency AC power system was required for core cooling during Phases I and II, and thus that no AC power was needed "to permit functioning of structures, systems, and components important to safety," within the meaning of GDC-17. The Board concluded that LILCO should be permitted to conduct fuel loading and low power testing as proposed in Phases I and II. Order of September 5, 1984 at 10.

As we read it, the Exemption Board found in essence that the purpose of GDC-17 -- to ensure that there is sufficient AC power to provide core cooling in the event of a postulated accident -- has no application to Phases I and II, and that GDC-17 was not intended to apply where there was no reason for its application.[3] We agree with the Exemption Board.

In CLI-84-8, we held that "10 CFR 50.57(c) should not be read to make General Design Criterion 17 inapplicable to low-power operation." By this we meant only that section 50.57(c) does not, by itself, carve out an exception from all health and safety regulations that would otherwise be applicable to a low power license. We did not mean to say,

---

(Footnote Continued)
affect the possible issuance of a low power license. The rationale for the Board's ruling is to be set forth in a future Board order.

[3]Suffolk and the State argue that the lack of a qualified onsite AC power system violates 10 CFR Part 50, App. B, and GDC's other than GDC-17, and that those violations must be adjudicated or exempted prior to issuing an OL. However, all of the other requirements cited are applicable only if GDC-17 requires LILCO to have a qualified onsite AC system for Phases I and II. The Exemption Board held that it did not, and we agree.

however, that every health and safety regulation, regardless of its purpose or terms, must be deemed fully applicable to fuel loading and to every phase of low power operation, or that the pressures, temperatures and other stresses associated with full power must be postulated in evaluating applicability of, or compliance with, regulations for low power. Each regulation must be examined to determine its application and effect for fuel loading and for each phase of low power operation. Simple logic and common sense indicate that some regulations should, by their own terms, have no application to fuel loading or some phases of low power operation. Indeed, this was recognized by counsel for Suffolk County in oral argument before us. See Oral Argument of May 7, 1984, transcript at 73-74.[4] The Exemption Board followed this approach in its decision. Under CLI-84-8, our effectiveness review has focused on the special issues that have been raised in this case related to GDC-17. We have not considered the merits of the Exemption Board's September 19, 1984 Order on physical security contentions. Under 10 CFR 2.764(f), low power decisions, including the September 19, 1984 Order, may become effective without prior Commission review.[5]

---

[4]We note that Suffolk's counsel recognized in oral argument before us that GDC-4, concerning environmental qualification and missile resistance, is not fully applicable to low power licenses. We see little distinction in this regard between GDC-4 and GDC-17 in the context of the Phase I and II license authorized by the Exemption Board.

[5]We note that on November 13, 1984, Suffolk and the State noticed an appeal of the Exemption Board's September 19, 1984 physical security decision, and of its October 29, 1984 Initial Decision.

Based upon our review of the parties' comments of September 14, 1984, we also address the factors specified in 10 CFR 2.788(e): whether the State and County have made a strong showing that they are likely to prevail on the merits; whether there will be irreparable harm to the County and State if no stay is granted; whether LILCO will be harmed by a stay; and where the public interest lies.

We are unpersuaded by the arguments that we have no authority to issue a license for Phases I and II, or by any of the other arguments that have been made to us opposing issuance of the license.[6] The State and County have not made a strong showing that they are likely to prevail on the merits.

The County and the State argue that although they would not be irreparably injured by the "minimal" irradiation of the plant, issuance of a Phases I and II license would irreparably injure "the integrity" of the licensing proceeding. We interpret this to be an argument that once the Phase I and II license is granted, the eventual issuance of a full power license is a foregone conclusion. We cannot agree with this

---

[6]Suffolk and New York State argue that the Commission may issue only construction permits and operating licenses because these are the only type of authorizations contemplated by the Atomic Energy Act and by our regulations. The Commission may not, then, authorize an operating license which permits anything less than fuel loading and testing up to five percent of full power. They call the Phases I and II license an illegal "no power license." We reject this argument. The argument ignores the language of section 50.57(c), which defines low power testing as "operation at not more than 1 percent of full power for the purpose of testing the facility" (emphasis added), and longstanding Commission practice of requiring issuance of a license before even fuel loading can be undertaken.

implication. A full power license will issue if and only if the Commission can make the findings that it must make prior to the issuance of such a license. Issuance of the Phase I and II license is completely without prejudice to later decisions on low or full power licensing, and we express no opinion at this time whether further licenses for low or full power can or will be issued.

Finally, the State and County have not demonstrated that the public interest will be harmed by the grant of a license for Phases I and II. We are obligated under the Administrative Procedure Act and under principles of fair and efficient administration to act with reasonable dispatch on requests for licenses. The hearing litigation in this case has been long and difficult, and where parts of it have been concluded and findings made, we believe the public interest requires that we accord those findings the legal effect they deserve.

For the above reasons, we have decided to approve the Exemption Board's September 5, 1984 decision, recognizing, as explained above, that no license can issue until some further consideration of the issues remanded in ALAB-788, and until staff is satisfied with resolution of any remaining uncontested issues. To allow for the orderly processing of any request for expedited judicial review, any written order of the Brenner Board, with supporting reasons, (1) determining that the issues remanded to it are not material to Phases I and II of low power operation, or resolving these issues on their merits in favor of LILCO, and (2) authorizing issuance of a license for Phases I and II, shall not become effective until 5:00 p.m., Eastern Standard Time, seven days after the date of the authorizing order.

The Brenner Board's expeditious consideration whether the issues remanded to it in ALAB-788 have any effect on the issuance of a license for Phases I and II is reflected by its orders of November 2, 5, and 20, 1984. The Commission directs the Board to continue its expeditious consideration of this issue by issuing its further order setting forth rationale as soon as practicable.

It is so ORDERED.

For the Commission

John C. Hoyle
Acting Secretary of the Commission

Dated at Washington, D.C.
This 21st day of November, 1984.