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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

BEFORE ADMINISTRATIVE JUDGES: '85 MAR 25 12:30

James L. Kelley, Chairman
Glenn O. Bright
Elizabeth B. Johnson

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SERVED MAR 25 1985

In the Matter of

LONG ISLAND LIGHTING COMPANY

Shoreham Nuclear Power Station,
Unit 1

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

ASLBP No. 77-347-01D-OL

March 22, 1985

MEMORANDUM AND ORDER
(Ruling on Threshold Safeguards Questions
and Establishing Partial Schedule)

Introduction. This Board's memorandum of March 5, 1985 posed a series of "threshold safeguards questions" to the parties. We have received responses and replies from LILCO, New York State and Suffolk County ("the County"), and the NRC Staff. These submissions state the arguments on the threshold issues and place the differences among the parties in clear focus. In the next section, the Board states its conclusions on the threshold issues in summary form. Thereafter, we comment on the more important reasons leading to our conclusions.

Conclusions on Threshold Questions.

1. Section 73.55 "equivalent" protection for low power operations.
LILCO is entitled to an opportunity to demonstrate under 10 CFR 73.55(a)

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(fourth sentence) that its proposed safeguards measures for the EMDs and GT have "the same high assurance objective" as specified in 10 CFR 73.55(a), and that the "overall level of system performance provides protection against radiological sabotage equivalent to that which would be provided" by section 73.55(b) - (h). In the alternative, LILCO may attempt to demonstrate that its safeguards measures, although not fully meeting the (b) - (h) standards (which assume full power operations), will nevertheless provide protection "equivalent" to those standards during low-power operations because the safeguards risks associated with low power are lower than those associated with full power. If the record supports findings that either demonstration has been made, LILCO will have shown compliance with 10 CFR 73.55 and, without any further showing, will be entitled to authorization of a low-power license.

2. Should the Board find that LILCO's proposed safeguards measures for the EMDs and GT do not provide "equivalent protection" for low power operating conditions, or should the record not support findings about such "equivalent protection," the Board may consider, in the alternative, whether LILCO's proposed safeguards measures justify an exemption under 10 CFR 73.5.

3. Scope of the exemption route. We cannot know at this point whether LILCO will succeed under paragraphs 1-2. Recognizing the realistic possibility that LILCO may eventually need to rely on an exemption, and wishing to avoid unnecessary duplication and delay, this proceeding should be structured at the outset to accommodate both the compliance and the exemption modes, to the extent practicable. (See

paragraph 5, below.) The central factual inquiry -- the extent of (1) safeguards protection afforded to the EMDs and GT, and (2) safeguards risks posed by low power operations -- will be identical, whether those issues are litigated in a "compliance" proceeding under section 73.55(a), or in an "exemption" proceeding under section 73.5. If we were writing on a clean slate, an exemption proceeding probably would be somewhat broader, because additional findings may be required under section 73.5 concerning safety and the "public interest." But our slate is not clean. Our earlier findings on "exigent circumstances" and the "public interest" for the Part 50 exemption (Initial Decision, at 1375-1382, 1401, ¶ 6.) may also be relevant to, or dispositive, of these factors in any LILCO request for a Part 73 exemption. We do not propose to relitigate those findings. Accordingly, our prior findings will be considered for the purpose of limiting or excluding a proposed contention on the same or an essentially similar subject.

4. Nature of safeguards and safety risks. The design basis safeguard threat is the same under low and full power operating conditions. The safety risks (excluding safeguards considerations) of low-power operations have already been established in the Initial Decision (at 1386, ¶ 23). The Board will hear argument from the parties on any proposed contentions alleging that safeguards risks at low power, under LILCO's safeguards measures, will be as great or greater than full power safeguards risks associated with a fully qualified emergency power source.

5. Standards for contentions. All proposed contentions based on presently available information, including contentions relevant only to an exemption request, shall be in the hands of the Board and parties by the due date below. This includes contentions previously proposed and rejected on the basis (at least in part) of our "vital equipment" ruling which was reversed in ALAB-800,¹ contentions based on information in Revision 9 of LILCO's security plan and on LILCO's filing of March 15, 1985, and any contentions based on the standards in section 73.5 (bearing in mind the effects of our prior findings, as discussed in paragraph 3, above). Contentions will be subject to the customary specificity and basis rules. In addition, contentions will be admissible only "(1) to the extent they arise from the changes in configuration of the emergency electrical power system and (2) to the extent they are applicable to low power operation." Contentions filed by the due date will be deemed timely and therefore will not be subject to the "five factors" balancing test under 10 CFR 2.714(a). Any contentions filed after that date, however, may be subject to the five factors test, even if they could not have been advanced earlier for lack of necessary information.

¹The contentions earlier rejected because of our "vital equipment" ruling may be resubmitted. However, the Board intends to allow de novo argument concerning other grounds for disallowing these contentions. Contentions previously denied admission on independent grounds will not be reconsidered.

6. Partial Schedule. The following schedule applies to the contention phase of this proceeding. The contentions, oppositions thereto, and replies shall be in the hands of the Board and Parties by c.o.b. of the due date.

	<u>Due Date</u>
Contentions	April 1, 1985
Oppositions to Contentions	April 8, 1985
Replies to Oppositions	April 12, 1985
Conference of Counsel for oral arguments and, possibly, on-the-record Board rulings on contentions; discussion of status of construction.	April 15, 1985

Promptly following rulings on contentions, the Board intends to adopt a tentative schedule for the remainder of the proceedings and then consider comments of the parties in finalizing a schedule.

Comments on Board Conclusions

In this section, we comment on the more significant reasons underlying our principal conclusions. The parties, particularly the County and LILCO, have briefed our "threshold questions" quite extensively, including some factors of secondary significance. While we appreciate such full briefing, we do not feel it necessary to respond in kind, given these narrow and largely interrelated issues. Furthermore, certain elements of our conclusions -- e.g. contentions must be specific -- are hornbook NRC law requiring no elaboration.

Narrowing of Options. Options 1 and 4 are eliminated from consideration for the reasons stated in our March 5, memorandum. The Staff continues to believe that Option 3 may be viable, but states that we need not reach that question unless LILCO chooses to pursue that option (Response, pp. 2-4). LILCO essentially agrees with the Staff on Option 3 (Reply, p. 8). The County apparently shares the Board's previously expressed doubts about the viability of Option 3 (Response at 3-5), which the Board continues to entertain. However, we agree that option 3 questions need not be resolved at this point, and they are left open. At least for now, we are focusing exclusively on legal questions presented by Options 5 and 2.

Section 73.55(a) "Equivalent" Safeguards Measures. The central legal question before the Board is whether LILCO may show compliance with 10 CFR 73.55 by showing something less than full compliance with subsections (b) - (h) for low power operations.²

LILCO asserts that it may prevail under 10 CFR § 73.55(a) even though the level of protection it proposes for the gas turbine may not be completely "equivalent" to the measures listed in sections 73.55(b) -

²Subsections 73.55(b)-(h) set forth enumerated, specific measures which must be taken to assure protection of vital equipment against sabotage. Very briefly, these regulations include requirements that Applicant have physical security organization including guards; physical barriers protecting vital equipment; limitation and control of access within specified areas; alarms and detection devices linked to a continuously manned central alarm station; guards equipped with a means of communicating with an alarm station; and a contingency plan in addition to the original safeguards plan.

(h). LILCO's argument rests principally on the premise that low power operation creates a smaller fission product inventory than full power, therefore safety risks are less, and therefore safeguards measures can be relaxed commensurately.

The County argues that, as a matter of law, if LILCO cannot meet all the requirements of 73.55(b)-(h) or comply with the standard of "equivalent" protection under 73.55(a), then the only alternative is an application for an exemption.

Staff takes a middle ground: LILCO should not be precluded as a matter of law from proceeding under 10 CFR 73.55, but it is skeptical whether, as a factual matter, the protection to be afforded the gas turbine can be shown to be sufficient.

The legal issue is debatable. The factors normally considered first -- language of the rule, its "legislative history", adjudicatory precedent -- do not yield a clear answer, as discussed below. In our judgment, the balance of relevant considerations, including common-sense practicalities favors our conclusion that LILCO should be given an opportunity to show that its safeguards measures are commensurate with low power risks.

The language of Part 73.55 does not explicitly provide separate standards for low power operations. Staff notes that "the regulations were not designed with low power operation in mind." Staff Response, p. 8. The County goes further, arguing that we should draw a negative inference from the lack of express provisions for the low power context. While this argument is entitled to some weight, it is certainly not dispositive. In at least one other context, low power

operations have been allowed to proceed with lesser safety measures on the basis of lesser associated risks, without express authorization in the rules. See e.g., Southern California Edison Co. (San Onofre Station), 15 NRC 61, 185 (1982).

Both LILCO and the County cite the legislative history of 73.55(a). LILCO Response, pp. 7-8. County/State Response, pp. 14-15. Each maintains that the legislative history bolsters its interpretation of the regulation. LILCO argues that the Commission intended a "common sense" meaning to be given to 73.55(a), providing for the evaluation of different protection than that specified under (b)-(h). The County states that the legislative history supports its position that the plain words of the fourth sentence in 73.55(a) permit compliance " only if the measures which are provided provide an equivalent level of protection." County Response at 14. We find the legislative history to be unenlightening.

Each party maintains that the Appeal Board's decision in ALAB-800 supports their arguments. The focus of disagreement focuses on language at the end of that decision (Slip op. pp. 19-20):

As an alternative, the Board might need to consider whether a level of protection for the temporary diesels and the gas turbine is adequate to satisfy the concerns for physical security of this equipment for low power testing, even though that level may be somewhat less than normally provided to vital equipment.

LILCO claims this language supports its position that lower safeguards risk justify lower required levels of protection in complying with Part 73. The County believes the quoted language was put forth

only in the context of an exemption, and argues that ALAB-800 mandates LILCO either to meet the standards set out in 73.55 completely, or to obtain an exemption. We share the Staff's difficulty in assessing the true import of this language. The Appeal Board probably did not have in mind the issues presently confronting this Board when that part of the decision was written. We surmise that the Appeal Board was raising the possibility that lower safety and safeguards risk levels may exist at low power, without reference to any particular procedural framework in which to consider the implications of such risks. As we read it, however, this most pertinent language from ALAB-800 supports LILCO more than the County.

LILCO cites the Appeal Board's 1982 decision in the Diablo Canyon operating license proceeding for the proposition that the Board may allow "a lesser level of protection at low power because of the lower risks." LILCO Response, at 11. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant), ALAB-653, 16 NRC 55, 86-88 (1982). The question presented in Diablo Canyon was whether the guard force was adequately trained to counter the postulated design basis threat. We recognize that this issue is not precisely the same as those that may arise here. However, the Appeal Board in Diablo Canyon did have to decide whether to grant a low power operating license in light of its finding that guard force training did not fully comply with Part 73 requirements. The decision is significant in its reasoning and supports LILCO.

As we have seen, the customary guides to a legal conclusion have produced a somewhat uncertain result. Therefore, we believe that allowing LILCO to at least try to show compliance with section 73.55 by its proposed measures is the most sensible thing to do. We know that safety risks are generally lower at low power, and therefore it seems logical that at least some safeguards risks may also prove to be lower. But given the unquantifiable nature of some aspects of safeguards risk, we expect LILCO may have some practical difficulties in meeting its burden of showing that its proposed safeguards measures are adequate.

Scope of the Exemption Mode. Obviously, it is open to LILCO to seek an exemption under section 73.5. The applicable standards are stated in general terms in that section. As the Board sees it, the central factual inquiry -- the extent to which safeguards risks are lower at low power and whether the safeguards protections proposed for the EMDs and GT are "equivalent" to the protections that would be afforded by full compliance with 73.55(b)-(b) at full power -- would be the same in the 73.55 compliance mode or the 73.5 exemption mode. The parties are divided as to what kinds of issues, in addition to that central inquiry, could be placed in issue in the exemption mode.

LILCO argues that the prior safety and "public interest" findings for the Part 50 exemption should apply equally to a Part 73 exemption, so that no further adjudication of such issues should be necessary (Response p. 16). The Staff appears to take a somewhat similar view, stating that, "in terms of factual issues . . . it probably would make little difference whether the proposal is addressed under Section 73.5

or Section 73.55." Response, p. 8. The Staff believes that our prior findings on "exigent circumstances" would apply to an exemption proceeding. It goes on to suggest that although it does not see any new "public interest" considerations, the State and County should have an opportunity in an exemption proceeding to attempt to raise any new considerations they deem relevant to physical security issues.

The County argues that the exemption mode is "necessarily broader" than a showing of compliance under section 73.55, but its argument depends partly upon the view, which we have rejected, that as a matter of law one cannot satisfy section 73.55 with safeguards measures that fall short of those required for full power operations. The County contends that "a broad inquiry into pertinent regulatory, policy and public safety factors is essential" in the exemption mode. The County appears to argue against any foreclosure of potential issues based on our prior findings, contending specifically that "the Board's prior ruling on exigent circumstances would not apply." Reply, p. 11.

The Board is taking a pragmatic approach to issues of scope in the exemption mode. On the one hand, we do not propose to relitigate factual issues that either were or could have been heard and decided last fall. On the other hand, it is not clear to us at this point that our prior findings under the Part 50 exemption necessarily cover the full range of safety and public interest issues that may be relevant to a Part 73 exemption. As suggested by the rather open-ended comments of the parties on this question, it is premature to decide scope questions on the present papers. These questions should be answered by rulings on

proposed contentions. The principal guidance we can provide at this juncture is that a proposed contention may be rejected if it was or could have been litigated in the Part 50 exemption proceeding.

Because we believe that much of LILCO's affirmative case would be the same under the 73.55 compliance mode or 73.5 exemption mode, we are requiring that all contentions under both modes be filed simultaneously at the outset (unless the parties stipulate to a different approach). In this manner, all contentions can be ruled on promptly and any necessary discovery can then proceed. We can then turn to summary disposition motions (if any) or a hearing on LILCO's compliance showing under section 73.55(a). Thereafter, based on a balancing of convenience and fairness to the parties and the state of the record, we might proceed to decision under section 73.55, hear the case for an exemption, or take other appropriate action.

We understand LILCO to be seeking timely authorization for low power operations in reliance on the EMDs and GT by any legal means available to it. In the circumstances, we do not agree with the County that "LILCO should not be permitted to proceed on two fronts" or that "to do so would create confusion and waste valuable resources," or that a separate "exemption application" needs to be filed. County Reply, pp. 17, 23. On the contrary, the apparent similarity of the issues under both modes and the Staff's skepticism about the viability of Option 5 (which we share to some extent) strongly indicate that we should proceed initially through contentions and discovery on "two fronts." If the Board and parties do a little more work now, we can

avoid having to start all over again on an "exemption" request should LILCO's attempt under section 73.55 fall short.

Nature of Safeguards and Safety Risks. All parties and the Board agree that the safeguards "design basis threat" under low and full power operating conditions is the same. LILCO Response, p. 17; Staff Response, p. 8; County Response, p. 25. We agree with LILCO and the Staff that the safety risks we previously found to be associated with low power operation (exclusive of safeguards considerations) -- most notably the smaller fission product inventory generated at low power -- will be applicable and should not be relitigated. LILCO argues that "the absolute level of security protection required to demonstrate compliance with § 73.55 at low power . . . is lower than that required to demonstrate compliance at full power." Responses, p. 19. As a very general proposition, that may be true, at least if one is considering only the smaller inventory of dangerous fission products in the core at low power. In any event, the burden will be on LILCO as part of its affirmative case to prove that to the extent its safeguards measures for the EMDs and GT do not meet the subsection (b)-(h) full power standards, they are nevertheless adequate to meet low power risk levels. In a sense, then, the "equivalent protection" requirement in section 73.55 serves the same function as a "contention" on which LILCO has the burden of proof when it elects to proceed under that provision.

For its part, the County suggests that low power safeguards risks are the same as at full power, and that they may even be higher. Response, p. 25. The possibility of certain higher safeguards risks are

outlined in an affidavit from certain County law enforcement officers which the County has submitted to Commission, with a copy to us. We, of course, do not reach the merits of the officers' positions at this state. It will be up to the County to formulate and propose specific contentions concerning any safeguards risks that are not fairly encompassed in LILCO's affirmative case. Such contentions as we admit will then be added to the burden of proof LILCO assumes by seeking to show compliance with section 73.55.

Contentions. The Board made clear in the March 5th Order its intent to require contentions, regardless of the format this proceeding may eventually take. In its March 15, 1985 Response, the Staff supports this view and sets forth reasons why contentions are necessary. Staff Response, pp. 1-2. We fully agree with the Staff on this point. Our directions on contentions in paragraph 5, above, are otherwise self-explanatory. The quoted Commission standard is from its unpublished Memorandum and Order of July 18, 1984, p. 3. The last sentence merely states the Commission's Catawba ruling, as it would apply to this proceeding. See Duke Power Co. (Catawba Station), 17 NRC 1041 (1983).

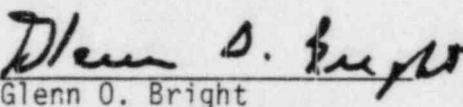
Any party may submit a brief (no more than six double-spaced pages) request for interpretation or clarification of the rulings in this Memorandum and Order no later than c.o.b. April 1, 1985. Any other party may respond briefly (no more than three double-spaced pages) to any such request by c.o.b. April 8, 1985. Requests and responses shall

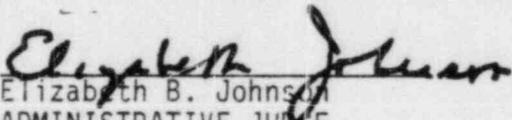
be in the hands of the Board and parties on those dates.

With a view toward establishing a further schedule, all parties should be prepared to discuss the status of construction and related matters at the April 15, 1985 conference of counsel.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD


James L. Kelley, Chairman
ADMINISTRATIVE JUDGE


Glenn O. Bright
ADMINISTRATIVE JUDGE *by gck*


Elizabeth B. Johnson
ADMINISTRATIVE JUDGE *by JHe*

Bethesda, Maryland
March 22, 1985