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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION 87 DEC 30 P8:59

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

BRANCH

In the Matter of)

LONG ISLAND LIGHTING COMPANY)

(Shoreham Nuclear Power Station,
Unit 1))

Docket No. 50-722-UL-6
(EP Exercise)

NRC STAFF EXPEDITED RESPONSE TO WHETHER CERTAIN
ISSUES DECIDED IN LBP-87-32 SHOULD BE
CERTIFIED TO THE COMMISSION OR BE HEARD
BY THE APPEAL BOARD ON AN EXPEDITED SCHEDULE

George E. Johnson
Counsel for NRC Staff

December 22, 1987

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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. 80-322-OL-5
)	(EP Exercise)
(Shoreham Nuclear Power Station,)	
(Unit 1))	

NRC STAFF EXPEDITED RESPONSE TO WHETHER CERTAIN ISSUES
DECIDED IN LBP-87-32 SHOULD BE CERTIFIED TO THE COMMISSION
OR BE HEARD BY THE APPEAL BOARD ON AN EXPEDITED SCHEDULE

I. INTRODUCTION

The Chairman of the Appeal Board has requested (by telephone, December 21, 1987) the Staff to address, by 3 p.m., Tuesday, December 22, 1987, two questions. The questions are whether the December 19, 1987 Motion filed by Applicant 1/ meets the standards for certification by the Appeal Board of questions to the Commission, or, if not, whether the Appeal Board should nevertheless expedite the schedule for consideration of the LILCO Appeal of the December 7, 1987 Partial Initial Decision of the OL-5 Licensing Board (LBP-87-32). LILCO has not presented bases warranting the granting of its request for immediate certification of issues to the Commission or,

1/ LILCO's Motion for Immediate Certification to the Commission of Issues Presented by LBP-87-32 or for Expedited Briefing, Argument and Decision by the Appeal Board, dated December 19, 1987 ("Motion").

alternatively, for expedited briefing, argument and decision by the Appeal Board of LILCO's Appeal from LBP-87-32.

II. DISCUSSION

A. LILCO Has Not Met the Standard for Certification to the Commission

As LILCO correctly notes, 10 C. F. R. Section 2.785(d) authorizes the Appeal Board to "certify to the Commission for its determination major or novel questions of policy, law or procedure." Motion at 22. However, LILCO fails to cite a leading case applying that provision, Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2) ALAB-421, 6 NRC 25 (1977), where the Appeal Board observed that the authority under Section 2.785(d) to certify matters to the Commission "'should be exercised sparingly.'" Id., at 27. Nor does it reference the citation therein to its earlier decision in Vermont Yankee, that "[a]bsent compelling reason, we will decline to certify a question to the Commission." ALAB-211, 7 AEC 982, at 984.

Instead, LILCO relies heavily on the Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), which applies in the main to the conduct of proceedings by Atomic Safety and Licensing Boards. Motion at 22-23. LILCO also relies on several inapposite cases involving the standards for interlocutory

review, (United States Energy Research and Development Administration Project Management Corporation Tennessee Valley Authority (Clinch River Breeder Reactor), CLI-76-13, 4 NRC 67 (1976); Offshore Power Systems (Floating Nuclear Power Plants), ALAB-500, 8 NRC 323 (1978)), as well as one case involving whether the Appeal Board had jurisdiction to entertain an appeal (Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-681, 16 NRC 146 (1982)).

Finally, LILCO cites a previous decision in this proceeding, ALAB-763, 19 NRC 996 (1984), which involved certification of questions to the Commission only after the Appeal Board had determined, based on full briefing, that decision on the "important-to-safety/safety-related" issue should be left to the Commission for determination. Motion at 22-24.

Employing these precedents, LILCO suggests that it is the Commission's policy to encourage certification of questions in the circumstances here presented. This is clearly incorrect. As noted above, even where a major or novel question of policy, law or procedure is presented, certification of questions to the Commission is employed sparingly, and only upon a showing of a compelling reason. Vermont Yankee, supra. Thus it is up to LILCO to demonstrate that a compelling reason for certification exists.

While LILCO does not address this standard, per se, it does attempt to show that it will suffer avoidable harm as a

result of a failure to certify the matter, and that the decision of the Licensing Board below effects not only Shoreham, but all near term operating license applications, and will "radically restructure [FEMA-NRC] interagency relationships." Motion at 25.

LILCO argues that immediate certification is necessary to avoid subjecting Shoreham to "a potentially infinite series of two-year cycles" to the licensing process, and to avoid frustration of the Commission policy of expedition of licensing proceedings. Id. Assuming for the sake of argument that such a showing might constitute "compelling reasons," it is simply not true that immediate certification will avoid the harm which LILCO foresees - being required to conduct another full-participation exercise prior to licensing of Shoreham.

First, even if the question were certified, and the Commission were to reverse the Licensing Board, such reversal would not support licensing of Shoreham for full power operation. The OL-5 Licensing Board has not decided the other contentions relating to the whether the results of the February 13, 1986 exercise reveal "fundamental flaws" in the LILCO Emergency Plan. That decision, and any appeals thereof must be resolved before the emergency exercise may be found to have been adequate for purposes of licensing.

Second, even were all emergency exercise issues to be resolved in time for licensing of Shoreham prior to February 13, 1988, an exceedingly unlikely scenario at this point,

given the evidence supporting a contrary result, a full power license could not be issued before the remaining issues pending before the Licensing Board were resolved. Those issues include the impact of the "realism doctrine" on the legal authority contentions, the adequacy of reception centers, the timeliness of school evacuation, adequacy of the Shoreham emergency broadcast system, and the adequacy of evacuation planning for hospitals.

LILCO has filed eight motions for summary disposition of the legal authority contentions and another contention on December 18, 1987. The motions and the attached documents supporting the motions are almost 500 pages in length. Replies to these motions would be due on January 11, 1988, if no extensions of time to answer these prolix motions were granted. In any event it is unrealistic to think they could be acted upon by February 13, 1988, so as to obviate another exercise. Should any portion of these motions be denied, hearings on the issues encompassed in the motions could not realistically be predicted even to begin prior to February 13, 1988.

In short, there are numerous emergency planning issues pending in addition to the adequacy of the emergency exercise which must be resolved for full power licensing of Shoreham. Any one of these issues could result in further evidentiary hearings. Thus, LILCO's position that expedition of the relatively narrow questions decided by LBP-87-32 will avoid the need for another full-participation exercise

is contrary to any reasonable expectation of future events in this case.

Finally, though the recent Licensing Board Partial Initial Decision, if upheld, could have a profound impact on future NTOL exercises, and on the NRC/FEMA approach to the conduct of emergency planning exercises, this fact alone does not warrant immediate certification. On the contrary, the potential importance of the issue suggests that the matters presented -- involving interpretation of Commission regulations and prior agency interpretations and administrative practice -- receive the benefit of the Appeal Board's consideration, prior to treatment of the issue by the Commission.

Thus, there is no compelling reason to speed up and truncate consideration of the important issues raised by LILCO's appeal. Even assuming that LILCO will prevail on the merits of its appeal, LILCO has not demonstrated that the harm it asserts will occur would be avoided by immediate certification. As a result, LILCO's request therefor should be denied.

B. LILCO's Request for Expedited Appeal Board Review
Should be Denied

In support of its request for expedited Appeal Board review, LILCO argues that, without such review, it is possible that LILCO will be forced to prepare for and undertake another full-participation exercise for Shoreham.

Motion at 27. This, it is argued, could entail another two years' delay in the licensing of Shoreham, with profound economic implications for LILCO. Id. at 27-28. LILCO acknowledges, however, that there are several other avenues which may be open to it, even if it is unsuccessful in overturning the recent PID. Id. Among these avenues are the possibility of correcting deficiencies in the exercise by a partial remedial exercise, and pursuit of an extension of the requirement that the initial full-participation exercise be held within two years of licensing. Id.

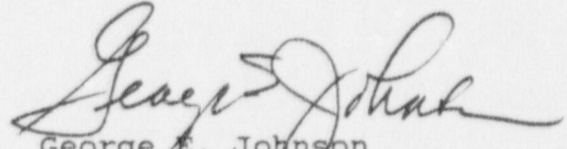
As argued above, however, the likelihood that LILCO will secure the necessary adjudicative rulings to obtain a full power license prior to February 13, 1988 is very low. The harm LILCO asserts will befall it will not be avoided by an expedited review of LILCO's appeal by the Appeal Board. In the absence of any real likelihood that Shoreham can be licensed before February 13, 1988, expedition of the appeal as requested is not only unnecessary, but is undesirable.

The parties and the Appeal Board should have adequate time to consider the merits of the appeal, so that all appropriate legal and factual considerations are taken into account. The importance of the questions presented, both to Shoreham, and to other pending operating license applications and the NRC-FEMA review functions, requires a full opportunity for briefing of the merits of the appeal. Thus, the request for expedition should be denied.

III. CONCLUSION

LILCO's Motion should be denied.

Respectfully submitted,



George E. Johnson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 22d day of December, 1987

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NUCLEAR REGULATORY COMMISSION

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OFFICE OF SECRETARY
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF EXPEDITED RESPONSE TO WHETHER CERTAIN ISSUES DECIDED IN LBP-87-32 SHOULD BE CERTIFIED TO THE COMMISSION OR BE HEARD BY THE APPEAL BOARD ON AN EXPEDITED SCHEDULE" 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 or, as indicated by double asterisks, hand delivery, this 22st day of December 1987.

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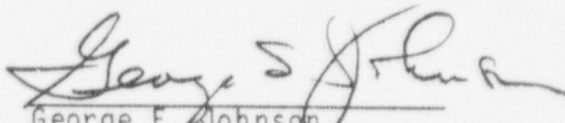
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