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LILCO, October 11, 1988

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'88 OCT 13 P3:55

Before the Atomic Safety and Licensing Appeal Board

In the Matter of)	
)	
LONG ISLAND LIGHTING COMPANY)	Docket No. 50-322-OL-3
)	(Emergency Planning)
(Shoreham Nuclear Power Station,)	
Unit 1))	

LILCO'S RESPONSE TO INTERVENORS' TOLLING MOTION

LILCO responds as follows to Intervenor's tolling motion of this morning:

1. Intervenors' Motion is Untimely and must therefore be denied.

LILCO objects to Intervenor's request to toll the deadline for filing a stay request of LBP-88-24 on the basis that it is untimely. LBP-88-24 was issued on September 23. It was also served, and service was completed, that afternoon, by telephone notification to the parties of the decision's availability and their actually picking it up that day.

Service may be completed by a variety of means under the pertinent Commission regulation, 10 CFR § 2.712. One of them is:

(d)(1) by personal delivery, on handing the paper to the individual....

It is undisputable that counsel for Intervenor dispatched an agent who received a copy of LBP-88-24 from the Licensing Board on the afternoon of September 23. The Appeal Board itself has so noted in its September 29 Memorandum and Order:

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We have been advised by Licensing Board Panel Staff that counsel for LILCO, the Government, and the NRC Staff picked up copies of LBP-88-24 on September 23.

Id. at 7 note 6.

The Rules of Practice also prescribe that a motion for a stay must be filed within 10 days after service of the pertinent decision of action sought to be stayed. 10 CFR § 2.788(a). With service effective on September 23, the ten-day period expired on Monday, October 3.¹

One Appeal Board case, Consolidated Edison Company of New York, (Indian Point Station, Unit No. 2), ALAB-414, 5 NRC 1425 (1977), is apparently to the contrary, at least as to practice involving courtesy service of Appeal Board decisions. It determines, as a subsidiary issue, that courtesy notification to the parties of the availability of an Appeal Board decision is not effective as a substitute for the manner of service delegated by the NRC Manual to the Docketing and Service Section. 5 NRC at 1427-28. However, LILCO submits that that case does not govern here. First, the circumstances in that case were complicated by the fact that the regulations involving stays and petitions for review of Appeal Board decisions (10 CFR §§ 2.2786, 2.788) took effect during the period in which the stay request under consideration was to be filed. Second, the pertinent provision

¹ Indeed, the Appeal Board used this fact -- that the parties had actually picked up LBP-88-24 on September 23 -- as a basis for criticizing LILCO'S motion for additional time to brief the bifurcation of Intervenors' appeal from LBP-88-24. Memorandum and Order, September 29, 1988, at 7.

regarding completion of service -- 10 CFR § 2.712(d)(1) -- is not even mentioned. Further, the NRC Manual provision on which the Appeal Board relied in that case, which is not published as part of the regulations themselves, should not override the plain text of the Rules of Practice: that service is complete when "the paper" in question -- here, LBP-88-24 -- "is handed to the individual" -- here, the authorized agent of Intervenors.

Construction of the plain text of the regulations so as not to frustrate expedition is particularly important in situations involving a stay, where time is of the essence. Intervenors' construction of the regulations adds over a week to what is contemplated under the regulations as a 10-day process. LILCO submits that the better construction, at least in cases where, as here, actual receipt has been verified, is that the literal text of § 2.712(d)(1) governs.

Intervenors' current tolling motion, dated October 11, is therefore a week out of time and must be denied.

2. If the Appeal Board grants Intervenors' motion, it should do so in a way that does not prejudice LILCO.

In the event the Appeal Board determines that Intervenors' motion is not untimely, LILCO does not object to granting the extension requested by them as long as it is so conditioned as not to prejudice LILCO, as indicated below:

LILCO does not oppose Intervenors' motion for an extension tolling the deadline for filing with the Appeal Board a motion to stay the portions of LBP-88-24 reversed by ALAB-902 until 48 hours after a decision reinstating the license authorization reversed in ALAB-

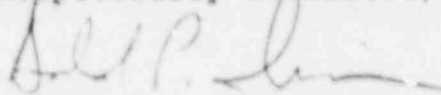
902, provided that: (1) the 48-hour period shall begin with receipt by Intervenor of any decision reinstating the license authorization, (2) the Appeal Board has previously approved this extension, and (3) the granting of this extension shall not be deemed to affect in any way any party's right to bring any matter before the Commission.

The inclusion of the conditions above is necessary to avoid unnecessary future delays in perfecting motions for stays and to ensure that LILCO's ability to take to the Commission matters which may properly be brought before it is not inadvertently impeded by the granting of any tolling motion.²

CONCLUSION

The Appeal Board should deny Intervenor's tolling motion for untimeliness. In the event it grants the motion, it should condition it as stated above, so as to avoid prejudicing LILCO.

Respectfully submitted,


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DATED: October 11, 1988

² LILCO takes passing issue with Intervenor's description of their "opportunity" for LILCO to comment in advance (see Motion at 5). The motion was telecopied, without notice, in draft late Saturday afternoon; yesterday was a federal holiday, which LILCO observed; and the motion was filed at the very start of business today. There was no opportunity for LILCO to comment on it in advance

CERTIFICATE OF SERVICEDOCKETED
USNRC

In the Matter of
LONG ISLAND LIGHTING COMPANY
 (Shoreham Nuclear Power Station, Unit 1)
Docket No 59-322-OL-3

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I hereby certify that copies of LILCO'S RESPONSE TO INTERVENORS' TOLLING MOTION were served this date upon the following by telecopy as indicated by an asterisk, by Federal Express as indicated by two asterisks, or by first-class mail, postage prepaid.

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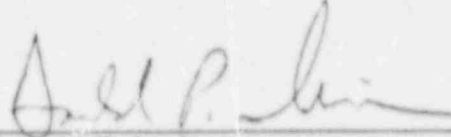
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