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July 29, 1987

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'87 JUL 30 P1:58

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF THE SECRETARY
DOCKETING & SERVICE
BRANCH

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

NRC STAFF RESPONSE TO LILCO MOTION
FOR AUTHORIZATION TO INCREASE POWER TO 25%

I. INTRODUCTION

On July 14, 1987, Long Island Lighting Company (LILCO) filed with this Licensing Board a Motion for Authorization to Increase Power to 25% ("Motion"), requesting the Board to take jurisdiction of LILCO's Motion pursuant to 10 C.F.R. § 50.57(c) and the Commission's decision in CLI-87-04, dated June 11, 1987. Motion, at 1-2, 6, 8. However, LILCO requests that no action be taken to activate this proceeding, pending disposition of a concurrently filed Motion for Designation of Licensing Board and Setting Expedited Schedule, pending before the Commission.

The Staff supports LILCO's Motion insofar as it requests this Board to take jurisdiction of the pending Motion. However, as set forth fully in the Staff's response to LILCO's concurrent motion before the Commission, appended hereto, LILCO's request for appointment of a new board and for expedited consideration of the 25% power authorization was required, under CLI-87-04, to be filed with this Licensing Board. LILCO's procedural and schedule proposals are matters appropriate for consideration by this Board, rather than the Commission. However, since

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LILCO has requested this Board not to consider those proposals at this time, the Staff here takes no position thereon.

II. DISCUSSION

In its June 11, 1987 Memorandum and Order, CLI-87-04, the Commission denied LILCO's April 14, 1987 Request for Authorization to Increase Power to 25% and Motion for Expedited Commission Consideration based on its determination that it could not, consistent with the Commission's regulations in 10 C.F.R. § 50.57(c) and 10 C.F.R. Part 2, Subpart G, resolve the new material factual issues raised by the 25% power request in time to grant the relief LILCO sought: authority to operate at 25% power before the end of Summer 1987. However, the Commission stated that "LILCO may refile its request under 10 C.F.R. § 50.57(c) with the Licensing Board when and if it believes that some useful purpose would be served." CLI-87-04, slip op. at 2. The Commission's decision thus allows LILCO to refile its request at a later date, and directs that such application be made pursuant to applicable Commission adjudicatory procedures.

Title 10 C.F.R. § 50.57(c) authorizes an applicant in a pending proceeding to make a motion before the presiding officer for authorization of operation above 5% power but short of full power operation. Any action by the presiding officer "shall be taken with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent that his contentions are relevant to the activity." 10 C.F.R. § 50.57(c). Both that provision and CLI-87-04 suggest that the regulation of the § 50.57(c) proceeding is left to the

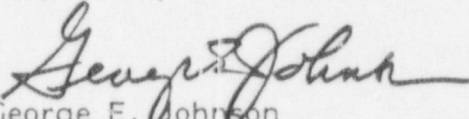
discretion of the presiding officer in the pending proceeding. Determinations as to the manner of pleading contentions, the scope of discovery, filing of testimony, and the schedule for consideration of procedural and substantive issues are appropriately made by the presiding officer. The Staff has more fully explained its position in the context of the issues presented in this proceeding in the attached pleading to the Commission.

In sum, CLI-87-04 expressly directs that further proceedings be before the Licensing Board. As a consequence, the Staff supports the LILCO Motion insofar as it requests the Licensing Board to accept jurisdiction. Since LILCO expressly asks the Licensing Board not to consider its procedural and schedule requests at this time, the Staff defers further discussion on those matters.

III. CONCLUSION

For the reasons given above, the Licensing Board should take jurisdiction of the LILCO Motion.

Respectfully submitted,


George E. Johnson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 29th day of July, 1987

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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO LILCO MOTION FOR AUTHORIZATION TO INCREASE POWER TO 25%" 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, this 29th day of July, 1987.

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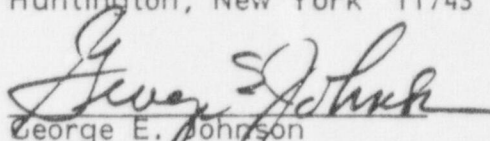
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
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LONG ISLAND LIGHTING COMPANY)	Docket No. 50-322-0L
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(Shoreham Nuclear Power Station,)	
Unit 1))	

NRC STAFF RESPONSE TO
LILCO MOTION FOR DESIGNATION OF
LICENSING BOARD AND SETTING EXPEDITED
SCHEDULE TO RULE ON LILCO'S 25% POWER REQUEST

I. INTRODUCTION

On July 14, 1987, Long Island Lighting Company (LILCO) served on the Commission its "Motion for Designation of Licensing Board and Setting Expedited Schedule to Rule on LILCO's 25% Power Request Motion" ("Motion"). This Motion followed the Commission's denial, June 11, 1987, of LILCO's April 14, 1987 request for 25% power operation and motion for expedited consideration. That denial was based on the Commission's finding that there was no prospect for resolving the new material factual issues introduced by LILCO's 25% power request, consistent with normal adjudicatory requirements, in time to grant the relief LILCO sought. CLI-87-04, slip op. at 2. The Commission noted, however, that "LILCO may refile its request under 10 C.F.R. § 50.57(c) with the Licensing Board when and if it believes that some useful purpose would be served thereby." Id.

In its Motion, LILCO notes that it has filed its 25% power motion with the Licensing Board in the OL-3 docket (the "Margulies Board"). Motion, at 1.

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However, LILCO argues that it is not clear that the Margulies Board has jurisdiction over the issues raised, and, in any event, only a newly designated Licensing Board would be able to give the requested expedited consideration of its 25% power request. Id., at 2. As grounds for Commission designation of a new board, LILCO argues that both extant boards (OL-3 and OL-5) are "already fully engaged" and there is "little realistic prospect" of their early consideration of the 25% power request. Id., at 6, 7-9. In addition, LILCO argues that the Motion "does not clearly raise emergency planning issues", and there is no need for common membership between the emergency planning boards and a board which might be appointed to hear the 25% authorization request. Id., at 7, 9-10. LILCO also reiterates arguments made in its April 14, 1987 filing that expedition is needed, id., at 10-13, and proposes an expedited and truncated schedule for implementation by a newly designated Licensing Board, id., at 13-16. ^{1/}

Because the instant Motion is inconsistent with the express instruction to LILCO to direct any further request for relief to the Licensing Board, the Motion should be denied. However, in the event the Commission determines to re-visit the substance of LILCO's arguments for designation of a new board

^{1/} While conceding that authority to appoint new board may rest with the Licensing Board Panel Chairman, LILCO questions whether he could impose or recommend the expedition LILCO seeks. LILCO argues that, in any event, action by the Commission is authorized, and would avoid delay in resolution of these matters. Motion, at 2, n.4. Given the express direction to LILCO to refer further requests to the Licensing Board, there can be little doubt that the Licensing Board has jurisdiction of this matter.

and for expedition, the Staff sets forward below a number of reasons which warrant denial of such reconsideration.

II. DISCUSSION

- A. The Commission Has Already Decided that Relief Related to the 25% Power Request is to be Sought before the Licensing Board Pursuant to 10 C.F.R. § 50.57(c).

By its June 11, 1987 Memorandum and Order, the Commission determined that the 25% power request must be considered under the provisions of 10 C.F.R. § 50.57(c) and Subpart G to 10 C.F.R. Part 2. As noted in the Staff's April 29, 1987 response to the original LILCO motion for expedited consideration, § 50.57(c) contemplates that such motions are to be directed to the presiding officer, who, after giving any party the right "to be heard to the extent that his contentions are relevant to the activity to be authorized...", will make appropriate findings in the form of an initial decision.

The Commission's June 11, 1987 Memorandum and Order expressly stated that LILCO "may refile its request under 10 C.F.R. § 50.57(c) with the Licensing Board when and if it believes that some useful purpose would be served thereby". Id., at 2. Thus, the Commission has already decided that under Commission regulations, further consideration of a 25% power authorization request should be upon application to the Licensing Board, pursuant to "normal adjudicatory procedures." Implicit in that decision is the determination that, under 10 C.F.R. § 50.57(c), the Licensing Board which has considered the contentions still pending, should hear from the parties concerning the relevance of such contentions to the activity sought to be authorized. Also implicit is the determination that procedural questions, such

as the use of expedited procedures, are properly addressed to the presiding officer. As a result, LILCO's Motion is contrary CLI-87-04, and should have been directed to the Licensing Board.

B. The Procedural Issues Raised in LILCO's Motion
are Properly Referred to the Licensing Board

In support of its request for a new Licensing Board, LILCO argues that disposition of its 25% power request "neither require(s) further litigation of outstanding emergency planning issues nor depend(s) on their prior dispositive resolution." Motion, at 9. However, it must be remembered that the very relief that LILCO seeks depends on an affirmative demonstration, based on at least one of the three criteria contained in 10 C.F.R. § 50.47(c)(1), that notwithstanding failure to meet one or more of the emergency planning standards in 10 C.F.R. § 50.47(b), "there is reasonable assurance that adequate protective measures can and will be taken..." under 10 C.F.R. § 50.47(a)(1). Conversely, under 10 C.F.R. § 50.57(c), a party contesting an application for operation short of full power is given an opportunity to demonstrate that there are indeed contentions pending before the licensing board that are relevant to the activity sought to be authorized. It follows that Intervenor here must be given the opportunity "to be heard" concerning whether deficiencies in emergency planning currently being litigated in the OL-3 and OL-5 proceedings are relevant and material to operation of Shoreham at 25% power, and whether such deficiencies prevent making the necessary finding of "reasonable assurance". As a result, LILCO's argument that the issues raised in its 25% power request are so distinct from pending issues as to obviate the regulatory policy that the

licensing board hearing evidence on contentions preside over the § 50.57(c) application is without merit.

Since there are evidentiary matters to be decided, the Commission's rules and policy dictate allowing the Licensing Board to initially deal with the difficult practical and legal questions which must be addressed at the threshold of consideration of the 25% power request. Ventilation of such matters before the Licensing Board will permit efficient disposition of procedural and evidentiary matters, while allowing any important questions of fact, law or policy to be concisely framed for Commission consideration if and when Commission review is necessary. (See 10 C.F.R. § 2.786)

LILCO argues extensively that expedition in the conduct of any proceeding on its Motion is essential, given (1) the completion of the facility, (2) the record of delay in completion of the licensing proceeding, (3) the need for electric power on Long Island, (4) national security considerations, and (5) the current availability and ongoing analysis of applicable technical and legal underpinnings for the 25% power request. Motion, at 10-13. However, these arguments for expedition should not be considered in a vacuum.

Implicit in the Commission's decision in CLI-87-04 is the recognition that the parties as well as the Commission have already committed enormous resources to this "complicated and prolonged proceeding." CLI-87-04, slip op. at 1. Even assuming LILCO were correct that the issues presented by its 25% power request were completely segregable from the ongoing emergency

planning proceedings, 2/ the resource issue goes not only to the availability of the sitting licensing boards, but to the availability of the parties. Given the heavy commitment of litigation resources in the ongoing proceedings, it is not clear that the parties have the resources to proceed simultaneously with all the ongoing matters as well as a potentially complex and lengthy proceeding on the 25% power request, particularly where the same issues and witnesses are involved. The Licensing Board is familiar with the procedural posture of each aspect of the proceedings on the OL-3 and OL-5 dockets. Given this familiarity, it is most appropriate for the Licensing Board to evaluate whether its own work load and priorities, and those of the parties warrant the procedural steps LILCO seeks. 3/

LILCO's request for relief under § 50.47(c)(1) also raises difficult legal issues, the resolution of which may profit from first consideration before the Licensing Board. Two issues which are presented are:

- (1) Did the Commission, in adopting § 50.47(c)(1), contemplate a showing that (a) emergency planning deficiencies are not significant for the plant in question, or (b) adequate interim compensatory actions have been or will be taken, based on reductions in accident risks associated with reduced power levels?

And if not, is an exemption from the requirements of 10 C.F.R. § 50.47 needed?

2/ As indicated above, that assumption is subject to substantial question.

3/ It should be noted that the Staff is well along in its review of the technical support for LILCO's 25% power request. Although recently suspended, the Staff is prepared to complete its evaluation in an expeditious manner. However, Intervenors have already claimed the need for substantially greater time to conduct their accident analyses. Suffolk County, State of New York, and Town of Southampton Response in Opposition to LILCO's Motion for Expedited Commission Consideration, at 22.

- (2) Did the Commission contemplate issuance of a full-power license based solely on a finding of "other compelling reasons to permit plant operations," where those reasons involve an urgent need for power?

Examination of the Statement of Consideration for the 1980 revisions to the Part 50 emergency planning requirements (45 Fed. Reg. 55402, August 19, 1980), the legislative history associated with those revisions, as well as the 1980 NRC Authorization Act (reviewed in LBP-83-22, 17 NRC 608, 628 et seq.), and the decisions in ALAB-818, 22 NRC 651, 670-671 (1985), and CLI-86-13, 24 NRC 22, 29 (1986), raises these substantial issues, which should be initially considered by the Licensing Board.

C. Any Section 50.57(c) Hearing Should Be Conducted Pursuant to Normal Adjudicatory Procedures

Should the Commission decide to consider LILCO's request for expedition and proposed schedule, Motion, at 10-16, the Staff believes there is good reason not to depart from normal adjudicatory procedures.

In its Motion, LILCO has proposed a truncated procedure, eliminating completely the contention phase of the proceeding, and, in addition, has argued that LILCO has already met its burden of going forward with its case and thus need not file testimony. Motion, at 13-14. The Staff believes LILCO's proposals are not workable.

First, the 25% power request relies heavily on severe accident analyses to demonstrate that "very small risk [is] associated with operation at 25%," and "that emergency planning is unwarranted at distances beyond one mile

from the plant." 4/ Although LILCO does not request relief from the requirement to plan for emergency response for a 10-mile emergency planning zone, the burden of its presentation is that, for Shoreham, the planning bases on which the 10-mile zone was premised, are satisfied at one mile from the plant if power operation is limited to 25%. While the issue of need for offsite emergency planning appears straightforward as a general matter, this does not end the inquiry. The analyses relied upon by LILCO, and which were under evaluation by the Staff, are new, and the use of these analyses to establish levels of accident risk from the Shoreham plant has not previously been addressed. 5/ The factual issues which may be raised in response to the proffered analyses are not obvious, and contention pleading or the equivalent is needed to focus and narrow the issues. Early definition of the issues will speed and streamline both the discovery and hearing stages. Testimony addressing clearly defined issues will take less time to hear than will testimony not focused on discrete issues. Presumably the issues and the testimony must address not only the validity of LILCO's analyses, but also whether there are specific aspects of currently unresolved issues which may affect emergency response capabilities at the 25% power

4/ Request for Authorization to Increase Power to 25%, April 14, 1987, at 59.

5/ In fact, litigation of such issues was precluded in this proceeding. See ALAB-832, 23 NRC 135, 146-148 (1986) (generic accident analyses "were conducted to remove the need for site specific calculations....")

level. Failure to follow standard NRC practice would likely further complicate and prolong such a proceeding, and certainly would not be expeditious.

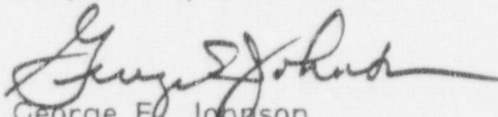
Other aspects of a prehearing schedule should await definition of the issues by a Licensing Board. However, as LILCO recognizes, meaningful discovery depends on the availability of analyses of the LILCO studies supporting its 25% power request. Discovery of the positions of parties other than LILCO will need to be commenced. No persuasive basis has been provided to depart from the general proposition that overall regulation of a § 50.57(c) proceeding is appropriately left to the Licensing Board, consistent with the regulations and the Commission's Statement of Power on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981).

In sum, the issues implicitly raised by LILCO's 25% power request are not susceptible to resolution without normal adjudicatory procedures for refining and exploring the applicability of properly raised contentions to the proposed activity, and LILCO's proposal to skip the contention phase and to treat LILCO as having already submitted opening testimony should be rejected. Management of these matters is properly left with the Licensing Board.

III. CONCLUSION

For the foregoing reasons, LILCO's Motion should be denied.

Respectfully submitted,


George E. Johnson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 29th day of July, 1987

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKET # 50-322-OL
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CERTIFICATE OF SERVICE

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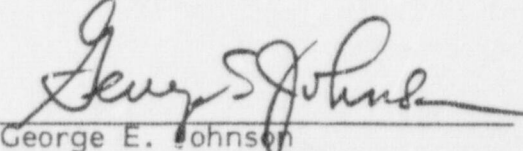
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