086

LILCO, March 15, 1985

RELATED CORRESPONDENCE

DOCKETED
USNRC

'85 MAR 18 A10:29

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

LILCO'S REPLY TO STAFF AND INTERVENORS' RESPONSES TO THRESHOLD SAFEGUARDS QUESTIONS

On March 12, 1985, all parties filed responses to the Board's Threshold Safeguards Questions of March 5, 1985. LILCO replies here to the Suffolk County and State of New York Memorandum in Response to Issues Raised in ASLB Order dated March 5, 1985 (Intervenors' Response) and the NRC Staff Response to Threshold Safeguards Questions (Staff's Response).1/

LILCO believes that its March 12 Responses to Threshold Safeguards Questions (LILCO's Response) set forth LILCO's basic responses to the five Board inquiries and anticipated numerous of the arguments contained in the other parties' papers. Accordingly, LILCO will merely respond to various remaining arguments made by Intervenors and the Staff.

1/ Additionally, LILCO will today serve under separate cover in accordance with appropriate safeguards procedures an outline of its intended additional security measures for the EMD diesels and 20 MW gas turbine.

8503190027 850315
PDR ADOCK 05000322
Q PDR

D503

In general, as discussed more specifically below, LILCO does not believe that either the Staff's or the Intervenors' responses adequately account for (1) the Appeal Board's decision in Diablo Canyon clearly recognizing Part 73 compliance at low power based on security measures deemed inadequate for full power, Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant), ALAB-653, 16 NRC 55, 86-88 (1982); (2) the "carryover sentence" at pages 19-20 of ALAB-800 recognizing the potential for a lesser necessary level of protection of vital equipment at low power in view of the lower risks, and without any mention of need for an exemption; and (3) the Commission's instruction in its July 18, 1984 Order that any security contentions must relate to the overall level of plant safety as specified in CLI-84-8.

Question One:
The Legality of Option (5)

As discussed in LILCO's Response, Option (5) is not only legal, but is consistent with ALAB-800, the Diablo Canyon decision and the Commission's July 18 Order. No other party has harmonized these three directives.

Both Intervenors (and perhaps the Staff) apparently contend that the "equivalent level of protection" specified in § 73.55(a) refers to a mechanical comparison, component-by-component or vital area by vital area, against each of the cookbook elements in § 73.55(b)-(h). The difficulty with such a mechanical item-by-item comparison is that it proceeds in disregard of the basic

question -- that of the plant's overall level of protection of public health and safety during low power. Neither Intervenors nor the Staff attempt to reconcile their theories with the Appeal Board's Diablo Canyon opinion.[2/] Their failure to address Diablo Canyon can only be taken as recognition that their positions conflict with the express holding in Diablo Canyon.

There is no question that the Appeal Board in Diablo Canyon approved and applied a standard for security protection at low power different from that for full power. In pertinent part, the Appeal Board stated as follows:

> Presumably, the proposed fuel loading and low-power testing, if authorized by the Commission, may take place before January 1, 1982, the date by which applicant has committed itself to meet the full requirements of Appendix B. Therefore, the adequacy of security protection prior to that date could be called into question. (See p. 86, supra). We believe two observations are pertinent in regard to this matter.
>
> First, it appears that as long ago as November, 1980, the applicant was probably engaged in Appendix B training . . . .
>
> Second, the Licensing Board has found that "the risks from fuel load and low-power testing are considerably reduced from that of full-power operation of the Diablo Canyon reactors." LBP-81-21, supra, 14 NRC at 138. . . .

2/ The failure of Suffolk County to address the Diablo Canyon holding concerning guard training is all the more surprising considering the representation by Messrs. Brown and Lanpher, Suffolk County's counsel in this proceeding, of Governor Brown in the Diablo Canyon case. While Intervenors cite Diablo Canyon in their Response for other purposes, they completely ignore the one portion of the opinion directly pertinent to the Board's five questions. (Intervenors' Response at 9, 14 n.7, 15, 20 n.9, 25).

> In these circumstances, we find that the training level of the Diablo Canyon guard force (somewhere between that specified by Regulatory Guide 5:20 and that of Appendix B) is adequate to provide high assurance against acts of radiological sabotage during the period of fuel loading and low-power testing.

16 NRC at 87-88.[3/] The quoted analysis followed the Appeal Board's finding that the applicant's security plan training program was "inadequate to prepare the security force to meet the design basis threat." 16 NRC at 86. Given this decision, it is simply illogical to contend that the "equivalent protection" of § 73.55(a) requires equivalent levels of security for individual components of a security plan at low and full power, rather than equivalent protection for the plant and public overall.

Additionally, neither the Staff nor Intervenors account for the Commission's July 18 Order. As supplemented by CLI-85-01, that Order precluded litigation of security contentions unless the contentions impacted upon the safety analysis required in CLI-84-8. Thus contentions were to be admitted only if they questioned whether low power operation at Shoreham using a functional analysis would be as safe to the general public as low power operation at other plants with qualified diesel generators. In short, whether the 20 MW gas turbine lacks protection equivalent to

---

3/ Appendix B training is required by § 73.55(b)(4). Thus, Diablo Canyon clearly had no "equivalent protection" to that of adequately trained guards during low power testing if the Appeal Board had employed the mechanical item-by-item approach suggested by the Staff and Intervenors.

specific items in § 73(b)-(h) is irrelevant unless the absence of such protection functionally increases the public's risk of radiological exposure.

Both the Staff and Intervenors repeatedly cite the "equivalent protection" language of § 73.55(a). Nowhere, however, do they cite any source that interprets that phrase. The stated goal of § 73.55(a) is to ensure that the overall level of system performance provides protection against radiological sabotage. If the risk of radiological sabotage affecting public safety is functionally the same during the proposed low power operation at Shoreham as it would be with qualified diesels, the inquiry need go no further.

Acccordingly, merely labeling the EMD diesels and the 20 MW gas turbine as "vital" is not dispositive. If it were, the language at pages 19-20 of ALAB-800 would be superfluous. As noted in LILCO's earlier response, the Appeal Board discussed the potential for an exemption from Part 73 only in response to the Licensing Board's reasoning in its September 19 Order that the existence of an exemption request effectively mooted all inquiry into compliance with Part 73. ALAB-800 at 17 (slip op.). Once the Appeal Board made that point, it reverted to a discussion of how LILCO might comply with Part 73 given the facts that had already been developed in the low power record. ALAB-800 at 18-20. This discussion made absolutely no mention of an exemption from Part 73. Indeed, since that discussion is couched in terms of compliance

with Part 73, the need for an exemption was, by definition, excluded. In the paragrapn beginning on page 19, the Appeal Board suggested that LILCO might rely solely on the EMD diesels for safety purposes and, accordingly, simply protect them as vital. If the EMD diesels were the sole facility upon which LILCO relied, and if they were protected as vital equipment, surely there would be no need for an exemption. In this same paragraph the Appeal Board discussed the possibility of a combined level of protection for the gas turbine and the EMD diesels which might suffice for low power, even though deficient for full power operation -- again with no mention of an exemption from Part 73. The Intervenors' Response (page 16) does not discuss the context of this language; Intervenors summarily proclaim it "not pertinent." The Staff more honestly states that it does not understand what the Appeal Board was saying. (Staff Response at 7). The position of both Intervenors and the Staff with regard to this language is understandable since the language cannot be reconciled with their theories of the meaning of § 73.55(a).

Again, both Intervenors and the Staff overlook the need to focus on the functional level of protection in their assertion that language differences between 10 CFR § 50.47(c)(1) and § 73.55(a) differentiate the two regulations. They argue that § 50.47(c)(1) affords an applicant the opportunity to demonstrate that deficiencies in an emergency plan are not significant, while § 73.55(a) requires an equivalent level of protection. They

ignore, however, the further language in § 50.47(c)(1) that in order to demonstrate that deficiencies in an emergency plan are not significant, an applicant must demonstrate "adequate interim compensating actions [that] have been or will be taken promptly or that there are other compelling reasons to permit plant operation." It is difficult to conceive of a § 50.47(c)(1) showing that would not relate to an at least circumstantially equivalent level of protection for public health and safety. Indeed, "adequate interim compensating actions" clearly means actions, which, while not in compliance with the planning standards of § 50.47(b) (or the more detailed criteria of NUREG-0654), will protect the public. Similarly, § 73.55 requires an equivalent level of protection with reference to the overall ability of the system to protect against radiological sabotage. If the functional risk to public health and safety from such sabotage attempts does not increase, an equivalent level of protection is afforded, regardless of whether individual components of the plant's system have equivalent protection to that specified in § 73(b)-(h).

Finally, several observations are pertinent with respect to the Staff's discussion of Option (3) versus Option (5). First, LILCO would pursue Option (3) if the Board agrees with the Staff that it is a viable legal theory. The option should not be discarded merely because LILCO did not emphasize it. Second, and in the same vein, LILCO continues to believe that Option (3) and Option (5) present essentially the same factual questions. The

Staff says that protection of the 20 MW gas turbine is not essential to achieve "high assurance" of public protection against radiological sabotage and, therefore, the gas turbine need not be protected as vital equipment. Option (5) essentially says that it does not matter whether you call the 20 MW gas turbine "vital": the level of protection to be afforded it still depends on the overall performance objective of providing high assurance to the public against radiological sabotage and that level of protection can vary according to what is needed to assure public protection considering overall plant operation. In short, LILCO and the Staff agree on the factual premise; they would simply dress the analysis in different legal garb.

Accordingly, the question of Option (3) versus Option (5) need not be resolved now by the Board. It is important only that the Board rule that an exemption request is not necessary to go forward at this point. Under either Option (3) or Option (5), the factual presentation and issues will be essentially identical (except that Option 5 would require attention to the 20 MW turbine that might not be required by Option 3). Under either approach, the emphasis will be on the overall level of plant protection and its impact at low power on public safety.

Question Two:
<u>Necessity for an Exemption</u>

For reasons discussed above, LILCO does not agree with the Staff that if the gas turbine is "vital," LILCO must necessarily

either qualify it fully under § 73.55(b) through (h) or its equivalent, or seek an exemption. An evaluation still would have to be made of the overall level of protection afforded to the public by the functioning of the plant's security systems as a whole against radiological sabotage.

Nor does LILCO agree with Suffolk County's arguments that if an exemption is required, this proceeding will be broadened. A holding, based on a technical reading of § 73.55(a), that an exemption is required does not mean that the plant is more vulnerable to sabotage, as Intervenors suggest. Vulnerability to sabotage is irrelevant unless it impacts upon public safety. Thus, the fact that the gas turbine might be more subject to sabotage, for example, will have no impact on public safety if the EMD diesels are secure and only one power source is needed in the unlikely event of a LOCA. In short, no "broad and searching inquiry" will be automatically necessary. The emphasis should be solely on safety and the level of public protection. Any divergence between the nominal requirements of Part 73 and the security protection afforded the alternate AC power sources will be immaterial unless it affects the overall risk to the public health and safety.

Intervenors further assume that the carryover sentence on pages 19-20 of ALAB-800 refers to an exemption proceeding. As discussed above, there is no merit to this assumption and Intervenors fail to support their assumption with any discussion of ALAB-800.

Finally, Intervenors wrongly suggest that a separate exigent circumstances or public interest inquiry would have to be conducted if an exemption were required. The applicable public interest/exigent circumstances considerations identified by the Commission in CLI-84-8 and CLI-85-01 essentially reduce to two categories. First, and foremost, the public interest is concerned with safety. To the extent that there are any safety ramifications from the security measures to be implemented at low power by LILCO, they will be considered in judging the safety of operation. No separate public interest inquiry need be conducted concerning safety. Second, the question is whether it is in the public interest to allow low power testing at this time. This determination has already been made by the Licensing Board, the Appeal Board and the Commission. It need not be made again; the same considerations would apply. One cannot isolate any necessary Part 73 exemption from the overall goal of low power operation. A Part 73 exemption is merely a means to that end; it is that end which must be considered with respect to the public interest. That has already been done.

Question Three:
Practical Difference Between
Compliance and Exemption Proceedings

Most of Intervenors' and the Staff's comments concerning any practical difference between an exemption and a compliance proceeding have been addressed above. LILCO need make only two

further comments here. First, regardless of whether this is a compliance or an exemption proceeding, the standard will be whether the security measures to be implemented by LILCO during low power operation will render operation of the plant as safe at low power as operation of a plant with fully qualified diesel generators. Essentially, this is the standard contemplated by the July 18 Commission Order, ALAB-800 and Diablo Canyon.

Second, while LILCO may have the ultimate burden of proof on any issues to be litigated, Intervenors have the burden to formulate specific contentions. In short, there is a hurdle for Intervenors to clear before any litigation will take place. This hurdle exists regardless of whether this is a "compliance" or "exemption" proceeding. In the "compliance" mode, Intervenors clearly must proffer sufficiently specific contentions to warrant litigation. Duke Power Company (Catawba Station), ALAB-687, 16 NRC 460 (1982). If this proceeding requires an application for an exemption, the Licensing Board still has the authority to convene a prehearing conference at any time, at which it can require identification of key issues and take any steps necessary for further identification of issues. In such a conference, the Licensing Board can identify areas as to which there is no controversy in order to specify the issues to be litigated. Such a conference would also allow the Board to require Intervenors to specify any factual disagreements they may have with LILCO. Absent specific factual disagreements, matters would be ripe for summary

disposition. The end result, therefore, is the same. That is, Intervenors will have to specify particular factual areas for inquiry.

Question 4:
The Level of Risks

Again, the difference in safeguards risk has adequately been discussed above and in LILCO's initial Response. The only direct response to the Staff's and Intervenors' comments concerning the level of safeguards risk is that neither account for the Diablo Canyon decision. Diablo Canyon explicitly recognizes that the level of risks at low power is lower than at full power and, accordingly, the level of safeguards protections may be lower and still comply with Part 73. In short, the lower risk present at low power clearly impacts on the level of protection required under Part 73. Otherwise, the guards at Diablo Canyon would have had to have been fully trained to Part 73 full power standards prior to performance of low power testing at Diablo Canyon or an exemption would have had to have been sought. The Appeal Board there required neither.

Question Five:
Formulation of Contentions

With respect to formulation of contentions and narrowing of issues, several replies to Intervenors' Response are necessary.

First, LILCO does not agree that it need apply for an exemption. If an exemption application is required, however, the Licensing Board should nevertheless require a pretrial narrowing of issues. Absent such a narrowing of issues, this proceeding will become unnecessarily formless and protracted. Such freestyle litigation serves no purpose but delay.

Second, with service of LILCO's plans for additional protection for the EMD diesels and the 20 MW gas turbine, Intervenors will now have ample information to formulate contentions and narrow issues. Except for this additional information, Intervenors have had ample opportunity to formulate contentions for many months. Though Intervenors should be afforded time for discovery after the issues are narrowed at the threshold and any contentions admitted, that opportunity needed not be lengthy. Despite Intervenors' attempt to portray themselves as bereft of information, they have had access to the security plan for more than two years, have known about LILCO's proposed low power configuration for nearly one year and have known about the additional protection to be afforded the EMD diesels as reflected in Revision 9 to the Security Plan for four months. Equally important, Suffolk County has never availed itself of the opportunities under the Final Security Settlement Agreement to request additional information about low power security or to suggest changes in it. It should not be allowed to use its deliberate failure to invoke discovery opportunities to bootstrap its request for lengthy discovery in

this proceeding in the event any issues are admitted for litigation.

Third, LILCO does not agree that the time for judging the timeliness of any additional contentions begins today. As noted above, Intervenors have had substantial information for a long time. Unless their contentions relate specifically to the information being provided by LILCO today, or to information received since the filing of contentions rejected by the Licensing Board on September 19, those contentions should be barred as untimely. Moreover, the only contentions which should now be considered are those pertaining specifically to the need to make the EMD diesels or the 20 MW gas turbine vital. Contentions regarding the effect of the EMD diesels and the 20 MW gas turbine on the overall security plan at Shoreham were rejected by the Licensing Board in its September 19 Order as having insufficient specificity. Again, unless those contentions can be related specifically to the "vitality" of the gas turbine or EMD diesel generators, ALAB-800 does not require them to be reconsidered.[4/]

4/ Intervenors' Response at p. 30 says broadly that sufficient nexus has been shown between the rejected security contentions and the alternate AC power system. This argument overlooks the fact that those contentions were rejected in their entirety. Any new or refiled contentions must demonstrate sufficient nexus to comply with the July 18 Order and this Licensing Board must examine those contentions anew -- to the extent they pertain to the protection of the EMD diesels and the 20 MW gas turbine as vital equipment.

Lastly, Intervenors suggest that the formulation of contentions or narrowing of issues should await discovery and any other pretrial procedures. This suggestion is both inconsistent with Commission practice and illogical. With receipt of the additional information being sent today Intervenors now have full information about LILCO's security arrangements and special security measures to be implemented for low power operation. They should now be in a position to specify contentions, if any, for litigation. If there are none which can be framed with sufficient specificity and with reference to the July 18 Order, no further proceedings of this Licensing Board are necessary. LILCO and the Staff should not have to bear the delay and expense of discovery and further proceedings unless Intervenors can satisfy this initial burden.

Conclusion

LILCO reiterates its request that this Board hold that LILCO may proceed under 10 CFR § 73.55(a) without applying for an exemption and that it set a schedule affording the Intervenors an opportunity to file security contentions and for further proceedings, if necessary. LILCO suggests the following schedule:

Opinion on threshold safeguards questions:	Day 0
Filing of contentions by Intervenors:	Day 7
Responses by LILCO and Staff to proposed contentions:	Day 10

Hearing on contentions (if necessary):	Day 12
Board Decision on Contentions:	Day D+0
Discovery begins (if necessary):	Day D+0
Preliminary witness lists and proposed areas of testimony, contention by contention, from each party, to be modified later only upon a showing of good cause:	Day D+3
Discovery ends:	Day D+21 5/
Filing of testimony by all parties (if necessary):	Day D+28
Hearings begin (if necessary):	Day D+35

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

By _____
Donald P. Irwin
Robert M. Rolfe
Lewis F. Powell, III

Hunton & Willimas
P.O. Box 1535
Richmond, Virginia 23212

DATED: March 15, 1985

5/ Parties to respond to document production requests within 7 days. Parties to file document production requests in time to receive responses by close of discovery.

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 - Remand)

I hereby certify that copies of LILCO'S REPLY TO STAFF AND INTERVENORS' RESPONSES TO THRESHOLD SAFEGUARDS QUESTIONS were served this date upon the following by first-class mail, postage prepaid, or (as indicated by an asterisk) by hand, or (as indicated by two asterisks) by Federal Express:

Judge James L. Kelley,*
Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Fourth Floor
East-West Towers (West Tower)
4350 East-West Highway
Bethesda, MD 20814

Judge Glenn O. Bright*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Fourth Floor
East-West Towers (West Tower)
4350 East-West Highway
Bethesda, MD 20814

Judge Elizabeth B. Johnson**
Oak Ridge National Laboratory
P. O. Box X, Building 3500
Oak Ridge, Tennesee 37830

Edwin J. Reis, Esq.*
Bernard M. Bordenick, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Maryland National Bank Bldg.
7735 Old Georgetown Road
Bethesda, MD 20814

Herbert H. Brown, Esq.*
Alan R. Dynner, Esq.
Lawrence Coe Lanpher, Esq.
Kirkpatrick & Lockhart
1900 M Street, N.W.
8th Floor
Washington, D.C. 20036

Fabian G. Palomino, Esq.**
Special Counsel to the Governor
Governor's Office, 57th Floor
Two World Trade Center
New York, New York 10045

The Honorable Peter Cohalan
Suffolk County Executive
County Executive/Legislative Building
Veterans Memorial Highway
Hauppauge, New York 11788

James B. Dougherty, Esq.
3045 Porter Street
Washington, D.C. 20008

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

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

Mr. Martin Suubert
c/o Congressman William Carney
1113 Longworth House Office
Building
Washington, D.C. 20515

Docketing and Service
Branch (3)
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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

Donald P. Irwin

Hunton & Williams
P.O. Box 1535
Richmond, Virginia 23212

DATED: March 15, 1985