

17244

October 11, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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-3
(Emergency Planning)

GOVERNMENTS' MOTION FOR TOLLING OF TIME PERIOD
WITHIN WHICH TO FILE MOTION FOR STAY OF LBP-88-24

I. Requested Relief

In this Motion, the Governments (Suffolk County, New York State, and the Town of Southampton) request that the Board grant the following relief:

1. Toll the time period within which the Governments must file a motion to stay LBP-88-24 until at least 48 hours after receipt of a decision which would have the effect of reinstating the license authorization contained in LBP-88-24; and,

8810180195 881011
PDR ADOCK 05000322
G PDR

DS03

2. In the interim period prior to ruling on the merits of this Motion, toll the time period within which the Governments must file a motion to stay LBP-88-24 until at least 24 hours after the Appeal Board has ruled on the merits of this Motion.

II. Discussion

The complex procedural posture of this case has constrained the Governments to file this Motion to ensure that their legal rights are not prejudiced. The Governments have no desire to file a stay motion which is premature or for which adequate bases do not exist. Given the posture of this case, however, it is not clear how the 10-day period for the filing of stay motions set forth in 10 CFR § 2.788 would be applied. We explain the procedural quandary which necessitates the filing of this Motion below.

Prior to the Appeal Board's decision in ALAB-902 last Friday, October 7, 1988, the Governments intended to file on October 11, 1988, a motion to stay LBP-88-24 and its authorization for issuance of a full power operating license for Shoreham, pending appellate review of the merits of LBP-88-24.^{1/}

^{1/} LBP-88-24 was served by mail on September 26, 1988. Accordingly, the 10-day period prescribed by 10 CFR § 2.788, taking into account service and holidays, expires on October 11.

The issuance of ALAB-902, however, created a procedural dilemma.

On the one hand, ALAB-902 immediately obviated the need to seek a stay of LBP-88-24. The Appeal Board vacated the authorization for issuance of a license, the relief which would have been sought via a stay motion.^{2/} On the other hand, LILCO has already sought Commission review of ALAB-901 and the Appeal Board's Orders of September 27 and September 29, and has stated its intent to seek Commission review of ALAB-902.^{3/} Clearly, it is possible that notwithstanding this Board's vacation of the license authorization in LBP-88-24, LILCO could succeed in obtaining a decision that might have the effect of reinstating the LBP-88-24 licensing authorization.

If a decision reinstating the license authorization were issued in the future, the Governments would wish to seek an immediate stay of that decision. The Governments believe that 10 CFR § 2.788 would allow them 10 days after such a decision within which to file a stay motion. It might be argued, however, that a stay motion filed after a decision which in effect rein-

^{2/} In its September 29 Memorandum and Order (at page 5), the Appeal Board appeared to agree that success by the Governments on their bifurcated appeal could obviate the need to seek a stay of LBP-88-24.

^{3/} The October 8 New York Times (at page 1) and the October 8 Washington Post (at page A3) both report LILCO's statements that it will appeal ALAB-902.

stated the decision in LBP-88-24, would be out of time if filed more than 10 days after service of LBP-88-24.

The Governments have found no NRC precedent that directly addresses the situation described above which is presented in this case. The Governments believe that the best view of the law is the following: a stay motion would be timely if filed promptly (within 10 days) after a reversal of the Appeal Board's orders or any other decision effectively reinstating the LBP-88-24 licensing authorization, even if the relief sought ultimately involved a stay pending appellate review of the OL-3 Board's allegedly erroneous decisions in LBP-88-24. Past experience has made the Governments wary about relying on this analysis, however. See the February 12, 1985, Appeal Board Order in the Shoreham OL-4 proceeding (Low Power) which is Attachment 1 hereto.

In light of ALAB-902 which vacated the license authorization in LBP-88-24, any stay motion filed now would have to be "contingent" upon the possible future issuance of an adverse decision. The Governments submit that the filing of such a "contingent" or speculative motion makes no sense and, in view of ALAB-902, would likely be considered premature in any event. Therefore, in light of the complex (perhaps unique) procedural posture of this case, the Governments request that the Appeal Board toll or extend the 10-day period in Section 2.788 for the

filing of a motion to stay LBP-83-24 pending appellate review of the merits until at least 48 hours after receipt of a decision which would have the effect of reinstating the Licensing Board's license issuance authorization.

The Governments have no desire to deprive either LILCO or the NRC Staff of the opportunity to respond to this Motion. The Governments provided a copy of a draft of this Motion to counsel for LILCO and for the Staff on Saturday, October 8, and advised each that the Governments would likely file this Motion on October 11, the first business day after receipt of ALAB-902. In the cover letter which accompanied the draft Motion, the Governments also sought the consent of LILCO and the Staff to the relief requested. See Attachment 2 hereto. On Monday, October 10, the NRC Staff stated that it could provide no response until some time on Tuesday, October 11. On Monday, October 10, LILCO's counsel stated that he could not determine LILCO's response until 9:30 a.m. Tuesday.

Unfortunately, as already noted, today, October 11, is the deadline for filing a stay motion, should the Appeal Board decline to grant this Motion. Therefore, the Governments have no choice but to file this Motion as early as possible, notwithstanding their inability to ascertain the positions of the other parties. Clearly, however, there is no assurance that the Appeal Board will be in a position to rule on the merits of this Motion

by close of business today. Accordingly, the Governments seek the following limited interim relief: that the Board immediately rule, ex parte if necessary, that no stay motion related to LBP-88-24 need be filed by the Governments until at least 24 hours after the Appeal Board has ruled on the merits of this Motion. The Governments submit that no party will be injured by such action.

Respectfully submitted,

E. Thomas Boyle
Suffolk County Attorney
Building 158 North County Complex
Veterans Memorial Highway
Hauppauge, New York 11788



Lawrence Coe Lanpher
Karla J. Letsche
Michael S. Miller
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
South Lobby - 9th Floor
Washington, D.C. 20036-5891

Attorneys for Suffolk County

Richard J. Zahnleuter (168)

Fabian G. Palomino
Richard J. Zahnleuter
Special Counsel to the Governor
of the State of New York
Executive Chamber, Room 229
Capitol Building
Albany, New York 12224

Attorneys for Mario M. Cuomo,
Governor of the State of New York

Stephen B. Latham (184)

Stephen B. Latham
Twomey, Latham & Shea
P.O. Box 398
33 West Second Street
Riverhead, New York 11901

Attorney for the Town of
Southampton

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

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

February 12, 1985

| | | |
|----------------------------------|---|------------------------|
| In the Matter of |) | |
| |) | |
| LONG ISLAND LIGHTING COMPANY |) | Docket No. 50-322-OL-4 |
| |) | |
| (Shoreham Nuclear Power Station, |) | (Low Power) |
| Unit 1) |) | |

ORDER

Intervenors Suffolk County and the State of New York filed today a motion for a stay pendente lite of the Licensing Board's October 29, 1984 initial decision in the low power phase of this operating license proceeding.¹ The motion is summarily denied as untimely. The Commission's regulations explicitly require that any request for a stay pendente lite of a Licensing Board decision be filed "[w]ithin ten (10) days after service of [that] decision * * *". 10 CFR 2.788(a). There is no explanation in intervenors' submission respecting why the present stay request was not filed within the period prescribed by Section 2.788(a). Intervenors do note that earlier today the Commission voted to accord immediate effectiveness to the October 29 initial decision. There is nothing in

¹ LBP-84-45, 20 NRC 1343.

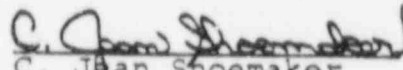
850214473

Section 2.788(a) to suggest, however, that that vote operated to start anew the running of the prescribed ten day period for filing a stay request.²

Needless to say, the denial of intervenors' motion should not be taken as implying any views on the merits of the issues presented by their pending appeal from the October 29 initial decision (which appeal has now been fully briefed and argued orally).

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board

² Although it has no bearing on our action here, we note the representation of the intervenors that they are also seeking stay relief from the Commission.

KIRKPATRICK & LOCKHART

SOUTH LOBBY - 9TH FLOOR
1800 M STREET, N.W.
WASHINGTON, D.C. 20036-5891

TELEPHONE (202) 778-1100
TELEX 440209 KL DC U
TELECOPIER (202) 778-9100

EXCHANGE PLACE
53 STATE STREET
BOSTON, MA 02109
(617) 227-6000

1428 BRICKELL AVENUE
MIAMI, FL 33131
(305) 374-8112

1500 OLIVER BUILDING
PITTSBURGH, PA 15222-5379
(412) 355-6500

KARLA J. LETSCHE
(202) 778-9064

October 8, 1988

VIA TELECOPIER

Donald P. Irwin, Esq.
Hunton & Williams
P.O. Box 1535
707 E. Main Street
Richmond, Virginia 23212

Mitzi Young, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Don and Mitzi:

Attached you will find a draft of a Motion which the Governments plan to file on Tuesday morning, October 11, 1988. As the Motion makes clear, the Governments seek Appeal Board guidance regarding their obligation to file a stay motion within 10 days of service of LBP-88-24, given the complex procedural posture of this case.

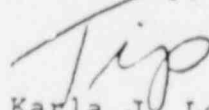
We are sending the draft Motion to you in advance of the filing to ask whether your clients will consent to (1) the Motion's basic request (i.e., tolling the time period for filing a stay motion until at least 48 hours after receipt of a decision having the effect of reinstating the license authorization in LBP-88-24 should one be issued); or, in the alternative, (2) the Governments' request that the period for filing a stay motion be tolled until at least 24 hours after the Appeal Board rules on the merits of the Motion. Depending upon your responses, the portion of the Motion on page 5 relating to LILCO and the Staff, and perhaps other portions, would obviously need to be changed.

KIRKPATRICK & LOCKHART

Donald P. Irwin, Esq.
Mitzi Young, Esq.
October 8, 1988
Page 2

We would appreciate hearing back from you, by telecopier or by telephone, no later than some time on Monday, October 10. If you have proposed language setting forth your response, we would be happy to consider it.

Sincerely,



Karla J. Letsche

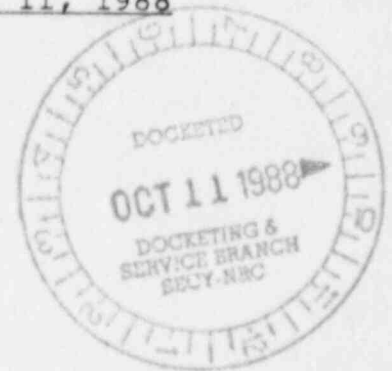
Enclosure

cc: Richard J. Zahnleuter, Esq.

October 11, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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-3
(Emergency Planning)

CERTIFICATE OF SERVICE

I hereby certify that copies of GOVERNMENTS' MOTION FOR TOLLING OF TIME PERIOD WITHIN WHICH TO FILE MOTION FOR STAY OF LBP-88-24 have been served on the following this 11th day of October 1988 by U.S. mail, first-class, unless otherwise indicated.

Christine N. Kohl, Chairman*
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Howard A. Wilber*
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John H. Frye, III, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Oscar H. Paris
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Frederick J. Shon
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Commissioner Kenneth C. Rogers
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Frederick M. Bernthal
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

James P. Gleason, Chairman
Atomic Safety and Licensing Board
513 Gilmore Drive
Silver Spring, Maryland 20901

William C. Parler, Esq.
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

William R. Cumming, Esq.
Spence W. Perry, Esq.
Office of General Counsel
Federal Emergency Management Agency
500 C Street, S.W., Room 840
Washington, D.C. 20472

Elisabeth Taibbi, Clerk
Suffolk County Legislature
Suffolk County Legislature
Office Building
Veterans Memorial Highway
Hauppauge, New York 11788

Mr. L. F. Britt
Long Island Lighting Company
Shoreham Nuclear Power Station
North Country Road
Wading River, New York 11792

Ms. Nora Bredes
Executive Director
Shoreham Opponents Coalition
195 East Main Street
Smythtown, New York 11787

Alfred L. Nardelli, Esq.
New York State Department of Law
120 Broadway, 3rd Floor
Room 3-118
New York, New York 10271

Lando W. Zech, Jr., Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Kenneth M. Carr
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Thomas M. Roberts
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edwin J. Reis, Esq.**
U.S. Nuclear Regulatory Commission
Office of General Counsel
Washington, D.C. 20555

Anthony F. Earley, Jr., Esq.
General Counsel
Long Island Lighting Company
175 East Old Country Road
Hicksville, New York 11801

W. Taylor Reveley, III, Esq.**
Hunton & Williams
P.O. Box 1535
707 East Main Street
Richmond, Virginia 23212

Stephen B. Latham, Esq.
Twomey, Latham & Shea
33 West Second Street
Riverhead, New York 11901

Docketing and Service Section**
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Hon. Patrick G. Halpin
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, California 95125

E. Thomas Boyle, Esq.
Suffolk County Attorney
Bldg. 158 North County Complex
Veterans Memorial Highway
Hauppauge, New York 11788

Mr. Jay Dunkleburger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Mr. Philip McIntire
Federal Emergency Management Agency
26 Federal Plaza
New York, New York 10278


Adjudicatory File*
Atomic Safety and Licensing Board
Panel Docket
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Monroe Schneider
North Shore Committee
P.O. Box 231
Wading River, New York 11792

Fabian G. Palomino, Esq.
Richard J. Zahnleuter, Esq.
Special Counsel to the Governor
Executive Chamber, Rm. 229
State Capitol
Albany, New York 12224

Mr. Stuart Diamond
Business/Financial
NEW YORK TIMES
229 W. 43rd Street
New York, New York 10036

David A. Brownlee, Esq.
Kirkpatrick & Lockhart
1500 Oliver Building
Pittsburgh, Pennsylvania 15222



Karla J. Letsche
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
South Lobby - 9th Floor
Washington, D.C. 20036-5891

* By Hand
** By Telecopy