LILCO, February 14, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Commission

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OFFICE OF SECRETARY
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In the Matter of)
)
LONG ISLAND LIGHTING COMPANY) Docket No. 50-322-OL-4
) (Low Power)
(Shoreham Nuclear Power Station,)
Unit 1))

LILCO'S MOTION FOR CLARIFICATION OF CLI-85-01

The Commission's February 12 Memorandum and Order in this matter, CLI-85-01, allowed the Atomic Safety and Licensing Board's Initial Decision of October 29, 1984 to become effective. Though cast in the limited terms of an immediate effectiveness review, that Memorandum and Order encompassed all of the major substantive areas of controversy in this exemption proceeding far more fully than in a typical immediate-effectiveness review. The Memorandum and Order articulated Commission law and policy on various areas central to the low power exemption proceeding. Nevertheless, the Memorandum and Order states, in the first paragraph of ¶ 6 that its "grant of the exemption, and authorization of Phases III and IV of low power testing, is entirely without prejudice to ongoing reviews and hearings related to low or full power authorization." (id. at 6). For the reasons outlined below, LILCO respectfully

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urges that the Commission clarify its Memorandum and Order so as to make clear that this statement was intended to avoid foreclosing the Appeal Board's review of the Licensing Board's determinations of fact and its application of Commission law and policy to them; but that the Commission did not intend that the Appeal Board's review of these matters proceed in artificial ignorance of actual expressions of Commission law and policy in CLI-85-01.

The pertinent regulation presumes that Commission immediate effectiveness determinations will be "entirely without prejudice" to subsequent reviews, either on motions for stay or appeals on the merits, by the Licensing Board and Appeal Board. 10 CFR § 2.764(g). Thus the Memorandum and Order merely followed this presumption. However, that same regulation provides that the Commission may give any degree of effect it desires to its immediate-effectiveness decisions in subsequent reviews by lower Boards if it "explicitly so directs in its immediate effectiveness determination." Id.[1/]

1/ The full text of § 2.764(g) is as follows:

> (g) Unless the Commission otherwise explicitly so directs in its immediate effectiveness determination, no comment made in the course of the opinion or statement reflecting that determination is to be given any weight by the Atomic Safety and Licensing Board or Appeal Board in its consideration of either a stay motion pursuant to § 2.788(e) or an appeal on the merits pursuant to §§ 2.762

(footnote continued)

The Commission has in this case a far more substantial immediate-effectiveness record than that presupposed by the regulations even for full-power reviews:[2/] those regulations authorize "brief comments" filed within 10 days of the Licensing Board's decision; the Commission may even omit comments; no mention at all is made of oral argument. § 2.764(f)(2)(ii). In this case, as the Commission well knows, two rounds of extensive written comments were tendered by the parties, on November 29, 1984 and January 7, 1985,[3/] plus numerous extramural briefs and affidavits.[4/] The Commission also held over two hours of oral arguments

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(footnote continued)

> and 2.785, or in any subsequent formal adjudication. The Commission's effectiveness determination is entirely without prejudice to such consideration in subsequent proceedings.

2/ The regulations do not even presume such review in decisions involving operation at 5% power or less. 10 CFR §§ 2.764(a), 2764(f)(2)(i).

3/ Pursuant to the Commission's direction, LILCO and the NRC Staff each limited their papers to 15 pages in length. Suffolk County and New York State combined their presentations in two filings 31 and 29 pages in length.

4/ "New York State and Suffolk County Supplementary Affidavit in Support of Comments Filed November 29 . . .," December 5, 1984; "LILCO's Objections to Suffolk County and State of New York Supplementary Affidavit and Affidavit of Alan M. Madsen," December 12, 1984; "New York State and Suffolk County Motion for Leave to Reply . . .," December 15, 1984; "Suffolk County and State of New York Motion for Commission Declaration that 10 CFR § 50.47(d) Does Not Apply . . .," December 19, 1984; "LILCO's Preliminary Response to Intervenors' Unauthorized December 19 Motion," December 31, 1984.

on February 8.- These papers and arguments were not restricted to the stay-type criteria typifying immediate effectiveness reviews and set forth in § 2.764(f)(2)(i).[5/] Rather, the arguments encompassed the full range of substantive issues raised in this vigorously contested exemption proceeding. Thus the Commission had specifically before it a far more comprehensive record, and conducted a far more extensive process, than that described by the immediate-effectiveness regulations. The result is that the Commission's immediate-effectiveness decision, expressed in CLI-85-01, is far more deeply rooted in the essence of this case than the typical immediate-effectiveness decision.

The intensity of the Commission's involvement in the Shoreham 5% power immediate-effectiveness review is particularly important given the numerous case-specific aspects of Commission law and policy initially set up by the Commission itself in May 1984 in CLI-84-8 (19 NRC 1154 (1984)), and interpreted and articulated in

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5/ Section 2.764(f)(2)(i) reads in pertinent part as follows:

> An operating license decision will be stayed by the Commission, insofar as it authorizes other than fuel loading and low power testing, if it determines that it is in the public interest to do so, based on a consideration of the gravity of the substantive issue, the likelihood that it has been resolved incorrectly below, the degree to which correct resolution of the issue would be prejudiced by the operation pending review, and other relevant public interest factors. (emphasis supplied).

this week's Memorandum and Order, CLI-85-01. Particularly with respect to the "as safe as" and public interest/balancing-of-equities tests set up by CLI-84-8 as a gloss on the standard exemptions provision, § 50.12(a), but in other respects also, the Commission's February 12 Memorandum and Order clarifies and illuminates its earlier standards. Lower Boards should not be artificially deprived of the guidance given by the Commission on these basic matters of law and policy. In short, the predominant issues before the Appeal Board involve interpretation of the Commission's language in CLI-84-8 and the application of CLI-83-17 to the exemption proceeding. The Appeal Board, charged with interpreting the Commission's intent as to these issues, should not have to proceed in ignorance of the Commission's recent expression of its intent and its interpretation of those decisions.

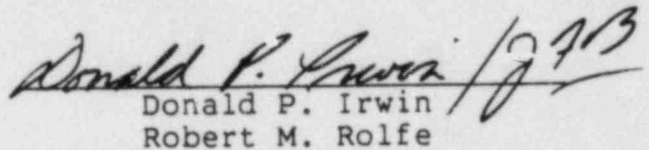
CONCLUSION

For the reasons stated above, LILCO moves that the Commission clarify the disclaimer in the first paragraph of ¶ 6 of CLI-85-01 (slip op.) to provide that (1) its judgments on the application of Commission law and policy to the facts of the low power decision are intended to be without prejudice to the Appeal Board's pending review of the Licensing Board's October 29, 1984 Initial Decision, and (2) the declarations of agency law and policy in CLI-85-01 are intended to be given deference and precedential effect by lower Boards as are any other such expressions by the Commission.

Since the Licensing Board's October 29 Initial Decision has been fully briefed and was argued to the Appeal Board this past Monday, February 11, and the Appeal Board has subsequently denied motions by Intervenors for a stay (Attachments 1 and 2 hereto), it may be presumed to be working on its decision on the merits at this point. So that the Commission's decision may be of practical value to the Appeal Board, we request that the Commission act on this motion as expeditiously as possible.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY



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DATED: February 14, 1985

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 12, 1985

In the Matter of	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-4
(Shoreham Nuclear Power Station, Unit 1)	)	(Low Power)

ORDER

Intervenors Suffolk County and the State of New York filed today a motion for a stay pendente lite of the Licensing Board's October 29, 1984 initial decision in the low power phase of this operating license proceeding.[1] The motion is summarily denied as untimely. The Commission's regulations explicitly require that any request for a stay pendente lite of a Licensing Board decision be filed "[w]ithin ten (10) days after service of [that] decision * * * ". 10 CFR 2.788(a). There is no explanation in intervenors' submission respecting why the present stay request was not filed within the period prescribed by Section 2.788(a). Intervenors do note that earlier today the Commission voted to accord immediate effectiveness to the October 29 initial decision. There is nothing in

[1] LBP-84-45, 20 NRC 1343.

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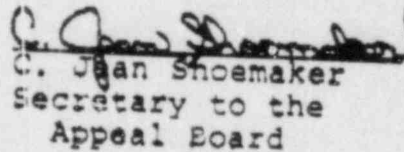
Section 2.788(a) to suggest, however, that that vote operated to start anew the running of the prescribed ten day period for filing a stay request.[2]

Needless to say, the denial of intervenors' motion should not be taken as implying any views on the merits of the issues presented by their pending appeal from the October 29 initial decision (which appeal has now been fully briefed and argued orally).

It is so ORDERED.

FOR THE APPEAL BOARD



C. Jean Shoemaker
Secretary to the
Appeal Board

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[2] Although it has no bearing on our action here, we note the representation of the intervenors that they are also seeking stay relief from the Commission.

Enclosure 2

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

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 decision[2] was summarily denied as untimely. Reconsideration is also _denied_.

Contrary to intervenors' assertion, we find nothing in CLI-84-8[3] that could have been reasonably taken by them to have rendered inoperative in this instance the plain mandate

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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

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[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.

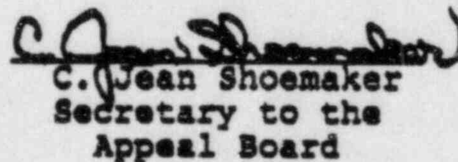
Finally, Section 2.788(a) cannot be read as providing that a new ten-day period for seeking stay relief from an appeal board is triggered by a Commission decision granting immediate effectiveness. And, as is illustrated by the circumstances of this case, there is good reason for not allowing a party 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
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Appeal Board

The dissenting opinion of Mr. Edles follows.

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[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.

CERTIFICATE OF SERVICE

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL-4 (Low Power)

I hereby certify that copies of LILCO'S MOTION FOR CLARIFICATION OF CLI-85-01 were served this date upon the following by U.S. mail, first-class, postage prepaid or by hand or telecopier (as indicated by one asterisk) or by Federal Express (as indicated by two asterisks).

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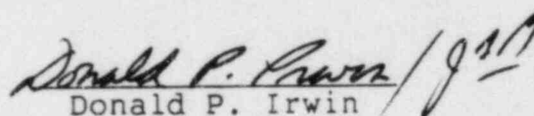

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DATED: February 14, 1985