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January 21, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	
LONG ISLAND LIGHTING COMPANY	Docket No. 50-322-OL-6 (25% Power)
(Shoreham Nuclear Power Station, Unit 1)	

GOVERNMENTS' MOTION FOR LEAVE TO FILE INTERLOCUTORY APPEAL

Suffolk County, the State of New York and the Town of Southampton (hereafter, collectively, the "Governments"), hereby seek leave to file the attached Notice of Appeal concerning the Memorandum and Order (In Re: LILCO's Request for Authorization to Operate at 25% of Full Power), dated January 7, 1988, and served January 11, 1988, issued by the Shoreham OL-6 Licensing Board now chaired by Judge Gleason (hereafter, the "Order").1/ That Order ruled that LILCO's Request for Authorization to Operate Shoreham at 25% Power, filed under the purported authority of 10 CFR §§ 50.57(c) and 50.47(c)(1) and based on a Shoreham-specific Probabilistic Risk Assessment (PRA), could be considered in the absence of any request under Section 50.12(a) or 2.758 for an

1/ A copy of the Order is attached to the Notice of Appeal.

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exemption from or waiver of compliance with the emergency planning regulations set forth in 10 CFR § 50.47 and Part 50 Appendix E.

The Governments acknowledge that this appeal is interlocutory in nature, and that interlocutory review is undertaken sparingly and only in compelling circumstances.[2/] The Governments submit, however, that even the NRC's stringent criteria governing decisions on whether to accept an interlocutory appeal are satisfied in this instance.

I. ISSUE PRESENTED

The issue presented here is straightforward. It does not involve disputed issues of fact or case-specific considerations. It is a purely legal question, involving the interpretation and application of Section 50.47. The subject is significant in the Shoreham proceeding, but has significant generic importance and ramifications as well.

The issue is the following:

2/ See e.g., 10 CFR § 2.730(f); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383-84 (1983); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129 (1987) and cases cited therein. In ALAB-861, however, the Appeal Board acknowledged that the prescription of Section 2.730 and the Commission's general policy do not preclude a party from requesting that the Board exercise its discretion, conferred by 10 CFR §§ 2.718(i), to undertake an interlocutory review of a particular ruling.

> Does Section 50.47(c)(1) permit a license applicant to argue that because operation of its particular plant at levels above 5% but below 100% of rated power would involve an allegedly lower risk than operation at 100% power, the NRC should issue a license authorizing such operation without application of Sections 50.12(a) or 2.758, despite (i) the provisions of Section 50.47(d), (ii) the NRC's generic accident assumptions which underlie 10 CFR § 50.47, and (iii) the applicant's lack of compliance with the offsite emergency planning requirements of Section 50.47(a), Section 50.47(b), and Appendix E?

The Gleason Licensing Board answered this question in the affirmative.

The Governments submit, however, that such a license request and argument constitute an impermissible challenge to the regulations, and to the generic findings and assumptions concerning accident probabilities and consequences upon which the Commission's emergency planning regulations are premised, particularly in light of the Commission's 1982 adoption of Section 50.47(d). The Governments submit that when an applicant concededly does not comply with the emergency planning regulations, a Board may not consider a request for authorization to operate above 5% power based upon site-specific accident risk analyses in the absence of an application for an exemption from compliance with those regulations (under Section 50.12), or a waiver of such compliance (under Section 2.758).

Thus, the issue presented by this appeal requires an interpretation of Section 50.47(c)(1) from a generic perspective.[3] The Commission provided in subpart (c)(1) a means to obtain a license to operate above 5% power in the face of emergency plan deficiencies that result in a failure to comply with particular provisions of subpart (b). In light of its adoption of Section 50.47(d) to eliminate case-by-case analyses of the risks of operation at 5% power or less, did the Commission intend subpart (c)(1) to permit case-by-case litigation of the types of accidents, their probabilities and consequences posed by operation of particular plants at varying power levels above 5% (but short of full power), to support arguments that failures to comply with subparts (a) and (b) and Appendix E are not significant?

II. THIS APPEAL MEETS THE CRITERIA FOR ACCEPTING AN INTERLOCUTORY APPEAL

A. The Gleason Board's Order Would Have a Pervasive and Unusual Effect on the Basic Structure of the Shoreham Proceeding

Marble Hill established two criteria for the acceptance of an interlocutory appeal; if either one is satisfied, the re-

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3/ LILCO's Request was filed prior to the October 29 amendment of Section 50.47(c)(1), and thus addresses the prior version of that section. The Order also does not address the amended version of that regulation. The LILCO license request at issue does not rely upon any of the amended provisions of Section 50.47(c)(1). Thus, this appeal does not require an interpretation of the recent rule amendment.

quested review may be undertaken.[4/] The Order would affect the basic structure of the Shoreham proceeding in a pervasive and unusual manner, thus satisfying the second of the Marble Hill criteria.

If not reversed, the Order would cause the basic foundation of the Shoreham licensing proceeding to change in a most fundamental way. Moreover, the resulting re-structured Shoreham proceeding would also be "unusual"; to the Governments' knowledge, such a proceeding has never before occurred, or been proposed, in any NRC case.

Pursuant to the Order, the parties to the Shoreham proceeding would no longer be litigating whether the LILCO offsite emergency response plan complies with the emergency planning requirements in Section 50.47, NUREG 0654, and Appendix E, based upon the well-established generic assumptions about the accident risks, probabilities and offsite consequences of operation above 5% power. Rather, the matter at issue would be whether those regulatory requirements need to be satisfied at all, in light of

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4/ See Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977), in which the Appeal Board stated:

> Almost without exception in recent times, we have undertaken discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner.

LILCO attempts to show that Shoreham-specific accident risks are low enough at 25% power to render those regulations superfluous and thus, its non-compliance with them irrelevant.

The fundamental premise of the Commission's emergency planning regulations is -- and has always been -- the assumption that a severe accident having serious offsite consequences will happen.5/ The Commission has repeatedly reaffirmed that assumption with respect to operation at any power level above 5%.6/ Indeed,

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5/ For example, the Commission has stated:

> The underlying assumption of the NRC's emergency planning regulations in 10 CFR 50.47 is that, despite application of stringent safety measures, a serious nuclear accident may occur. This presumes that offsite individuals may become contaminated with radioactive material or exposed to dangerous levels of radiation or perhaps both.

Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 533 (1983), rev'd in part on other grounds, CUARD v. NRC, 753 F.2d 1144 (1986).

6/ In adopting Section 50.47(d) in 1982, the Commission did change its generic assumptions with specific reference to low power operations at power levels of 5% or less. It did so in explicit recognition that it was possible to make generic assumptions about accident probabilities and risks applicable to 5% power operation that differed from those it had determined were appropriate for operation at higher power levels. Thus, the Commission stated:

> When the Commission published the upgraded emergency preparedness regulations in August 1980, the subject of low power operating licenses was not addressed. At that time the Commission did not differentiate as to what emergency planning requirements would be applicable to the period of fuel loading and low power testing. The Commission has now focused on the risks associated with this level of operation and has chosen a level of emergency

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it did so even in connection with its recent amendment of Section 50.47(c)(1). The Commission stated in its March 6, 1987 notice of proposed rulemaking:

> If in the future nuclear plant designs are proposed which offer greater protection of the public health and safety than do current designs, then additional rulemaking may be appropriate which examines the need for emergency planning in consideration of the reduced overall risk to the public. In this rulemaking, however, no assumptions are necessarily being made regarding possibly improved plant designs or operations since 1980 when the new emergency planning regulations were issued.

52 Fed. Reg. 6983, n. 1 (emphasis added).

The fundamental Commission assumption that a serious accident will happen has always been the underlying premise of the Shoreham emergency planning litigation as well. To date, LILCO's emergency plan has been evaluated based on the assumption that it must have adequate planning and preparedness for, and it must be able to implement, protective actions (including evacuation) for persons in the entire 10 mile EPZ. Consequently, the proceeding

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> preparedness appropriate to assure the health and safety of the public at the stage [sic]. In doing so, the Commission does not alter the high standards applicable to the review of emergency preparedness at full power.

47 Fed. Reg. 30232 (emphasis added). See also 47 Fed. Reg. 30233 addressing Section 50.47(d) and the proposed rule change eliminating public participation in exercise reviews (subsequently invalidated by the UCS decision) ("Exercises will still be required before actual power above 5% and commercial operation."); Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985).

has been structured around whether LILCO's emergency planning proposals satisfy the requirements set forth in Section 50.47 and Appendix E, assuming a serious accident with potential offsite consequences requiring protective actions for the entire 10 mile EPZ.7/

Under the Order, however, entirely new and fundamentally different premises and assumptions would govern the proceeding and re-define its structure. The new premises would be based on new LILCO proposals concerning how it intends to operate its plant at up to 25% power, LILCO characterizations concerning existing or to-be-added features of its plant, and LILCO's new 25% power PRA and analyses thereof. See, e.g., LILCO Request for Authorization to Increase Power to 25% (April 14, 1987) at 18-28. New Shoreham-specific accident spectra, probabilities, and consequences, as well as a de facto request for adoption of a one mile Shoreham EPZ,8/ would form the backdrop for evaluation of the

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7/ The Appeal Board has also confirmed and relied upon these basic assumptions and premises. See, e.g., Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 155-56 (1986), rev'd in part and aff'd in part on other grounds, CLI-87-12, ___ NRC ___ (Nov. 5, 1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 713 (1985), review declined, CLI-86-5, 23 NRC 125 (1986).

8/ Although LILCO states that it plans to retain the defined 10 mile EPZ at 25% power, the clear thrust of its 25% power request is to obtain approval of a de facto one mile EPZ. See, e.g., LILCO Request at 19. See also NRC Staff Response to LILCO Motion for Designation of Licensing Board and Setting Expedited Schedule to Rule on LILCO's 25% Power Request (July 29, 1987) at 7-8, in which the Staff observed:

> [T]he 25% power request relies heavily on severe
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> (footnote continued)

adequacy of emergency preparedness under LILCO's Plan, and would provide the structure for the Gleason Board ordered proceeding. Thus, the basic question in the restructured proceeding would be whether particular NRC emergency planning regulations, which on their face apply to any operation above 5%,9/ can be disregarded on the basis of plant-specific risk analyses purporting to demonstrate that the NRC's generic accident assumptions are inapplicable to the Shoreham site.

Clearly, a proceeding resulting from the Gleason Board's Order would differ dramatically from the Shoreham emergency planning litigation to date. The Order would throw out the

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accident analyses to demonstrate that "very small risk [is] associated with operation at 25%," and "that emergency planning is unwarranted at distances beyond one mile from the plant." Although LILCO does not request relief from the requirement to plan for emergency response for a 10-mile emergency planning zone, the burden of its presentation is that, for Shoreham, the planning bases on which the 10-mile zone was premised, are satisfied at one mile from the plant if power operation is limited to 25%.

The Staff stated, further, that "The analyses relied upon by LILCO . . . are new, and the use of these analyses to establish levels of accident risk from the Shoreham plant has not previously been addressed," and noted that "[i]n fact, litigation of such issues was precluded in this proceeding" citing ALAB-832, 23 NRC 135, 146-48 (generic accident analyses "were conducted to remove the need for site specific calculations...."). Id. at 8.

9/ Under Section 50.47, and particularly in light of Section 50.47(d), all the Governments' admitted offsite emergency planning contentions are "relevant" to any operation above 5% power. See 10 CFR § 50.57(c). It is only if one is permitted to attempt to redefine the generic accident assumptions which underlie Section 50.47 that there could be any basis for or need to engage in any "relevance" debate.

window, and throw open to Shoreham site-specific litigation, the most fundamental element of this -- indeed any -- emergency planning proceeding: the definition of the risks for which planning is required.10/

The Order's impact on this proceeding would be "unusual" as well as pervasive, however. First, its unprecedented nature would make it, by definition, unusual. Second, the fact that it would require a re-thinking and re-definition of all the generic premises and assumptions which have formed the basis of every other NRC emergency planning proceeding would also render it unusual. Third, the very allowance of a challenge to such generic assumptions and the regulations themselves, in the absence of an exemption or waiver request, would, in an NRC proceeding, be unusual (and, in the Governments' view, clearly illegal).

For the foregoing reasons, the standards for undertaking interlocutory review are satisfied and the Board should entertain this appeal.11/

10/ This Appeal Board previously ruled that that definition cannot be challenged absent an exemption from, or waiver of, the regulations. ALAB-832, 23 NRC at 146-48. The Gleason Board has plainly failed to follow that guidance.

11/ The Governments emphasize that unlike many of the litigated cases in which interlocutory review has been denied, this is not an instance where review is sought of a decision admitting or denying the admission of a contention which merely results in, or prohibits, additional litigation. Similarly, it is not a situation in which the sole basis for complaint is simply an erroneous legal ruling, or one which will result in additional expense for the parties. Such results will certainly obtain if the Order is not reversed. Indeed, the suggestion by the Gleason Board that resources are available to handle, simultaneously with

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B. The Gleason Board's Order Presents a Legal Issue with Significant Generic Ramifications

The Order presents a legal issue with broad and significant generic implications. It is one which could well arise in many other cases before the Shoreham proceeding ends (which does not appear imminent) and an ordinary appeal could be taken. And, to the Governments' knowledge, the issue presented has not been previously addressed. The Appeal Board should entertain this appeal for these reasons as well. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460 (1982) vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983). See also Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-81-36, 14 NRC 691, 700-701 (1981).

The Gleason Board's Order suggests that licensees and license applicants are free to challenge, on a case-by-case and site-specific basis -- but without meeting the requirements of 10 CFR §§ 50.12 or 2.758 -- the generic risk assumptions which underlie the Commission's emergency planning requirements.12/

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all other ongoing Shoreham matters, an additional proceeding on such a novel and complex subject, is without basis. See Order at 12. The Governments' Petition is not premised on the resource-related impact of the Gleason Order, however. Rather, the Petition should be granted because in the absence of interlocutory review, the Order will result in a fundamental, pervasive and, to the Governments' knowledge, unprecedented, change in the structure of this licensing proceeding.

12/ The Order fails to address the provisions of Section 50.12 or the Commission's discussion of its purposes. In the
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Attempts to do so by even a few applicants or licensees would create significant new resource demands upon the NRC Staff, Boards, and other parties (to review site-specific PRAs and their alleged implications for reducing or eliminating the need to comply with emergency preparedness requirements).

Moreover, given the high profile of the Shoreham litigation, it is likely that the Gleason Board's Order and its implications for other plants will be highly publicized in the nuclear industry. This makes it even more likely that there would be attempts to apply it or its rationale in other cases. The Appeal Board should accept this appeal to provide guidance on this matter of significant generic importance.

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Governments' view, however, Section 50.12(a), which sets forth the standards for exemptions from NRC regulations, was designed to address requests such as the one presented by LILCO -- not Section 50.47(c)(1). See 50 Fed. Reg. 50764-77. Section 50.47(c)(1), while an "exemption" provision, was intended to address deficiencies in offsite emergency plans which an applicant can attempt to demonstrate are not significant or are compensated for; it was not intended to deal with matters involving the power levels of operation, the reactor's technical specifications or operating procedures, or accident spectra, probabilities or consequences. See Consolidated Edison Co. of New York (Indian Point, Unit No. 2), Power Authority of the State of New York (Indian Point, Unit No. 3), CLI-83-16, 17 NRC 1006, 1010, 1011 (1983), citing, 45 Fed. Reg. 55,403 (50.47(c)(1) is intended to involve determinations of "whether features of one plan can compensate for deficiencies in another plan"); 47 Fed. Reg. 30234 (the types of deficiencies to which 50.47(c)(1) is addressed are those "that only reflect the actual state of preparedness which may be easily remedied"); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2), ALAB-809, 21 NRC 1605, 1612 (1985), vacated as moot, CLI-85-16, 22 NRC 459 (1985).

III. THIS APPEAL, IF ACCEPTED, WOULD NOT MATERIALLY IMPACT THE PROGRESS OF THE SHOREHAM PROCEEDING

As this Board is aware, the Shoreham licensing proceeding is at present moving forward on several fronts. It would continue to do so should this appeal be accepted.

First, a decision to take review of the Gleason Board's Order would have no impact upon the progress of the 1986 Exercise-related portion of the proceeding. Part of that matter already is before this Board on appeal by LILCO, and the remainder is still pending before the Frye Licensing Board. Second, a decision to take review would also have no impact upon the three remand proceedings concerning LILCO's new EBS proposal, its new proposals for the evacuation of school children, or the ad hoc hospital evacuation issue, each of which is currently in progress before the Gleason Board.

Third, litigation concerning LILCO's proposed general population reception centers would also proceed unaffected by a decision to take review of the Gleason Board's Order. (That matter is still pending before the Gleason Board; when a decision is rendered, appeals could also proceed unimpeded by this appeal.) Finally, LILCO's fourth attempt to obtain summary disposition of the legal authority contentions, and its attempt to use the amended Section 50.47(c)(1)(i)-(iii) to obtain a favorable ruling on Contentions EP 1-10, are also proceeding apace before the Gleason Board, and would not be affected by a decision to accept this appeal.

With respect to the 25% power issue, the Gleason Board's Order itself provides that litigation concerning LILCO's Request would not begin immediately. Rather, the following preliminary events are scheduled. First, the Staff is to resume and complete its review of LILCO's new PRA and the LILCO license request; next, after issuance of a Staff SER on that subject and reasonable time to review it, the Governments would be given "an opportunity to state with basis and specificity the ways in which any of their present contentions are relevant to the proposed operation." Then, other parties could comment on the Governments' statements, pursuant to a schedule to be set by either a new Board, a Special Master, an Alternate Board Member, or a Technical Interrogator "with due regard to the equities involved." Order at 11.[13/] Thus, even some of these preliminary 25% power-related activities could perhaps proceed while this appeal was being briefed and decided; the Governments submit, however, that such a course would make no sense and could create severe and prejudicial logistic and resource allocation problems. If this

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13/ The Order also seeks the comments of the parties by January 22 "on the relative advantages and disadvantages of requesting that the Chief Administrative Judge appoint an auxiliary Board, or in consultation with him, a Special Master with the parties [sic] consent, or an Alternative Board Member or Technical Interrogator without it." Order at 11. Whatever "new forum" is selected, according to the Order, "would consider the discrete question of whether any of the contentions currently before this Board, including the so-called legal authority contentions and the contentions before us on remand, are substantively relevant to the proposed operation at 25% of full power." Id. at 10. A courtesy copy of the Governments' comments will be provided to the Appeal Board.

appeal is accepted, it would make far more sense to hold the 25% power proceeding in abeyance while this Board addresses the threshold issue presented on appeal.

It is thus apparent that a decision to take review of the Gleason Board's Order would have no significant effect on the overall progress of the Shoreham proceeding. If the Board so determined, even the 25% power issues could be pursued, at least through some of the preliminary stages, while the appeal is pending.

IV. SOME PERTINENT BACKGROUND RELATING TO THE APPEAL

The Governments will file a complete brief pursuant to whatever schedule is adopted by this Board should it accept this appeal. To assist the Board in evaluating this Motion, however, we set forth below some background information.

A. The Proceedings Below

LILCO first filed its Request for Authorization to Operate at 25% Power with the Commission on April 14, 1987, accompanied by a Motion for Expedited Commission Consideration. The Request was made under the provisions of 10 CFR § 50.47(c); it was based upon a new LILCO PRA and other analyses which allegedly demonstrated that operation of the Shoreham plant at 25% power would result in accident risks and offsite consequences so low that emergency planning and an ability to evacuate was necessary only for the area located one mile from the plant. See, e.g., Request

at 19. It was also based upon LILCO's assertion that 25% power operation of Shoreham was necessary to prevent an electrical power shortage on Long Island during the summer of 1987. Request at 104-117. The Governments opposed the Request in a filing dated April 27, 1987.

In a June 11, 1987 Order, the Commission denied the Request and Motion.[14] It stated, however, that LILCO "may refile its request under 10 CFR 50.57(c) with the Licensing Board when and if it believes that some useful purpose would be served thereby." CLI-87-04, at 2. On July 14, 1987, LILCO filed with the Commission a Motion for Designation of Licensing Board and Expedited Schedule to Rule on LILCO's 25% Power Request.[15] On August 12, 1987, the Commission found LILCO's Motion "misdirected" in light of CLI-87-04's instruction "that LILCO was to request from the Licensing Board any further relief concerning 25% operation."[16]

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[14] Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-87-04, ___ NRC ___, slip op. (June 11, 1987). The Commission noted that LILCO had offered no suggestion on how the issues raised by its filing could be handled under the NRC's normal adjudicatory procedures, and "no explanation of how the Commission may lawfully circumvent its usual rules for decisions." It stated, further, that on the basis of the filings presented, "there is nothing the Commission can lawfully do to grant LILCO's request for immediate authorization to operate at 25 percent power." CLI-87-04, slip op. at 2.

[15] LILCO also filed its Request with the Margulies Licensing Board, but asked that no action be taken pending a ruling by the Commission on its Board Designation Motion.

[16] Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1) NRC Order, ___NRC ___, slip op. at 1 (Aug. 12, 1987).

The Commission referred the LILCO Board Designation Motion to the Margulies Licensing Board for "appropriate action under the Commission's rules."17/

In a Memorandum to the Parties dated October 6, 1987, the Margulies Board sought briefs from the parties concerning "a number of significant questions" raised by LILCO's filings, which the Licensing Board wished "to have resolved before fully considering the motion." Memorandum to the Parties at 1 (Oct. 6, 1987). The Board identified several specific questions it wished the parties to address. Among them were the following:

> [W]hether if an applicant were issued a license . . . to conduct operations at less than full power, the less than full power operations could be considered as part of an adequate interim compensating action in view of what the Commission [has] stated interim compensating actions are [referring to Consolidated Edison Co. of New York (Indian Point, Unit No. 2), Power Authority of the State of New York (Indian Point, Unit No. 3), CLI-83-16, 17 NRC 1006, 1101, 1011, citing 45 Fed. Reg. 55403].

17/ Id. at 1-2. It may be argued in response to this Motion that these Commission Orders are somehow indicative of Commission approval of the propriety of LILCO's Request in seeking relief without applying for an exemption or waiver. The Governments submit that the Orders cannot be so construed. They clearly do not address either the substance or merits of LILCO's Request, nor do they purport to do so. The Commission decided nothing beyond the procedural question of whether it was the appropriate adjudicator to address the Request in the first instance. Of course, it also made note of the fact, obvious to the most casual observer, that the relief requested (issuance of an unprecedented 25% power license, within two months time, in a highly contested proceeding) could not possibly be granted under the Commission's regulations.

Memorandum to the Parties at 4. In discussing LILCO's attempt to rely on Section 50.47(c)(1) and its failure to address the unresolved contentions in the emergency planning proceeding, the Board also stated:

> In its Request (p. 16), Applicant considered the unresolved offsite emergency planning matters to be minor deficiencies, that are remediable and represent no-bar to a full power license. The Licensing Board does not consider them to be minor deficiencies. Only after further hearing can it be determined whether the fatal flaws the Licensing Board found are remediable and not a bar to the issuance of a full power license. Applicant misconstrues the current record. LILCO acts as if it received a reasonable assurance finding on offsite emergency planning and all that there is left to do in that regard is to tidy up some minor deficiencies. To the contrary, a no reasonable assurance finding was made by this Licensing Board. Although the proceeding was remanded for further hearing by the Commission in CLI-86-13, as regards the fatal flaws found, they were never resolved in Applicant's favor. They are yet to be decided albeit employing other considerations. Applicant also ignores the pending issue of the adequacy of the emergency planning exercise and its ramifications, a matter before the OL-5 licensing board.

Id. at 6. The Margulies Board also identified the following matter to be addressed by the parties:

> Major support of Applicant's Request for a 25% power license is its claim that a probabilistic risk assessment demonstrates that the probability of any prompt offsite injury as a result of an accident at Shoreham, operating at 25% power, even if no protective action is taken, is vanishingly small and that the risk and consequences of accidents at 25% power are so greatly reduced that any remaining unresolved emergency [planning] issues become entirely insignificant (p.5).

> The Licensing Board wants to be briefed by the parties on whether such an approach is acceptable to the Commission as a method to overcome emergency planning deficiencies or to bypass the regulations on offsite emergency planning [citing Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 713, Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 533, rev'd in part on other grounds, GUARD v. NRC, 753, F.2d 1144 (1985); Part 50, Statement of Consideration, 45 Fed. Reg. 55403, col. 3].

Id. at 7-8.

The parties filed the requested briefs on November 6 and replies on November 16, 1987.[18/] The Order which is the subject of this appeal was issued by the Gleason Board on January 7, 1988.

B. The January 7 Order

The portion of the Gleason Board's Order which the Governments seek to appeal is the ruling that "LILCO's Motion is properly filed and that no exemption from the regulations is needed . . . ." Order, at 6. In so ruling, the Gleason Board held that "LILCO has the right to pursue operation at 25% of full power by invoking 50.57(c) and using 50.47(c)(1) in the latter's 'not significant for the plant in question' provision to satisfy the requirements of 50.57(a)(3) as required under 50.57(c)." Id. at 14.

18/ The Staff did not originally file a reply brief, but in response to a Gleason Board Order of December 11 requesting a Staff reply, one was filed December 15, 1987.

A review of the Order reveals that the Gleason Board never addressed the substance of the dispositive issue: whether the LILCO Motion constituted an impermissible challenge to the regulations and the generic findings and assumptions underlying them, particularly in light of the Commission's stated intentions and purposes in adopting Sections 50.47(c)(1) and 50.47(d). This failure is particularly egregious because that precise issue had been raised by the Margulies Board's Order, and discussed by both the Governments and the NRC Staff.19/

Furthermore, the Gleason Board's Order relied on cases which preceded the 1982 rulemaking which adopted subsection 50.47(d) to exempt low power testing at 5% power or less from compliance with emergency planning requirements. See Order at 5-6. That reliance and its related analysis ignore the generic findings accompanying the rulemaking, which affirmed the continued

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19/ We do not detail here the analyses of this issue or other issues which were presented to the Board, both initially and in response to the Margulies Board's own observations, but would do so in our brief on appeal. For the Board's reference, however, we direct its attention to the following filings: Governments' April 27, 1987, Response in Opposition to LILCO's Motion for Expedited Commission Consideration; NRC Staff Response to LILCO Motion for Designation of Licensing Board and Setting Expedited Schedule to Rule on LILCO's 25% Power Request (July 29, 1987) at 7-8; NRC Staff Response to Board Memorandum Requesting Parties' Views on Questions Raised by LILCO 25% Power Authorization Motion (Nov. 6, 1987) at 12-18, e.g., ("Consideration of the comparative risks of accidents at 25% power does not appear to be what the Commission had in mind when it determined to allow a showing of 'interim compensating actions' in Section 50.47(c)(1)"); Views of Suffolk County, the State of New York, and the Town of Southampton in Response to Licensing Board's October 6, 1987 Memorandum Concerning LILCO's Request to Operate at 25% Power (Nov. 6, 1987); Reply of Suffolk County, the State of New York and the Town of Southampton to LILCO's Brief on 25% Power Questions (Nov. 16, 1987).

validity and applicability of the Commission's original risk assumptions for any operation above 5% power.[20] Finally, the Gleason Order ignores (a) the provisions of Section 50.12 (which, as noted above, appear to be intended to deal with requests such as LILCO's), (b) past precedent concerning other applicants' attempts to reduce the size of EPZs and thereby reduce the amount of necessary emergency preparedness,[21] and (c) the plain provisions of Section 2.758 prohibiting challenges to the Commission's regulations.

The Governments will discuss these matters in greater detail in their brief should this appeal be accepted.

20/ See, e.g., NRC Staff Response to Board Memorandum Requesting Parties' Views on Questions Raised by LILCO 25% Power Authorization Motion (Nov. 6, 1987) at 18, ("While the case law preceding [adoption of 50.47(d)] suggests that use of [PRA data] is permitted to attempt to secure 'exemption' from certain requirements under Section 50.47(c)(1) . . . the rulemaking in effect codifying the case law suggests that the rationale for allowing such analysis may not be applicable to power operations of an indefinite nature, but rather only to low power testing of a relatively short duration. . . . Adoption of Section 50.47(d) had the effect of resolving generically the insignificance of lack of approved offsite plans for operations limited to 5% power testing").

21/ Two other utilities have sought EPZ size reductions: Baltimore Gas & Electric Company and Public Service Company of New Hampshire. Both proceeded by way of exemption or waiver requests. Both were also summarily denied. See Letter, dated Feb. 14, 1986, from Harold A. Denton to J. A. Tierman, Vice President-Nuclear Energy, Baltimore Gas & Electric Co. (Docket Nos. 50-317, 50-318); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-12, 25 NRC 324 (1987).

V. CONCLUSION

For the foregoing reasons, this Board should take review of the January 7, 1988 Gleason Board Order.

Respectfully submitted,

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January 21, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL-6 (25% Power)

NOTICE OF APPEAL

Suffolk County, the State of New York, and the Town of Southampton hereby notice their appeal of the January 7, 1988, Licensing Board Memorandum and Order (In re: LILCO's Request for Authorization to Operate at 25% of Full Power). A copy of that Memorandum and Order is attached.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
James P. Gleason, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL-6 (Emergency Planning) (ASLBP No. 87-553-04-SP) January 7, 1988

MEMORANDUM AND ORDER
(In Re: LILCO'S Request for Authorization to Operate at 25% of Full Power)

Introduction

Before us is the Applicant's Motion For Authorization to Increase Power to 25% of July 14, 1987 (Motion), together with an ensuing agglomerate of answers, replies, responses and counter responses.[1] It was at the outset by

[1] These include: LILCO's Motion For Designation of Licensing Board and Setting Expedited Schedule to Rule on LILCO's 25% Power Request of July 14, 1987 (Designation Motion); Suffolk County State of New York and Town of Southampton Statement Concerning LILCO's July 14, 1987, Motion to Increase Power to 25% of July 27,1987 (Governments' Opposition to Designation); Suffolk County, State of New York, and Town of Southampton Response in Opposition to LILCO Motion for Designation of Licensing Board and Setting Expedited Schedule to Rule on

(Footnote Continued)

no means clear, either from the Motion or from the original Request for Authorization, exactly what path of reasoning through the legal maze the Applicant intended us to wend toward the relief it sought. Because of this we issued our Memorandum to the Parties of October 8, 1987. We pointed out therein that the Applicant had originally characterized its request as being under 10 C.F.R. 50.47(c)(1), that the Commission had directed that the request, if refiled with this Board, be filed under 10 C.F.R. 50.57(c), but that, in refiling, Applicant had merely stated that the request was under the

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(Footnote Continued)
LILCO's 25% Power Request of July 27, 1987 (Opposition to Designation); NRC Staff Response to LILCO Motion for Authorization to Increase Power to 25% of July 29, 1987 (Staff Response to Motion); LILCO's Brief on 25% Power Questions of November 6, 1987 (LILCO's Brief); Views of Suffolk County, The State of New York, and The Town of Southampton in Response to the Licensing Board's October 6, 1987 Memorandum Concerning LILCO's Request to operate at 25% Power of November 6, 1987 (Governments' Views); NRC Staff Response to Board Memorandum Requesting Parties' Views on Questions Raised By LILCO 25% Power Authorization Motion of November 6, 1987 (Staff's Views); LILCO's Reply Brief on 25% Power Questions of November 16, 1987 (LILCO's Reply); Reply of Suffolk County, The State of New York, and The Town of Southampton to LILCO's Brief on 25% Power Questions of November 16, 1987 (Governments' Reply); and NRC Staff Reply to Other Party Views on Board Questions concerning LILCO Motion for Authorization to Operate at 25% Power of December 15, 1987. All these filings reference or are founded upon LILCO's Request for Authorization to Increase Power to 25% and Motion for Expedited Commission Consideration filed before the Commission of April 14, 1987, (Request for Authorization); Governments' Response in Opposition to LILCO's Motions for Expedited Commission Consideration of April 27, 1987 (Governments' Opposition to Commission' Expedited Consideration); Staff's NRC Staff Response to LILCO Motion for Expedited Consideration of Request to Authorize Operation at 25% of Full Power of April 29, 1987. (Staff Support of Expedition); and the Commission's ensuing Memorandum and Order CLI-87-04.

required section but had, in effect, neither changed the previous reasoning nor demonstrated the chain of logic that linked it to the required section of the regulations.

In LILCO's Brief and LILCO's Reply the Applicant has largely ameliorated the flaw, establishing a train of reasoning which we can at least follow, although we cannot, as explained below, fully support it.

As we understand LILCO's theory of the case, the logic is as follows: The request for 25% power is made under the provision of 10 C.F.R. 50.57(c) which would allow ". . . operations short of full power operations . . ." upon favorable findings concerning the matters under 50.57(a). LILCO believes that only one numbered section of 50.57(a), section (a)(3), involves any dispute, and believes further that the showing which has been made under 50.47(c)(1) by its Request for Authorization fully satisfies the two-pronged test of 50.57(a)(3) by demonstrating that the 25% power operation "can be conducted without endangering the health and safety of the public" and "will be conducted in compliance with the regulations." LILCO's Brief at 5, 6.

The Governments view LILCO's implication that it has demonstrated compliance with 50.47(c)(1) as "patently false". Governments' Reply at 4. The Governments point out that before a license can be issued under 50.57(c) there must be an initial decision on the matters identified in 50.57(a). Further, the Governments argue that sections 50.57(a)(2),(3),and (6) must all be satisfied, not simply 50.57(a)(3) alone. They point out further that LILCO has not acknowledged the important provision of 50.57(c) that the parties have the right to be heard on relevant contentions before the required initial decision is issued. Governments' Reply at 6.

Staff cites 50.57(c):

> Action on [a motion to operate at low power] shall be taken by the presiding officer with due regard to the rights of the parties to the proceeding, including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized. Prior to taking any action on such a motion which any party opposed, the presiding officer shall make findings on the matters specified in paragraph (a) of this section as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized...

The Staff then notes that "[t]his language indicates that the Board should (1) consider whether pending contentions in the proceeding are relevant to the request for authorization of the activity (here 25% power operation); (2) allow any party with contentions the opportunity to show that those contentions are so relevant; and (3) make findings on the application of the 50.57(a) criteria to the activity sought to be licensed with respect to those criteria (sic) [contentions] placed into controversy by an opposing party." Staff's Views at 6.

We are thus confronted at the outset with the following questions:

1. Can the Applicant rely upon 50.57(c) to obtain authorization for operation at less than full power by using 50.47(c)(1) to meet the requirements of 50.57(a)?

2. Which of the requirements of 50.57(a) must be met in this manner?

3. Which, if any, of the contentions currently in litigation are "relevant to the activity to be authorized"?

4. Through which of the three permitting conditions of 50.47(c)(1) ("not significant for the plant in question", "adequate interim compensating actions", or "other compelling reasons") can 50.57(c) be seen to function where the movant attempts to rely on the sequence in question 1. above?

Analysis of Question 1

In examining the way in which 50.47(c)(1) can be used to satisfy the requirements of 50.57(c), it is instructive to consider the history of the section under which LILCO is presently operating the plant at 5% power, 50.47(d). That section is of comparatively recent origin (47 Fed. Reg. 30,232 (July 13, 1982)) and postdates both 50.57(c) and 50.47(c)(1). Two cases, Diablo Canyon, (14 NRC 107) and San Onofre, (15 NRC 61), arose before the Commission adopted 50.47(d), and in each the applicant sought permission to operate at low power for testing purposes while still unable to fully comply with the Commission's emergency planning requirements. 14 NRC 107 at 120 et seq, 15 NRC 61 at 191 et seq.

In each case the applicant argued, as LILCO does here, that operation at a restricted power level (there 5%, here 25%) so reduced such factors as fission product inventory, residual heat, urgency to respond to off-normal conditions, and the possible consequences of an accident that the deficiencies of the emergency plans were not significant for the plant in question. 14 NRC 107 at 123-139, 15 NRC 61 at 191-197. After hearing argument the Boards in those cases found that, for the proposed operations, the deficiencies in the plans were indeed not significant. 14 NRC 107, 139; 15 NRC 61, 197.

Both of these decisions were undisturbed on review. Indeed, when the Commission issued the rule change that created 50.47(d), permitting operation up to 5% without full compliance with the emergency planning regulations, it noted these decisions favorably, saying:

> The level of risk associated with low-power operation has been estimated by the staff in several recent operating license cases:Diablo Canyon...San Onofre... and LaSalle... In each case the Safety Evaluation Report concluded that low-power risk is several orders of magnitude less than full-power risk. These findings support the general conclusion in the text that a number of factors associated with low-power operation imply greatly reduced risk compare[d] with full power.

47 Fed. Reg. 30,232, 30,233, fn. 1.

We see a compelling analogy between the situation obtaining before the rule change with respect to all low power operation and that obtaining at present with respect to operation above 5%. Where only emergency planning contentions remain to be adjudicated, if an applicant submits a request under 50.57(c) for operation in excess of 5% power, and asserts that the unresolved contentions can be resolved for that power level by virtue of the "not significant for the plant in question" provision of 50.47(c)(1), we must at least give the request serious consideration. It is at least possible that the applicant may be able to comply with the regulations and obtain a low power license through this route. Thus we conclude that LILCO'S motion is properly filed and that no exemption from the regulations is needed as urged by the Governments.

We caution, however, that the road may be a difficult one. In particular, we note that the Commission sanctioned 5% operation in part because Staff analyses had indicated that the risk involved were "several orders of magnitude less than full power risk." It may well be that the risk at 25% is not so greatly diminished. We note also that the Statement of Considerations which the Commission offered at the time of the rule change specifically noted that while the rule change exempted the applicant from NRC and FEMA review of many of the requirements of 50.47(b), the NRC would

nonetheless be expected to review for compliance with Subsections 50.47(b)(3),(5),(6),(8),(9),(12),and (15). 47 Fed. Reg. 30,232, 30,233. The exact significance of the Commission's establishing this requirement we have not evaluated in the light of 50.47(c)(1)'s stated relief from all the requirements of 50.47(b).

Furthermore, we agree with the Staff that the plain wording of 50.57(c) requires that we "(1) consider whether pending contentions in the proceeding are relevant to the request . . .; (2)allow any party with contentions the opportunity to show that those contentions are so relevant; and (3) make findings on the application of the 50.57(a) criteria to the activity sought to be licensed" with respect to the matters in controversy.

The interaction between Sections 50.57(c) and 50.47(c)(1) is, in the case at bar, also complex. It would appear to the Board, for example, that the "relevance" test for contentions expressed in 50.57(c) is much less rigorous than the "not significant" test of 50.47(c)(1). Further, LILCO's claim that 25% of power operation lowers the risk sufficiently so that any emergency planning deficiencies are insignificant or compensated (LILCO's Reply at 10) is a claim that inherently compares two incommensurables. How far some given risk must drop and in what way it must drop in order that some particular precaution may become unnecessary is not a matter instantly perceived.

Thus our answer to question 1 is: The applicant is entitled to pursue this course, but the circumstances of a particular case may well require a hearing, and we are bound to consider at the outset whether due process requires such a hearing and upon which of the unresolved contentions it should be based.

Analysis of Question 2

Here the controversy is simple, direct, and, in the Board's view, of little consequence. The Governments believe that the motion under 50.57(c) must consider Subsections 50.57(a)(2), (3), and (6). Governments' Reply at 5-6. LILCO believes it need only satisfy the requirements for 50.57(a)(3). LILCO's Reply at 3-5. Staff apparently takes no position.

The three Subsections involved in the dispute set forth findings which would be required in order to issue a license (whether for full power or for limited power under 50.57(c)). They read as follows:

> 50.57(a) Pursuant to 50.56, an operating license may be issued by the Commission, up to the full term authorized by 50.51, upon finding that:
>
> * * *
>
> (2) The facility will operate in conformity with the application as amended, the provisions of the Act, and the rules and regulations of the Commission; and
>
> (3) There is reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the regulations in this chapter; and
>
> * * *
>
> (6) The issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.

LILCO's position, while not succinctly expressed, is apparently that, since only Subsection (a)(3) requires "reasonable assurance" and that "reasonable assurance" finding was made with respect to the extant 5% power

license, all other 50.57(a) findings, for whatever power level, have already been resolved favorably to LILCO. LILCO's Reply at 6. We find the logic difficult to follow, but we see no need to grapple with it.

In the Board's view, for this case, where common defense and security are not at issue nor is the plant's conformity with the application, a positive finding under 50.57(a)(3) would, in fact, be tantamount to a positive finding for all three of the subsections at issue. Certainly a negative finding would be dispositive. We shall proceed on the assumption that a license can issue only if its issuance, the operation of the facility, and the activities authorized will all give reasonable assurance of the protection of health and safety and compliance with the regulations.

Analysis of Question 3

The question of which contentions currently in litigation are relevant in a substantive way to the activity to be authorized is a question that stands at the core of any litigation concerning the request for 25% power. Furthermore, it is a question of great complexity, involving as it does the interplay of emergency preparedness with the variable scope of potential accidents when that scope is considered as a function of power level. There are no quick or obvious answers, and, in our view, the answer to this question may itself be achieved only through the analytic crucible of litigation.

The matter of the validity of the technical analysis supporting LILCO'S motion is a narrow one and constitutes only a small part of the total

litigation. Its complexity together with the existing burdens on this Board however calls, we believe, for the attention which could only be given by separating out that portion of the case for separate consideration. Four possibilities present themselves: We can request the appointment of a separate Board, the appointment of a Special Master, the appointment of an Alternate Board Member, or a Technical Interrogator. In any case the new forum would consider the discrete question of whether any of the contentions currently before this Board, including both the so-called legal authority contentions and the contentions before us on remand, are substantively relevant to the proposed operation at 25% of full power. These bodies would be empowered to examine the relevance of such contentions based on LILCO'S technical risk assessment and on any evidence produced by other parties.[2] The chief difference in their powers would be that a Board so appointed could decide, upon finding that none of the contentions had substantive relevance to 25% operation, that an initial decision could be issued and the request could be granted. If the contentions were evaluated in opposition to a favorable finding under 50.57(3), the request would be denied. In either case, the decision of the separate Board would be appealable. The authority of the

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[2]Our understanding of LILCO's intent is that it would attempt to prevail on a showing of immateriality of the unresolved contentions under 50.47(c)(1) based on its technical risk assessment and the uncontested elements of emergency planning now in place. Therefore, the inquiry of the separate forum would focus on the risk assessment and not on final resolution of the remaining contentions in the case. If LILCO establishes that the plant is sufficiently safe when restricted to a maximum of 25% power so that the remaining contentions are immaterial to public health and safety, the contentions would be substantively irrelevant for the purposes of 50.57(c).

Special Master, Alternate Board Member or Technical Interrogator would be limited to the advisory and assistant role established by 10 C.F.R. 2.722. The matter of dealing with those contentions at 25% of power would be left to the present Board. We defer deciding what further procedures may be required at that point. It appears certain to us now that the examination of this question cannot be accomplished without some opportunity for the Governments to review both LILCO's original request and the Staff's analysis thereof. In the interest of expedition we therefore direct that the Staff resume its review of the proposal. Further, in order to focus the inquiry, we believe that the Governments must be given further opportunity to state with basis and specificity the ways in which any of their present contentions are relevant to the proposed operation. These statements, of course, would necessarily await the publication of the Staff Safety Evaluation and a reasonable period for review by the Governments' experts. The precise schedule for review, submission of statements, and comment by the parties on such statements would be set by the proposed new Board, Special Master, Alternate Board Member or Technical Interrogator with due regard to the equities involved.

We therefore seek the parties comments on the relative advantages and disadvantages of requesting that the Chief Administrative Judge appoint an auxiliary Board, or in consultation with him, a Special Master with the parties consent, or an Alternate Board Member or Technical Interrogator without it. 10 C.F.R. 2.722(a)(2)(3). The parties have of course given us their views on this matter previously, but this was before we decided that LILCO's motion is properly filed and that it is entitled to timely consideration of its motion under existing regulations without first seeking

an exemption. With today's decision it is no longer open to the parties to argue that LILCO is not entitled to proceed on the course it has chosen, that no consideration at all be given its request or that its request be deferred indefinitely. We can and do additionally consider LILCO's economic concerns in deciding that as a procedural matter LILCO is entitled to explore all possibilities afforded by NRC regulations for obtaining an operating license for Shoreham within a meaningful time frame. Therefore, it is no longer open to the parties to argue that no proceeding be undertaken or that it be long deferred on grounds of excessive burden or lack of resources. Further proceedings by one of the above alternatives, unless LILCO withdraws its request, are inevitable. Parties' views on the best alternatives for going forward may be changed by these developments and their recommendation on the narrow issue we pose is warranted.

Analysis of Question 4

As is clear from the discussion above, in the cases that we regard as precedential concerning the matter of operation at powers less than full power, 50.47(c)(1) was deemed to operate through its "not significant for the plant in question" provision both by the Boards that decided the issue and by the Commission. We believe that it should so function here.

We have given consideration to LILCO's position that the other provisions of 50.47(c)(1) may also afford the requested relief. The position of both Staff and Governments is that the notion of "adequate interim compensating action" was meant to cover the situation where provisions in the emergency

plans of one organization compensated for deficiencies in the preparedness of other organizations but was not meant to apply to whatever safety benefits that might result from operation of the reactor at restricted power levels. We are persuaded by the briefings of the parties and our own review of the regulations that emergency planning regulations are promulgated as a matter of policy and that relief from the requirements of these regulations cannot generally be obtained based on probabilistic risk assessments that show low risk to public health and safety from restricted reactor operations. The Commission has of course devoted considerable effort to assuring that reactor operations even at 100% power have low risk to the public but still it requires emergency preparedness.

The Commission has not spoken directly on this matter and there appears to be no precedential case law controlling. Additionally, LILCO argues that restricted power levels are but one element among several which together would permit its motion to be granted under the adequate interim compensating action provision 50.47(c)(1). This route therefore remains at least potentially open to obtain the relief sought if LILCO wants to pursue it although the burden may be a difficult one.

We also considered whether "other compelling reasons" could include impending power shortages on Long Island as a basis for relief as espoused by LILCO. Power shortages may cost money; they may inconvenience people or threaten jobs or loss of industrial capacity. LILCO has not alleged and we find no reason for believing that there are reasons, for granting the request under this provision, related to the public health and safety, at least at any level of significance likely to result from the near term unavailability of

Shoreham. Thus, LILCO's reliance on this provision of 50.47(c)(1) appears to be based principally on an economic argument. It is well established that relief from the Commission's safety regulations cannot be founded upon economic considerations. The Commission has clearly designated emergency planning as a matter required for protection of public health. Thus, we do not believe that it would be fruitful to pursue a restricted power license for Shoreham based on the possibility of power shortages on Long Island, because even if true beyond question, relief could not be granted for that reason alone. If safety related reasons exist for granting a license to operate at 25% power, they will have to succeed on their own merit under the regulations without assistance from economic considerations.

Conclusion

LILCO has the right to pursue operation at 25% of full power by invoking 50.57(c) and using 50.47(c)(1) in the latter's "not significant for the plant in question" provision to satisfy the requirements of 50.57(a)(3) as required under 50.57(c). The Governments, however, have the right to be heard to the extent that their contentions are relevant to such operation.

In order to assure all parties' rights in this proceeding, we direct that the Staff resume its review of LILCO's proposal, and we direct that all parties comment upon the relative desirability of appointing a Special Master, another Board, an Alternate Board Member or Technical Interrogator to direct the inquiry into whether there are extant contentions in this case which are substantively relevant to the proposed operation at 25% of power. If a

Special Master is appointed such Special Master would be empowered only to recommend to this Board whether there is such relevance to the contentions presently before us. If a Board is appointed, such Board would be empowered to grant LILCO's request upon a finding that no such contentions existed or, if relevance is found, to deny LILCO's motion. If the motion is denied, this Board will seek the views of the parties as to whether it would be preferable to proceed with resolution of emergency planning contentions for 25% power or for 100% power in the posture of the case as it then exists. If an Alternate Board Member is appointed, that alternate will submit a report to the Board which will be advisory only, and if a Technical Interrogator, that person will assist the Board in evaluating evidence and preparing a suitable and complete record. This Board will retain jurisdiction over resolution of existing emergency planning contentions at all times.

ORDERED:

1. LILCO is entitled to proceed with its request for 25% power operation under 10 C.F.R. 50.57(c).

2. Intervenors are entitled to be heard on the relevance of their contentions to LILCO's request.

3. The Staff is directed to proceed with a review of LILCO's 25% power request.

4. The parties are directed to recommend to the Board by January 22, 1988 on the appointment of a separate Board, a Special Master, an Alternate Board Member, or a Technical Interrogator to consider LILCO's 25% power request.

THE ATOMIC SAFETY AND
LICENSING BOARD

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 7th day of January, 1988.

January 21, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Appeal Board

In the Matter of	
LONG ISLAND LIGHTING COMPANY	Docket No. 50-322-OL-6 (25% Power)
(Shoreham Nuclear Power Station, Unit 1)	

CERTIFICATE OF SERVICE

I hereby certify that copies of GOVERNMENTS' MOTION FOR LEAVE TO FILE INTERLOCUTORY APPEAL and NOTICE OF APPEAL have been served on the following this 21st day of January 1988 by U.S. mail, first class, except as otherwise noted.

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* By Hand, Jan. 22
** By Federal Express, Jan. 21