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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station,
Unit 1)

}
Docket No. 50-322-OL-3
(Emergency Planning)
}

NRC STAFF ANSWER TO LILCO REQUEST FOR RESUMPTION
OF IMMEDIATE EFFECTIVENESS REVIEW OR FOR STAY

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I. INTRODUCTION

On October 21, 1988, LILCO filed a request for the Commission to "immediately resume its immediate effectiveness review of LBP-88-24 pending any review of the Appeal Board's decision in ALAB-902." LILCO Request to Resume Immediate Effectiveness Review or, in the Alternative, for a Stay of ALAB-902 ("Request"), at 1. Alternatively, if the Commission determines that a stay of ALAB-902 is "a prerequisite to continuing its immediate effectiveness review," LILCO requests a stay of ALAB-902 for the reasons set forth in its stay request to the Appeal Board (Request Attachment A). Id. at 2. For the reasons stated below, the NRC Staff supports the requests for a stay of ALAB-902 and the resumption of the Commission's immediate effectiveness review. 1/

1/ Pursuant to 10 C.F.R. § 2.788(e), answers to applications for a stay may not exceed ten pages. The Staff's discussion of LILCO's stay request complies with this limit. The additional pages in this filing discuss LILCO's alternative (or separate) request for the resumption of the Commission's immediate effectiveness review.

II. BACKGROUND

In LBP-88-24, 28 NRC ____ slip op. at 148-49 (September 23, 1988), the OL-3 Licensing Board, inter alia, dismissed Suffolk County, the State of New York and the Town of Southampton ("Intervenors") from the Shoreham proceeding and authorized the issuance of a full power license for Shoreham. The Appeal Board in ALAB-902, 28 NRC ____ slip op. at 20 (October 7, 1988), reversed LBP-88-24 insofar as it "purports to dismiss the Governments from the proceeding now before the OL-5 Licensing Board" and vacated the full power license authorization. On October 14, 1988, LILCO sought a stay of ALAB-902 (see Request at Attachment A), and the Appeal Board summarily rejected this request for a stay in a Memorandum and Order, dated October 18, 1988 ("October 18 Order"). The Appeal Board concluded that LILCO did not need a stay of ALAB-902 to achieve the resumption of the Commission's immediate effectiveness review and stated that LILCO was free to pursue "its objective elsewhere without further delay." October 18 Order at 2-3, 5. The Appeal Board reasoned that while it appeared that the immediate effectiveness review based on the Commission's receipt of LBP-88-24 had apparently been suspended, the stay of the effectiveness of ALAB-902 was not a condition precedent to the resumption of the Commission's review. Id. at 5-6. Rather, the Commission could as a matter of discretion, proceed with its 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." Id. at 5. The Appeal Board thus recommended that LILCO ask the Commission "to

resume its immediate effectiveness review pending the outcome of any petition LILCO may file for review of ALAB-902." Id. at 6.

III. DISCUSSION

A. Request for Stay

Pursuant to 10 C.F.R. § 2.788(e), any determination as to whether an application for a stay should be granted must be based upon a consideration of the following four 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.

While no one of the four factors is necessarily dispositive, the weightiest consideration is "the need to preserve the status quo -- whether the party requesting a stay has shown that it will be irreparably injured unless a stay is granted." Westinghouse Electric Corp. (Exports to the Phillipines), CLI-80-14, 11 NRC 631, 662 (1980). In determining whether the movant has satisfied the four factors set forth in 10 C.F.R. § 2.788(e), it must be recognized that:

The burden of persuasion of these factors rests on the moving party. . . . To meet the standard of making a strong showing that it is likely to prevail on the merits of its appeal, the movant must do more than merely establish possible grounds for appeal. In addition, an "overwhelming showing of likelihood of success on the merits" is necessary to obtain a stay where the showing on the other three factors is weak.

Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981) (footnotes omitted), citing, Florida Power &

Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-89 and ALAB-415, 5 NRC 1435, 1437 (1977); see also Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977). The U.S. Court of Appeals has also explained the significance of the first two factors by stating:

To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or vice versa.

Cuomo v. NRC, 772 F. 2d 972, 974 (D.C. Cir. 1985).

While LILCO has failed to demonstrate that it will be irreparably injured, the Commission should stay ALAB-902 (1) because there is a high probability of success on the merits and (2) in order to preserve the public interest by not allowing parties found guilty of misconduct which prejudiced the integrity of NRC proceedings (LBP-88-24, slip op. at 130) to continue to participate further in proceedings (other than an appeal of LBP-88-24).

1. Likelihood of Prevailing on the Merits

This factor weighs in favor of a stay. The Staff believes that ALAB-902's reversal of the OL-3 Licensing Board's authorization to issue a license was in error and that there is a strong likelihood that LILCO will prevail on the merits. The creation of the OL-5 docket in the Shoreham proceeding was a case management tool to expedite decisionmaking on the the 1986 exercise and did not leave the principal licensing board, the OL-3 Board, powerless to impose a sanction which would dismiss intervenors from the entire proceeding. The licensing board constituted in the OL-3

phase of the Shoreham proceeding was "to preside over the proceeding on all emergency planning issues." Establishment of Licensing Board to Preside in Proceeding, 48 Fed. Reg. 22235 (May 17, 1983). In accordance with the Commission's direction in CLI-86-11, 23 NRC 577 (1986), the OL-3 Board was originally given the responsibility to preside over litigation of the results of the February 1986 emergency exercise at Shoreham ^{2/} and that litigation was assigned the OL-5 docket number "[f]or more effective docket management." ^{3/} The panel was later reconstituted to remedy member schedular conflicts. ^{4/}

The Commission's decision in CLI-86-11 was in response to motions filed by LILCO and Intervenors requesting Commission guidance specifically concerning litigation of the results of the 1986 exercise. See Motion of Suffolk County, the State of New York, and the Town of Southampton for Ruling Concerning Proceedings Related to the Shoreham Exercise, March 7, 1986, at 1-2; Long Island Lighting Company's Motion for Establishment of Licensing Board and Institution of Expedited Procedures for Litigation of Shoreham Emergency Planning Exercise Issues, and Response to Intervenors' March 7, 1986 "Motion Concerning Proceeding Related to the Shoreham Exercise," March 13, 1986, at 1, 10. Thus, the establishment of the OL-5 Board did not remove the jurisdiction of the OL-3 Board to decide all exercise-related matters, but was merely to accomplish the expedited litigation of the results of the 1986 exercise. In addition, the OL-5

^{2/} Establishment of Atomic Safety and Licensing Board, 51 Fed. Reg. 21815 (June 16, 1986).

^{3/} Change of Docket Number, 51 Fed. Reg. 27296 (July 30 1986).

^{4/} Reconstitution of Board, 51 Fed. Reg. 36619 (October 14, 1986).

Board itself concluded that it no longer had jurisdiction over any matter concerning Shoreham once it had rendered its decision on the 1986 exercise. LBP-88-7, 27 NRC 289, 291-92 (1988).

Moreover, the result in ALAB-902 appears to be at odds with the philosophy behind the Commission's guidance concerning the imposition of sanctions for a party's misconduct. In its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981), the Commission stated that boards may impose a spectrum of sanctions against an offending party, including the dismissal of the party from a proceeding. The holding in ALAB-902 renders a licensing board powerless to impose this severe sanction against a party found guilty of willful misconduct in a proceeding solely because of the fortuitous separation, for administrative convenience, of issues in a single proceeding into proceedings before more than one board. Under these circumstances, NRC adjudicatory boards could not swiftly and thoroughly punish egregious misconduct merely because a case management tool has been utilized for administrative convenience. In order to accomplish the sanction of dismissal from the entire proceeding, the matter must be repeatedly raised before each board separately and each board must consider the facts surrounding the misconduct and the propriety of the sanction. The better view, consonant with CLI-81-8 and the broad authority of boards to regulate the conduct of participants in NRC proceedings, 10 C.F.R. § 2.718(f), is that each board has the authority to dismiss, from the proceeding, a party it determines has deliberately defied board orders that are in accordance with substantive requirements (in this case, the realism rule). In short, this factor favors the granting of a stay.

2. Irreparable Injury

This factor should be accorded little weight in evaluating LILCO's motion. LILCO argues that it will be "irreparably and unnecessarily harmed to the tune of about \$1 million a day, for every day that Shoreham licensing is delayed." Request at 6. LILCO also argues that because there is no reason to postpone completion of the Commission's immediate effectiveness review until any review of ALAB-90⁵ is completed, any expenditures caused by the postponement of the Commission's review would be unjustified. Id.

The Staff agrees that normally the economic damages cited by LILCO under this factor are a relevant consideration for determining whether a stay is appropriate. See cases cited in Request, Attachment A at 6-7. However, in the unusual circumstances of this case, it is not clear that LILCO will suffer any harm as a result of the suspension of the Commission's immediate effectiveness review. LILCO has not recounted the fact that (1) there is a settlement agreement which, if approved by various New York State entities (including the State Legislature and the Governor), would result in the sale of the Shoreham facility to the Long Island Power Authority so that it may be decommissioned and (2) LILCO has committed not to operate the facility in excess of five percent power while the settlement process continues. ^{5/} While the approval of that agreement by all the cognizant parties is in no way certain, it is

^{5/} See BN 88-04, Recent Correspondence Between NRC and FEMA and Long Island Lighting Co., dated June 3, 1988, at attached letter from W. J. Catacosinos, LILCO, to V. Stello, NRC, dated June 1, 1988; Letter from W. T. Revely, III, to Hon. Lando W. Zech, Jr., dated August 9, 1988.

difficult to estimate under these circumstances the harm LILCO may suffer, if any, as a result of any delay in the completion of the Commission's immediate effectiveness review. LILCO's failure to address these unique circumstances undermines its argument that it will be harmed unless a stay is granted. Thus, this factor should be accorded little weight in determining whether a stay should be granted.

3. Harm to Other Parties

The granting of a stay pending review of ALAB-902 will not result in substantial harm to either the Intervenor or the Staff. A stay will not result in the issuance of a full power license for Shoreham, October 18 Order at 6, and Intervenor has previously indicated an intention to file their own stay motion, see Request at 5. In addition, if the license authorization is reinstated, the Commission would still have to complete its immediate effectiveness review and would be faced with Intervenor's request for a stay of ALAB-902 and their assertion that their dismissal was improper in the comments they provided to the Commission. ^{6/}

A stay of the effectiveness of ALAB-902, without a stay of LBP-88-24, would result in the Intervenor not being able to actively litigate, for example, their proffered exercise contentions in the OL-5 proceeding. See Emergency Planning Contentions Relating to the June 7-9, 1988 Shoreham Exercise, October 24, 1988. If the dismissal sanction is upheld,

^{6/} See Suffolk County, New York State, and Town of Southampton Comments Concerning Immediate Effectiveness Review, October 3, 1988. The Commission also has before it the matters in the immediate effectiveness comments filed by LILCO as well as the jurisdiction issues raised in LILCO's petition for review. See LILCO's Comments on the Immediate Effectiveness of LBP-88-24, October 3, 1988; Long Island Lighting Company's Petition for Review of ALAB-902, October 21, 1988.

Intervenors will not have been injured by the foreclosure of their right to participate in anything other than an appeal. If the dismissal sanction is not upheld, however, Intervenors would only be temporarily prevented from pursuing their contentions and admission of those contentions is not guaranteed given the favorable FEMA finding concerning the 1980 Emen. (See Letter from G. C. Peterson, FEMA, to V. Stello, Jr., dated September 9, 1988). Thus, no substantial or irreparable harm to the other parties is evident from the grant of a stay and this factor should be accorded little weight.

4. The Public Interest

This factor favors the granting a stay, but on grounds other than those which LILCO has asserted. LILCO argues that this factor favors the grant of a stay because the public interest dictates that a "safe plant should be allowed to operate without unnecessary delay." Request at 7. In addition, LILCO states that the integrity of the NRC regulatory process requires that licensing board findings as to the safe operation of Shoreham being given legal effect. Id. Ordinarily, LILCO would be correct that there is a public interest in the operation of a power facility capable of safe operation. However, as noted above, there is an agreement not to operate Shoreham during the pendency of the settlement agreement approval process and that Shoreham is to be decommissioned if the settlement is approved. LILCO's failure to address the effect of its agreement not to operate Shoreham (above five percent power) undermines its argument that there is substantial public interest in the operation of the Shoreham facility which is adversely affected by the absence of a stay.

On the other hand, there is an important public interest in the timely conduct of agency determinations on a license application and an equally important interest in the integrity of NRC adjudicatory proceedings. If ALAB-902 is stayed, the integrity of the NRC's adjudicatory process will be preserved by prohibiting a party who has been found guilty of egregious misconduct from further participation in hearings (e.g., on the 1988 exercise before the OL-5 Board) while the appropriateness of the dismissal is under review. ^{7/}

In sum, the first and fourth factors weigh in favor of the granting of a stay of ALAB-902. There is a strong likelihood that LILCO will prevail on the merits and a strong public interest in permitting the Commission to come to timely determinations on license applications while preserving the integrity of NRC proceedings. While LILCO may not suffer foreseeable injury if a stay is not granted, the strong likelihood that it will prevail on the merits coupled with the NRC's interest in the integrity of its license determinations warrants the application of a stay of the effectiveness of ALAB-902.

^{7/} As a result of ALAB-902, Intervenor's are currently free to participate in the ongoing proceedings before the OL-5 Licensing Board concerning the 1988 exercise despite the fact that Intervenor's have been found by the OL-3 Licensing Board to have engaged in a "pattern of behavior designed to prevent the Commission from reaching an informed conclusion with respect to the adequacy of LILCO's emergency plan." LBP-88-24, slip op. at 108. Although Intervenor's have the right to appeal the OL-3 Board's determination, and such appeal is presently pending, the Staff opposes permitting Intervenor's to participate further in any other aspect of this licensing proceeding pending disposition of the appeal because Intervenor's have been found guilty of "a sustained willful strategy of disobedience and disrespect for the Commission's adjudicatory processes" and actions which were "willful, taken in bad faith and . . . prejudicial to LILCO and the integrity of the Commission's adjudicatory process." LBP-88-24, slip op. at 129, 130.

B. Request for Resumption of Immediate Effectiveness Review

As noted by the Appeal Board in denial of LILCO's request for a stay of ALAB-902, a stay is not a prerequisite for the continuation by the Commission of its "immediate effectiveness" review as a matter of Commission discretion. ALAB-902, slip op. at 5. In addition, Commission oversight concerning this matter is not dependent on the receipt of a board decision authorizing the issuance of a license for operation at power levels in excess of five percent since 10 C.F.R. § 2.764(f)(2) expressly reserves the authority of the Commission to step in at an earlier time. ^{8/}

A fundamental issue pervades the entire Shoreham proceeding at this time -- whether Intervenor were properly dismissed by the OL-3 Licensing Board from further participation as parties in the Shoreham operating license proceeding on the grounds of serious misconduct. See LBP-88-24, slip op. at 148. In ALAB-902 the Appeal Board concluded the OL-3 Licensing Board did not have jurisdiction to dismiss Intervenor from the entire proceeding. ALAB-902, slip op. at 20. That matter is the subject of related petitions for Commission review filed by LILCO. ^{9/} Although these procedural questions may be resolved as a result of LILCO petitions for Commission review, the case as a whole will remain in the shadow of

^{8/} As there is no outstanding authorization to operate (above five percent), the nature of the review would be somewhat different from determining "whether to stay the effectiveness of the decision," 10 C.F.R. § 2.764(f)(2).

^{9/} Long Island Lighting Company's Petition for Review of ALAB-901 and Follow-On Orders, October 5, 1988; Long Island Company's Petition for Review of ALAB-902, October 21, 1988.

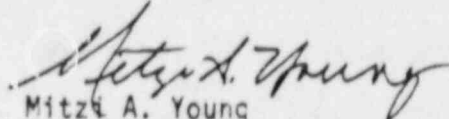
further procedural complexity until the Appeal Board (and perhaps subsequently the Commission) resolves the question of the merits of the OL-3 Board dismissal sanction. If the dismissal sanction is determined to have been improperly imposed, LBP-88-24 itself may require revision to address the contentions before the OL-3 Board on the merits rather than as dicta (see slip op. at 131-147), and it will be necessary to complete litigation of other aspects of the proceeding such as contentions relating to the 1988 exercise, regardless of the procedural question of jurisdiction to impose sanctions. On the other hand, if the sanction of dismissal imposed by LBP-88-24 is sustained, subsequent dismissal from other parts of the proceeding is a likely result given the character of the misconduct found by the OL-3 Board even if the procedural questions are decided in terms of separate sanction jurisdiction consistent with ALAB-902.

These same questions are before the Commission in connection with LILCO's petitions for review of ALAB-901 and ALAB-902 and because Intervenor's asserted in their immediate effectiveness comments that the sanctions were improperly imposed. See section III.A.3, supra. A Commission decision on these questions or Commission guidance to the Appeal Board and the Shoreham licensing boards based on its review of LBP-88-24 would be of great value in bringing the remaining aspects of the overall Shoreham operating license proceeding to a close. Regardless of whether a stay is granted or denied, the Commission should exercise its discretion to proceed with its review of matters in this case, but for reasons of greater moment than those offered by LILCO.

IV. CONCLUSION

For the reasons stated above, the Commission should grant LILCO's requests for a stay of ALAB-902 and for the resumption of the Commission's immediate effectiveness review.

Respectfully submitted,


Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 31st day of October 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

LONG ISLAND LIGHTING COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO LILCO REQUEST FOR RESUMPTION OF IMMEDIATE EFFECTIVENESS REVIEW OR FOR STAY" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, as indicated by double asterisks, by telecopy, and triple asterisks, will be hand carried this 31st day of October, 1988.

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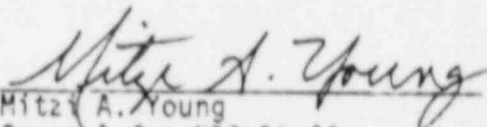
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