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-3
	)	(Emergency Planning)
(Shoreham Nuclear Power Station, Unit 1)	)	
	)	

LILCO'S REQUEST FOR STAY OF ALAB-902

LILCO hereby requests, pursuant to 10 C.F.R. § 2.788, a stay of ALAB-902, 28 NRC ___ (Oct. 7, 1988).

ALAB-902 reverses LBP-88-24, on "jurisdictional" grounds, insofar as it dismissed the Intervenors from the entire Shoreham proceeding. ALAB-902 also vacates the Licensing Board's full power license authorization. ALAB-902, slip op. at 4. As a result of ALAB-902, the Commission apparently has halted its immediate effectiveness review of LBP-88-24, and Intervenors attempted to pressure the NRC Staff to cancel a previously-scheduled meeting with LILCO concerning readiness for Shoreham full power operation. See Letter, Lawrence Coe Lanpher (counsel for Suffolk County) to Peter Crane (NRC office of General Counsel), Oct. 12, 1988; Letter, Herbert H. Brown to A. Randy Blough, Chief, Reactor Projects Section No. 3B, NRC Region I (Oct. 11, 1988)(Both letters are attached to this request).

LILCO will imminently ask the Commission to review ALAB-902 along with ALAB-900 and ALAB-901. ALAB-902 should be stayed pending the Commission's review of these decisions.

Section 2.788(e) provides that in determining whether to grant or deny an application for a stay, the Appeal Board will consider the following factors:

1. Whether the moving party has made a strong showing that it is likely to prevail on the merits;

2. Whether the party will be irreparably injured unless a stay is granted;

3. Whether the granting of a stay would harm other parties; and

4. Where the public interest lies.

10 C.F.R. § 2.788(e) (1988). LILCO submits that these factors justify the stay requested herein.

With the resolution -- at long last -- of all planning issues remanded or reopened after the Licensing Board's 1985 initial decisions, the only remaining obstacle to a full-power license is the possibility that the Intervenors will both remain parties to the OL-5 proceeding and succeed in convincing a licensing board that the 1988 exercise reveals a "fundamental flaw" in the LILCO offsite emergency plan. In light of FEMA's finding of no "deficiencies" in the June 1988 exercise and its finding of "reasonable assurance" based on the exercise and the LILCO Plan, this possibility is slight. In a case of unprecedented length and thoroughness like this one, the suspension of the Commission's "immediate effectiveness" review apparently prompted by ALAB-902 is unjustifiable and irreparably harmful to LILCO, as described infra.

1. LILCO has made a strong showing that it is likely to prevail on the merits

As detailed below, LILCO believes it has made a strong showing that it will succeed in having ALAB-902 reversed. The issue in ALAB-902 is whether the OL-3 Board had the authority to dismiss a party from the entire emergency planning proceeding. LILCO has argued the Board clearly had such authority. Although the Appeal Board rejected LILCO's argument, LILCO submits it should nevertheless conclude there is a strong likelihood LILCO will prevail on appeal.[1/]

First, the Appeal Board's decision disagrees with the independent opinions of two licensing boards: the OL-3 Board's unappealed decision that it did not have continuing

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1/ At the same time, LILCO recognizes the inherent difficulty in persuading the Appeal Board that it decided ALAB-902 incorrectly. In cases such as this, however -- i.e., where a party seeks a stay from the very tribunal that issued the disputed order -- the first stay factor (strong showing that moving party will likely win on the merits) becomes the least important of the four. See Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-40, 18 NRC 93, 97 (1983).

jurisdiction over exercise matters, LBP-88-7, and the OL-3 Board's opinion that it did have authority to dismiss the Intervenors as parties, LBP-88-24.

Second, ALAB-902 appears to be inconsistent with earlier Appeal Board pronouncements in this very case. The conclusion in ALAB-902 -- that when the Chairman of the ASLB Panel appoints a second board he strips both boards of the power to dismiss a party entirely -- is difficult to justify, particularly given the Appeal Board's past pronouncements on the subject of multiple boards:

> Manifestly, that announcement [that a separate board was being established] did not give rise to a separate and distinct proceeding on the Shoreham application. Rather, it simply added a new dimension to the emergency planning issue that had long been an ingredient of the proceeding that commenced in 1976.

Long Island Lighting Co. (Shoreham Nuclear Power station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983). In a footnote the Appeal Board elaborated:

> Needless to say, the fact that a separate licensing board was recently established to consider the emergency planning issues does not suggest the institution of a new proceeding. That action was taken for administrative reasons only; i.e., because of the other demands on the time of the members of the Licensing Board that had been previously assigned to hear all issues in controversy. See, in this connection, 10 C.F.R. Part 2, Appendix A, § I(c)(1).

Id. 397 n.38.

Third, the result reached in ALAB-902 can be expected to be unpalatable to any reviewer who is concerned about the integrity of the NRC process. ALAB-902 finds that every licensing board in a multi-board proceeding lacks the power to dismiss a party that has defied the boards' orders and obstructed the agency's factfinding process in bad faith. The suggested solution, which is that some other party (in particular, the party who has been prejudiced by such bad faith obstruction) go from board to board and ask that the sanction be imposed by each separate board, is both cumbersome and unsupported by Commission regulation or caselaw, until ALAB-902. Moreover, it burdens the party who has suffered injury rather than the party who caused it.

The result of ALAB-902 is particularly onerous when it is recognized that the subject

matter of the litigation before the OL-3 (Gleason) Board and the previously terminated OL-5 (Frye) Board concerns the same subject matter - LILCO's emergency plan. A reading of ALAB-902 gives no apparent consideration to the intrinsic link of the subject matter before both boards. This is not a case where one licensing board was considering seismic issues and the other board considering emergency planning issues.

Finally, it is clear that ALAB-902 relies substantially on the existence of another "proceeding pending before the OL-5 Board," as an important basis for reversal of the sanction posed by the Gleason Board after substantial evidentiary hearings on the bad faith obstruction of the proceeding engaged in by Intervenors over a significant time period. There is substantial doubt that the Appeal Board's granting, in part, of Intervenor's motion that any 1988 exercise litigation be conducted in the OL-5 docket, coupled with the Chief Administrative Judge's conclusion that as of October 6, 1988, there were no "matters to be adjudicated in connection with the Shoreham plant within the jurisdiction of this [Licensing Board] panel,[2/] constituted a "pending proceeding" under the Atomic Energy Act of 1954, as amended. Thus, the "pending proceeding" argument in ALAB-902 is of doubtful validity.

Obviously, the Appeal Board believes it is right and that LILCO, the NRC Staff, and the two licensing boards were wrong. But for the purposes of applying the stay criteria of § 2.788(e) the Appeal Board should put to one side its decision on the merits and look at the case objectively, as a reviewing Commission would look at it. Viewed in that manner, the issue should be seen as one as to which LILCO has made a strong showing.

2. LILCO will be irreparably injured unless a stay is granted

LILCO will be irreparably harmed if a stay is not granted. The harm lies in further delay of this proceeding, at a critical time period. LILCO has documented the costs of delay many times in this proceeding. As is again stated in the Affidavit of Adam M. Madsen, the

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2/ "Memorandum and Order," ASLBP 89-580-01 Misc., p. 3 (October 6, 1988).

cost of carrying Shoreham as an unproductive electric generating plant is roughly 30 million dollars a month, or a million dollars each day. See attached Affidavit of Adam M. Madsen, dated October 14, 1988.

The effect of ALAB-902 has been, apparently, to suspend the Commission's immediate effectiveness review, notwithstanding the fact that both the Intervenors and LILCO had filed their comments on that review.[3/] In a letter dated October 12, 1988, to Peter Crane of the NRC's Office of General Counsel, counsel for Suffolk County says that the NRC "has ceased its immediate effectiveness review for Shoreham" due solely to ALAB-902. Counsel for Suffolk County asserts, further, that the Office of General Counsel has ceased preparation of its analysis of issues for the Commission's review. Letter, Lawrence Coe Lanpher to Peter Crane, Oct. 12, 1988.

Moreover, Suffolk County has written to the NRC Staff requesting "confirmation" that a scheduled meeting between the Staff and LILCO to discuss Shoreham operation has been canceled. Letter, Herbert H. Brown to A. Randy Blough, Chief, Reactor Projects Section No. 3B, NRC Region I (Oct. 11, 1988).[4/] Thus the Intervenors have sought to use ALAB-902 to stay not only the Commission's, but also the Staff's review.

In the circumstances of this case, the suspension of the ordinary immediate effectiveness process caused by ALAB-902 is harmful and unjustifiable. As LILCO's comments on immediate effectiveness pointed out, the Shoreham proceeding has been going on for almost two decades; the emergency planning issues have been in full-scale litigation since the spring of 1982 -- over six years now. See LILCO's Comments on the Immediate Effectivenss of LBP-88-24, filed with the Commission October 3, 1988. Hundreds if not thousands of emergency planning issues have been litigated and adjudicated.

3/ Such reviews involve the Commission's supervisory as well as its adjudicatory functions. See Proposed Rule, "Power Reactor License or Permit Following Initial Decision," 52 Fed. Reg. 3442 (Feb. 4, 1987). Thus, LILCO suffers irreparable harm greater than the scope of ALAB-902.

4/ This demand has been refused by counsel for Region 1. See Letter, Jay M. Gutierrez to Herbert H. Brown, October 14, 1988 (attached).

As a result of this exhaustive review, all emergency planning issues have been resolved by licensing boards in LILCO's favor, with the exception of exercise-related issues. As to exercise-related issues, FEMA has found that the exercise of June 1988 had no "deficiencies." FEMA has also found, based on its review of the exercise and the LILCO plan, that the plan provides reasonable assurance that adequate protective actions can and will be taken in an emergency. FEMA's findings are entitled to a rebuttable presumption of correctness. See 10 C.F.R. § 50.47.

Given the exhaustive review that has already taken place, and given that all issues have been found in LILCO's favor either (in most cases) by licensing boards or (in the case of the exercise) by FEMA, a delay in this proceeding, as will flow from ALAB-90[illegible] [illegible]tifiable.

In deciding whether to stay a decision, it is appropriate to consider economic harm to LILCO from further delay in an already-delayed proceeding. The Commission, for example, considered this factor in the Waterford case:

> By letters dated March 8 and 11, 1985, Intervenors have requested a 2-week stay of the effectiveness of this Order. The utility, by letters of March 12 and 14, 1985, has opposed this request.
>
> In our view, the utility has offered persuasive reasons why the Commission should not delay the effectiveness of this Order. Ascension to full power is a gradual process. During the first 12 days of this process, Waterford will not exceed 20% of its full-power level of operation. The public health and safety risks of these low levels of power are far less than the theoretical risks of full-power operation. Nor is the level of contamination which results from such levels of operation significantly different than those associated with, and already reached as a result of, Waterford's low-power operation. Moreover, in the event that a stay is sought and ordered by a court the utility can reverse this process and reduce power levels to below the 5% level. Finally, it appears that every day of delay in commercial operation of Waterford will cost the Applicant and the public it serves 1 million dollars.
>
> Intervenors have offered little to balance against these facts. Nor have they presented the Commission with a formal request to stay Waterford full-power operation. Thus, they have not offered to the Commission any legal arguments which would support a stay and they have not made us aware of any significant legal issue that a reviewing court might have to resolve with regard to any judicially requested stay.

> Accordingly, this Order is being made immediately effective by the Commission.

Louisiana Power & Light Co. (Waterford Steam Elec. Station, Unit 3), CLI-85-3, 21 NRC 471, 476-77 (1985). The Appeal Board likewise considered the economic impact on the licensee in Limerick. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602-03 (1985).

The Appeal Board should weigh this factor in favor of a stay in this case.[5/]

3. The granting of a stay would not harm the Intervenors

The only effect of a stay would be to allow the Commission's immediate effectiveness review to continue and potentially shorten the time until a full-power license can be issued following its completion. A stay of ALAB-902 would not effect the issuance of a full power license. It would, however, prevent the Intervenors from using ALAB-902 to attempt to suspend the Commission's and NRC Staff's immediate effectiveness review. Elimination of such delay does not constitute a legal "harm" to the Intervenors.

Moreover, if the Appeal Board stays the effect of ALAB-902 and reinstates the Licensing Board's license authorization in LBP-88-24, the Intervenors have already stated that they will file a stay application of their own within 48 hours. Appeal Board Memorandum and Order (Oct. 12, 1988); Governments' Motion for Tolling of Time Period Within Which to File Motion for Stay of LBP-88-24 (Oct. 11, 1988). Thus, the Intervenors will have an opportunity to protect their interests, i.e., to prevent the issuance of a full power operating license for Shoreham pending appellate review, without unnecessarily delaying the Commission's immediate effectiveness review. Intervenors will not be harmed by the relief LILCO now seeks.

5/ The Intervenors likely will challenge LILCO's showing of irreparable harm on the grounds that, under the pending settlement agreement between LILCO and New York State, LILCO has agreed not to take Shoreham above 5% power while the proposal is pending. That much is true; however, it does not justify continued delay in the Commission's immediate effectiveness review. If the settlement collapses, LILCO intends to operate Shoreham at full power as soon as possible. LILCO is entitled to expeditious review and issuance of a full power operating license.

4. The public interest requires a stay

The fourth stay criterion is what the "public interest" requires. Here it requires a stay of ALAB-902.

In the Diablo Canyon case about three years ago the Commission applied the stay criteria of 10 C.F.R. § 2.788(e) in denying a stay of the Diablo Canyon operating license. Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 180 (1985). There the intervenors asked for a stay of effectiveness of a full-power license, in part because of questions about seismic design. The Commission declared that the "public interest" lay in the use of the plant:

> In sum, the Joint Intervenors have not established that they are likely to demonstrate a lack of reasonable assurance that the seismic design is adequate. With respect to the other factors of the stay criteria, Joint Intervenors assert that they will suffer irreparable injury because they are put at risk by full-power operation and because it may become more difficult or more costly to adopt any necessary modifications to the plant. Mere exposure to risk, however, does not constitute irreparable injury if the risk, as here, is so low as to be remote and speculative and any difficulty or expense in adopting necessary modifications is not an injury to Joint Intervenors. Moreover, the harm to others posed by even a short delay in permitting operation of a fully constructed and tested nuclear power plant is not de minimis in terms of its economic effect on the licensee and its ratepayers. The Commission has determined that there is reasonable assurance that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and that such activities will be conducted in compliance with Commission regulations and the license. In these circumstances, the public interest lies in the use of this plant and in the orderly functioning of the regulatory process. Accordingly, the request for a stay is denied.

Similarly, in the low power phase of this case, the Commission held as follows:

> Finally, the State and County have not demonstrated that the public interest will be harmed by the grant of a license for Phases I and II [of low-power testing]. We are obligated under the Administrative Procedure Act and under principles of fair and efficient administration to act with reasonable dispatch on requests for a license. The hearing litigation in this case has been long and difficult, and where parts of it have been concluded and findings made, we believe the public interest requires that we accord those findings the legal effect they deserve.

Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1441 (1984).

The emergency planning litigation likewise has been long and difficult, and the Licensing Board in LBP-88-24 has decided its last remaining vestiges in LILCO's favor. These exhaustive findings should be given the legal effect they deserve. In short, Shoreham has been adjudged safe, and the public interest dictates that a safe plant should be allowed to operate. Accordingly, the Appeal Board should stay ALAB-902 to permit the Commission to continue its immediate effectiveness review.

5. The Appeal Board should immediately grant LILCO a temporary stay

LILCO asks the Appeal Board to temporarily stay the effect of ALAB-902 pending its determination of whether to grant the full stay requested in this application. Under 10 C.F.R. § 2.788(g), the Appeal Board may grant a temporary stay in extraordinary cases "to preserve the status quo without waiting for filing of any answer."[6/] This is an extraordinary case. The Appeal Board has reversed a Licensing Board decision that resolved all remaining emergency planning issues in LILCO's favor on the merits, and, due to a six-year pattern of bad faith obstruction and defiance of Board orders, dismissed the Intervenors from the Shoreham proceeding. Moreover, the Appeal Board has vacated the Licensing Board's license authorization, effectively putting a halt to the Commission's immediate effectiveness review. Yet the Appeal Board based its reversal not on safety grounds, but on what it terms "jurisdictional" grounds. LILCO requests a temporary stay to provide LILCO the interim relief it needs to avoid further unnecessary delay in consideration of LILCO's license application.

Conclusion

For the above reasons, the Appeal Board should stay ALAB-902 pending the Commission's decision whether to review it. LILCO requests prompt action on this request, so that it may apply to the Commission for a stay, pursuant to 10 C.F.R. § 2.788(f), if the instant request is denied.

6/ The other parties have 10 days, exclusive of additional service days, to file an answer to LILCO's stay request. 10 C.F.R. § 2.788(d)(1988).

Respectfully submitted,

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DATED: October 14, 1988

Attachment 1

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October 12, 1988

VIA TELECOPY

Peter Crane, Esq.
Office of General Counsel
U.S. Nuclear Regulatory Commission
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Re: Docket No. 50-322-OL

Dear Mr. Crane:

This letter will confirm our telephone conversation of this morning. You advised me that in view of ALAB-902, in which the Appeal Board vacated the Licensing Board's authorization for a full power license for Shoreham, the Nuclear Regulatory Commission has ceased its immediate effectiveness review for Shoreham. You advised specifically that in the normal immediate effectiveness review, the Office of General Counsel ("OGC") prepares an analysis of issues for transmission to the Commission as part of the immediate effectiveness review and that, given ALAB-902, the OGC has ceased preparation of any such analysis for Shoreham.

You also advised me that in your opinion, there probably would not be any official notification to the parties that the immediate effectiveness review process has been terminated. It is for that reason that I am writing this letter to confirm my understanding that notwithstanding lack of official notice, such termination has occurred.

If any of my understandings are incorrect in any respect, or if there are any changes in circumstances, please advise me immediately.

Sincerely yours,

Lawrence Coe Lanpher

Lawrence Coe Lanpher

cc: Donald P. Irwin, Esq.
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Docketing and Service Section
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