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. 50-322-OL-5
	)	(EP Exercise)
(Shoreham Nuclear Power Station, Unit 1)	)	
	)	

LILCO'S VIEWS ON THE DISPOSITION OF LILCO's APPEALS FROM LBP-87-32 AND LBP-88-2

By Order of June 27, 1988, the Appeal Board requested the parties' views on the disposition of LILCO's appeals from the two Licensing Board partial initial decisions concerning the February 13, 1986 exercise, LBP-87-32, 26 NRC 479 (1987) and LBP-88-2, 27 NRC 85 (1988). Specifically, the Appeal Board has asked "whether the appeals should be dismissed and the two challenged partial initial decisions vacated on the ground of mootness." Order at 3. The Appeal Board's inquiry is stated to be premised on two facts: first, that more than two years have passed since February 1986, thus requiring an extension of the two-year effectiveness period of "initial" exercises in order for the 1986 exercise to serve as a licensing basis; and second, that a second "initial" exercise intended to satisfy the Commission's requirements was held on June 7-9, 1988. This is LILCO's brief on that question.

LILCO's appeals are not moot. The Appeal Board should consider and decide them promptly so that LILCO may obtain definitive appellate rulings in time to be of use in litigating LILCO's June 1988 exercise. In the alternative, LILCO respectfully requests that the Appeal Board certify the issue of mootness and the issues raised in LILCO's appeals forthwith to the Commission for a merits determination.

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At the outset, the 1986 exercise is not necessarily invalid as a licensing basis; all that is required, if that exercise is found to be a sufficient demonstration on the merits, is an extension of the two-year period of automatic effectiveness prescribed in 10 C.F.R. Part 50 Appendix E § IV.F.1. Only the length of this litigation has prevented that merits determination to date.

Second, the principal questions raised on appeal from the PIDs are not unique to the 1986 exercise; they inhere in any "initial" exercise and in any exercise of a utility offsite plan. Central among them are the primarily legal questions of (1) the required scope of an "initial" exercise (the focus of LBP-87-32) and (2) the proper characterization and determination of whether an exercise reveals a "fundamental flaw" in an emergency plan (the focus of LBP-88-2). These issues are subject to being raised again (even though specific facts will surely differ) in regard to LILCO's exercise of last month. Further, the 1986 exercise has a host of additional applications of precedential value in any litigation of the 1988 exercise.

Under traditional definitions, vacating a decision renders it a legal nullity, destroying any precedential value to it. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), CLI-82-26, 16 NRC 880, 881 (1982); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-723, 17 NRC 555, 557 (1983). Vacating the PIDs would wipe the slate clean on the PIDs themselves; however, it could also be construed as wiping the slate on the entire litigation leading up to them, as though it (and the 1986 exercise) had never occurred. This would subject LILCO to the prospect of de novo relitigation of exactly the same issues in connection with the June 1988 exercise, and being unable to use the 1986 exercise's litigation for purposes of res judicata or collateral estoppel.[1/] The years of additional delay inherent in this prospect

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1/ For this purpose, the litigation of the 1986 exercise encompasses not only the final result contained in the PIDs, but the entire course of that litigation, including

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would simply deny LILCO due process.

LILCO respectfully urges the Appeal Board to promptly issue its full decision on LBP-87-32 and to hear argument on and promptly decide the appeal from LBP-88-2. In the alternative, LILCO respectfully urges the Appeal Board to certify the questions summarized below forthwith to the Commission for decision.[2/]

I. Background

On February 13, 1986, LILCO participated in a one-day federally-graded exercise of the LILCO Offsite Emergency Plan. FEMA issued its evaluation (Post-Exercise Assessment) of the exercise on April 17, 1986. On June 6, 1986, the Commission ordered "immediate initiation of the exercise hearing to consider evidence which Intervenors might wish to offer to show that there is a fundamental flaw in the LILCO emergency plan." CLI-86-11, 23 NRC 577, 579 (1986). The Commission ordered the licensing board "to expedite the hearing to the maximum extent consistent with fairness to the parties." Id. at 582.

The Intervenors initially filed 162 pages of contentions on August 1, 1986. Two months later, the Licensing Board admitted some of the contentions and rejected

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rulings on the permissible scope of issues admitted for litigation; the use of various kinds of evidence; and the like. It is important to remember that thousands of events involving over 1100 players occurred during the 1986 exercise. Of these events, hundreds were the subject of proposed contentions. Not all were admitted for litigation. Of those admitted and tried to conclusion, only those decided adversely to LILCO remain at issue. In toto, this process has a potentially great narrowing effect on the available scope of litigation of the 1988 exercise, but may be lost if the 1986 exercise is simply vacated.

2/ The only course less desirable than the Appeal Board's vacating the PIDs would be for it to delay in disposing of them. This would have the effect of subjecting LILCO to trial-level litigation of the 1988 exercise not only against the background of various incorrect rulings in the 1986 PIDs, but also against the possibility of their eventual modification. That type of uncertainty could confuse litigation of the 1988 exercise; as a result, it could provide a basis for requests for delay in that litigation, to LILCO's prejudice.

numerous others. Prehearing Conference Order, Oct. 3, 1986. Among the contentions admitted, over LILCO, Staff, and FEMA objections, were EX 15 and 16, which alleged that the exercise scenario designed by FEMA and LILCO was insufficient in scope to satisfy NRC regulations. The Licensing Board affirmed its decision to admit EX 15 and 16 upon review of motions for reconsideration filed by FEMA and LILCO. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-86-38A, 24 NRC 819 (1986). With LILCO support, FEMA sought interlocutory review of the Board's admittance of the scope contentions, but the Appeal Board denied FEMA's petition on procedural grounds. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129 (1987). Litigation of the admitted contentions proceeded.

The hearings on the remaining contentions began on March 10, 1987, nine months after the Commission's order in CLI-86-11 for expedited hearings, and continued over the course of four months, until June 18, 1987, when the record was closed.[3/] LILCO filed its proposed findings on August 3, 1987, and the Intervenors and Staff filed their proposed findings on August 17, 1987 and September 11, 1987 respectively. LILCO filed its reply findings on September 25, 1987.

The Licensing Board issued its Partial Initial Decision on Contentions EX 15 and 16 on December 7, 1987. LBP-87-32, 26 NRC 479 (1987). The Board found that the Feb. 13, 1986 exercise was deficient in scope due to LILCO's failure to test four enumerated functions. Id. at 481. In light of the impending expiration of that exercise's automatic effectiveness for licensing purposes on February 13, 1988, LILCO noticed its appeal and moved for immediate certification or, in the alternative, for expedited briefing, argument and decision by the Appeal Board. "LILCO's Motion for Immediate Certification

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3/ Thirty-four witnesses testified. Hearing transcripts numbered 8,694 pages, excluding 3,218 pages of prefiled written testimony and 149 exhibits. LBP-88-2, 27 NRC 85, 89 at n. 2 (1986).

to the Commission of Issues Presented by LBP-87-32 or for Expedited Briefing, Argument and Decision by the Appeal Board," December 19, 1987. The Appeal Board denied LILCO's motion, ruling that LILCO had not shown sufficient justification either for certifying the case to the Commission or expediting the appeal process. Memorandum and Order, Dec. 23, 1987 (unpublished).

On February 1, 1988, almost two years after the 1986 exercise, the Licensing Board issued its Initial Decision on the exercise performance contentions. LBP-88-2, 27 NRC 85 (1988). The Board found fundamental flaws in the LILCO Plan in the areas of communications, traffic guide performance, and training. Id. at 213. LILCO appealed.

Oral argument on the scope appeal was held on April 28, 1988. On May 25, 1988, after stating without explanation that "LILCO's appeal is technically moot," the Appeal Board issued an advisory opinion on the merits.[4/] The Appeal Board stressed that its Memorandum reflects its tentative conclusions, and that a full decision and opinion "will be issued in due course." Memorandum at 5.

Finally, in accordance with 10 C.F.R. Part 50, App. E § IV.F.1,[5/] LILCO conducted a second graded exercise on June 7-9, 1988. In light of this event, the Appeal Board has asked whether it should dismiss as moot LILCO's exercise appeals and vacate both underlying PIDs, effectively wiping the slate clean of LILCO's first graded exercise and the more-than-two years of litigation that it spawned.

4/ The Appeal Board agreed with the Licensing Board that LILCO failed to adequately test school participation, ingestion pathway objectives, and coordination with special facilities. Memorandum (May 25, 1988) at 3-4. The Appeal Board disagreed with the Licensing Board's conclusion that LERO's failure to actually contact WALK Radio constituted a deficiency in the exercise. Id. at 3.

5/ As amended by Final Rule dated May 6, 1987, 10 C.F.R. Part 50, App. E § IV.F.1 provides that a full participation exercise should be conducted at each site "within two years before the issuance of the first operating license for full power . . ." This rule previously stipulated such a full participation exercise within one year of issuance of a full power operating license.

II. Argument

A. The Appeal Board Should Not Dismiss LILCO's Appeals or Vacate the Licensing Board's PIDs

The Appeal Board should consider and decide LILCO's appeals from the exercise partial initial decisions. In LILCO's view, the appeals are not moot because, even though a bottom-line legal finding of adequacy could make the 1986 exercise a valid basis for licensing only with an extension of the exercise's two-year effectiveness period, the Licensing Board's factual and legal determinations are still relevant and will have continuing application both to potential future litigation of LILCO's June 1988 exercise and to exercise litigation at other plants. Moreover, as a policy matter the Appeal Board should not allow an entire exercise, and two years of work spent defending it, to be nullified simply because the agency's own process has failed to reach a conclusion, despite LILCO's constant efforts at expedition, within the two years called for under its regulations.

1. LILCO's Appeals Are Not Moot

The Appeal Board has already stated tentatively that LILCO's appeal of LBP-87-32 is "technically moot." Memorandum (May 25, 1988) at 1. Although the Board did not set forth its rationale, presumably it based its opinion on the fact that more than two years had elapsed since LILCO's February 13, 1986 exercise, and therefore the presumptive two-year exercise window provided in 10 C.F.R. Part 50, App. E § IV.F.1 had closed. Moreover, in its June 27 Order requesting the parties' views, the Appeal Board suggests that LILCO's appeals are moot because LILCO recently conducted a second graded exercise, superseding the first. Order (June 27, 1988) at 2-3.

LILCO does not agree that its exercise appeals are moot. A case is only "moot" when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. Murphy v. Hunt, 455 U.S. 478, 481 (1982); Conyers v. Reagan, 765 F.2d 1124, 1127 (D.C. Cir. 1985). The basic question is whether there is a sufficient

prospect that the decision will have an impact on the parties. Williams v. I.N.S., 795 F.2d 738, 741 (9th Cir. 1986), quoting 13A C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3533 at 212 (2d ed. 1984). A case is not moot if the issue presented is a recurring one and likely to be raised again between the parties. Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974). The burden of demonstrating mootness is a heavy one. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979).

By contrast, the issues raised in LILCO's appeals clearly will have an impact on the existing controversy and are likely to be raised again by the parties. Although it is true that, absent an exemption from the regulation's two year requirement, LILCO can no longer rely on the February 1986 exercise as its ultimate and complete basis for licensing, and that LILCO has since conducted a second exercise in accordance with 10 C.F.R. Part 50, App. E § IV.F.1, the legal issues raised in LILCO's appeals still need to be resolved. In fact they are likely to surface again in any future litigation of the June 1988 exercise. If the Appeal Board vacates the entire 1986-88 litigation as moot, there will be no precedent to cut off de novo relitigation of these same issues, which will likely reappear before the Appeal Board in the context of LILCO's second exercise.[6/]

6/ The cases cited in the Appeal Board's June 27 Order are not directly analogous to the circumstances of this case. In those cases, the intervening events that superseded licensing board decisions or orders more clearly rendered the appeals moot. For example, in Limerick, CLI-85-16, 22 NRC 459 (1985), the licensing board granted PECo an exemption from 10 C.F.R. § 50.47(a) and (b) regarding emergency planning issues raised by the Graterford prison inmates, and authorized full power operation. The Commission declined to make the decisions immediately effective, and the Appeal Board (in ALAB-809) vacated them, remanding for further consideration. After the licensing board completed its consideration of the inmates' contentions, PECo no longer needed the exemption. So the Commission vacated both the licensing and Appeal Board decisions concerning the exemption as moot.

In Braidwood, ALAB-874, 26 NRC 156 (1987), the intervenors appealed from two licensing board orders denying intervenors' motion to file a late contention about the financial qualifications of potential new owners of the facility. Subsequently, Commonwealth Edison withdrew its license amendment application because a State agency had rejected its ownership restructuring plan. The proposed contention no longer being

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The two most important legal issues that need to be resolved are the requirements for a full participation exercise and the definition of "fundamental flaw." These are generic legal matters that will likely arise again in exercise litigation at other plants.[7/] More importantly, however, they will likely resurface in this case, since definitive appellate rulings will help narrow the scope and length of any litigation of LILCO's June 1988 exercise.[8/] The Appeal Board should not avoid ruling on them simply

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relevant, the Appeal Board dismissed the appeal and vacated the underlying licensing board orders. See also Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), ALAB-656, 14 NRC 865 (1981) (Applicant cancelled project for which licensing board had granted construction permit; Appeal Board terminated proceeding and vacated licensing board decision supporting permit); Rochester Gas and Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 897 (1980) (After licensing board authorized construction permit for Sterling facility, a State siting board denied applicant's application for the necessary siting certificate. Upon applicant's motion, the Appeal Board terminated the proceeding and vacated the licensing board decision authorizing a construction permit.)

In this case, all that has happened is that the passing of two years -- all of it spent in agency litigation -- has made the February 1986 exercise no longer eligible to serve as a licensing basis absent an exemption from the two-year cutoff. However, that lapse of time -- which is not to be laid at LILCO's doorstep -- does not moot LILCO's appeals from the Licensing Board's legal and factual determinations concerning that exercise.

7/ In a Prairie Island decision, the Appeal Board was dissuaded from dismissing an appeal as moot because the correctness of the licensing board's application of the 10 C.F.R. § 20.1 ALARA standard in that case "might very well be of importance in the disposition of a number of present and future licensing proceedings." Northern States Power Co. (Prairie Island Nuclear Generating Plants, Unit 1 and 2), ALAB-455, 7 NRC 41, 55 (1978). That consideration applies equally in the present case.

8/ A definitive ruling on the "scope" contentions is particularly important because LILCO shaped its second exercise in light of the Licensing Board's decision on the first. Transcript of Oral Argument, April 28, 1988, at 12-13 (Irwin). Thus, although LILCO believes that the February 1986 exercise was sufficiently broad in scope to pass regulatory muster, it tailored the scope of the recent exercise to satisfy the requirements that the Licensing and Appeal Boards established following the first. In this connection, the Appeal Board already has recognized the continuing applicability of the results of the first exercise. After noting that LILCO had scheduled another exercise for early June, the Appeal Board provided an advisory opinion on the scope appeal so that its tentative conclusions "may be relied upon" to the extent feasible in the conduct of the next exercise." Memorandum (May 25, 1988) at 1 (emphasis added).

because LILCO's second exercise unavoidably has overtaken its first.[9/]

Equally important, the Licensing Board's multiple factual and legal determinations should not be deemed moot by the expiration of the two-year deadline. Such determinations -- those that LILCO won and those that LILCO lost but has appealed -- will be used as the basis on which to litigate the second exercise. Tr. (Apr. 28, 1988) at 13. (Irwin). For example, the Licensing Board found that LERO's backup route alerting system is not fundamentally flawed because it need not be completed within 45 minutes (EX 34, 27 NRC at 96-97); that LERO's news release effort was not fundamentally flawed (EX 38.B, C, and G, 27 NRC at 157 n. 37); and that LILCO's Rumor Control operation was not fundamentally flawed due to allegedly delayed and insufficient responses (EX 39, 27 NRC at 164, 166). Accordingly, Intervenors would be precluded from alleging the same types of problems in litigating the second exercise, unless LERO's performance in those areas gave rise to new types of concerns.[10/] In short, litigation of LILCO's June 1988 exercise, if necessary, would be limited to those areas shown during the previous exercise litigation to need remediation, along with any new potential "fundamental flaws" uncovered in the second exercise. Thus, obtaining definitive appellate rulings on LILCO's first exercise, as opposed to dismissing LILCO's appeals and vacating the PIDs, could mean the difference between litigating a discrete set of issues from the second exercise and litigating the whole second exercise from scratch.

9/ As the Appeal Board has stated, "the precedential value of an ultimate appellate determination on a generic legal issue litigated in a particular proceeding should not hinge upon the presence or absence of wholly extraneous subsequent developments in that proceeding." Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-723, 17 NRC 555 (1983).

10/ In addition, Intervenors would be precluded from litigating exercise activities that they failed to challenge in their 1986 contentions and which did not occasion new types of concerns in the 1988 exercise. Examples of such activities include the development and issuance of protective action decisions and the dissemination of EBS messages within the 15 minute regulatory deadline.

2. As a Policy Matter, the Appeal Board Should Not Nullify More than Two Years of Exercise Proceedings

The litigation of the February 1986 exercise was ordered by the Commission to be "expedited." CLI-86-11, 23 NRC 577, 582 (1986). It is now July 1988. Two and a half years have elapsed since the 1986 exercise, and over two since the Commission's Order requiring expedition. Despite numerous requests for expedition by LILCO, litigation is not yet complete, and LILCO has been forced to conduct a second exercise. Policy dictates that the Appeal Board should not discard its own decisional processes at this advanced stage and subject LILCO willy-nilly to another multi-year de novo litigation when it has been the agency's own pace of process, pure and simple, that has created the situation of potential mootness.

It is fundamentally unfair that nearly thirty months after its first exercise, LILCO is only now obtaining appellate review of whether that exercise was sufficient in scope and free of fundamental flaws. See Tr. of April 28, 1988 Oral Argument at 79-80 (Judge Rosenthal). The Intervenors sought to litigate every conceivable issue arising from that exercise, and have litigated in exhaustive detail every contention admitted by the Licensing Board. Even though NRC regulations require that a full participation exercise be conducted, absent an exemption, within two years before full power licensing, this Appeal Board should not permit such aggressive litigiousness to frustrate the agency's own ability to reach decisions within the time period prescribed by its regulations.

The Commission's two year rule does not suggest otherwise. When the NRC changed its rules to require an exercise within two years of licensing (instead of one year), it explicitly recognized the "onerous" resource and scheduling burdens created by the necessity to permit litigation of exercise results. 52 Fed. Reg. 16,823, 16,824 (1987).[11/] The NRC also acknowledged that litigation delays might make it impossible

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11/ The Commission also stated that the purpose of the exercise, to reveal whether an emergency plan has fundamental flaws, can be achieved "at least as well" by an exercise held within two years of licensing as within one year. 52 Fed. Reg. 16,824 (1987).

for an applicant to comply with the one year regulatory scheduling requirement. Id. The Commission's fears have now been realized, only it is the two-year deadline, not the one-year deadline, that LILCO has been forced to miss.

The Appeal Board should not establish a precedent that condones a course of action whereby dilatory litigation can nullify an exercise and dictate whether an applicant can satisfy the two-year regulatory requirement. Instead, the Appeal Board should allow LILCO to obtain final appellate review of the 1986 exercise and use its conclusions -- whatever they may be -- as a foundation against which to assess LILCO's second exercise.

B. Alternatively, the Appeal Board Should Immediately Certify LILCO's Appeals to the Commission for a Merits Decision

If the Appeal Board decides not to rule on the merits of LILCO's appeals, LILCO requests that the Appeal Board use its discretion under 10 C.F.R. § 2.785 (d) to immediately certify to the Commission the question of mootness and the issues raised in LILCO's appeals.[12/] If the Commission agrees that they are moot, the exercise PIDs would be vacated. If the Commission decides that they are not, then LILCO requests that the Commission itself rule on the merits of the appeals.

Commission case law reveals two primary circumstances in which certification is appropriate: when the failure to certify an issue to the Commission results in

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12/ Section 2.785 (d) provides as follows:

> an Atomic Safety and Licensing Appeal Board may, either in its discretion or on direction of the Commission, certify to the Commission for its determination major or novel questions of policy, law or procedure.

10 C.F.R. § 2.785(d)(1987). The Appeal Board's certification authority is properly invoked in order to maintain efficient licensing proceedings and effectively use Commission resources. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456-57 (1981); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-681, 16 NRC 146, 149 (1982).

avoidable delay and prejudice to the licensee, and when the consequences of a decision on a novel question extend beyond the case in which the question arose. Each of the necessary factors is present here.

First, the mootness issue is a novel question of law and policy. It necessarily raises the issue of whether, under the Commission's two-year exercise requirement, 10 C.F.R. Part 50, App. E § IV.F.1, the passing of two years and the conducting of a subsequent exercise have the effect of nullifying for all purposes the original exercise and all of a licensing board's factual and legal determinations based upon it. This is a question never before raised, to LILCO's knowledge, and involves a recently-amended Commission regulation. The Commission itself should determine its effect.

Second, the mootness issue involves potentially serious delay and prejudice to LILCO's license application. LILCO will seek as prompt approval of its June 1988 exercise as a licensing basis, through litigation if necessary, as the NRC's process will possibly permit. Accordingly, LILCO needs to have its appeals from the 1986 exercise resolved as expeditiously as possible so that it may narrow or limit the extent of potential litigation from the start. An appellate decision to vacate both exercise PIDs, or an appellate merits decision delayed by a month or more would leave LILCO without necessary guidance in litigating its 1988 exercise. In either case, LILCO might be condemned to suffer a potentially endless series of two-year litigation cycles, indefinitely frustrating the Shoreham licensing proceeding.

Finally, the mootness issue threatens to impose similar potentially severe consequences on other plants. The most obvious applicant who could fall victim to such a licensing quagmire is Public Service Company of New Hampshire, which conducted its initial full participation exercise for Seabrook in late June 1988. However, the same mootness issue might affect every other NTOL plant facing such an exercise and the potentially lengthy litigation following it.

In short, the novelty, gravity, and importance of this issue justify its certification to the Commission, if the Appeal Board decides not to pass on the merits itself. For the reasons outlined above, any such certification should be accomplished forthwith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL-5

I hereby certify that copies of LILCO's Views on the Disposition of LILCO's Appeals from LBP-87-32 and LBP-88-2 were served this date upon the following by telecopier, as indicated by one asterisk, by Federal Express, as indicated by two asterisks, or by first-class mail, postage prepaid.

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