UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

SERVED JUN 19 1985

Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles
Howard A. Wilber

June 19, 1985
(ALAB-810)

DOCKETED USNRC

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

Herbert H. Brown, Lawrence Coe Lanpher and Karla J. Letsche, Washington, D.C., for the intervenor Suffolk County.

Fabian G. Palomino, Albany, New York, for the intervenor State of New York.

Donald P. Irwin and Robert M. Rolfe, Richmond, Virginia, for the applicant Long Island Lighting Company.

Robert G. Perlis for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

Before us is the joint motion of intervenors Suffolk County and the State of New York for a stay pendente lite of the effectiveness of the Licensing Board's June 14, 1985 partial initial decision in this operating license proceeding involving the Shoreham nuclear facility.[1] In that decision, the Board addressed the issue of whether the

[1] See LBP-85-18, 21 NRC ___.

Transamerica Delaval (TDI) diesel generators now installed at the facility can be relied upon to satisfy the regulatory requirement of an onsite alternating current electric power system meeting certain standards.[2] Subject to several qualifications, the Licensing Board answered this question affirmatively. Accordingly, it authorized the Director of Nuclear Reactor Regulation to permit the facility to operate at levels up to five percent of rated power.[3]

Upon the receipt of the intervenors' motion, the Board Chairman entered an ex parte stay to preserve the status quo pending the consideration of the motion following the filing of the responses of the other parties.[4] Those responses are now in hand. Both the applicant and the NRC staff oppose the relief requested.

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[2] That requirement is contained in General Design Criterion (GDC) 17, 10 C.F.R. Part 50, Appendix A.

[3] LBP-85-18, 21 NRC at ___ (slip opinion at 116). As matters now stand, the Shoreham facility has an authorization that extends only to fuel loading, precriticality testing, and cold criticality testing. See CLI-84-21, 20 NRC 1437 (1984). These activities have been uniformly referred to in this proceeding as Phases I and II of low-power operation. The June 14 decision authorized Phases III and IV of such operation.

[4] See order of June 17, 1985 (unpublished), entered by the Board Chairman, in the absence of a quorum, under the authority of 10 C.F.R. 2.787(b)(1). That order also provided that the responses to the stay motion were to be in the hands of the Board by this morning.

As required by 10 CFR 2.788(e), we have assessed the intervenors' claims of entitlement to a stay in the context of the four familiar criteria:

> (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
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> (2) Whether the party will be irreparably injured unless a stay is granted;
>
> (3) Whether the granting of a stay would harm other parties; and
>
> (4) Where the public interest lies.

For the reasons that follow, we conclude that that claim is without merit. We are, however, continuing our emergency stay for a brief additional period to allow the intervenors to seek relief from the Commission if they are so inclined.

I.

A. In addressing the first section 2.788(e) factor, the intervenors barely mention the June 14 partial initial decision. All we are told is that the Licensing Board committed "serious substantive and procedural" errors in, inter alia, its interpretation and application of the governing General Design Criterion[5] and its exclusion of certain evidence proffered by the County and State.[6] That

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[5] See note 2, supra.

[6] Suffolk County and State of New York Motion for Stay of Low Power License (June 17, 1985) (hereafter "Intervenors' Motion") at 6-7.

representation, without further detail, is plainly insufficient to constitute the required "strong showing" that the intervenors are likely to prevail on an appeal from the June 14 decision.[7]

The intervenors' main assertion, however, is that the Commission erred when, in response to a question certified by us, it held a year ago that the issuance of a supplemental environmental impact statement is not a prerequisite to low-power Shoreham operation.[8] Needless to say, that assertion is addressed to the wrong forum. It is not within our province to pass judgment, for stay purposes or otherwise, upon the correctness of Commission rulings. Nor, contrary to the intervenors' apparent belief, can we attach significance to the fact that the Commission determination in question is now pending judicial review by the Court of Appeals for the District of Columbia Circuit.[9] As the intervenors acknowledge,[10] the Commission denied

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[7] See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1632-33 (1984).

[8] ALAB-769, 19 NRC 995 (1984); CLI-84-9, 19 NRC 1323, 1325-28 (1984).

[9] See Cuomo v. NRC, No. 85-1042 (D.C. Cir., filed January 18, 1985). It is our understanding that the briefing of the intervenors' petition for review is almost complete, but the Court of Appeals has not as yet scheduled the matter for oral argument.

[10] Intervenors' Motion at 3.

their earlier request to withhold a low-power license pending the outcome of that review. Although they go on to insist that developments since that denial reinforce the foundation for their claim that the National Environmental Policy Act required the issuance of a supplemental environmental impact statement, we entertain substantial doubt that that is so. Be that as it may, it is for the Commission and/or the Court of Appeals -- not us -- to assess what impact, if any, recent events (both those cited by the intervenors and those not mentioned) might have upon the validity of the Commission determination that they have challenged.

B. There is no better footing to the intervenors' claim that they will suffer irreparable injury if a stay is not granted (the second section 2.788(e) factor). In advancing that claim, the intervenors do not assert, let alone demonstrate, that operation of the facility at levels up to five percent of rated power would pose a threat to the public health and safety.[11] Rather, the asserted

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[11] The stay motion is accompanied by the unsigned and undated joint statement of Dale G. Bridenbaugh and Gregory C. Minor. Apart from the fact that it is not relied upon by the intervenors in connection with their irreparable injury argument, our inspection of this document has disclosed nothing to suggest that increasing the power level of the facility to five percent might be injurious to the general public. (Under its Phase II authority (see note 3, supra), (Footnote Continued)

irreparable injury is the potential mooting of their pending petition for judicial review of the Commission's decision that a supplemental environmental impact statement is not required.

As we had recent occasion to observe in denying a stay in the Catawba proceeding, the potential mooting of an appeal does not per se constitute irreparable injury; it also must be established that the activity that will take place in the absence of a stay will bring about concrete harm.[12] Indeed, if the rule were otherwise, it would rarely be possible for an adjudicatory decision to take effect until all appellate remedies had been exhausted -- an obviously untenable result. Thus, in the absence (as here) of the slightest showing of an actual threat to the public health and safety (or irreparable environmental damage) stemming from low-power Shoreham operation, the mootness consideration cannot carry the day.

C. As also observed in Catawba, if the movant for a stay fails to meet its burden on the first two section 2.788(e) factors, it is unnecessary to "dwell long on whether a stay would cause serious injury to the applicant"

(Footnote Continued)
the facility is now authorized to operate at levels up to 0.001 percent of rated power. See LBP-84-45, 20 NRC 1343, 1363, 1384 (1984).)

[12] 20 NRC at 1635.

or to "delve deeply into public interest considerations."[13] Here, as there, it suffices to say that

> even when viewed in its most favorable light, the intervenors' presentation on those factors does not approach balancing the shortcomings of their case on the other two factors. Indeed, standing by itself, the intervenors' failure to demonstrate that they might be irreparably injured in the absence of a stay is enough to call for the denial of their application.[14]

II.

Intervenors call our attention to the fact that, on the same day they filed their stay motion with us, they sought an emergency stay of the effectiveness of the July 14 partial initial decision from the Court of Appeals for the District of Columbia Circuit. According to intervenors, that development merits our grant of a stay to at least July 2 even should we find that the "traditional stay criteria" are not satisfied.[15] The significance of the reference to July 2 is that the intervenors apparently have asked the Court of Appeals to rule (if necessary) upon their emergency stay motion by that date.

As we see it, our function in passing upon stay motions is to determine, on an application of the four section

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[13] Ibid.

[14] Ibid.

[15] Intervenors' Motion at 11.

2.788(e) factors, whether the movant has established an entitlement to the sought relief. We have now discharged that function here and reached a conclusion adverse to the motion. Whether the effectiveness of the June 14 decision should nonetheless be withheld for an additional period to accommodate possible judicial action is, in our view, a question appropriate, at least in this case, for response in the first instance by the Commission itself.

To this end, we will briefly extend the June 17, 1985 emergency stay entered by the Board Chairman. That stay will remain in effect until 5:00 p.m. on June 20, 1985. If, prior to that time, the intervenors have a renewal of their stay motion in the hands of the Commission, the emergency stay will be automatically extended to 5:00 p.m. on June 25, 1985, assuming that the Commission does not direct otherwise in the interim.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

Mr. Edles did not participate in the consideration or disposition of this matter.