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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

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

October 18, 1988

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

MEMORANDUM AND ORDER

1. At the close of business last Friday, October 14, the applicant Long Island Lighting Company (LILCO) transmitted to us by telecopier a motion seeking a stay of ALAB-902, 28 NRC ____ (October 7, 1988), pending the outcome of LILCO's as yet unfiled petition for Commission review of that decision. In ALAB-902, we reversed in part a decision rendered by one of the Licensing Boards -- the so-called OL-3 Board -- that had been convened to entertain issues presented in this operating license proceeding involving the Shoreham nuclear facility. See LBP-88-24, 28 NRC ____ (September 23, 1988). More specifically, ALAB-902 concluded that the OL-3 Board lacked the authority to dismiss for asserted misconduct the intervenor Governments (Suffolk County, the State of New York and the Town of Southhampton) as parties from not merely the portion of the proceeding

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pending before that Board but, as well, the portion before the so-called OL-5 Licensing Board.¹ On the strength of that conclusion, we went on to vacate the OL-3 Board's authorization of the issuance by the NRC staff of an operating license for Shoreham -- an authorization that necessarily was dependent upon the dismissal of the Governments from the entire proceeding rather than just that part before the OL-3 Board.

The stay request at hand would have us restore pendente lite the license authorization contained in LBP-88-24. We are told that all four of the factors that are ordinarily taken into account in passing upon a stay application favor the grant of such relief.² As we explain below, however,

¹ In ALAB-901, 28 NRC _____ (September 20, 1988), we remanded new matters raised in connection with the June 1988 exercise of LILCO's emergency response plan to the OL-5 Board. LILCO now has pending petitions for Commission review of both ALAB-901 and another recent decision (ALAB-900, 28 NRC _____ (September 20, 1988)) in which we upheld the OL-5 Board's finding that an earlier exercise of the emergency response plan was deficient in scope. It is apparently LILCO's desire that the Commission examine all three decisions (i.e., ALAB-900, ALAB-901, and ALAB-902) at the same time.

² Those factors, set forth in 10 C.F.R. § 2.788(e), are:

(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.
(Footnote Continues)

LILCO does not need a stay of ALAB-902 to achieve the limited objective it claims to seek. For that reason, we summarily dismiss the motion, thus leaving LILCO free to pursue its objective elsewhere without further delay.

2. In so many words, LILCO assures us that its stay request is not designed to obtain the issuance at this time of a full-power operating license for Shoreham. Rather, we are told, the only effect of a stay would be to allow the Commission to continue with a procedure that it had instituted in the wake of the issuance of LBP-88-24 but, so LILCO had been informed, subsequently discontinued because of the rendition of ALAB-902 two weeks later. See LILCO's Request for Stay of ALAB-902 (October 14, 1988) at 7.

The procedure in question is set forth in 10 C.F.R. § 2.764(f)(2). In essence, that section provides that a licensing board decision paving the way for the issuance of a license authorizing facility operation above five percent

(Footnote Continued)

unless a stay is granted;

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

(4) Where the public interest lies.

The same factors have traditionally been applied by the courts. See Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958), and Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

of rated power shall not take effect pending the outcome of a Commission "immediate effectiveness" review. The function of that review, which the section states the Commission intends to complete within 30 days of receipt of the licensing board decision, is to determine whether the decision should be stayed further "in the public interest." In making that determination, the Commission considers "the gravity of the substantive issue, the likelihood that it has been resolved incorrectly below, the degree to which correct resolution of the issue would be prejudiced by operation pending review, and other relevant public interest factors." 10 C.F.R. § 2.764(f)(2)(i).

In this instance, the immediate effectiveness review presumably commenced upon receipt of LBP-88-24 with its authorization for the issuance of a full-power operating license. Both LILCO and the Governments took advantage of the opportunity, provided by 10 C.F.R. § 2.764(f)(2)(ii), to file with the Commission "brief comments . . . pointing out matters which, in their view, pertain to the immediate effectiveness issue." That review is apparently now suspended. For LILCO has directed our attention to an October 12, 1988, letter from Lawrence Coe Lanpher, one of the attorneys for Suffolk County, to Peter Crane, an attorney in the NRC's Office of the General Counsel (OGC). The purpose of Mr. Lanpher's letter was to confirm a telephone conversation with Mr. Crane earlier in the day, in

which the latter had indicated that, in view of ALAB-902, the "Commission has ceased its immediate effectiveness review for Shoreham."

In a nutshell, LILCO believes that it will be irreparably injured if the immediate effectiveness review does not go forward at this juncture. Although we entertain substantial doubt as to the validity of that belief, we need not pursue that doubt here. We see no reason, and LILCO has assigned none, why a stay of the effectiveness of ALAB-902 is a condition precedent to the Commission's resumption of its immediate effectiveness review. To be sure, it is not difficult to understand the logic behind a determination to suspend the review once we vacated in ALAB-902 the operating license authorization contained in LBP-88-24. It scarcely follows, however, that the Commission lacks the discretion to proceed with an immediate effectiveness review in the unusual circumstances of this case if (1) it is asked to do so by one of the parties, and (2) it agrees with that party that such a step is, in fact, required to avoid irreparable harm. To the contrary, it is manifest to us that the Commission possesses that authority, at least to the extent of determining whether there are any obstacles other than

our determination in ALAB-902 that stand in the path of a full-power Shoreham license.

Thus, in our view, LILCO's recourse is to ask the Commission to resume its immediate effectiveness review pending the outcome of any petition LILCO may file for review of ALAB-902. As long as ALAB-902 remains undisturbed, of course, such a review cannot culminate in a full-power operating license for Shoreham. But that fact is of no consequence here, given that LILCO requests "only . . . 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." LILCO's Request at 7. In other words, LILCO does not profess to be in quest of an operating license prior to the Commission's action regarding ALAB-902. Instead, its concern appears to be solely that the immediate effectiveness review required by 10 C.F.R. § 2.764(f)(2) not remain as a barrier to full-power operation, should all other barriers be removed.³


³ In this connection, even if favorable to LILCO, the Commission's disposition of ALAB-902 would not perforce remove all such barriers. ALAB-902 was addressed to only a small part of the Governments' appeal from LBP-88-24, which was bifurcated for early separate consideration. The balance of that appeal is currently in the briefing stage. Should the Commission's action on ALAB-902 be unfavorable to them, the Governments still have an opportunity to seek a

(Footnote Continued)

For the foregoing reasons, we are persuaded that LILCO's stay request was improvidently filed, in that the concern that prompted its submission may be accommodated by the Commission, if so advised, without any alteration in the effectiveness pendente lite of ALAB-902.⁴ Accordingly, we summarily dismiss that request and in doing so relieve the other parties to the proceeding of the obligation to respond.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board

(Footnote Continued)

stay of the effectiveness of the full-power license authorization in LBP-88-24 pending the resolution of the remainder of their appeal from that decision. See Appeal Board Memorandum and Order of October 12, 1988 (unpublished). Our decision on such a stay request would not be controlled by any immediate effectiveness determination respecting LBP-88-24 that the Commission might have made in the interim. For 10 C.F.R. § 2.764(g) provides that a determination of that character is "entirely without pre-judice" to our consideration of either a stay motion filed under 10 C.F.R. § 2.788(e) or an appeal on the merits taken under 10 C.F.R. §§ 2.762 and 2.785.

⁴ Needless to say, we express no opinion respecting whether the Commission should resume its immediate effectiveness review at this time.