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LILCO, November 8, 1984

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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))	

LILCO'S COMMENTS CONCERNING IMMEDIATE
EFFECTIVENESS OF LOW POWER INITIAL DECISION

On October 29, 1984, the Licensing Board issued its Initial Decision authorizing issuance of "a license or licenses to authorize low-power testing (up to 5% of rated power) of the Shoreham Nuclear Power Station, Unit 1." Initial Decision at 104. That Initial Decision followed nine days of exhaustive evidentiary hearings, six days of conferences with counsel and approximately 3,450 pages of transcript. The Initial Decision followed and re-affirmed the Licensing Board's September 5 Order Reconsidering Summary Disposition of Phase I and Phase II Low Power Testing (September 5 Order), which awaits this Commission's action, views having been filed on September 14 by all parties. Accordingly, the import of the Initial Decision is to authorize issuance of a license for Phases III and IV of LILCO's proposed low power testing.

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This matter is now before the Commission pursuant to its May 16 Order, CLI 84-8, 19 NRC 1154 (1984). Departing from the norm under its regulations, which require no immediate effectiveness review for a low power license, the Commission has ordered such an immediate effectiveness review here because an exemption is involved. Accordingly, LILCO files these comments pursuant to 10 CFR § 2.764(f)(2)(ii).¹

Because the purpose of an immediate effectiveness review is simply to "determine whether to stay the effectiveness of the decision," 10 CFR § 2.764(f)(2)(i), LILCO here addresses only considerations pertinent to that decision. They are specifically set forth in § 2.764 as follows:

¹ On October 31, 1984, two days after the issuance of the "Miller" Licensing Board's Low Power Initial Decision under review here, the Appeal Board issued its Decision on review of the "Brenner" Licensing Board's Partial Initial Decision on safety issues generally. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL, ALAB-788 (October 31, 1984). The Appeal Board Decision upheld the Brenner Licensing Board's decision on all issues except for three "relatively minor matters", which had not been fully resolved on the face of the record before it, and which it remanded to the Licensing Board, slip op. at 6: (1) operation of Shoreham pending resolution of Unresolved Safety Issue A-47, ALAB-788, slip op. at 6, 55-59; (2) certain housekeeping matters, id. at 6, 71-76; and (3) environmental qualification of electrical equipment, id. at 6, 98-105. The Brenner Licensing Board subsequently issued a bench ruling on November 2 and a confirmatory written order on November 5, 1984 (copies attached), requiring all parties to submit joint, or at least coordinated, reports to it as soon as possible and in any event by November 14, concerning disposition of these three issues. This paper does not address the effect, if any, of the three remanded issues on issuance of a low power license. As soon as the parties have made their views on these issues known to the Brenner Licensing Board, LILCO will seek leave to provide the Commission with its views on their effect, if any, on issuance of a low power license.

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 operation pending review, and other relevant public interest factors.

10 CFR § 2.764(f)(2)(i). These considerations do not warrant a stay.

II. NO STAY SHOULD BE GRANTED

A. The Gravity of the Substantive Issues Does Not Warrant a Stay

Virtually by definition the authorization of a low power license for Shoreham is not of sufficient gravity to support a stay. The Commission's regulations expressly exclude low power licenses from immediate effectiveness review. 10 CFR § 2.764. This exclusion reflects a generic judgment that such low power licenses need not be stayed.

The only reason an immediate effectiveness review was ordered here, presumably, is the involvement of an exemption request to allow low power testing to be conducted without the completed qualification of onsite diesel generators. Yet the Licensing Board has expressly found that there is no more risk to public health and safety from the proposed mode of low power testing than there would be with qualified onsite diesel generators. Indeed, with respect to Phases I and II, the Licensing Board has found

that there is no risk of harm at all since no AC power would be needed to mitigate any accident or transient.

B. There Is Little
Likelihood that the Appropriate
Issues Were Not Resolved Correctly Below

The Commission has been involved extensively in this exemption proceeding almost from its inception. Thus, there is little likelihood that the substantive issues surrounding the authorization for granting a low power license were not correctly resolved by the Licensing Board. Twice the Commission has set forth applicable guidance concerning the interpretation of its regulations. The Licensing Board has merely made factual findings within the parameters of that guidance.

On May 16, 1984, the Commission issued an Order establishing that LILCO must seek an exemption with respect to Phases III and IV of low power testing when diesel generators would ordinarily be used to provide sufficient core cooling and achieve the other functions specified in GDC 17. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154 (1984).² Having determined that an exemption request would be

² With respect to Phases I and II, the September 5 Order authorized a low power license because no AC power was needed to achieve the functions specified in GDC 17. That matter has been fully briefed by the parties and awaits this Commission's immediate effectiveness determination. Phases I and II, therefore, should not be confused with Phases III and IV in this immediate effectiveness review.

necessary, the Commission then described standards for evaluating that exemption request. Implicitly recognizing that common defense and security was not an issue, the May 16 Order gave guidance as to how the remaining aspects of 10 CFR § 50.12 ought to be applied. First, it recognized that LILCO intended to prove the absence of danger to life or property by establishing that its proposed mode of low power testing would be as safe as low power testing at a plant having qualified onsite diesel generators. Accordingly, the May 16 Order advised LILCO to address the "as safe as" standard. Second, the Commission addressed the public interest requirement, combined it with its own exigent circumstances requirement and set forth explicitly the factors which ought to be considered in determining whether such exigent circumstances existed as would warrant the granting of an exemption.

Finally, on July 18, 1984, the Commission gave further guidance with respect to security. The Commission held that "common defense and security" was not at issue, but that Intervenors ought to be afforded the opportunity to raise additional physical security concerns which might affect health and safety if those concerns pertained solely to the alternate AC power sources proposed for LILCO's low power operation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), Memorandum and Order, July 18, 1984 (unpublished). Thus, the Licensing Board was not left alone to wrestle with the meaning of the Commission's regulations. It had only to make factual findings pursuant to the guidance offered. After extensive hearings, it did so.

The Licensing Board applied the "as safe as" standard in accordance with the Staff's interpretation and common sense and found "that the enhanced system provides a comparable level of protection as a fully-qualified system would and thus meets the 'as safe as' standard set by the Commission in CLI-84-8." Initial Decision at 55. The Intervenor's sole factual contention with respect to "as safe as" was that each component of the alternate power system ought to be compared individually with the TDI diesels and subject individually to a single failure analysis. Quite properly, the Licensing Board responded:

Suffolk County's arguments would have us conduct a point-by-point comparison of Shoreham's emergency power configuration with TDI diesels and without them. "As safe as" cannot be based on such a point-by-point comparison of the components of systems. In comparing any roughly equivalent power systems, neither is required to be better than the other in every respect; even two "qualified" systems would not be identical in every respect. If LILCO's original and alternate emergency power systems were identical in every respect, there would be no need for an exemption. The purpose of these systems is to provide protection for public health and safety, by whatever combination of features they possess. Even the General Design Criteria themselves are premised upon the idea of what a system must be able to do, not upon whether one machine might be somewhat better than another.

Initial Decision at 25-26.

Similarly, with respect to exigent circumstances and public interest, the Licensing Board made extensive factual findings pursuant to the guidance in CLI-84-8. It found that the Shoreham plant has now been physically completed. That status, combined

with the extensive scrutiny to which this plant has been subjected in more than eight years of litigation before seven different licensing boards, weighs in favor of granting the exemption.³ Initial Decision at 59-60. The Board also found that financial hardships arose from having a physically completed, otherwise acceptable nuclear facility standing unused and nonproductive because of substantial licensing delays. Id. at 60-61. The Board further found that the licensing proceedings themselves have imposed unusually heavy financial and economic hardships upon LILCO. Id. at 62-63.

The Board next examined the regulations themselves and found them internally inconsistent in their application. Initial Decision at 63-66. The Board then found that LILCO had made a good faith effort to comply with GDC 17 and that LILCO intends to comply fully with the requirements of GDC 17 for full power operation. Id. at 67. Finally, the Board found no public interest in mechanical adherence to the regulations and no safety significance given its health and safety findings that operation as proposed by LILCO would be as safe as operation at low power with qualified onsite diesel generators. Id. at 68-70.

³ The Shoreham operating license proceeding before the NRC, in all its aspects (safety, emergency planning, low power, diesels), has now amassed 235 days of evidentiary hearings as of October 31, 1984. Shoreham's construction permit proceeding involved 70 days of proceedings before the AEC between 1970 and 1973, plus 22 days of related proceedings before the New York Department of Environmental Conservation, portions of which were incorporated into the AEC record to avoid duplication. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-73-13, 6 AEC 271, 274 (1973).

Given these extensive factual findings on each specific issue set forth by the Commission in CLI-84-8, the likelihood of error below is minimal. As importantly, given that the Board's decision, on its face, is consistent with the Commission's guidance, any error that may exist could only be demonstrated by an exhaustive review of the factual record. Clearly that is an inappropriate undertaking for an immediate effectiveness review.

Finally, security issues were considered extensively by the Licensing Board subsequent to the Commission's Memorandum and Order entered July 18, 1984. See Initial Decision at 17-21. In a 20-page order following conferences of counsel and extensive filings by the parties, the Board rejected the seven security contentions proffered by the Intervenors, both as a matter of law and because the proffered contentions failed to include reasonable specificity, despite the Intervenors' access to detailed security information for nearly two years. Id. at 20. Additionally, LILCO has voluntarily made certain low-power security enhancements, leading the Staff to indicate that its security concerns have been resolved. Id. at 21. Again, therefore, the Licensing Board has evaluated the record and has made findings. Unless the Commission is to set aside those findings and reevaluate a lengthy record, there is little likelihood that error will be found below during this immediate effectiveness review.

C. Even If Error
Existed in the Board's Factual
Determinations, Correct Resolution Would
Not Be Prejudiced by Operation Pending Review

The commencement of low power testing is not irreversible. It can be stopped at any time if the Commission were to find that the Licensing Board made improper factual findings concerning safety or exigent circumstances. In evaluating any prejudice from immediate effectiveness, the Commission should keep in mind that the Licensing Board found by summary disposition that there was no need for AC power for either Phases I or II of the proposed low power testing. Thus, the capacity of LILCO's AC power sources is totally irrelevant until Phases III and IV. When the time necessary to complete Phases I and II is combined with the two to three week lag between the granting of a license and fuel load, there is a substantial time period for any appeal to progress. Even should Phases III and IV be reached before any appeal may be decided, testing could be stopped at any time in the unlikely event that a decision adverse to LILCO warranted such action.

The Intervenors may again attempt to argue, as they have in their recent Request of Suffolk County and New York State to Present Written Briefs and Oral Arguments on the Licensing Board's Low Power Decision, that the effects of commencing low power testing are irreversible. Yet, as the Intervenors have conceded, there will be no such harm from Phases I and II. See Suffolk County and State of New York Views as to Why the ASLB's September 5 Order May

Not Serve as a Basis for a "Phase I and II" License (September 14, 1984), at 11. Second, and more importantly, this argument seeks to resurrect the Intervenor's old contention that no low power license should issue in the face of the uncertainty surrounding a full power license. This Commission has rejected that argument. The sole question now before the Commission is whether the exemption sought by LILCO was properly approved, thus permitting the early commencement of low power testing before completion of licensing proceedings concerning onsite diesel generators.

D. Other Public Interest Factors

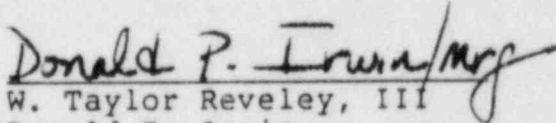
There are no appropriate public interest factors commending a stay of the Phases III and IV license pursuant to this immediate effectiveness review. Indeed, in addition to the unusual step of subjecting a low power license to an immediate effectiveness review, this situation is atypical in that the Licensing Board has already considered and evaluated public interest factors in deciding to recommend the grant of an exemption and authorize a low power license. Public interest and exigent circumstances are considerations evaluated by the Licensing Board pursuant to § 50.12(a) and CLI-84-8. Again, unless this Commission intends to duplicate the Licensing Board's factual finding process, there is no need to revisit public interest factors in this immediate effectiveness review.

IV. CONCLUSION

As a result of the extensive guidance given the Licensing Board by this Commission and the extensive factual findings and opportunity for argument before the Licensing Board, there is no basis in the record of the low power proceeding for a stay of the Initial Decision, and the Commission should declare the Initial Decision immediately effective upon resolution of issues, if any, deriving from the Appeal Board's decision and required to be resolved before fuel load.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

By 
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DATED: November 8, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence Brenner, Chairman
Dr. George A. Ferguson
Dr. Peter A. Morris

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

Docket No. 50-322-OL

November 5, 1984

ORDER CONFIRMING SCHEDULE FOR REPORTS FROM
THE PARTIES ON ISSUES REMANDED BY OCTOBER 31, 1984
APPEAL BOARD DECISION

On October 31, 1984, the Appeal Board issued its decision (ALAB-788) on the appeals from this Licensing Board's Partial Initial Decision of September 21, 1983, LBP-83-57, 18 NRC 445. The Appeal Board remanded for our further consideration issues related to three subjects: Unresolved safety issue A-47, known as "control system interactions" (slip op. at 55-59); quality assurance implementation of "housekeeping" requirements (slip op. at 75-76); identification of any equipment which would fall under section (b)(2) of 10 C.F.R. § 50.49, which governs environmental qualification of electrical equipment (slip op. at 104-106).

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On the record of the November 2, 1984 evidentiary hearing on diesel engine issues, the Licensing Board directed the parties which had actually participated in the litigation and appeal of the three remanded issues to file a joint report, or at least coordinated reports, on the status of the three issues, any further procedural and substantive actions deemed necessary to be accomplished by the parties among themselves or before the Board, and the effect of the three issues on issuance of a low power license. The report or reports were ordered to be received as soon as practicable, no later than November 14, 1984.

A copy of the pertinent transcript pages (25,682-84) is enclosed.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD


Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
November 5, 1984

Attachment: Transcript Pages 25,682-84.

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P R O C E E D I N G S

2 JUDGE BRENNER: Good morning.

3 We have two preliminary matters. One involves
4 the fact that as I told the parties from time to time in
5 other contexts, but perhaps it was mostly off the record and
6 I want to put it on the record so the parties could act if
7 they wished to on their own, the NRC has purchased the
8 transcript and is having it loaded onto a computer and of
9 course, as an NRC purchase, that is available to the
10 Licensing Boards, Staff, and all other entities of the
11 Commission. And we will be using it and I imagine the Staff
12 will be using it. It is a word search capability on a
13 computer.

14 I mention it because I understand that if any
15 other party wishes to pursue that that it would be feasible
16 for that party to do so through individual contracts with
17 the reporting service and other appropriate entities. Just
18 so the parties are aware of that possibility and can act or
19 not act on their own, I wanted to put that on the record.

20 Turning to more substantive matters, we have
21 received, through the courtesy of Staff Counsel this week,
22 the Appeal Board's decision which is a review of our
23 September 1983 partial initial decision in this matter. The
24 Appeal Board's decision is ALAE 788; dated October 31.

25 The Appeal Board remands three what it describes

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WRBeb 1 as relatively minor matters. The three matters involve,
2 one, unresolved safety issue A-47, sometimes referred to by
3 the shorthand "control system interactions," two, ^a matter
4 relating to the quality assurance implementation of
5 housekeeping requirements, and three, a matter related to
6 the identification of any electrical equipment requiring
7 environmental qualification under the subpart ~~3-2~~ ^{(b)(2)} of the
8 environmental qualification of electrical equipment rule,
9 which is 10 CFR Section 50.49.

10 We would like to schedule receiving joint or
11 simultaneous reports from the parties on the remanded
12 matters, and we want the parties to discuss the status of
13 this matters, obviously prior to being in a position to give
14 us joint or simultaneous reports.

15 We would schedule the receipt of the joint or
16 simultaneous reports -- are scheduling the receipt of those
17 reports for November 14th. If the parties can accelerate
18 that date we would appreciate it but in any event, a receipt
19 date of November 14th. If we are at the hearing, we want it
20 received at the hearing, and if we are not, we want it
21 received in our offices.

22 The three matters might call for different types
23 of responses, and we will let the parties deal with that in
24 the first instance. To the fullest extent feasible, we want
25 whatever we receive to include the reports from the Staff

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1 which are being required by that Appeal Board decision,
2 reports to us which the Appeal Board requires from the
3 Staff. And of course that would include a status report if
4 it is not feasible to give us the full report.

5 We also want included the joint and coordinated
6 views on the effect on issuance of a low power license, of
7 those issues in the particular context of the status of the
8 issues as the parties see it at the time they give us the
9 report.

10 As we see it, the participating parties in those
11 three remanded issues are the Staff, LILCO, and Suffolk
12 County, but if any party believes — if any of those three
13 parties believes any other party is involved in those
14 issues, given the participation in the appeal, we ask that
15 they alert that other party. The only possible other party,
16 which is not present here, would be the Shoreham Opponents
17 Coalition. But I have given our views on who we think the
18 participating parties are.

19 If I could, I guess I would ask the County for
20 the courtesy of informing Counsel for Shoreham Opponents
21 Coalition. I don't even know what their status is, frankly,
22 whether or not they are still an existing group or whether
23 or not they still have Counsel, but there was a Counsel of
24 record, ⁷ Mr. Daugherty, and if the County could inform him
25 of our remarks this morning I would appreciate that.

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)

DOCKETED
USNRC

I hereby certify that copies of LILCO'S COMMENTS CONCERNING IMMEDIATE EFFECTIVENESS OF LOW POWER INITIAL DECISION were served this date upon the following by U.S. mail, first-class, postage prepaid or by hand (as indicated by one asterisk) or by Federal Express (as indicated by two asterisks).

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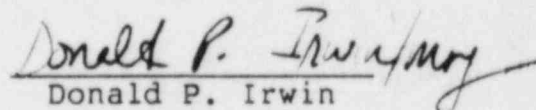
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DATED: November 8, 1984