

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

DOCKETED
USNRC

'85 AUG 27 P3:36

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

Docket No. 50-322-1
(OL)

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

NRC STAFF RESPONSE TO SUFFOLK COUNTY
AND STATE OF NEW YORK BRIEF IN SUPPORT
OF APPEAL OF JUNE 14, 1985 ASLB DECISION
ON EMERGENCY DIESEL GENERATORS

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of)
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(Shoreham Nuclear Power Station,) (OL)
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I. INTRODUCTION

On June 14, 1985, the Atomic Safety and Licensing Board presiding over the Shoreham operating license proceeding issued a partial initial decision ("PID") on emergency diesel generators (LBP-85-18, 21 NRC ____) authorizing the NRC Staff to issue a low power (up to 5% of rated power) operating license, providing the Staff has made findings supporting such a license on all issues not in controversy. PID at 4. The Licensing Board held that the three Transamerica Delaval Inc. emergency diesel generators (EDGs) that Applicant proposes to use to supply backup emergency electrical power, which is required to effect a safe shutdown of the Shoreham Nuclear Station in the event of a loss of off-site electrical power, satisfied the requirements of General Design Criterion 17, 10 C.F.R. Part 50, Appendix A ("GDC 17"). On July 17, 1985, Suffolk County and the State of New York (hereinafter "Intervenors") filed a brief appealing from the Licensing Board's June 14, 1985 Decision

authorizing the issuance of the low power license. They argue that the Licensing Board decision should be reversed on the sole ground that the Licensing Board erroneously excluded evidence purportedly showing that GDC 17 had heretofore been "interpreted and applied to require that . . . the maximum load at which EDGs are permitted to operate ('maximum permitted load') must be substantially higher than the EDGs' maximum emergency service loads ('MESL')." ^{1/} Brief at 1-2. The Staff herein responds to the issues raised in the Intervenors' appeal and, for the reasons given below, submits that the Licensing Board's Decision should be affirmed.

II. STATEMENT OF THE CASE

On June 14, 1985, the Licensing Board presiding over the operating license proceeding issued a partial initial decision on emergency diesel generators, which resolved all issues in controversy necessary for the issuance of a low power operating license. LBP-85-18, 21 NRC ____ (1985). ^{2/}

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- ^{1/} The MESL is the maximum electrical load existing on any EDG during the occurrence of a design basis event. The design basis event for Shoreham is a loss of off-site electrical power (LOOP) coincident with a loss of coolant accident (LOCA). PID at 90 (L-4).
- ^{2/} This decision also authorizes the issuance of a full power operating license for the first fuel cycle, insofar as the diesel issues before the Licensing Board were concerned. It should be noted, however, that offsite emergency planning issues still pending presently preclude the issuance of a license above 5% of rated power. PID at 4.

The emergency diesel generator issues in contention in this proceeding derive from a County motion dated May 2, 1983, wherein the County moved to admit a new contention which alleged, inter alia, that the Shoreham emergency diesel generators failed to comply with the requirements of GDC 17 because of known cracking of cylinder heads and excessive vibration. Applying the standards both for admitting a late filed contention and for reopening the record to the County's proposed contention, the Board granted the County's motion in part, ^{3/} and scheduled evidentiary hearings on the EDG Contention as admitted. Prior to the beginning of those hearings, in August 1983 the crankshaft of one of the three Shoreham EDGs broke during preoperational testing. Upon disassembly and examination of the other two EDGs, cracks were also discovered in the crankshafts of those units. The failure of the crankshafts caused a postponement of the hearing, and Applicant and the NRC Staff began the conduct of lengthy technical reviews of the Shoreham EDGs, as well as other engines manufactured by Transamerica Delaval, Inc. Other defects in the components of the engine, including the cylinder blocks, were discovered during these reviews. PID at 1, 2.

After the discovery of these additional defects in the EDGs, the County moved to admit a supplemental EDG contention on January 27, 1984. The Licensing Board, by oral rulings on February 27, 1984 and July 5, 1984, which were confirmed by written order of the Board dated July 17, 1984, granted the County's motion in part, admitting a supplemental EDG

^{3/} Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132 (1983).

contention. That contention, as admitted, alleged that, contrary to the requirements of GDC 17, ^{4/} the EDGs would not operate reliably or adequately perform their required functions, because the EDGs were overrated and undersized, and that certain EDG components, including crankshafts and cylinder blocks, were inadequately designed or were not satisfactorily manufactured.

Evidentiary hearings on this supplemental EDG contention began on September 10, 1984. Before the close of the record of that proceeding, on November 6, 1984, Applicant moved to reopen its case and supplement the record. In connection with this motion, LILCO sought to amend the FSAR by reducing the maximum permitted load ratings for the EDGs from their original continuous duty rating of 3500 KW, with a short time

^{4/} GDC 17 requires in pertinent part that, during an assumed loss of off-site electrical power, the on-site electric power system, i.e. the EDGs, must have sufficient capacity and capability to permit functioning of structures, systems and components important to safety. It states, in part:

Criterion 17 - Electric power systems. An onsite electric power system and an offsite electric power system shall be provided to permit functioning of structures, systems, and components important to safety. The safety function for each system (assuming the other system is not functioning) shall be to provide sufficient capacity and capability to assure that (1) specified acceptable fuel design limits and design conditions of the reactor coolant pressure boundary are not exceeded as a result of anticipated operational occurrences and (2) the core is cooled and equipment temperature and other vital functions are maintained in the event of postulated accidents.

excursion rating of 3900 KW ^{5/}, to a "qualified load" ^{6/} of 3300 KW. The Licensing Board, in an unreported order dated December 4, 1984, granted Applicant's motion and offered the parties to the proceeding the opportunity to file contentions challenging the lower "qualified load" rating proposed by Applicant.

On December 17, 1984 the County and State jointly moved to admit an additional contention. This contention, as modified and admitted by the Licensing Board in an unreported order dated January 18, 1985, specifically alleged that the EDGs with a maximum "qualified load" of 3300 KW as the maximum permitted load did not provide sufficient capacity and capability to assure various safety functions because the qualified load did not encompass all of the loads that could be imposed on the EDGs, including loads that may be imposed due to operator error. ^{7/}

^{5/} A "continuous rating" is generally the electric power output capability that the diesel-generator unit can maintain in the service environment for 8760 hours of operation per year. A "short-time rating" is generally the electric power output capability that the diesel-generator unit can maintain in the service environment for 2 hours in any 24 hour period. See IEEE Standard 387-1977. This standard is referred to in Regulatory Guide 1.9, Rev. 2, December 1979, at 1 §B.

^{6/} The qualified load is defined as that load which bounds the maximum emergency service load (MESL) for the EDG and at which certain key components have operated successfully for at least 10,000,000 loading cycles, or approximately 740 hours. The MESL for each of the Shoreham EDGs, see note 1 supra, is 3253.3 KW or less, and is determined by summing the loads imposed by all equipment which will be connected for more than brief periods of time following the initiation of a LOOP/LOCA event. The concept of a "qualified load" was introduced by the NRC Staff as an interim licensing basis for TDI emergency diesel generators, at Shoreham and elsewhere. PID at 89-92 (L-3 to L-8).

^{7/} Joint Motion of Suffolk County and New York State to Admit EDG Load Contention, December 17, 1985, Attachment 1, at 1.

As part of the submitted contentions, the Intervenor proposed that the contentions state in part:

(b) There is little or no margin between 3300kW and the maximum emergency service loads for the EDGs, in sharp contrast to emergency diesel generators at other nuclear plants where a substantial margin provides adequate assurance of requisite reliability under GDC 17.

In denying the admission of this part of the contention insofar as it would bring into litigation conditions at other nuclear plants, the Licensing Board stated:

. . . In addition, to the extent admission of this part would arguably include consideration of the margin at other nuclear plants, such litigation would be irrelevant or at least so remotely collateral to the material issues before us as to be digressive without any redeeming usefulness. ^{8/}

On January 25, 1985, the Intervenor filed the subject testimony, and by motion of February 8, 1985, LILCO moved to strike those portions of the subject testimony dealing with design margins at other nuclear plants. ^{9/} In striking those portions of the Intervenor's proffered testimony, the Licensing Board ruled:

. . . These portions of the testimony would lead to consideration of the margin at other nuclear plants. As set forth in our January 18, 1985 Order ruling on the admissibility of the EDG load contention, at 5 [sic], such litigation would be ". . . at least so remotely collateral to the material issues before us as to be digressive without any redeeming usefulness." That reasoning applies directly to and, indeed, is buttressed by these portions of the testimony which we are striking. We are not striking other portions of the County's testimony which LILCO's motion placed in this same category,

^{8/} Memorandum and Order Ruling on Admissibility of Emergency Diesel Generator Load Contention, January 18, 1985, at 8.

^{9/} LILCO's Motion to Strike Testimony of Dale G. Bridenbaugh and Gregory C. Minor Regarding Suffolk County's Emergency Diesel Load Contention, February 1, 1985, at 2-4.

and in the apparently related category denominated by LILCO's motion as "Overload Rating." It is relevant to the admitted portions of the contention, particularly (a)(i), and not digressively collateral, for the County to proffer testimony that the general industry practice is to bound intermittent and cyclic loads by a short-term overload rating for the EDG's. Unless another party disputes this, there should be no need to embark on the collateral path of examining details of operation at other nuclear plants. ^{10/}

The reopened hearings began on February 12, 1985, and concluded with the closing of the record on March 12, 1985. As indicated in the Order of February 11, 1985, the Board received and considered testimony on general industry practice in regard to the consideration of intermittent and cyclic loads in setting short-term overload ratings for emergency diesel generators. See PID at 17-21 (B-12 to B-16).

On June 14, 1985, the Licensing Board issued its Partial Initial Decision which is the subject of this appeal, holding that the EDGs met the requirements of GDC 17, and authorizing the NRC Staff to issue a low power operating license for the Shoreham Station.

III. ARGUMENT

The Licensing Board did not err when it excluded evidence regarding overload ratings at other nuclear plants on the grounds that the proffered evidence was irrelevant and so remotely collateral to the issues in controversy as to be without merit.

This appeal is predicated solely on the exclusion of evidence which intervenors maintain would show that GDC 17, governing the provision of emergency electrical power, has heretofore been interpreted and applied

^{10/} Memorandum and Order Ruling on Motions to Strike Portions of Suffolk County and LILCO Testimony, February 11, 1985, at 3.

by the NRC to require that the maximum loads at which emergency diesel generators are permitted to operate be substantially higher than the maximum loads the diesels would experience in an emergency. Brief, at 1-2. The Licensing Board excluded this evidence on the ground that it would be "remotely collateral to the material issues . . . as to be digressive without any redeeming usefulness." ^{11/} Thus while the Board allowed the introduction and consideration of evidence regarding general industry practice on short term overload ratings for the EDGs which would bound intermittent and cyclic loads, it refused to embark on the collateral path of examining details of operation at other nuclear power plants. ^{12/} On this appeal, Intervenors allege that the erroneous exclusion of this evidence deprived Intervenors of the opportunity to demonstrate that the EDGs fail to comply with GDC 17. The Staff submits that no error was committed by the Licensing Board in excluding the subject evidence, as:

- a) The proffered evidence did not demonstrate past agency practice to require that the maximum permitted loads for emergency diesel generators be substantially higher than peak emergency service loads.
- b) The proffered evidence was not material to the manner in which the Applicant sought to comply with GDC 17.
- c) The submitted evidence was collateral to the issues and digressive.
- d) The exclusion of the evidence did not prejudice Intervenors.

11/ Id.

12/ Id.

- A. The excluded evidence is irrelevant to a determination of whether the Shoreham EDGs comply with GDC 17 capacity and capability requirements.

The thrust of Intervenor's appeal is that it was error to exclude evidence showing past Commission interpretation of GDC 17 to require that the maximum permitted load of emergency diesel generators be substantially higher than the maximum loads they would see in an emergency. Intervenor's Brief at 6. However, this was not in fact what the evidence showed. It only identified margins between peak emergency service loads and the capacity of the emergency diesel generators at selected BWR plants. It showed a wide range of apparent differences in such "margins" without any apparent standard or criterion for the amount by which the capacity exceeds load. Such evidence does not show a consistent staff or industry interpretation of GDC 17 to require a given minimum margin between peak emergency service loads and the capabilities of emergency diesel generators. The proffered evidence only showed that plants having the margins shown were licensed, and not that others without such margins would not be licensed. In short, the excluded evidence did not show any NRC practice or an interpretation probative of the meaning of GDC 17 to require a particular margin in quantitative terms.

General design criteria (GDC) set out minimum requirements for the principal design criteria of water cooled nuclear power plants. Acceptable methods for implementing these general design criteria are provided to license applicants through regulatory guides, standard format and content guides for safety analysis reports, standard review plan provisions and branch technical positions. However, applicants are free

to select any other method of their choice to achieve the goal of compliance. ^{13/}

GDC 17 requires, in part, that the on-site emergency electrical power system for a nuclear power plant have "sufficient capacity and capability to assure that (1) specified acceptable fuel design limits and design conditions of the reactor pressure boundary are not exceeded as a result of anticipated operational occurrences and (2) the core is cooled and containment integrity and other vital functions are maintained in the event of postulated accidents." An applicant is free to demonstrate, by use of regulatory guides or independently derived methods, that the emergency diesel generators are capable of meeting the loads required to perform these tasks.

The Licensing Board indeed recognized that the past standard practice in the nuclear industry for determining whether EDGs comply with GDC 17 was to refer to the continuous and short time ratings in accordance with the procedures set forth in Regulatory Guide 1.9. PID at 17-20 (B-12 to B-15). However, the Board correctly indicated that emergency diesel generator capacity may be evaluated by means other than those set out in Regulatory Guide 1.9. Id. In this case, the Applicant demonstrated by other means that the maximum emergency service loads would not exceed the maximum load ratings (qualified loads) of the EDGs. PID at 101-02 (L-30); Tr. 27,967-89 (Berlinger).

^{13/} Petition For Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406-07 (1978), citing Nader v. NRC, 513 F.2d 1045, 1052 (D.C. Cir. 1975).

Intervenors further argue that as the regulatory standards are not totally free from ambiguity, the past practice of the NRC staff and the nuclear industry in interpreting and applying GDC 17 is not only relevant and material, but is the best evidence of what GDC 17 really means. ^{14/} The general principle embodied here derives from the canon of construction that the reasonable interpretation of a regulation by officials who drafted it and are charged with its administration is entitled to deference. ^{15/} The Intervenors cite three NRC cases where deference was accorded to the Commission's interpretation of its regulations. ^{16/} However, these cases are not germane. There has been no previous interpretation of GDC 17 to require particular quantified margins, and as pointed above, the evidence proffered did not establish any consistent staff or industry practice establishing a minimum margin. ^{17/}

^{14/} Intervenors' Brief at 10 and fn.11.

^{15/} Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 190-91 (1978), and cases cited therein.

^{16/} Northern Indiana Public Service Commission v. Porter County Chapter of the Izaak Walton League of America, Inc., 423 U.S. 12, 14 (1975); Power Reactor Development Company v. International Union of Electrical, Radio, and Machine Workers, 367 U.S. 396, 408 (1961); North Anna Environmental Coalition v. NRC, 533 F.2d 655, 665 (D.C. Cir. 1976). In U.S. v. Clark, 454 U.S. 555, 565 (1982), the Court similarly accorded deference to an agency interpretation of its regulation and the enabling statute.

^{17/} In the instant case, the Staff, in testimony and proposed findings, made clear its position interpreting GDC 17 as requiring no margin beyond the design load, and that Staff interpretation is now being challenged by the Intervenors. Tr. 28,011 (Berlinger); Tr. 27,743 (Knox, Berlinger); Tr. 27,745, 752 (Knox); NRC Staff's Proposed Findings of Fact and Conclusions of Law L-2, L-7, L-8.

Intervenors also argue that GDC 17 does not provide a quantifiable standard for diesel generator capacity and capability, ^{18/} but Intervenors fail to show any manner in which the standards in GDC 17 would be clarified or explained by admission of the excluded testimony. ^{19/} The loads to be accommodated by the emergency diesel generators are prescribed in GDC 17 in terms of the safety function requirements which are placed on the on-site power system. A definite criteria for determining the equipment which must operate following any event is prescribed and the resulting maximum electric power demand which each diesel generator must supply is identified. PID at 101 (L-30). This site-specific load requirement establishes the capacity and capability requirements for emergency diesel generators. Applicant computed this required electrical load for Shoreham and demonstrated that it was bounded by the "qualified load of 3300 KW." Decision at 89-103 (L-2 to L-32), 113-14 (L-48). The record below demonstrates that GDC-17 has not been construed as requiring a substantial margin, or a margin to accommodate operator error, ^{20/} between

^{18/} County Brief at 6, 10.

^{19/} In the North Anna case cited by the County supra note 15, at 667, the Court acknowledged the necessity for flexibility in the Commission's regulations, rejecting intervenor's attempt to "impos[e] inflexible standards on a flexible regulation."

^{20/} The Licensing Board found that the design load, as defined in IEEE Standard 387-1977, and the qualified load, need not consider loads erroneously placed on the engines by operator error, as no single operator error could result in exceedance of the qualified load on more than one diesel and violation of the single failure criterion of GDC 17. PID at 102-04, 113-14 (L-30 to L-33, L-48). Only 2 of the 3 EDGs are required for safe plant shutdown. PID at 103 (L-32).

a diesel generator's rating or qualified load and the maximum emergency service load. 21/

In summary, the proffered evidence does not show that the application of GDC 17 was interpreted in the past to require particular margins. The proffered evidence was correctly excluded as collateral to the issues in controversy. 22/

B. The Licensing Board Correctly Concluded that the Qualified Load Presents an Adequate Interim Licensing Basis for the Shoreham Emergency Diesel Generators.

Intervenors allege in their appeal that the Licensing Board has applied a lower and erroneous standard of compliance with GDC 17 to the "troubled Shoreham EDGs than has been applied to reliable EDGs." Intervenors Brief, at 11. Attributing to the Board a view of the Shoreham EDGs as "suspect", the Intervenors allege that the Board nonetheless permitted operation of the engines with a margin between the MESL and their maximum permitted load, a "far less stringent standard than has been applied to all other BWR EDGs which have not had problems and which are not suspect." Intervenors' Brief at 11, 12. Intervenors thus again

21/ Indeed, as to the inclusion of operator error loads in the qualified load and the requirement for a capacity of the diesel generators encompassing this limit, Staff witnesses have testified that there may be, and probably are, operating plants where addition of the operator error loads would result in exceeding the ratings of the emergency diesel generators. Tr. 28,200 (Hodges, Knox).

22/ Cf. Duke Power Company (William B. McGuire Nuclear Power Station, Units 1 and 2), ALAB-669, 15 NRC 453, 473 (1982); Duke Power Company (Catawba Nuclear Station, Units 1 and 2); ALAB-397, 4 NRC 397, 416 (1976).

raise the question of a quantitative margin requirement for the EDGs as being required by the provisions of GDC 17.

The decision of the Board recognized that the Staff had introduced the concept of a qualified load as an interim licensing basis for the TDI diesel engines. PID at 18 (B-13), 89 (L-3). That qualified load is defined as the load which bounds the maximum emergency service load for the diesel generator and at which certain key components of the engine have been successfully operated for at least 10,000,000 loading cycles. This qualified load was established at 3300 KW for Shoreham. Id. The Board acknowledged that no engines other than engines manufactured by TDI have been tested and approved using this approach, although the Staff has used the same approach in reaching licensing decisions on other nuclear plants using different models of TDI engines.^{23/}

It appears that the source of Intervenor's dissatisfaction is the deviation by the Applicant from the standard regulatory guide analysis of EDG capacity set forth in Regulatory Guide 1.9. That regulatory guide, incorporating section 3.7 of the IEEE Standard 387-1977, sets forth "principal design criteria and qualification testing requirements that, if followed, will ensure that selected diesel generator units meet their performance and reliability requirements."^{24/} However, as the document itself indicates, a Regulatory Guide provides optional regulatory guidance;

^{23/} Decision at 89, fn.14.

^{24/} Regulatory Guide 1.9, Revision 2, December 1979 at 1, Section B. See footnote 5, supra.

and although it sets out a manner of meeting regulatory requirements, it need not be followed. ^{25/} Regulatory Guide 1.9 explicitly states:

Regulatory Guides are issued to describe and make available to the public methods acceptable to the NRC staff of implementing specific parts of the Commission's regulations, to delineate techniques used by the staff in evaluating specific problems or postulated accidents, or to provide guidance to applicants. Regulatory Guides are not substitutes for regulations, and compliance with them is not required. Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission.

Here it has been demonstrated by credible evidence that the loads to which the diesels have been qualified by tests will not be exceeded by the maximum emergency service loads which the diesels will see in operation. This evidence demonstrates that the requirements of GDC 17 are met, and a proper basis exists for licensing the subject plant. PID at 88-92 (L-1 to L-8), 113-14 (L-48). Evidence relating to whether the engines conform to the guidance in Regulatory Guide 1.9 was immaterial.

C. The Licensing Board Correctly Excluded the Proffered Evidence as Excessively Collateral.

Substantial discretion is vested in Atomic Safety and Licensing Boards to use their authority in order to assure that hearings remain focused sharply on matters in controversy. This authority includes a

^{25/} Petition for Emergency and Remedial Action, supra note 11, at 406-07; see also Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1161 (1984); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 937 (1981); Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 773-75 (1977).

broad discretion to exclude proffered evidence on issues which would be excessively collateral to those set forth in admitted contentions, in order to avoid time-consuming and digressive litigation. ^{26/} A review of the subject evidence offered by intervenors leads to the conclusion that its admission in evidence, and the resultant examination and cross-examination of witnesses with regard to the numerous facilities identified in this exhibit, would have resulted in very time-consuming and collateral litigation concerning the accuracy, meanings and reliability of data not relevant to the facility at issue in this proceeding. ^{27/} The Staff notes again that the "qualified load" concept which has been adopted for the evaluation of TDI diesel generators, including the specific emergency diesel generators which are at issue in this proceeding, differs significantly in approach from the Regulatory Guide 1.9 methodology for evaluating the capability and capacity of EDGs. Accordingly, an excursion to consider margins at other BWR facilities whose characteristics of design and operation are not identified would have inordinately delayed completion of an already long and prolix proceeding. It would not have provided evidence on the basic question at issue in Shoreham -- i.e. whether the onsite power supply at Shoreham (the Emergency Diesel Generators) under the conditions explicitly assessed for Shoreham in fact satisfy the requirement of GDC 17. The

^{26/} See 10 CFR Part 2, Appendix A at V; Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 176 (1978).

^{27/} Applicant's Brief at pp. 9 - 14 extensively discusses the substantive content and apparent flaws appearing in the excluded Exhibit.

hearing on diesel issues in this proceeding took 42 days, involved the testimony of 32 witnesses, and the generation of 8,127 pages of transcript along with 189 admitted exhibits. In light of the extensive testimony provided by Applicant and Staff witnesses on the applicability and acceptability of the qualified load methodology, the Licensing Board properly exercised its responsibility to facilitate a relevant and orderly hearing on material issues by excluding the proffered evidence.

- D. Assuming arguendo that the Licensing Board erred in excluding the proffered evidence, such error was non-prejudicial, as admission of the proffered evidence would not have affected the outcome of the proceeding.

The NRC Staff has taken the position that the exclusion of the proffered evidence was not erroneous. However, assuming arguendo that the Licensing Board did in fact err in this evidentiary ruling, Intervenor must nevertheless establish that such error was prejudicial in that it would have affected the outcome of the proceeding. An erroneous evidentiary ruling by the Licensing Board, standing alone, would not occasion any appellate relief. ^{28/} The Appeal Board has ruled that only serious errors affecting substantial rights, and which might have influenced improperly the outcome of the hearing, merit the taking of

^{28/} Acknowledging that a Licensing Board ruling limiting cross-examination within the scope of an admitted contention "may well [have been] erroneous," the Commission has held that such an error afforded no grounds for relief, absent a persuasive showing of substantial prejudice. Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-11, 15 NRC 1383, 1384-85 (1982), affirming ALAB-673, 15 NRC 688, 697 and n.14 (1982). See also Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983).

exceptions and briefing on appeal. ^{29/} As the Appeal Board stated in denying a request for extension of time in which to brief numerous exceptions, "some procedural and evidentiary errors will almost invariably occur in lengthy hearings where a presiding officer must rule quickly and without the opportunity for collegial consultation that makes appellate tribunals appear omniscient." ^{30/} The remedy sought in that case was simply an additional 25 days of enlargement of briefing time, as opposed to the instant case where the Intervenors seek to reverse the findings of the Licensing Board. Here, the intervenors have not offered any demonstration that the alleged error could substantially affect the outcome of the proceeding.

The qualified load concept was the subject of extensive testimony by Applicant and Staff. ^{31/} The Board found it provided a proper method of showing compliance with GDC 17 and a proper basis for the interim acceptance of the diesels and licensing of the Shoreham facility. ^{32/} The Intervenors fail to show that if proof were admitted of higher margins at other nuclear power stations which use Regulatory Guide 1.9 and IEEE standard 387-1977 methodology to demonstrate compliance with GDC 17 at such other plants, it would undercut reliance on the qualified load

^{29/} Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), ALAB-204, 7 AEC 835, 836 (1974).

^{30/} Ibid.

^{31/} See, e.g., Dawe, et al. ff. Tr. 27,153 at 9-11; Tr. 27,759-60, 27,772-73, 27,945-46, 27,960-66, 27,983-84, 27,990, 28,181-82 (Berlinger).

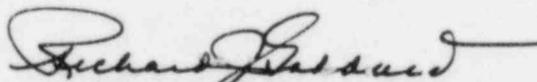
^{32/} PID at 113-14 (L-48).

methodology as an acceptable basis of finding that the diesels at Shoreham meet the requirements of GDC 17. ^{33/} Accordingly, the intervenors have failed to show that, even if the proffered evidence were wrongfully excluded, any cause exists to reverse the Licensing Board. ^{34/}

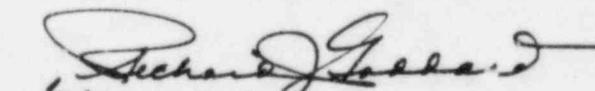
IV. CONCLUSION

For the reasons stated herein, the Staff submits that the appeal of Suffolk County and New York State should be denied.

Respectfully submitted,



Richard J. Goddard
Counsel for NRC Staff


for Edwin J. Reiss
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland
this 26th day of August, 1985

^{33/} The Appeal Board approved a similar approach taken by the Licensing Board earlier in this operating license proceeding, finding it "inappropriate to compare [seismic design] spectra produced by site-specific methodology" incorporating actual site characteristics with Regulatory Guide spectra "designed for applicability at essentially any location in the country and [are] unnecessarily conservative for Shoreham." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1169-70 (1984) (footnotes omitted).

^{34/} See Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984), quoting Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO SUFFOLK COUNTY AND STATE OF NEW YORK BRIEF IN SUPPORT OF APPEAL OF JUNE 14, 1985 ASLB DECISION ON EMERGENCY DIESEL GENERATORS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 26th day of August, 1985.

Alan S. Rosenthal, Esq., Chairman*
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Howard A. Wilber*
Atomic Safety and Licensing Appeal
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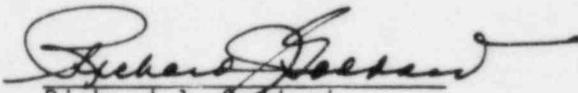
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