

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
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BRANCH

Before Administrative Judges:

Lawrence Brenner, Chairman  
James H. Carpenter  
Peter A. Morris

SERVED MAY 17 1982

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

Docket No. 50-322-CPA

May 14, 1982

MEMORANDUM AND ORDER RULING ON SOC'S  
CONSTRUCTION PERMIT EXTENSION  
CONTENTIONS AND REQUEST FOR HEARING  
OF SHOREHAM OPPONENTS COALITION

Memorializing a ruling made at a prehearing conference of parties held March 10, 1982 (Tr. 497-501),<sup>\*/</sup> the Board denies each of the four contentions proposed by the Shoreham Opponents Coalition (SOC) as being beyond the scope of matters litigable in a construction permit extension proceeding, and determines that SOC's

<sup>\*/</sup> Pursuant to an Order of the Atomic Safety and Licensing Board Panel dated March 23, 1982, this Board has been reconstituted by the appointment of Dr. Peter A. Morris to replace Mr. Frederick J. Shon. Judge Shon, who joined in the Board's March 10, 1982 ruling, has read this opinion and concurs in the reasoning and the result.

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failure to raise at least one litigable contention requires that its hearing request be denied.

BACKGROUND

On November 26, 1980, the Long Island Lighting Company (LILCO/ Applicant) applied for an extension of construction permit CPRR-55 (CP) for the Shoreham Generating Station, Unit 1.<sup>1/</sup> This application requests that the term of its permit, which was initially granted in April 1973<sup>2/</sup> and then extended in May 1979,<sup>3/</sup> be continued to March 31, 1983.<sup>4/</sup>

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- <sup>1/</sup> The CP would have expired on December 31, 1980. Pursuant to the Commission's regulations, 10 C.F.R. §2.109, and Section 9(b) of the Administrative Procedure Act, 5 U.S.C. §558(c), LILCO's timely request for an extension continues the life of its existing permit until the application has been finally determined.
- <sup>2/</sup> The CP was originally issued by the Atomic Energy Commission. Pursuant to the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §§5801, et. seq., the licensing functions of the AEC were transferred to the NRC effective January 19, 1975.
- <sup>3/</sup> See 44 Fed. Reg. 29545 (1979).
- <sup>4/</sup> LILCO's November 26, 1980 application to extend its CP predicted a May 31, 1981 fuel load date. Applicant has subsequently revised its estimate and believes that construction at Shoreham will be completed in September 1982.

On December 31, 1980 and January 23, 1981, SOC<sup>5/</sup> requested that the NRC conduct a hearing on LILCO's CP extension application, pursuant to Section 189(a) of the Atomic Energy Act of 1954, as amended.<sup>6/</sup> By the same documents, SOC requested that the Director of Nuclear Reactor Regulation (NRR) institute proceedings, pursuant to 10 C.F.R. §2.206, to suspend or revoke CRR-55, or to modify that CP by adding certain conditions.<sup>7/</sup>

In his decision dated June 26, 1981, the Director of NRR denied SOC's 10 C.F.R. §2.206 petition, concluding that suspension of the construction is not mandated by either law or Commission policy, as SOC's petition did not "give reasons why public health and safety would be threatened imminently if permit suspension were not ordered."<sup>8/</sup>

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<sup>5/</sup> SOC was granted party status in the Shoreham Operating License (OL) proceeding (Docket No. 50-322) pursuant to ASLB Orders dated March 5 and May 1, 1980. The OL proceeding has been ongoing since 1976 (see 41 Fed. Reg. 11367 (1976)) and has recently entered its evidentiary phase.

<sup>6/</sup> 42 U.S.C. §2239(a).

<sup>7/</sup> See SOC's January 23, 1981 filing at 21-30.

SOC apparently commenced lawsuits in both the U.S. Court of Appeals, Second Circuit, and in the U.S. District Court (E.D.N.Y.) on June 17, 1981, alleging that the NRC had both failed to grant SOC a hearing on LILCO's CP extension application and had failed to rule on SOC's 10 C.F.R. §2.206 petition. (See SOC's September 24, 1981 statement of contentions and motion to supplement OL contentions, at 2.) The record before this Board is silent as to the disposition of these suits. Presumably they were discontinued in light of subsequent Commission actions. See infra.

<sup>8/</sup> DD-81-9, 13 NRC 1125 at 1126 (1981).

The Director stated that while SOC had set forth a number of matters in its petition which it believed should be considered in a hearing held in connection with LILCO's application for a CP extension, SOC had alleged only that the operation of the facility would be unsafe or environmentally unsound, not that the construction of the facility itself is improper or inadequate under existing regulatory requirements such that a 10 C.F.R. §2.206 remedy would be appropriate.

Since a permittee pursues work under a construction permit at its own risk, pending approval of the CP extension or of the application for an operating license,<sup>9/</sup> the Director concluded that the institution of proceedings to suspend the permit is not required, because "permitting continued construction of the plant despite unresolved safety questions does not itself pose any danger to the public health and safety."<sup>10/</sup> SOC's request for a hearing on the CP extension was thereafter referred by the Director to the Commission.

The Commission, by its unpublished Order of July 22, 1981, determined that SOC's request for a hearing should be granted "subject to the petitioner advancing one litigable contention, and

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<sup>9/</sup> Id. at 1127-1128, citing Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396 (1961).

<sup>10/</sup> 13 NRC at 1128, quoting Porter County Chapter of the Izaak Walton League, Inc. v. NRC, 606 F.2d 1363, 1369 (D.C. Cir. 1979).

that the Atomic Safety and Licensing Board is to be convened to consider whether SOC's petition raises issues litigable in this construction permit extension proceeding, and, if so to hear and decide those issues." (Citations omitted.)<sup>11/</sup>

On September 24, 1981, SOC filed four proposed contentions which it sought to litigate in this CP extension proceeding. LILCO and the NRC Staff each filed their replies opposing the admission of all SOC's proposed contentions on October 15, 1981.

For the reasons discussed below, we find that none of SOC's contentions should be litigated in a CP extension proceeding.

The Scope of Issues Which May Be Considered in Construction Permit Extension Proceedings

Section 185 of the Atomic Energy Act, 42 U.S.C. §2235, provides, in pertinent part, that should construction of a nuclear facility not be completed by the date prescribed in the CP, "the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date." (Emphasis added.)

This proviso is implemented in 10 C.F.R. §50.55(b) of the Commission regulations, which states:

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<sup>11/</sup> Id. at 2.

Based on those filings before it, the Commission concluded that SOC had sufficiently demonstrated that it possessed standing to request a hearing on this matter. Id. at 2, n.1.

If the proposed construction or modification of the facility is not completed by the latest completion date, the permit shall expire and all rights thereunder shall be forfeited: Provided, however, That upon good cause shown the Commission will extend the completion date for a reasonable period of time. The Commission will recognize, among other things, developmental problems attributable to the experimental nature of the facility or fire, flood, explosion, strike, sabotage, domestic violence, enemy action, an act of the elements, and other acts beyond the control of the permit holder, as a basis for extending the completion date.

LILCO's November 26, 1980, request for extension of its CP alleges four reasons in support of its need for a CP extension:

1. New Regulatory Requirements
2. Evolving Interpretation of Existing Regulatory Requirements
3. Late Delivery of Equipment
4. Unexpected Difficulties in Completion of Required Plant Modifications

LILCO cites examples of delays alleged to have been encountered because of each one of these factors as justification for its request for a CP extension.

In response to the Commission's July 22, 1981 Order, conditioning SOC's admission to this proceeding upon its advancing at least one litigable contention, SOC filed a petition dated September 24, 1981 setting forth four contentions which, for purposes of brevity, we summarize as follows:

1. Evaluation of Potential Accidents and Corrective Measures - Applicant and Staff must evaluate the probability and the consequences of a Class 9 accident occurring at Shoreham, and determine what measures, including design modifications, can be taken to reduce the probability of such accidents or to mitigate their effects.
2. Liquid Pathway Impacts - An evaluation of the effects of liquid pathway interdiction (both close to the source and

further along population exposure pathways) should be conducted for the Shoreham site. A liquid pathway interdiction system should be implemented for Shoreham.

3. Siting/Emergency Evacuation - Operation of a nuclear power plant at the Shoreham site endangers public health and safety because the population density and distribution, the topography, and the configuration of transportation corridors would make prompt evacuation of Eastern Long Island virtually impossible during unfavorable weather conditions.
4. Financial Qualifications - LILCO has not demonstrated that it has the financial qualifications to complete the construction of the Shoreham plant.

While SOC did contend in its January 23, 1981 petition to institute proceedings in this matter, at 2, that "good cause to extend the construction permit does not exist," we are unaware of anything in either that petition or in any subsequent SOC filing before this Board which challenges the adequacy of any of the four reasons advanced by LILCO in support of its application for a construction permit extension. Instead, we read SOC's contentions as seeking to have this Board litigate matters other than whether the four reasons stated by LILCO in justification of its failure to complete Shoreham on schedule constitute good cause for the requested extension.

SOC does not appear to dispute this. In its September 24, 1981 statement of contentions, at 3-4, SOC states that in determining what matters are to be considered in an application for a CP extension, an Atomic Safety and Licensing Board is not restricted to an examination of the reasons for delay alleged by an applicant, but must instead look at the "totality of the circumstances" and

invoke a "common sense" approach. SOC relies upon the Atomic Safety and Licensing Appeal Board's decision in Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558 (1980) as supporting its conclusion that this Board should conduct hearings on its contentions in this CP extension proceeding.

However, in the views of Applicant and Staff, as set forth in their respective filings dated October 15, 1981, SOC has failed to raise at least one contention which would be litigable in a CP extension proceeding. Also, relying on Bailly, supra, each of them concludes that the failure of SOC to establish some nexus between its proposed contentions and those reasons for delay alleged by LILCO is fatal to their cause.

Bailly involved an appeal from a Licensing Board's denial of two petitions for intervention which had sought to raise site suitability contentions in a construction permit proceeding for a plant which was, some six and one-half years after the initial issuance of a construction permit, still less than one percent completed.<sup>12/</sup> In affirming that Licensing Board's decision, the Appeal Board explained its own decision in Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414 (1973), the only previous Appeal Board decision to address the question of the scope of a Licensing Board's inquiry

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<sup>12/</sup> 12 NRC at 561.

in a proceeding pursuant to Section 185 of the Atomic Energy Act of 1954 and 10 C.F.R. §50.55(b).

As restated in Bailly, the holding in the Cook decision was that intervenors in a construction permit extension proceeding

... could litigate only those safety or environmental issues which both (1) arose from the reasons assigned in justification of the request for a construction permit extension; and (2) could not, consistent with the protection of the interests of the intervenors or the public interest, "appropriately abide the event of the environmental review facility operating license hearing." (Citations omitted.)<sup>13/</sup>

The Appeal Board noted in Bailly, however, that the Cook test was tailored to the particular facts of that case, and should not be considered to be "offered as an inflexible mold for passing judgment on the litigability in a permit extension proceeding of every variety of contention in every conceivable setting."<sup>14/</sup>

Instead, the Appeal Board reaffirmed its statements from Cook that a licensing board applying this test must look at the "totality of circumstances" and invoke a "common sense" approach in determining the scope of "good cause" inquiry in the specific case.<sup>15/</sup>

In light of these considerations, the Appeal Board concluded that it would have great difficulty in finding, based on anything which was stated in Cook, that the site suitability issues raised by intervenors in the Bailly construction permit extension proceeding

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<sup>13/</sup> 12 NRC at 568.

<sup>14/</sup> Id. at 570.

<sup>15/</sup> Id.

should, in the absence of any other vehicle for raising its concerns, abide the operating license proceeding. Since that plant was less than one percent complete, the Appeal Board deemed it to "offend reason" to suggest that these siting contentions should only be explored years hence, following a substantial additional monetary investment, "if there currently exists substantial cause to believe that the Bailly site is unacceptable."<sup>16/</sup>

The Appeal Board concluded, however, that a construction permit extension hearing was not the only available proceeding in which the Bailly intervenors might advance their concerns; instead, that Appeal Board viewed 10 C.F.R. 2.206, authorizing "any person" to file a request for the institution of a show-cause proceeding under 10 C.F.R. §2.202 "to modify, suspend or revoke a license or for such other action as may be proper," as providing a vehicle whereby concerns such as those raised by the Bailly intervenors could be raised at any time.<sup>17/</sup>

SOC construes the language of the Bailly opinion as indicating that the only reason the Appeal Board concluded that those intervenors should not be allowed to raise their siting concerns in that proceeding was because those parties had access to another remedy, i.e., 10 C.F.R. §2.206; having already exhausted that avenue, SOC now seeks to have us consider these matters, which it

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<sup>16/</sup> Id.

<sup>17/</sup> Id.

acknowledges to be unrelated to the reasons advanced by LILCO for a CP extension, stating that no other remedy exists for its concerns.<sup>18/</sup>

We believe that SOC fundamentally misconstrues the Appeal Board's reasoning in Bailly. We do not read Bailly as mandating that a licensing board consider issues in a CP extension proceeding having no relationship to those reasons assigned by the applicant in justification of its request for a CP extension or otherwise evolving from the act of extension, solely because the proponent of those issues has already exhausted its 10 C.F.R. §2.206 remedy. Were Bailly to stand for that proposition, it would seem that any person having standing to raise any litigable issue could seek a hearing on that issue in a construction permit extension proceeding, regardless of its relationship to those allegations of "good cause" asserted by the applicant, or its relationship to the act of extension, so long as he first raised the matter pursuant to 10 C.F.R. §2.206 and had his petition denied by the Director of NRR.

In our view, the concern expressed in Bailly was whether intervenors had any vehicle available to them, other than the CP extension proceeding, in which they might raise their concerns about the suitability of the Bailly site, prior to the operating license proceeding.

As we observed, supra, Bailly was just the second Appeal Board decision to interpret Section 185 of the Atomic Energy Act of 1954

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<sup>18/</sup> See SOC's September 24, 1981 statement of contentions, at 5.

and its implementing regulations. The Appeal Board noted in both Bailly and its predecessor, Cook, that because of the dearth of legislative history on point, it considered the scope of a Section 185 "good cause" inquiry to be "entirely res nova."<sup>19/</sup>

We can only speculate whether the Appeal Board would have concluded that the site suitability issues raised by the intervenors with respect to the less than 1 percent complete Bailly plant should be heard in a CP extension proceeding, rather than abiding the operating license proceeding, if 10 C.F.R. §2.206 did not exist. In such a procedural vacuum, "common sense" and the "totality of circumstances" might have mandated such a holding.<sup>20/</sup>

In Bailly, the Appeal Board expressly stated that "a permit extension proceeding is not convened for the purpose of conducting an open-ended inquiry into the safety and environmental aspects of reactor construction and operation."<sup>21/</sup> To be litigable in such a proceeding, issues must "evolve naturally from the extension

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<sup>19/</sup> See Cook, 6 AEC at 418-420; Bailly, 12 NRC at 567.

<sup>20/</sup> 12 NRC at 570

<sup>21/</sup> Id. at 573.

which is the source of the proceeding."<sup>22/</sup> For matters having no "discernible relationship" to any other pending proceeding involving the same facility (e.g., one concerned with permit extension), "the Section 2.206 remedy must be regarded as exclusive."<sup>23/</sup>

The fact that the Section 2.206 remedy is available in every case, as it was in the one before us, was therefore useful for the Bailly Appeal Board to note as the exclusive alternative only where the issues raised could not appropriately be litigated in a CP extension proceeding because they had nothing to do with the reasons assigned for the extension and did not otherwise evolve from the extension. However, as the Bailly decision took pains to explain, the Section 2.206 remedy is not exclusive where the issues sought to be litigated could equally be raised in a permit extension proceeding. Bailly supra, at 572. Accordingly, as in the Cook case, the availability of the Section 2.206 remedy plays no part in a licensing board's analysis of whether the issues are admissible in a permit extension proceeding. The availability (or possible prior exhaustion) of the Section 2.206 remedy has played no part in our decision.

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<sup>22/</sup> Id. This is broader than being related to the reasons assigned by permittees in justification of the extension request. If the scope of an extension proceeding was limited to just the reasons assigned, permittees would be able to unilaterally limit the permissible scope of the proceeding by being selective in their proffered reasons.

<sup>23/</sup> 12 NRC at 570.

The litigability of SOC's contentions in this proceeding must therefore be determined upon the basis of the Appeal Board's two prong Cook test as amplified in Bailly: whether those issues both (1) arose from the reasons assigned in justification of the request for a construction permit extension or evolve naturally from the extension; and (2) could not appropriately abide the event of the operating license hearing.<sup>24/</sup>

SOC's CP Extension Contentions

The Board concludes that all four of SOC's proposed contentions are inappropriate for admission in a CP extension request hearing.

1. Evaluation of Potential Accidents and Corrective Measures.

In its October 15, 1981 filing, the Staff urges rejection of this contention both because "this issue has no relation to whether the Applicant has 'good cause' to seek extension" and because "any contention that 'Class 9' accidents must be looked at in the CP extension proceeding, where the Final Environmental Impact Statement has been issued is a challenge to the Commission's 'Class 9' policy statement." LILCO takes a similar position.

We agree that this contention is not properly litigated in a Shoreham CP extension hearing for the reason that it does not arise from the good cause reasons set forth in justification of the extension request and neither evolves from nor is exacerbated by the

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<sup>24/</sup> 12 NRC at 568, 573.

act of extension. Further, if litigable at all under the Commission's Policy Statement,<sup>25/</sup> it can certainly abide the ongoing operating license hearing. Indeed, safety issues relating to "Class 9" accidents have been raised by SOC in the OL proceeding in its series of four contentions designated 7B(1)-(4). These several OL contentions are better particularized than this broadly stated contention. We have addressed in our ruling on those contentions the extent to which this matter is litigable in the Shoreham OL proceeding. Memorandum and Order Confirming Rulings Made at the Conference of Parties, LBP-82-19, 15 NRC \_\_\_\_, slip. op. at 2-15 (March 15, 1982).

2. Liquid Pathway Impacts - There is no relationship of this contention to the reasons asserted in LILCO's request for a CP extension, nor is it otherwise affected by the extension.

3. Siting/Emergency Evacuation - This contention has no connection with the reasons stated by LILCO's as causing the need for the CP extension, nor is it otherwise affected by the extension. Emergency planning issues will be specified and litigated in the operating license proceeding.

4. Financial Considerations (related to ability to complete construction) - As set forth in SOC's September 24, 1981 filing before this Board, this contention has no connection with the

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<sup>25/</sup> "Statement of Interim Policy on Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969," 45 Fed. Reg. 40101 (1980).

reasons stated in Applicant's request for a CP extension, nor was it alleged or appeared to evolve out of the act of extension.

In the Prehearing Conference held on March 10, 1982, Counsel for SOC noted that at page 15 of its January 23, 1981 request for hearing, SOC had alleged that LILCO's increasing financial problems could affect the quality of the completion of construction and stated his belief that SOC had raised an issue related to LILCO's CP request.<sup>26/</sup>

In ruling upon this contention from the bench, we found that even when viewed in the light most favorable to SOC, it had presented an insufficient basis to determine that there is a nexus between the financial qualifications of LILCO to complete the construction of the facility and the CP extension. We disagree with LILCO's assertions that this matter would be litigable in the OL proceeding, as that proceeding would examine LILCO's financial qualifications to operate the facility, not to construct it. However, we noted that SOC could at the ongoing OL proceeding raise issues related to defects which it alleges result from LILCO's failure to construct the facility properly. Our reasoning was that at the CP stage, any assessment of the applicant's ability to construct the plant properly was necessarily predictive and indirect, and that assessment of its financial qualifications to construct the plant was part of this indirect assessment. However,

<sup>26/</sup> Tr. at 414-420.

at the OL stage the much more direct inquiry is whether the facility bearing completion in fact has been constructed properly. This will be an issue, in the context of LILCO's past QA/QC alleged deficiencies in construction, in the OL proceeding.<sup>27/</sup>

Subsequent to that time, the Commission amended its regulations, eliminating all requirements for financial qualifications review and findings for electrical utilities that are applying for construction permits or operating licenses for production or utilization facilities. The Statement of Considerations to these amendments stated that this includes ongoing licensing proceedings.<sup>28/</sup> Contentions related to financial qualifications are therefore no longer litigable in NRC licensing proceedings, including this one.

It is therefore

ORDERED that each of SOC's four contentions proposed for consideration in this CP extension proceeding is denied admission; and it is

ORDERED that, pursuant to the Commission's July 22, 1981 Order, SOC's failure to advance one litigable contention in this CP extension proceeding mandates that its January 23, 1981 hearing request be denied.

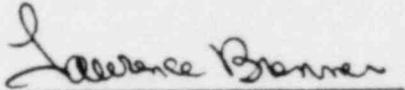
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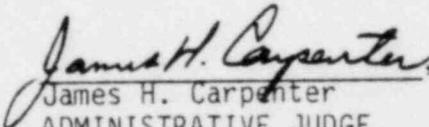
<sup>27/</sup> Tr. 498-501.

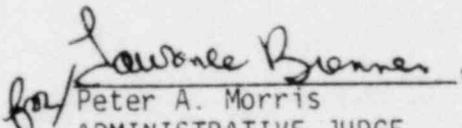
<sup>28/</sup> 47 Fed. Reg. 13750 (March 31, 1982).

Pursuant to 10 CFR §2.714a, SOC is advised that this order wholly denying its request for a hearing may be appealed on the question of whether its hearing request should have been granted in whole or in part by the filing of a notice of appeal and supporting brief with the Atomic Safety and Licensing Appeal Board within ten days after service of this order (with the allowance of five additional days for time taken by mailing of this order).<sup>29/</sup>

THE ATOMIC SAFETY AND LICENSING  
BOARD

 , Chairman  
Lawrence Brenner  
ADMINISTRATIVE JUDGE

 , Member  
James H. Carpenter  
ADMINISTRATIVE JUDGE

 , Member  
Peter A. Morris  
ADMINISTRATIVE JUDGE

Bethesda, Maryland  
May 14, 1982

<sup>29/</sup> We are aware, of course, that SOC is currently participating in the OL evidentiary hearing before us. Licensing boards do not have authority to extend the time for appeal. Requests for extension of time in which to appeal, for good cause shown, should be received by the Appeal Board prior to the expiration of the time for appeal. It is the preferred, in some circumstances mandatory, practice for such requests to note the views of the other parties to the extension proceeding.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

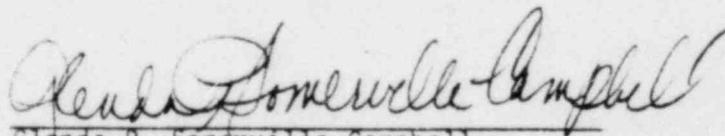
Lawrence Brenner, Chairman  
James H. Carpenter  
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In the Matter of	)	Docket No. 50-322-0L
LONG ISLAND LIGHTING COMPANY	)	
(Shoreham Nuclear Power Station	)	May 14, 1982
Unit 1)	)	

COURTESY NOTIFICATION

As circumstances warrant from time to time, the Board will mail one copy of its orders and memoranda directly to each party, petitioner or other interested participant. This is intended solely as a courtesy and convenience to those served to provide extra time. Official service will be separate from the courtesy notification and will continue to be made by the Office of the Secretary of the Commission. Unless otherwise stated, time periods will be computed from the official service.

I hereby certify that I have today mailed two of the Board's memoranda of this date to the persons designated on the attached Courtesy Notification List.

  
Glenda P. Somerville-Campbell  
Secretary, Atomic Safety and Licensing  
Board

Bethesda, Maryland

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