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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles
Howard A. Wilber

February 13, 1985

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In the Matter of)
)
LONG ISLAND LIGHTING COMPANY)
)
(Shoreham Nuclear Power Station,)
Unit 1))
_____)

Docket No. 50-322-OL-4
(Low Power)

ORDER

In a telephone conference yesterday afternoon,¹ intervenors Suffolk County and the State of New York sought reconsideration of our order entered earlier in the afternoon in which their motion for a stay pendente lite of the Licensing Board's October 29, 1984 initial decision² was summarily denied as untimely. Reconsideration is also denied.

Contrary to intervenors' assertion, we find nothing in CLI-84-8³ that could have been reasonably taken by them to have rendered inoperative in this instance the plain mandate

¹ Participating in the conference were counsel for Suffolk County (also apparently representing the State of New York), the applicant and the NRC staff.

² LBP-84-45, 20 NRC 1343.

³ 19 NRC 1154 (1984).

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of 10 CFR 2.788(a) that any application to an appeal board for a stay of a licensing board initial decision be filed within ten days after service of that decision. Insofar as here relevant, CLI-84-8 stated simply that any Licensing Board decision authorizing a grant to the applicant of an exemption from the General Design Criterion 17 requirements would not become effective until the Commission had conducted an immediate effectiveness review.⁴ As we explicitly determined in ALAB-787,⁵ issued prior to the Licensing Board's decision here, in taking this step the Commission had not affected to any extent the independent adjudicatory review authority conferred upon us by the Rules of Practice. An integral part of that authority is the consideration and disposition of timely applications under 10 CFR 2.788 for stays of initial decisions. In short, the fact that the Commission will conduct its own immediate effectiveness review of a particular Licensing Board decision has no bearing upon the ability of an appeal board to stay itself the effectiveness of that decision -- so long

⁴ Id. at 1156. The procedure for immediate effectiveness reviews of licensing board initial decisions is detailed in 10 C.F.R. 2.764. Normally, the Commission does not undertake such a review in an operating license proceeding unless the initial decision authorizes facility operation at greater than five percent of rated power. See 10 C.F.R. 2.764(f) (1).

⁵ 20 NRC 1097, 1100 (1984).

as the request for such relief is made within the period prescribed by Section 2.788(a).

Nor do we see any basis for the intervenors' reliance on the fact that the October 29 initial decision was rendered on an exemption application rather than directly on an application for a low-power or full-power license. Apart from the fact that the effect of the decision was to clear the path for a low-power license, Section 2.788(a) allows no such distinction: it applies in terms to all initial decisions that have possible operative effect.

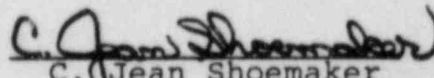
Finally, Section 2.788(a) cannot be read as providing that a new ten-day period for seeking stay relief from an appeal board is triggered by a Commission decision granting immediate effectiveness. And, as is illustrated by the circumstances of this case, there is good reason for not allowing a party to await Commission immediate effectiveness action before seeking Section 2.788 stay relief. Because the intervenors withheld their stay motion until after the Commission voted yesterday morning to grant immediate effectiveness to the October 29 decision, they were compelled to ask for action on the motion -- filed with us (and presumably served upon the other parties to the proceeding) at 3:00 p.m. -- by no later than 11:00 this

morning.⁶ Even allowing for our familiarity with the case stemming from the briefing and oral argument of the merits of intervenors' appeal from the October 29 decision, such a proposed decisional schedule scarcely left a decent interval for responses to the motion and then our own deliberations.

Although denying stay relief for the reasons assigned in this order and that entered yesterday, we are herewith directing the applicant to provide us (and the parties) with two business days advance notice of its intention to embark upon Phase III of its low-power testing program.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board

The dissenting opinion of Mr. Edles follows.

⁶ According to intervenors, this request was necessitated by the fact that the Commission had indicated that its determination would take effect at 5:00 p.m. today unless an emergency stay was sought from a federal court of appeals in the interim. Intervenors indicated that they had filed the stay motion with us in an endeavor to obviate the need for seeking judicial stay relief.

Opinion of Mr. Edles, dissenting:

I would grant a stay pendente lite of the Licensing Board's decision. I agree with my colleagues that the intervenors' request is untimely. In a more usual situation, I would join in their result. But we have already received briefs and heard oral argument on the merits of the intervenors' appeal. On fuller reflection, I now believe that the Licensing Board has probably erred in at least some respects and that such error requires a reversal of the Board's decision. I would not allow the decision to go into effect and the applicant to move to Phases III and IV of its low power operation, with the attendant contamination of the plant, until the problems with the Board's decision have been remedied. Irrespective of our ultimate collegial view of the merits of the appeal, we can promptly reach a decision and articulate at least a brief rationale. That being so, it seems pointless to me to require the parties and the Court of Appeals to go through the time and expense of judicial stay proceedings at this time.