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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'88 OCT 12 P3:58

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman  
Alan S. Rosenthal  
Howard A. Wilber

October 12, 1988

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

MEMORANDUM AND ORDER

By motion filed October 11, 1988, the Governments (the State of New York, Suffolk County, and the Town of Southampton) request a tolling of the time period within which to file a motion for a stay of the Licensing Board's decision in LBP-88-24. That decision, which purported to resolve all remaining issues in this proceeding and authorized the Director of the Office of Nuclear Reactor Regulation to issue a full-power operating license for the Shoreham facility, was issued on September 23, 1988, and served on the parties by the Commission's Secretary on September 26 by first class mail. The Governments compute that, under the Commission's Rules of Practice, a motion for stay would be required to be filed by October 11. On the last business day preceding October 11 (i.e., October 7), however, we issued ALAB-902, in which we reviewed and reversed a narrow aspect of LBP-88-24 on jurisdictional

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grounds. As a consequence of that ruling, we also vacated the license authorization in LBP-88-24.

According to the Governments, this has created a procedural dilemma. They had intended to file a motion for a stay of LBP-88-24 on October 11. But vacation of the license authorization -- the relief they would have sought via the stay motion -- is no longer necessary as a result of our decision in ALAB-902. LILCO, however, has publicly stated its intent to seek Commission review of ALAB-902. Should LILCO succeed in having that decision overturned, the license authorization could be reinstated. The Governments thus want to preserve their right to seek a stay of LBP-88-24 in that circumstance. They essentially request that we extend the time for filing a motion to stay LBP-88-24 until at least 48 hours after they receive any decision that would have the effect of reinstating the license authorization contained in LBP-88-24.<sup>1</sup>

LILCO objects to the Governments' motion on the ground that it is untimely. It argues that service of LBP-88-24 was completed on September 23 when, under 10 C.F.R. § 2.712(d)(1), the Governments actually picked up a copy of

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<sup>1</sup> In an unpublished interim order issued October 11, the Chairman of this Appeal Board, pursuant to 10 C.F.R. § 2.787(b)(1), tolled the time for filing any motion to stay LBP-88-24 until further Board order.

that decision from the Licensing Board. In LILCO's view, the ten-day period in which to seek a stay, prescribed by 10 C.F.R. § 2.788(a), expired on October 3, making the Governments' request more than a week late. LILCO argues in the alternative that it does not object to a grant of the Governments' motion, provided that we condition it as follows:

LILCO does not oppose Intervenor's 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.

LILCO's Response (October 11, 1988) at 3-4. LILCO claims that this condition is necessary to avoid delay and prejudice to LILCO.

The NRC staff also opposes the Governments' motion as untimely. It does not indicate what date it believes a motion for a stay of LBP-88-24 was due. The staff notes, however, that requests for extensions of time are to be received in advance of a document's due date. It states that the Governments have not justified either the filing of

their protective motion at "the last minute" or the request for an extension itself.<sup>2</sup>

The Governments' motion is timely. While all of the parties received copies of LBP-88-24 from the Licensing Board on September 23, the only proof of service, as required by 10 C.F.R. § 2.712(e), indicates that the Commission's Office of the Secretary served that decision on the parties on September 26. The certificate of service does not indicate the manner of service, but the Secretary's consistent practice is to effect service by deposit in first class U.S. mail, unless otherwise explicitly noted on the certificate. Moreover, the Secretary is delegated the responsibility of serving all adjudicatory issuances. See 10 C.F.R. §§ 2.712(a), 1.25(g). The copies routinely made available by both licensing boards and appeal boards over many years of practice are "courtesy" copies only. They contain no proof of service; are not official, "served" copies; and have never been used for the purpose of

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<sup>2</sup> The staff refers to "instructions from the Appeal Board . . . [to provide] its response within six hours after receiving the Motion." NRC Staff Response (October 11, 1988) at 2. n.1. The staff misunderstood the Board's inquiry. The Board established no particular time for responses to the Governments' motion. After being notified by LILCO on the morning of October 11 that it would telecopy its response to the Board by noon that day, the Board simply attempted to elicit from the staff if it would be filing its response equally expeditiously.

computing filing dates for notices of appeal, motions for stays, and the like. Thus, pursuant to 10 C.F.R. §§ 2.788(a) and 2.710, the time for filing a motion for a stay of LBP-88-24 expired on October 11.

As for the staff's apparent suggestion that the Governments should have filed their Motion for Tolling at least one business day in advance of October 11 (i.e., October 7), that, of course, was not possible here. The issuance of ALAB-902 on the afternoon of October 7 provided the cause for the Governments to file their Motion for Tolling in lieu of the motion to stay LBP-88-24. See Governments' Motion (October 11, 1988) at 2. Obviously they could not have filed their Motion for Tolling any sooner.


We also believe that there is good cause for tolling the time for filing a motion for a stay of LBP-88-24 until the issuance of any decision or order that would effectively reinstate the license authorization of LBP-88-24. As noted above, the Governments fully intended to seek a stay of LBP-88-24, but ALAB-902 rendered that unnecessary or at best premature. Indeed, had the Governments moved for a stay anyway, we likely would have ordered the matter to be held in abeyance pending future action to reinstate the license authorization. Given that, we see no reason to deny the Governments a fair opportunity to seek a stay of LBP-88-24, should the license authorization therein be effectively reinstated in the future.

We see no basis, however, for imposing the condition requested by LILCO. By its terms, that condition would, for all intents and purposes, nullify the grant of the Governments' motion because it would limit any future stay motion to that part of LBP-88-24 reversed by ALAB-902. If the Commission overturns ALAB-902 on the merits and reinstates the license authorization -- action that would prompt the filing of a motion for a stay -- the Governments could not ask us to stay a portion of the Licensing Board's decision already upheld by the Commission on the merits. Rather, the Governments would seek a stay of the major, unreviewed part of LBP-88-24 on other grounds. In any event, there are so many variables that could affect the future course of this proceeding that conditioning the grant of the Governments' Motion for Tolling would only add to the procedural complexities of this matter without any corresponding benefit. The delay that LILCO seeks to avoid with respect to a future stay motion is minimized by the 48-hour time constraint on the filing of such a motion suggested by the Governments. As for LILCO's claim of prejudice, we fail to see (and LILCO does not explain) how the extension granted here interferes with either LILCO's ability to seek appropriate relief from the Commission in connection with certain of our other rulings, or its ability to respond to any future arguments pressed by the Governments in seeking a stay of LBP-88-24.

The Governments' Motion for Tolling is granted. The time for filing a motion for a stay of LBP-88-24 is extended until the close of NRC business (4:15 p.m.) on the second business day after the Governments' lead counsel (the firm of Kirkpatrick & Lockhart) receives any decision effectively reinstating the license authorization in LBP-88-24.<sup>3</sup>

It is so ORDERED.

FOR THE APPEAL BOARD

  
C. Jan Shoemaker  
Secretary to the  
Appeal Board

The concurring statement of Mr. Rosenthal follows at p. 8.

Mr. Wilber did not participate in this memorandum and order.

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<sup>3</sup> In this case, "filing" of the motion means receipt by us and the parties. In addition, an affidavit from the Governments' lead counsel stating the date, time, and place of their receipt of any reinstatement decision must accompany the motion.

Mr. Rosenthal, concurring:

Although in full agreement with the foregoing memorandum and order, I am constrained to note my belief that the NRC staff's response to the Governments' motion was most unhelpful. Even had its insistence that the motion was untimely rested on a better footing than it did, we still would have been entitled to at least some development of the staff's views on the merits of the tolling request. (In no circumstances does the failure to meet a filing deadline for a motion of this character have jurisdictional significance.) Yet, the staff response contained no explanation whatever. This omission cannot be justified on the ground that the staff lacked a reasonable opportunity to present its thinking on the matter. For, apart from the fact that, in actuality, it was not directed to respond within a matter of hours following the receipt of the motion (see supra note 2), if necessary in order to enable an adequate response the staff assuredly could have informed us that it needed additional time. In this connection, it would not appear that a large amount of such time would have been required to elaborate upon its position on the tolling question.