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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)	)	

NRC STAFF RESPONSE TO PETITIONS FOR REVIEW OF ALAB-800

Robert G. Perlis
Counsel for NRC Staff

March 18, 1985

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On February 21, 1985, the Appeal Board issued a Decision (ALAB-800) in the Shoreham low power proceeding affirming in part and reversing in part the Licensing Board's October 29, 1984 Decision (LBP-84-45, 20 NRC 1343) authorizing issuance of an operating license for Phases III and IV of LILCO's low power testing program. On March 4, 1985, LILCO filed pursuant to 10 C.F.R. §2.786(b) a petition for Commission review of that portion of ALAB-800 that revised LBP-84-45. On March 8, 1985, Suffolk County and the State of New York filed jointly a petition for review of the remainder of ALAB-800 that affirmed LBP-84-45. The Staff herein responds to both petitions for review. 1/

I. BACKGROUND

LBP-84-45 was forwarded directly to the Commission for the conduct of an immediate effectiveness review. The Commission received written

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1/ 10 C.F.R. §2.786(b)(3) limits answers to petitions for review to ten pages. Pursuant to permission received from John Hoyle, Assistant Secretary to the Commission, the Staff has combined its answers to both petitions into one 13-page response which addresses each petition seriatim.

comments on LBP-84-45 from the parties on November 29th and January 14th and held an oral argument on February 8th. On February 12th, the Commission concluded its review with the issuance of CLI-85-01 allowing LBP-84-45 to become effective.

While the Commission was conducting its immediate effectiveness review, LBP-84-45 was appealed to the Appeal Board pursuant to 10 C.F.R. §2.762. After receiving briefs from the parties and holding oral argument, the Appeal Board issued ALAB-800 on February 21. In its review, the Appeal Board found that the issues raised on appeal fell into 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, an earlier Commission decision in this proceeding;
>
> (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 a 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 3 (footnotes omitted).

The Appeal Board found that the Commission had resolved the pivotal issues in the first two areas in CLI-85-01. (ALAB-800 at 4-9). The Appeal Board examined the third area, however, and found that the Licensing Board had erroneously dismissed physical security contention proffered by the Intervenors. (Id. at 9-20). The Appeal Board accordingly vacated the authorization of issuance of a license for Phases

III and IV and remanded the case to the Licensing Board for consideration of physical security matters.

In its Petition for Review, LILCO claims that the Appeal Board incorrectly decided security issues. In their Petition, the State and County address the other two of the three areas identified by the Appeal Board; they contend that the Appeal Board failed to give their appeal a fair and full appellate review.

II. LILCO'S PETITION

A. The Reversal of LBP-84-45

LILCO's quarrel with the Appeal Board's decision centers around the question of whether any part of the alternate AC power system for Shoreham should be protected as "vital equipment" pursuant to 10 C.F.R. ¶ 73.2(i). 2/ The Licensing Board found that neither the EMD's nor the gas turbine should be considered vital equipment; the Appeal Board disagreed. LILCO argues in its Petition that emergency power sources have not in the past been considered vital and that there is no technical reason to so treat them at low power. (Petition at 2-5).

The Staff disagrees. It is true that the definition of "vital equipment" does not specifically identify onsite AC power sources as vital equipment. It is also true that such equipment would be needed

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2/ That Section defines vital equipment as:
> any equipment, system, device, or material, the failure, destruction, or release of which could directly or indirectly endanger the public health and safety by exposure to radiation. Equipment or systems which would be required to function to protect public health and safety following such failure, destruction, or release are also considered to be vital.

during low power operation only in the unlikely event of a concurrent LOCA and loss of offsite power. It does not follow, however, that there is neither a need nor a requirement to protect any AC power source.

AC power is needed for the proper operation of certain accident mitigation systems. Although emergency AC power is only needed (at low power) in the event of a LOCA, the Staff nontheless believes an adequate source of such power is necessary at low power. The Staff therefore premised its support for LILCO's exemption request on the acceptability of the alternate power system (consisting of the EMD's and gas turbine). See, e.g., Shoreham Supplemental Safety Evaluation Reports 5 and 6.

In its Petition, LILCO seems to suggest that the Staff does not normally require security protection for emergency AC power sources. (Petition at 3-4). To the contrary, the Staff has required such protection at all plants licensed since 1980. While the need for emergency AC power is much lower at low power than at full power, the record developed during the low power hearing demonstrated that backup power could be required during Phases III and IV. Under the circumstances, the Staff believes that it would be prudent to provide some security protection for the alternate emergency power system. The Staff therefore believes the Appeal Board was correct in determining that Section 73.2(i) applied to the system.

B. Clarification of ALAB-800

In addition to challenging the Appeal Board's ruling on vitalization, LILCO asserts that Commission review is necessary because of perceived ambiguity in ALAB-800. The Staff agrees that the wording of ALAB-800 is somewhat unclear and has generated some confusion in the

remanded security proceeding. Before ALAB-800, LILCO had argued that no protection was needed for backup AC power during low power operation, the Intervenors argued that all sources of backup power should be protected, and the Staff argued that protection of one source (the EMD's) would be sufficient. Although the Appeal Board clearly rejected LILCO's position, the Appeal Board never addressed the Staff's position that not all of the backup power system needed to be treated as vital equipment. 3/ It is also unclear whether the Appeal Board considers a lower level of security protection adequate for low power operating or whether the language to that effect at pages 19-20 of ALAB-800 is directed solely towards an exemption from Part 73.

The parties and the Licensing Board in the remanded security proceeding are currently wrestling with the meaning of ALAB-800. The Board has raised certain threshold security questions (Order of March 5, 1985) to which the parties have filed responses (on March 12th and 15th). LILCO has raised questions in its Petition for Review similar to those posed by the Board in its Order of March 5th. (See Petition at 6-7). It is simply not clear from ALAB-800 whether the Appeal Board has resolved the questions posed by the Licensing Board (and by LILCO in its Petition) or whether the Licensing Board is working from a clean slate. Clarification of these matters at the outset of the proceeding could

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3/ Simply stated, the Staff believes that since the public could only be adversely affected if four unlikely events occurred simultaneously (LOCA, loss of offsite power, failure of the gas turbine, and failture of the EMD's), security protection would be sufficient if it guarded against a LOCA and protected the EMD's. It is not clear whether this position was rejected by ALAB-800 or not.

prevent unnecessary delay and confusion. It is also worth noting that the Appeal Board did not have the benefit of detailed briefing from the parties on physical security matters. 4/

Because the Staff believes clarification of ALAB-800 would be helpful to the parties and the Licensing Board in the remanded proceeding, the Staff supports that portion of LILCO's Petition that seeks such clarification. The Staff believes that clarification of ALAB-800 could come from either the Commission or the Appeal Board; inasmuch as the issues now before the Licensing Board (and raised in LILCO's Petition) were not squarely addressed by the parties before the Appeal Board, it may be more appropriate to refer LILCO's petition for clarification to the Appeal Board than for the Commission to initially rule upon this matter.

C. Vacation of the Exemption

Finally, LILCO argues that even if it were correct in reversing the Licensing Board, the Appeal Board should not have vacated the authorization of the license for Phases III and IV.

As support for this position, LILCO contends that no serious safety concern has been identified with respect to the remanded security issues, the "equities" favor restoring the licensing, and issuance of a license now would not prejudice future resolution of the security issue. (Petition at 8-9).

4/ Intervenors did raise security matters in their appeal, but the briefs before the Appeal Board did not examine in any depth the issues that are now being examined by the Licensing Board. See, e.g., Intervenors' Appeal Board Brief at 18-23.

The Staff disagrees with LILCO's argument. The Appeal Board's decision to vacate the license authorization is entitled to deference in the first instance. LILCO has provided the Commission with no reason to question that decision.

LILCO's position that no serious safety concern has been identified seems to reflect that party's belief that security protection for the alternate AC power sources is not needed. The Staff believes that at least one source of emergency AC power should be protected. The Staff is not prepared to say that such protection has no safety value.

As to the "equities" involved, LILCO appears to believe that the equities here are the same as those involved in the original decision to issue an exemption. Those equities were evaluated as part of a determination as to whether to grant an exemption from Part 50 after a full evidentiary hearing had determined that the alternate system was "as safe as" a fully qualified onsite power system. Here there has been no showing that noncompliance with Part 73 would not adversely affect the public health and safety (indeed, the Staff believes the primary focus of

a security hearing would be on this very issue). Without such a showing, it is by no means clear that equities favor granting the exemption. 5/

Finally, LILCO baldly asserts that issuance of a low power license would not prejudice resolution of the issue. Leaving aside the safety significance of the issue, the Staff fails to see how issuance of a license could do anything other than moot the very issue involved. The sole issue involved is whether security for equipment only to be used during low power testing is adequate. Once low power testing is completed, this issue will necessarily be rendered moot.

D. Conclusion on LILCO's Petition

For the reasons stated above, the Staff submits that the Appeal Board properly reversed LBP-84-45 and did not improperly vacate issuance of a license for Phases III and IV. The Staff does believe clarification of ALAB-800 would be helpful and supports that portion of LILCO's Petition which seeks such clarification.

5/ LILCO also included an affidavit from John Leonard explaining how delay would prejudice LILCO. Much of this prejudice flows from the delay in proceeding to Phases III and IV after having completed testing at Phases I and II. If this affidavit is being offered to justify reauthorization of the license, the short answer is found in the Commission's Order of November 21, 1984 (CLI-84-21) authorizing issuance of a license for Phases I and II. The Commission there indicated that issuance of a license for Phases I and II was without prejudice to any later decisions. (Order at 6). In proceeding with operation at Phases I and II, LILCO proceeded at its own risk that later licenses might not issue.

III. INTERVENORS' PETITION

In their Petition, the State and County attack the Appeal Board's resolution of the "as safe as" and "exigent circumstances" issues. The Appeal Board relied heavily on CLI-85-1 in resolving these issues. Intervenors contend that in doing so, the Appeal Board violated the explicit guidance of 10 C.F.R. § 2.764(g) and CLI-85-1 that the Commission's immediate effectiveness review not prejudice Appeal Board appellate review.

The general purpose of an immediate effectiveness review is to "determine whether significant safety issues exist that warrant staying the effectiveness of the Licensing Board decision . . .. The Commission's effectiveness reivew was never intended to be a detailed, formal review of the record developed before the Licensing Board. Rather, this informal and expedited review focuses upon significant issues of public health and safety." 47 Fed. Reg. 40535 (September 15, 1982). Thus the traditional immediate effectiveness review is similar to an immediate stay review.

In this case, it appears that the Commission's immediate effectiveness review was more involved. The Commission received detailed filings from the parties on November 29, 1984 and January 14, 1985; an oral argument was held on February 8, 1985. The issues brought before the Commission were practically identical to those raised by Intervenors before the Appeal Board. Indeed, these issues were briefed before the Commission largely at the behest of the State and County. (See, e.g., Commission Order of November 19, 1934). Similarly, the State and County repeatedly requested that the Commission hold oral argument on this matter.

As noted earlier, the Appeal Board found that Intervenors' appeal raised three issues. Their Petition for Review addresses two of these issues: application of the "as safe as" criterion; and the meaning and scope of "otherwise in the public interest" as it relates to the standard for granting an exemption in CLI-84-8 ("exigent circumstances"). (Petition at 2). Resolution of both of these issues depends heavily on the interpretation of the standards governing LILCO's exemption request set forth by the Commission in CLI-84-8. In their appeal of these issues to the Appeal Board, Intervenors complained both that the Licensing Board incorrectly interpreted the CLI-84-8 standard and that various rulings by the Board effectively deprived the State and County of their right to a fair hearing. The Staff will examine the Appeal Board's treatment of the interpretation of CLI-84-8 and the procedural rulings seriatim.

A. The Interpretation of CLI-84-8

The Appeal Board found that the Commission in CLI-85-1 had fully addressed the interplay of Section 50.12(a) and the standard set forth in CLI-84-8. See ALAB-800 at 7-8. On its face, this determination by the Appeal Board seems eminently reasonable. It must be kept in mind that the Commission requested two sets of briefs on the Licensing Board's interpretation of the exemption standard. See Commission Orders of November 19, 1984 and January 7, 1985. Furthermore, as the authors of CLI-84-8, the Commission is uniquely qualified to resolve any and all questions relating to the interpretation of the standards set forth therein. A fair reading of CLI-85-1 could well indicate that the Commission had fully resolved all the interpretive questions related to Intervenors' appeal.

The Staff is mindful of the language in Section 2.764(g) prohibiting an appeal board from giving any weight to an immediate effectiveness decision. Under the circumstances, the case could be remanded to the Appeal Board with directions that it give no weight to CLI-85-1. This is in fact what Intervenors suggest should now be done.

The Staff submits that a decision on whether to remand ALAB-800 for reconsideration of the interpretation of the exemption standard should depend on whether the Commission fully considered this issue in CLI-85-1. If, as it appeared to the Appeal Board, the Commission fully considered the arguments of the parties and resolved the issue of the correctness of the Licensing Board's interpretation of the CLI-84-8 standard, there is no reason to remand this matter to the Appeal Board. In the first place, the State and County would have received the full benefit of an appellate review of this portion of their appeal. 6/ Moreover, any potential error caused by the Appeal Board's reliance on CLI-85-1 would clearly be harmless; if the Commission has fully resolved this matter, anything the Appeal Board might rule to the contrary would be reversed upon Commission review of that ruling. Under these circumstances, a remand would be pointless.

On the other hand, if the Commission considers its ruling in CLI-85-1 on the nature of the exemption standard to be a tentative one

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6/ Indeed, it is somewhat disingenuous of Intervenors to suggest that they have been denied a full appellate review when the Commission invited (and received) detailed briefs and held an oral argument because of Intervenors' insistence that the Commission review the Licensing Board's decision.

and not finally dispositive of the issue, full consideration of this portion of the appeal by the Appeal Board would be appropriate and ALAB-800 should be remanded.

B. Claims of Procedural Error

In addition to claiming that the Licensing Board incorrectly applied the standard for an exemption, the Intervenors contended in their appeal that the Licensing Board committed various procedural errors which effectively deprived the State and County of their due process rights to a fair trial. The Appeal Board found that, given the Commission's ruling in CLI-85-1 concerning the meaning of Section 50.12(a) and CLI-84-8, any error committed by the Licensing Board in the course of the exemption proceeding (excluding its ruling on security matters) was harmless.

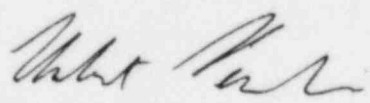
In its immediate effectiveness review, the Commission dealt with a number of the error claims advanced by Intervenors. For example, the Commission found that admission of the proffered PRA testimony would not have affected the "as safe as" determination, the Commission assumed for purposes of its review that power from Shoreham is not needed immediately and that LILCO may have been negligent in its attempt to comply with GDC-17, and the Commission determined that the Licensing Board properly refused to consider the possibility that a full power license may never issue for this facility. (CLI-85-1 at 3-5). It is not clear whether the Appeal Board relied on these portions of CLI-85-1 in its determination that any Licensing Board error was harmless, or whether the Appeal Board performed a full merits review of Intervenors' claims of procedural error. Appeal Board reliance on these factual and legal determinations would have been improper in light of Section 2.764(g).

If the Appeal Board did rely on the Commission's legal and factual determinations identified above, it should reexamine the claims of error without regard to those determinations. If, on the other hand, the Appeal Board did not rely on those determinations, it should more fully explain its basis for finding that no Licensing Board error warranted reversal in this area. Such an explication would remove any possible claim that the County and State were improperly denied their right to a full appellate review.

C. Conclusion on Intervenors' Petition

For the reasons presented above, the Staff submits that the Commission should determine whether it intended to fully resolve the exemption standard issues in CLI-85-1. If the Commission intended to fully resolve the interpretation of CLI-84-8, remand of ALAB-800 to the Appeal Board on this matter would serve no purpose. On the other hand, if CLI-85-1 was not intended as the Commission's final word on the subject, a remand of ALAB-800 would be proper. In either event, the Staff believes it would be appropriate for the Commission to ask the Appeal Board for a fuller explanation of why no Licensing Board errors might warrant reversal. In light of the remanded security proceeding, a fuller explication by the Appeal Board would not delay the ultimate resolution of low power issues.

Respectfully submitted,



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Dated at Bethesda, Maryland
this 18th day of March, 1985

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PETITIONS FOR REVIEW OF ALAB-800" 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 18th day of March, 1985.

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