730

DOCKETED
USNRC 12/19/84

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '84 DEC 20 A11 :09

Before the Commission

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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 MOTION FOR COMMISSION DECLARATION THAT 10 C.F.R. § 50.47(d) DOES NOT APPLY IN THIS CASE IF THE MILLER BOARD'S "AS SAFE AS" RULING IS APPROVED

The "Comments" filed by Suffolk County and the State of New York with the Commission on November 29, 1984, demonstrated that the Miller Board failed to apply the Commission's "as safe as" standard in accordance with the Commission's explicit mandate in CLI-84-8. See Suffolk County and State of New York Comments Concerning Commission Review of LILCO's Exemption Request, November 29, 1984, at 27-29. Thus, the Miller Board found that LILCO had met the "as safe as" standard despite the fact that, in the Board's own words, "there is unquestionably a lesser margin of safety provided by LILCO's alternate power system." Id. at 28, quoting Miller Board Decision at 24. The very terms of this finding compel the Commission to reverse the Miller Board.1/

1/ For reasons stated in the County/State November 29 Comments and the County/State December 11 Brief to the Appeal Board, the Miller Board improperly applied the Commission's "as safe as" (footnote continued)

D503

The instant Motion is to inform the Commission: (1) that the Miller Board's decision, if upheld by the Commission, would render Section 50.47(d) of the NRC's regulations inapplicable to Shoreham; and (2) that in such case the Commission could not lawfully issue a low power license to LILCO unless there were a fully approved and implemented offsite emergency plan for Shoreham. As the Commission knows, there is no such plan. Therefore, no low power license may be issued to LILCO.

In short, the Miller Board's decision has created for the Commission only two mutually exclusive options:

-- Rule that the "as safe as" standard has not been met because there is a "lesser margin of safety" for low

---

(footnote continued from previous page)
standard. In concluding that the proposed operation would be as safe as with a fully qualified AC power source, the Miller Board not only refused to admit evidence to the contrary submitted by Suffolk County, but also ignored, or acknowledged but then ignored by reaching the contrary general conclusion, evidence in the record which demonstrated that the proposed operation would substantially reduce safety margins from those present during low power operation with a fully qualified system. Thus, the Miller Board's finding of compliance with the "as safe as" standard cannot be upheld because it distorted and misapplied the NRC's straightforward standard. The Commission did not set an amorphous standard of whether operation with the alternate configuration would, in the subjective judgment of the Board, be safe enough, nor did the Commission license or otherwise instruct the Miller Board to divine a definition of how much safety is "enough." Rather, the Commission, certainly mindful of the impact of the exemption request on 10 C.F.R. § 50.47(d), instructed the Miller Board to determine whether operation with the alternate configuration would be as safe as operation would have been with fully qualified EDI diesels. A reduction in the margin of safety, or a reduction in the defense in depth protection which is central to the NRC's licensing concept, cannot be ignored under the Commission's as safe as standard. Plainly, however, the Miller Board did exactly that. See County/State November 29 Comments at 28-30.

power operation, as the Board in fact found and as the evidence established; or

-- Rule (contrary to the evidence of record) that the "as safe as" standard has been met but, in light of the existing "lesser margin of safety" found by the Board, that Section 50.47(d) of the regulations cannot now be met. By this ruling, Shoreham would not be eligible to operate at low power unless there were a fully approved and implemented offsite emergency plan.

DISCUSSION

The Commission's "as safe as" standard does not represent a casual formulation of words. Rather, as demonstrated by the precision of the Commission's May 16 Order,2/ the "as safe as" standard was a debated and deliberate requirement. The standard was adopted by the Commission in plain recognition that if operation at low power with the alternate AC power configuration were not as safe as operation with fully qualified diesels, then the rationale underlying Section 50.47(d) would not be present. Thus, there would be no basis for permitting low power operation of Shoreham without an approved offsite emergency plan.

2/ LILCO was directed to demonstrate "[i]ts 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 onsite AC power source." 19 NRC at 1155-56.

The Commission adopted Section 50.[illegible] in July 1982. See 47 Fed. Reg. 30,232 (1982). There were three bases stated for the Commission's decision to permit low power operation in the absence of an approved and implemented offsite emergency plan: (1) lower fission product inventory during low power operation; (2) reduction in the required capacity of systems designed to mitigate the consequences of accidents as compared to the required capacities at full power operation; and (3) more time available to react to a low power accident. Id. at 30,233. In considering LILCO's exemption proposal and, ultimately, establishing the "as safe as" standard, the Commissioners clearly were concerned that the second factor would be undermined if low power operation with the alternate AC power configuration were not in fact as safe as low power operation with a fully qualified emergency AC power system.

The Commissioners first expressed this concern at the Commission's April 23 meeting regarding Shoreham. At that meeting, the Commission discussed the Miller Board's intention to compare the safety of LILCO's proposed low power operation with the alternate AC power configuration, with the safety of full power operation with a fully qualified AC power system in ruling on LILCO's low power proposal. The Commissioners expressed concern that if a lesser degree of safety were permitted for low power operation of Shoreham with the alternate AC power configuration than is normally present during low power operation with a qualified emergency power system, (i.e., because the low power

risk was found to be the same as the full power risk), the rationale for Section 50.47(d) would be undercut because the assumption of a lower risk during low power operation would no longer be valid. See April 23 Transcript at 12-13, 30-32, 38, 44-45, 68 (Commissioner Gilinsky); id. at 12-13, 30-32, 38, 44-45, 51 (Commissioner Asselstine); id. at 13-14, 40-41, 51, 67 (Commissioner Bernthal). See also id. at 12-13, 38-40, 44-45 (Commission Staff comments); id. at 31-32, 51 (Chairman Palladino). But see id. at 45 (Roberts).3/ This concern was flatly stated by the Commission in its April 30 Order:

> The [Licensing] Board's [April 6] Order states that if public protection at low power operation without the diesel generators required for full power operation is equivalent to (or greater than) the protection afforded to the public at full power operation with such approved generators, then LILCO's motion for low power authorization should be granted. In these circumstances, what justification is there for waiving the emergency preparedness requirements applicable to full power operation?

NRC April 30 Order at 2.

The "as safe as" standard articulated in the Commission's May 16 Order was designed to address the Commission's concern that no GDC 17 exemption for low power operation have the effect

---

3/ The rationale for the Commissioners' concern was as follows: the capacity of mitigating systems such as emergency diesel generators ("EDGs") is sized for full power; at low power, fully qualified EDGs have over-capacity, thus compensating for lack of an approved offsite emergency plan; if there were no fully qualified EDGs and no alternate system just as safe as fully qualified EDGs, then there would be no compensation for lack of the offsite emergency plan and, thus, the basis for applying 10 C.F.R. § 50.47(d) would be lacking. E.g., April 23 Tr. at 44, 46-47.

of eliminating the basis for application of Section 50.47(d). For example, in discussing the "as safe as" standard, the General Counsel stated that the position of the Miller Board and the Staff prior to the May 16 Order -- that the level of safety for low power operation only need be equivalent to that associated with full power operation in full compliance with the regulations -- would have "obliterated the distinction between the safety risks at low power as opposed to full power, and thereby defeated the customary basis for defeating court injunctions against low power, and the basis for the rule requiring no finding regarding offsite emergency planning for low power." SECY-84-290A, July 24, 1984, at 16, n. 2. The General Counsel indicated that the "as safe as" standard was designed to avoid that result. Id. In the Commission's discussion of SECY-84-290A on July 25, the Commissioners appear to have agreed with the General Counsel.4/

4/ Although the transcript has a "disclaimer" concerning its citation, we bring the transcript to the Commission's attention as evidence of the Commission's conclusive intentions when it adopted the "as safe as" standard in CLI-84-8. The following discussion took place:

> MR. MALSCH: The Commission has in the past justified low power operating licenses on the ground that they present a level of risk which is substantially less than the level of risk associated with full power operation.
>
> And that, indeed, is a basis for exempting a number of full power licenses from certain requirements such as requirement for off-site emergency planning and other kinds of requirements. I know there wasn't any in the regulations.
>
> Now the concern in low power licensing cases is that if you simply adopt a no undue risk standard for low power licenses, then it becomes ambiguous

(footnote continued)

In sum, therefore, the "as safe as" standard clearly was established by the Commission with the view that this standard was necessary in order to preserve the applicability of 10 C.F.R. § 50.47(d). If the level of safety for low power operation of Shoreham were reduced under the alternate AC power configuration, the Commission believed that there would be no basis to permit

---

(footnote continued from previous page)

> as to whether the low power license you end up with is clearly less risky, substantially less risky, than full power, or not.
>
> And I think that led the Commission, in the interest of maintaining the argument that there was a substantially lesser level of risk associated with low power licenses and therefore maintaining the distinction in its regulations between requirements that apply to low power and requirements that apply to full power, that led the Commission, I think, to adopt the as-safe-as requirement.
>
> Now that doesn't mean, you know, substantially as-safe-as or as-safe-as something to diminuous variation might not do the trick.
>
> But I do think that to simply adopt a no undue risk argument does present this kind of difficulty for low power license.
>
> COMMISSIONER ASSELSTINE: You're exactly right. That was a key element in the Commission's discussion.
>
> COMMISSIONER BERNTHAL: In the end, that was precisely the standard that at least some of us, I think, applied in Grand Gulf.
>
> And in my judgment, for the sake of argument, you surely want to argue as-safe-as. That means there are compensating measures.
>
> Saying something is safe enough, that is, if there is the absence of any compensating measure, is a horse of a different color.

July 25 Discussion of Commission Practice in Granting Exemptions, at 48-51.

low power operation without an approved and implemented offsite emergency plan. Clearly, such result is mandated by Section 50.47(d) and the rationale underlying that section.

Nonetheless, the Miller Board went off in a different direction. The Board thus applied a "safe enough" rationale but still saw fit to reach the requisite "as safe as" conclusion. A review of the Miller Board Initial Decision and the evidence of record reveals that the "as safe as" finding conforms to the Commission's standard in semantics only. The Miller Board found that operation of Shoreham at low power with the alternate AC power system is less safe than operation with fully qualified diesels: "there is unquestionably a lesser margin of safety provided by LILCO's alternate power system." Decision at 24. Similarly, the Board found that "It is, of course, obvious that a fully qualified system would have an established and documented higher resistance to seismic events than does the system proposed by LILCO . . . ," (id., at 52), again establishing that operation with LILCO's alternate configuration inherently provides a lesser margin of safety. The Board also found that it is not significant that under LILCO's alternate configuration 30 minutes of the 55 minutes available to restore power before core damage results during low power operation (as opposed to 15 seconds) could be necessary before any power is available -- or before it is even known by plant personnel that power will not be available. See id. at 23-25. The Miller Board found further that evidence concerning the inferiority of the alternate

equipment proposed to be used by LILCO, and its vulnerability to single failures was "irrelevant." Id. at 51.

Clearly, the Miller Board used the Commission's words ("as safe as") in its conclusion, although the facts before the Board without question belie the suggestion that those words mean what the Commission intended. For example, the evidence before the Miller Board established that:

1. There is less redundancy and thus, a reduced margin of safety, with the alternate configuration because the alternate configuration contains only two power sources, whereas the qualified configuration contains three.

2. The alternate system's vulnerability to single failures, and its vulnerability to a common mode failure of the offsite system, represents a substantially reduced margin of safety as compared to a qualified system.

3. The vulnerability of the EMD diesel set -- one-half of the alternate system -- to disabling single failures makes the margin of safety and defense-in-depth approach substantially less than that available with three single failure proof power sources.

4. The reliance upon human operators to perform both properly and rapidly in the event of a station blackout, reduces the margin of safety from that available with a fully automatic emergency power system.

5. A reduced resistance to seismic events and a likelihood of failure in an SSE, means that there is a smaller margin of

safety of operation with the alternate configuration than with a seismically qualified system.

6. There is a substantial reduction in safety margins, as compared to those present with a fully qualified system, if necessary equipment, such as that in the alternate configuration, is vulnerable to fire which may not be detected or extinguished, and if information concerning the abnormal status of necessary equipment is not immediately available to the plant operators. See County/State November 29 Comments, at 28-30; County/State Proposed Findings of Fact and Conclusions of Law, dated August 31, 1984, and citations to the record contained therein.

Clearly, in the face of the Miller Board's conclusion (should it be approved by the Commission), and the admitted reduced margin of safety of LILCO's proposed low power operation as stated by the Miller Board and demonstrated by the facts in the record, 10 C.F.R. § 50.47(d) cannot be applied to Shoreham. Accordingly, if the Commission were now to approve the GDC 17 exemption (despite the gross errors perpetuated by the Miller Board during the exemption proceeding), the Commission would have to rule that Shoreham is ineligible for a low power license unless an offsite emergency plan is fully approved and implemented.

Respectfully submitted,

Martin Bradley Ashare
Suffolk County Department of Law
Veterans Memorial Highway
Hauppauge, New York 11788

Herbert H. Brown
Lawrence Coe Lanpher
Karla J. Letsche
KIRKPATRICK & LOCKHART
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

Attorneys for Suffolk County

Fabian G. Palomino
Special Counsel to the Governor
of the State of New York
Executive Chamber, Room 229
Capitol Building
Albany, New York 12224

Attorney for Mario M. Cuomo,
Governor of the State of New York

December 19, 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 SUFFOLK COUNTY AND STATE OF NEW YORK MOTION FOR COMMISSION DECLARATION THAT 10 C.F.R. § 50.47 (d) DOES NOT APPLY IN THIS CASE IF THE MILLER BOARD'S "AS SAFE AS" RULING IS APPROVED, dated December 19, 1984, have been served on the following this 20th day of December 1984 by U.S. mail, first class, except as otherwise indicated.

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

Edwin J. Reis, Esq. *
Bernard M. Bordenick, Esq.
Office of Exec. Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Honorable Peter Cohalan
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Fabian G. 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, Jr., Esq.
Robert M. Rolfe, Esq.
Hunton & Williams
707 East Main Street
Richmond, Virginia 23212

Mr. Martin Suubert
c/o Cong. 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

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

Nunzio J. Palladino, Chairman*
U.S. Nuclear Regulatory Commission
Room 1114
1717 H Street, N.W.
Washington, D.C. 20555

Commissioner Lando W. Zech, Jr.*
U.S. Nuclear Regulatory Commission
Room 1113
1717 H Street, N.W.
Washington, D.C. 20555

Commissioner James K. Asselstine*
U.S. Nuclear Regulatory Commission
Room 1136
1717 H Street, N.W.
Washington, D.C. 20555

Herzal Plaine, Esq.
U.S. Nuclear Regulatory Commission
10th Floor
1717 H Street, N.W.
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 Sta.
P.O. Box 618
North Country Road
Wading River, New York 11792

Jay Dunkleberger, Esq.
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Comm. Frederick M. Bernthal*
U.S. Nuclear Regulatory Comm.
Room 1156
1717 H Street, N.W.
Washington, D.C. 20555

Comm. Thomas M. Roberts*
U.S. Nuclear Regulatory Comm.
Room 1103
1717 H Street, N.W.
Washington, D.C. 20555

Stephen B. Latham, Esq.
John F. Shea, Esq.
Twomey, Latham and Shea
33 West Second Street
Riverhead, New York 11901

Lawrence Coe Lanpher

Lawrence Coe Lanpher
KIRKPATRICK & LOCKHART
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

DATE: December 19, 1984

---

* By Hand on 12/20/84
\# By Federal Express on 12/19/84