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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

Docket No. 50-322-OL-6
(25% Power)

GOVERNMENTS' BRIEF IN RESPONSE
TO THE STAFF BRIEF OF APRIL 20, 1988

INTRODUCTION

On April 20, 1988, the NRC Staff submitted a pleading styled "NRC Staff's Response to LILCO's and Intervenors' Briefs of April 1, 1988 on Motion to Authorize Operations at 25% of Full Power." (hereafter "Staff Brief"). The Staff Brief manifests the Staff's cavalier attitude toward the procedures established by the Board by advancing arguments that completely disregard the Board's Orders.

The Board's February 26, 1988 Order directed the parties to file briefs addressing the "impact of pending emergency contentions [sic] on a reasonable assurance finding authorized by 10 C.F.R. 50.57(c)." Despite this Board directive, however, the

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Staff did absolutely nothing in response to the Board's Order except to file a two page document unilaterally declaring that the Staff would not file the brief requested by the Board.^{1/}

Having failed to comply with the Board's Order requiring the parties to brief the relevance of pending contentions by April 1, 1988, the Staff now has the temerity to file the Staff Brief, which asserts that the Governments "ignore" the Board's directions, suggests that the Governments are acting improperly by not having completed a review of the technical bases for LILCO's 25% power Request, and argues that the Governments should not be permitted to submit new contentions challenging the technical bases for LILCO's Request at the appropriate time. Staff Brief at 2-3.

The Staff chose to ignore the Board's Order requiring the parties to file briefs addressing the relevance of pending emergency planning contentions to LILCO's 25% power Request. Having done so, it cannot now use the reply procedure set up by the Board to advance new arguments to which the other parties, particularly the Governments, cannot respond. The Staff Brief should be summarily rejected, in light of the Staff's failure to comply with the Board's Order and with the procedures established by the Board.

^{1/} On March 9, 1988, the Staff announced that the Staff review of the LILCO 25% power PRA would not be completed until "late spring," and that the Staff would not be able to ascertain "whether pending contentions are substantively relevant to operation at a 25% power level" until early fall. See NRC Staff Response to Board Order on Relevance of Pending Emergency Planning Contentions to Operation 25 Percent Power [sic] (March 9, 1988); Staff Brief at 1.

Should the Board choose to consider the Staff Brief, however, the Governments (Suffolk County, the State of New York, and the Town of Southampton) submit this response to the arguments made in the Staff Brief, consistent with the Board's provision for replies to briefs submitted pursuant to the February 26 Order. The Staff arguments must be rejected because they ignore the Board's Orders governing the 25% power proceedings, they ignore the contents of the Governments' April 1 Brief, and they advocate a procedure contrary to fundamental due process.

I. THE STAFF IGNORES THE BOARD'S RULINGS CONCERNING THE GOVERNMENTS' RIGHT TO DISCOVERY AND TO REVIEW LILCO'S AND THE STAFF'S TECHNICAL ANALYSES

The Staff Brief completely ignores the Board's statement that the Governments are entitled to review the Staff Safety Evaluation before undertaking any technical analysis. Indeed, the Board's language on this point could not be clearer. The Board held that the technical issues raised by LILCO's Report cannot be addressed "without some opportunity for the Governments to review both LILCO's original request and the Staff's analysis thereof."^{2/} The Board also held that statements concerning the relevancy of pending contentions "would necessarily await the publication of the Staff Safety Evaluation and a reasonable period for review by the Governments' experts."^{3/} In the February 26 Order, the Board reiterated the point:

^{2/} Memorandum and Order (In re: LILCO Request for Authorization to Operate at 25% of Full Power) (January 7, 1983) (hereafter, "January 7 Order") at 11 (emphasis supplied).

^{3/} Id. (emphasis supplied).

If the Staff's technical review of the Applicant's motion is not completed or made available in a timely manner, the parties will be afforded an additional opportunity to respond to such review.^{4/}

On April 1, the Governments submitted a brief discussing in detail why the pending contentions prevented the reasonable assurance finding required under Section 50.57(c), precisely as directed by the Board's Orders. Because the Staff's review was not completed and no discovery schedule has yet been set, the Governments could not and did not address the technical bases of LILCO's Request. They explained, however, why such technical analysis is not necessary to respond to the Board's February 26 filing.

Given the Board's specific language postponing technical analysis until the publication of the Staff Evaluation, the propriety of the Governments' approach is beyond cavil. In fact, the Governments' inability to address the technical issues raised by LILCO's Request is no different from that announced by the Staff on March 9. Unlike the Staff, however, the Governments did respond to the Board's February 26 directive by demonstrating why, for non-technical reasons, the pending emergency planning contentions (1) are relevant to LILCO's proposed 25% power operation, (2) preclude the reasonable assurance finding required under Section 50.57, and (3) require the denial of LILCO's 25% Power Request.

^{4/} Order, dated February 26, 1988.

II. THE STAFF BRIEF IGNORES THE SUBSTANCE OF THE GOVERNMENTS' APRIL 1 BRIEF

The Staff Brief essentially ignores the contents of the Governments' April 1 Brief. For example, the Staff's assertion that the Governments' have not shown whether the pending emergency planning issues, including res judicata decisions by the OL-5 Licensing Board, are substantially relevant to the issuance of a 25% power license, is ridiculous. See Staff Brief at 3-4. In fact, the Governments' April 1 Brief included extensive discussion, with detailed citations to LILCO's Request, to the pending contentions, and to the OL-5 Board's decisions, which demonstrated the relevance of the outstanding emergency planning issues to the matter identified by the Board as the issue in this proceeding: whether there can be a finding of reasonable assurance that adequate protective measures can and will be taken, based on the LILCO Plan and the purportedly "trained" LERO organization. The Staff's suggestion that the Governments failed to address the subject of the Board's inquiry is without basis.

III. THE STAFF IGNORES THE GOVERNMENTS' RIGHT TO CHALLENGE THE BASES OF LILCO'S 25% POWER REQUEST AND THE BOARD'S ORDERS TO THAT EFFECT

There are two layers of issues which must be addressed in resolving LILCO's 25% Power Request according to the Board's Orders interpreting Section 50.57. First, issues concerning whether pending emergency planning contentions are relevant to the 25% power proceeding must be addressed. Second, if it is

determined that no pending emergency planning contentions are relevant, then issues concerning the validity of the technical analyses supporting the 25% power Request and whether the analyses permit the finding required under the regulations must be addressed.

LILCO's 25% power Request makes abundantly clear that that Request rests on two bases: (1) a 25% power limitation; and (2) an adequate Plan and LERO. Because issues concerning the adequacy of the LILCO Plan and the LERO are the only issues ripe for discussion, they are the issues which the Governments have addressed to date. They alone require the denial of LILCO's Request.

Should the Board rule (erroneously, in the Governments' view) that LILCO's Request can be considered despite the relevant pending emergency planning contentions, it is clear that the technical issues raised by LILCO's Request must be addressed. The Board has stated that such issues are critical to LILCO's application and must be fully developed in "the analytical crucible of litigation." January 7 Order at 9. The Staff has acknowledged the importance of the technical issues as well.^{5/}

^{5/} The significance of the technical issues was acknowledged by the Staff when it stated:

As the Staff does, LILCO recognizes that action in its request to operate at 25% power requires an analysis of the validity of its projections of differences in accident sequence progressions at a 25% power level in contrast with operations at full power.

Staff Brief at 2.

Yet, because of the complicated nature of these technical matters, the Staff has not completed its analysis of the technical issues. As noted, the Governments are in a similar position in that they have yet to complete a review of the technical issues, and in fact are not required to complete that review until a reasonable time after the publication of the Staff Evaluation.

As the Governments have repeatedly stated, they do not concede the validity of LILCO's technical analysis. At the time deemed appropriate by the Board, and after the completion of the Staff Evaluation and any necessary discovery, the Governments will file contentions addressing the validity of LILCO's technical analyses or conclusions. The Staff's argument that the Governments cannot file contentions challenging the validity of LILCO's assumptions, analyses and conclusions (see Staff Brief at 3, n.1), suggests that the Board could address LILCO's 25% power Request without affording the Governments the right to challenge the bases of LILCO's license request. Such a procedure would be a gross deprivation of the Governments' due process right to a hearing which is guaranteed by the Atomic Energy Act and the U.S. Constitution. There is no conceivable basis for the suggestion that this Board could consider LILCO's unprecedented license application and consider or rely upon LILCO's submitted technical analyses and conclusions without providing the Government an opportunity to challenge the LILCO submittal.^{6/}

^{6/} The Staff has cited two authorities in attempting to truncate the Governments' rights to file contentions: Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983) and Statement of Policy on Conduct of Licensing Pro-

On November 6, 1987, the Staff appeared to recognize the two separate areas of inquiry involved in LILCO's Request by advocating a procedure which contemplated a three step process for resolving 25% power issues: (1) pending emergency planning contentions would be analyzed for relevance to the Request; (2) after the pending contentions were analyzed, any party would have an opportunity to demonstrate that new contentions are relevant; and (3) the Board would then make determinations with respect to the matters placed in controversy by the opposing party.^{7/} Thus,

ceedings, CLI-81-8; 13 NRC 452, 454 (1981) (hereafter "NRC Statement of Policy"). Neither of these authorities are relevant. The Catawba case concerns late filed contentions -- a subject which is irrelevant in this proceeding. In particular, under NRC regulations, the Governments are required to file contentions no later than 15 days prior to the first prehearing conference. 10 C.F.R. § 2.714(b). No such conference has been scheduled for 25% power, and there is therefore no requirement to file contentions. Indeed, in the 25% power proceeding, the Board has directed that pending contentions be addressed before new contentions are analyzed for relevance.

The Staff's citation to the NRC's Statement of Policy is similarly inapposite. The Staff cites to the Statement of Policy section concerning a party's obligations in NRC proceedings. The Governments have fulfilled their responsibilities as defined by the Board, and it is indeed ironic that the Staff, which has yet to complete its analysis, would make unfounded allegations about another party's failure to fulfill their responsibilities.

^{7/} In particular, the Staff analyzed the way the requirements of 10 C.F.R. § 50.57(c) should be applied to the 25% power proceedings, and concluded as follows:

This 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 Section 50.57(a) criteria to the activity sought to be licensed with respect to those criteria placed into con-

under the procedure earlier advocated by the Staff, new contentions concerning the technical bases for the 25% power application would not be heard until after pending emergency planning contentions were analyzed. That proposed procedure was particularly appropriate for structuring the 25% power proceedings, for, as the Board has observed, a determination that a pending emergency planning contention is relevant by itself requires the denial of LILCO's 25% power application.^{8/}

The Board essentially adopted the Staff's earlier recommended procedure of first determining the relevance of pending emergency planning contentions.^{9/} Moreover, the Board ordered that even before the relevance of pending contentions could be addressed, the Governments are entitled to review the Staff Safety Evaluation at the outset.^{10/} Given the fact that the

troversy by an opposing party.

NRC Staff Response to Board Memorandum Requesting Parties Views on Questions Raised by LILCO's 25% Power Authorization Motion (November 6, 1987) (emphasis supplied) at 6.

^{8/} January 7 Order at 15.

^{9/} The Board stated the following:

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 Section 50.57(a) criteria to the activity sought to be licensed" with respect to the matters in controversy.

January 7 Order at 7.

^{10/} The Board stated that the Governments' statements on the

Staff had not yet completed its review, the Governments followed precisely the course directed by the Board when it addressed the non-technical reasons why the pending emergency planning contentions are relevant at 25% power.

The Governments, pursuant to the Board's Orders, have followed the procedure previously advocated by the Staff and adopted by the Board. Yet, in a reversal of its earlier position, the Staff now contends that the Governments should not be allowed to submit new contentions challenging the technical basis of LILCO's Request. The motive for the Staff's about face is difficult to fathom, but the Staff's new position clearly contravenes the Board Orders and fundamental notions of due process. The Board must therefore reject the Staff arguments.

CONCLUSION

In conclusion, the Staff Brief contradicts earlier Staff positions in this case, contravenes the Board's Orders, and proposes a procedure which violates due process. The Staff Brief must therefore be rejected.

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relevance of pending contentions "would necessarily await publication of the Staff Safety Evaluation and a reasonable period for review by the Governments' experts." January 7 Order at 11.

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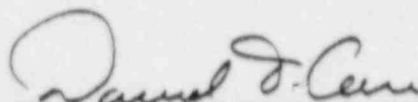
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