

ADS L.I. Shoreham

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August 23, 1984

The Honorable Nunzio J. Palladino  
Chairman  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dear Chairman Palladino:

In SECY-84-290 dated July 17, 1984, the NRC staff posed several questions with respect to the Commission's May 16, 1984, decision in the Shoreham case relating to the standards for exemptions under 10 CFR 50.12(a). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC \_\_\_\_\_, slip op. May 16, 1984). The Office of the General Counsel provided its recommendations on this issue on July 24, 1984, in SECY-84-290A entitled "Exemptions." During a public meeting on July 25, 1984, the Commission met to consider SECY-84-290. The staff observed in its paper that the Shoreham decision "establishes practices and requirements for licensing which differ significantly from prior regulatory interpretation and practice" and requested further guidance from the Commission in implementing the decision. SECY-84-290, p.1.

The Atomic Industrial Forum's Lawyers Committee has reviewed the SECY documents and the transcript of the public meeting, and offers the following comments on the Commission's guidance to the staff. The Committee supports fully the Commission's decision to clarify the limitations of the Shoreham case and to proceed expeditiously with a study of the exemption process. We offer below some suggestions for consideration in this future study.

The Commission Correctly Limited  
the Shoreham Case

The issue of the procedures and standards for granting exemptions from the requirements of NRC regulations arises in the context of Long Island Lighting Company's request for a low power operating license pursuant to 10 CFR 50.57(c) and the applicability of General Design Criterion 17 (Electric Power

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Systems) to such licenses. After briefing and oral arguments, the Commission ruled on May 16, 1984, that "10 CFR 50.57(c) should not be read to make General Design Criterion 17 inapplicable to low-power operation." Shoreham, CLI-84-8, slip op. at 1. In its decision, the Commission requested that the applicant address two "standards" in any request for an exemption under 10 CFR 50.12(a). (The applicant had already stated its intention to seek an exemption during the May 7, 1984, oral argument before the Commission). These standards were (Shoreham, CLI-84-8, slip op. at 2-3):

1. The "exigent circumstances" that favor the granting of an exemption under 10 C.F.R. 50.12(a) should [the applicant] be able to demonstrate that, in spite of its non-compliance with GDC 17, the health and safety of the public would be protected. (footnote omitted).
2. [The applicant's] basis for concluding that, at the power levels for which it seeks authorization to operate, operation would be as safe under the conditions proposed by it, as operation would have been with a fully qualified onsite A/C power source.

Some of the difficulties with the Commission's Shoreham decision have been described by the staff in SECY-84-290 and by the Office of General Counsel in SECY-84-290A. Briefly stated, the "exigent circumstances" and "as safe as" standards go far beyond the existing exemption standards found in 10 CFR 50.12(a) and appear to constitute a new set of rules for granting exemptions.

In addition, it is possible to interpret Shoreham in a way which upsets the licensing procedures which have been historically followed by the staff, procedures which are clearly authorized under existing regulations. See for example, 10 CFR 50.57(b), which provides that "[e]ach operating license will include appropriate provisions with respect to any uncompleted items of construction and such limitations or conditions as are required to assure that operation during the period of the completion of such items will not endanger public health and safety." A formal exemption under 10 CFR 50.12(a) need not be called into play where the subject of the request is a temporary non-compliance which the Applicant intends to cure at a later date respecting "any uncompleted items of construction."



Such a temporary non-compliance can and has been handled by the staff with appropriate license conditions and limitations which will not endanger public health and safety. See 10 CFR 50.36(c)(2). A different situation is presented where the applicant will never meet the General Design Criteria. There, a formal exemption process may well be required.

#### Suggestions for Future Consideration

In connection with the Commission's direction to its staff to study the exemption process, the Lawyers Committee suggests that the staff include four broad areas in its focus. First, the standards for granting exemptions should be clear and capable of practical application such that the staff can apply the standards to exemption requests with a reasonable degree of flexibility. It is especially necessary to retain flexibility in the licensing process given that strict compliance with some regulations may have an adverse effect on the integrity of some components. See discussion of Appendix J in the transcript of the July 25, 1984, public meeting, pages 32-36. At this time, we see no need to change the criteria listed in 10 CFR 50.12 or the procedures long followed by the staff. Years of staff experience have shown that the regulation and its implementation have worked well in a substantial number of cases.

The Commission may, however, in its study of the exemption process wish to make it clear that 50.12 provides for two different kinds of exemptions, each with its own standards. In contrast to CLI-84-8, previous Commission decisions have not merged the standards in 50.12(a) and (b), a fact which was recognized by the staff in SECY-84-290\*. It would be helpful for the Commission to state clearly that 50.12(b) is limited to certain activities undertaken prior to the award of a construction permit. The standard of 50.12(a) is to be used for all

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\*"The concept of 'exigent circumstance' had previously been considered a factor only in exemptions granted pursuant to 10 CFR 50.12(b), limited work authorizations." SECY-84-290, p. 3.



other exemption requests. Such a distinction is fully compatible with the standards set forth in 10 CFR 50.57(b) on limitations and conditions and with the Commission's statutory mandate.

Secondly, the effect of revision of the exemption process on other areas of licensing must be carefully considered. As noted in the analysis of the Office of General Counsel, the Sholly regulatory process may be affected. SECY-84-290A, p.21. The Sholly regulations are already a cumbersome process and must not be made more so by changes to the general exemption regulations. The staff should also consider possible effects on the integrated scheduling plans which have been adopted voluntarily by some operators.

Thirdly, the Lawyers Committee opposes the suggestion in the General Counsel's analysis that the Commission prohibit exemptions for operating reactors and treat non-compliance as a violation of Commission regulations. SECY-84-290A, p. 22-23. Therein it is suggested that any noncompliance would be the subject of enforcement action appropriate to the severity of the safety issue posed, including the necessity for plant shutdown. To the extent that the General Counsel is talking about exemptions from regulations, the concerns expressed in SECY-84-290A are misplaced because there are no Sholly problems. The staff can and should continue to process such exemptions under the exemptions procedures.

Inherent in the General Counsel's concept of "no exemptions" for operating reactors is the idea that the regulations of the Commission are so perfect and the vision in adopting such regulations so all encompassing that there can never be a circumstance not covered by the regulations. With more than eighty reactors currently licensed for operation in multiple locations and with a multiplicity of design features, it is difficult to accept such an underlying rationale. Clearly, the Commission must have the flexibility to consider and grant exemptions for operating reactors where circumstances warrant. Otherwise the regulatory process becomes muscle-bound and self-defeating.

In those cases where an exemption would require alteration of a license condition (which we believe are few in number), the Forum's Lawyers Committee is opposed to the General Counsel's

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suggestion for several reasons. The willingness of the Commission to entertain exemptions on an open public record for good reason and under appropriate circumstances is an invitation to improve safety by technical innovation. Continuing efforts by the Commission and the private sector in safety research will quickly die if a message of absolutely "no exemptions" is adopted. The Commission should address directly the question of revision of the exemption process rather than use an approach which resembles back door regulation.

Finally, we believe that the Commission's action at its July 25 public meeting confirms that no new exemption policy was created by the Shoreham decision. While the Commission may have the authority to make new policy in the context of an adjudicatory proceeding, we urge the Commission to proceed on a generic rather than plant specific basis.

Sincerely,

A handwritten signature in cursive script that reads "Barton Z. Cowan".

Barton Z. Cowan  
Chairman, AIF Lawyers Committee

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cc: Commissioner James K. Asselstine  
Commissioner Thomas M. Roberts  
Commissioner Frederick Bernthal  
Commissioner Lando Zech, Jr.  
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September 10, 1984

The Honorable Nunzio J. Palladino  
Chairman  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dear Chairman Palladino:

On May 16, 1984 the Commission issued an order in the Shoreham proceeding which has subsequently created some confusion within the NRC and the nuclear industry with respect to the NRC's 10 C.F.R. § 50.12 exemption process. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC \_\_\_\_\_ (slip op., May 16, 1984). On behalf of Duke Power Company, we respectfully submit our comments on the exemption process in light of the Shoreham decision and subsequent discussions.<sup>1/</sup>

The NRC Staff, as reflected in SECY-84-290, "Need and Standard for Exemptions" (July 17, 1984), initially interpreted CLI-84-8 to alter broadly the NRC's § 50.12 exemption process. In our opinion, there is no reason the Staff's past exemption practice should be altered by either the Shoreham decision or through changes to the exemption regulation. The Staff in the past has recognized the need for flexibility in the regulatory process. This flexibility would not be possible if the Commission were to adopt a rigid exemption approach such as is implied by Shoreham. We recognize that the Commission has already voted to limit CLI-84-8 to the Shoreham facts. However, as discussed below, it is not entirely clear that the Staff has done this. Moreover, we offer our comments in view of the Commission's announced intent to reevaluate the exemption regulation.

1. Background

To justify an exemption from GDC 17 for low power operation in Shoreham, the Commission stated that the applicant should show (1) the "exigent circumstances" that favor the granting of an exemption under § 50.12(a), and (2) the basis for concluding that, at low power, operation would be "as safe" under the

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<sup>1/</sup>Arkansas Power and Light Company, Mississippi Power and Light Company, and New York Power Authority also subscribe to these comments.

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conditions proposed as it would be with full compliance with the GDC. Shoreham, CLI-84-8, slip op. at 2-3. This decision appeared to both raise the threshold for the grant of § 50.12 exemptions and to increase the number of situations in which requests are necessary. In fact, the NRC Staff did so interpret Shoreham in a number of cases. For example, prior to issuing a license for fuel load for Duke's Catawba plant, the Staff required Duke either to demonstrate compliance with each regulatory requirement for a full power operating license or to request a specific exemption from such requirement.

At the request of the NRC Staff, a public Commission meeting was held on July 25, 1984 at which the Staff sought clarification of the exemption requirements in view of the Shoreham order. See SECY-84-290. This meeting was a positive step toward eliminating the unnecessary confusion caused by Shoreham. By a four-to-one vote the Commission decided that the Staff should limit CLI-84-8 to the facts of that case and continue to follow its past practice with respect to exemption requests. The effect of that direction to the Staff is to return the standard for the grant of an exemption to "no undue risk" and "good cause". Similarly, former Staff practice of utilizing license conditions rather than explicit exemption requests should be reinstated. It is not clear, however, that the Staff has in fact returned to its prior practice in this latter regard.

In addition, the Commission at the July 25 meeting agreed to undertake a long term evaluation of the entire exemption process and directed that the Staff prepare a discussion paper within 30 days. The Commission also requested a short staff response in 7 days to proposals by Commissioner Asselstine which in effect would apply and amplify the Shoreham tests for exemptions in all cases. Because we consider this to be a significant issue, we urge consideration of our comments. We have reviewed the Staff's 7-day response related to Commissioner Asselstine's proposals dated August 2, 1984. Our comments on the proposals and the Staff's August 2 response are included herein.

## 2. The Standards to be Applied to Exemption Requests

We begin by addressing the standards by which exemption requests will be evaluated, because it is in this context that the Shoreham decision has the greatest implications. In CLI-84-8 the Commission required that LILCO, in a request for an exemption from GDC 17 under § 50.12(a), address (as LILCO proposed):

1. The "exigent circumstances" that favor the granting of an exemption under 10 C.F.R. 50.12(a) should it be able to demonstrate that, in spite of its non-compliance with GDC 17, the health and safety of the public would be protected. [Footnote omitted.]

2. Its basis for concluding that, at the power levels for which it seeks authorization to operate, operation would be as safe under the conditions proposed by it, as operation would have been with a fully qualified on-site A/C power source.

Shoreham, CLI-84-8, slip op. at 2-3. As pointed out by the Staff in SECY-84-290, these standards exceed by a substantial margin prior requirements for exemption requests. We, however, perceive no reason for an alteration of the prior Staff standards. The Commission was correct in its July 25th decision to limit applicability of CLI-84-8 to Shoreham. In considering the future of the exemption process, however, we wish to emphasize several points.

a. Exigent Circumstances

First, "exigent circumstances" should not be a necessary component of the showing required for a § 50.12(a) exemption. Exigent circumstances have been and should be required only for § 50.12(b) exemptions related to construction activities which precede issuance of a construction permit. Such an "exigency" test cannot by definition be met in many instances during the operating life of a plant where exemptions are sought on an interim schedular basis rather than a permanent technical basis. A request from an applicant or a licensee for an interim (schedular) exemption can be premised only on economic or logistical arguments and the lack of safety significance of compliance with the regulation for the particular short term situation. Exigent circumstances, as understood for example in the context of the Sholly regulations, may not exist. The Commission must recognize this, and its system must be able to distinguish between these matters. Application of the Shoreham § 50.12 "exigent circumstances" standard fails to do so.

The Commission, in Shoreham, did allude to an appropriate standard for § 50.12(a) exemptions:

The Commission regards the use of the exemption authority under 10 C.F.R. 50.12 as extraordinary. This method of relief has previously been made available by the Commission only in the presence of exceptional circumstances. See, United States Department of Energy, et al. (Clinch River Breeder Reactor Plant), CLI-83-1, 17 NRC 1, 4-6 and cases cited therein (1983). A finding of exceptional circumstances is a discretionary administrative finding which governs the availability of an exemption. A reasoned exercise of such discretion should take into account the equities of each situation. The

equities include the stage of the facility's life, any financial or economic hardships, any internal inconsistencies in the regulation, the applicant's good-faith effort to comply with the regulation from which an exemption is sought, the public interest in adherence to the Commission's regulations, and the safety significance of the issues involved.

Of course, these equities do not apply to the requisite findings on public health and safety and common defense and security.

Shoreham, CLI-84-8, slip op. at 2-3, fn. 3. This Commission footnote stresses that in judging an exemption request, a balancing of all of the equities of each situation is appropriate. This standard allows the Commission necessary flexibility in applying the exemption standard and is consistent with the wide discretion allowed the Commission by law in evaluating exemption requests as stressed by the Office of General Counsel in SECY-84-290A. Without adding excess language to the exemption regulation, this balancing concept can be established by use of a "good cause" test rather than an "exigency" test.

The NRC has appropriately applied equitable standards in other contexts. For example, 10 C.F.R. § 2.788 governing requests for stays pending intra-agency review, adopts the equitable balancing test of Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). The presiding officer is granted the discretion to weigh the arguments on a case-by-case basis in order to determine where the equities of the situation lie. See e.g., Portland General Electric Co. (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, 69 (1979). Similarly, a flexible test for "good cause" is used in ruling on petitions for late intervention in licensing proceedings. 10 C.F.R. § 2.714(a)(1). What constitutes good cause in any given case will depend directly upon the facts and equities of that case. See e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 396-99 (1983). There is no reason a similar equitable test cannot be applied by the Staff in evaluating exemption requests under § 50.12 (a).

b. As Safe As

Our second point related to exemption standards is that the Staff's traditional standard for exemptions, requiring a showing of "no undue risk", is appropriate and should be continued. It can be applied without modification to both interim (scheduler) and life-of-plant (technical) exemption requests. It correctly allows for an evaluation of overall plant conditions that will exist during the time the exemption will be in effect. This

evaluation includes a review of the purpose of the regulation, the extent to which alternative measures or compensatory measures achieve that purpose, operating conditions (e.g., power level), and the length of time for which the exemption will be needed. Such a standard provides the Staff with necessary regulatory flexibility to effectively deal with the technical merits of each exemption request. Such a standard would also minimize Staff interpretive difficulties because the Staff has been applying the standard for a long time and can draw from its exemption experience.

The Commissioners discussed modifications to the Shoreham "as safe as" standard at the July 25th meeting. These modifications are apparently intended to eliminate the problems created by the Shoreham standard which never existed with the "no undue risk" standard. This strikes us as traveling a rather roundabout route only to return to the start. For example, the Commission considered recognizing a "de minimis" concept in the standard, or to make it a "substantially as safe as" test. The Commission therein correctly recognizes that the "as safe as" test was overly stringent and could not be met for many exemption requests (especially schedular but also full-term ones). However, such a problem never existed under a "no undue risk" standard. We believe that the existing "no undue risk" standard is appropriate and urge that it be continued.

### 3. The Situations in Which Exemptions are Required

As an outgrowth of the Shoreham decision, the Commission also appeared to be reevaluating the types of situations in which the exemption process would be invoked. The Staff originally interpreted CLI-84-8, as expressed in SECY-84-290, to require explicit exemptions in many cases where traditionally license conditions or technical specifications with limiting conditions on operation have sufficed. For example, the Staff's interpretation would require an exemption request if spent fuel pool cooling will not be available until the first refueling outage. The rigid interpretation ignores the technical reality that there is no need for the spent fuel pool cooling until after the first cycle of operation. The Staff, in its more flexible prior practice, would have handled this situation with a license condition that pool cooling be available by the first refueling outage. We believe the rigid Shoreham interpretation of the exemption process is improper, and that in considering the future of the exemption process the Commission should address the scope of that process as well as the standards to be applied.

In this context we again do not see any compelling need to change the prior Staff practice. The Commission appears to regard exemptions as extraordinary measures justified only in exceptional circumstances. United States Department of Energy, et al. (Clinch River Breeder Reactor Plant), CLI-83-1, 17 NRC 1, 4-6; Long Island Lighting Co. (Shoreham Nuclear Power Station,

Unit 1), CLI-84-8, 19 NRC \_\_\_\_\_, slip op. at 2-3, fn. 3 (May 16, 1984). However, such will not be the case if the Shoreham approach as originally interpreted by the NRC Staff is followed. Under that approach explicit exemptions are required to justify short-term (scheduler) exemptions for both near term operating license (NTOL) facilities and operating plants.

a. NTOL Facilities

Routinely, under prior practice, license conditions would be required instead of exemptions to allow an NTOL to receive a low power license. The license conditions schedule full regulatory compliance at some later time consistent with public health and safety. Although not reviewed under the § 50.12 process, the Staff applies a standard equivalent to the "no undue risk" test discussed above. Therefore, this approach provides the same level of public protection as an exemption approach, is more flexible, and allows for full consideration of the technical realities of short term operation.

Many of the instances in which the NRC Staff has been requiring requests for exemptions since CLI-84-8 and since the July 25th meeting involve Staff interpretations of Appendices to Part 50 (often quite recently changed interpretations). Some of the provisions in Appendices to Part 50 were originally intended to serve as guidance documents rather than hard and fast requirements, or to be interpreted in construction permits as design objectives and not as prerequisites to 10 C.F.R. § 50.57 findings. Where compliance with a regulation or GDC for low power operation makes no technical sense, or presents no undue risk, an exemption request should not be necessary. A license condition approach prevents unnecessary exemption paperwork and potential licensing delays, and appropriately reserves the exemption process for extraordinary cases.

b. Operating Reactors

Perhaps in recognition of the fact that interim schedule exemptions for operating plants could not meet the Shoreham exemption standard, the Commission, at the July 25th meeting, discussed the idea of eliminating such scheduler exemptions for operating reactors from the § 50.12 process. The Office of General Counsel (OGC) proposed instead that violations of schedule requirements be treated as enforcement matters. Under this scheme, a notice of violation would issue for a failure to meet the schedule, and appropriate enforcement actions would follow depending upon the safety significance of the violation. SECY-84-290A, at 20-23, 27.

We believe the OGC approach is undesirable. For the reasons discussed above, we agree that interim scheduler exemptions should not be held to a standard higher than the present "no undue risk" standard. However, this reason alone does not

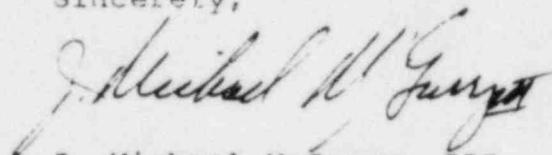
justify creating an awkward exception to the exemption process. The OGC approach presents a rather peculiar, indirect means for licensees to obtain necessary and often relatively routine interim extensions of time for compliance with regulatory requirements. Consider, for example, a case in which a periodic offsite emergency planning exercise must be held a month or two late because a state or local government cannot participate until that time. Initiation of enforcement action and a decision not to prosecute or to issue a pro forma notice of violation would be an inefficient, after-the-fact, process for granting what is in effect an exemption.

Such notices of violation may also have financial and public relations implications for nuclear utilities. The violations may be subject to financial reporting obligations and may create an unwarranted perception of high investment risk in the financial community. In terms of the public perceptions, the OGC approach would have the further disadvantage of turning routine matters, where no undue safety risk is involved, into enforcement matters which by their very nature cast the licensee under the cloud of an appearance of guilt.

#### 4. Conclusion

In conclusion, we believe that the Commission should re-examine and clarify the complete exemption process in light of the Shoreham decision. The Commission should reaffirm the Staff's existing, clear standard for both short-term (scheduler) and long-term (technical) exemption requests. Further, the Commission should not expand the process to include situations presently handled by license conditions. Nevertheless, if the exemption process is altered, it should include standards that are clear and consistently applied to all exemption requests, and a format that does not create unnecessary enforcement action.

Sincerely,



J. Michael McGarry, III

cc: Commissioner James K. Asselstine  
Commissioner Thomas M. Roberts  
Commissioner Frederick Bernthal  
Commissioner Lando Zech, Jr.  
Mr. William Dircks, Executive Director for Operations  
Mr. Guy Cunningham, Executive Legal Director  
Mr. Hertzell Plaine, General Counsel