

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Appeal Board

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

)
)
) Docket No. 50-322-OL-5
) (EP Exercise)
)
)
)

SUFFOLK COUNTY, STATE OF NEW YORK
AND TOWN OF SOUTHAMPTON MOTION FOR APPOINTMENT
OF LICENSING BOARD WITH JURISDICTION TO HEAR EXERCISE ISSUES

INTRODUCTION

This Board currently has before it certain issues related to an exercise, held in February, 1986, of LILCO's offsite radiological emergency plan for the Shoreham nuclear power plant. Those issues were heard by a Licensing Board (the "OL-5 Licensing Board") established for the express purpose of considering exercise-related matters. The creation of that Licensing Board had the effect of divesting the previously-existing Shoreham emergency planning Licensing Board (the "OL-3 Licensing Board") of jurisdiction over exercise-related matters.

Due to LILCO's deficient performance and the passage of time, LILCO was required to hold another exercise which took place in June of this year. FEMA released its evaluation of the

June 1988 exercise on September 8, 1988. On the following day, the NRC Staff filed a motion with the OL-3 Licensing Board to establish a schedule for hearing issues related to the June 1988 exercise.^{1/} The OL-3 Board, however, has no jurisdiction over exercise matters and thus cannot take action on the Staff Motion, except to decline jurisdiction.

This Board now has jurisdiction over exercise-related matters by virtue of the appeals from the rulings of the OL-5 Licensing Board now before it. Accordingly, Suffolk County, the State of New York and the Town of Southampton (the "Governments") hereby move this Board to direct the Chairman of the Atomic Safety and Licensing Board Panel to convene a Licensing Board with jurisdiction to hear issues related to LILCO's latest exercise. Preferably, the new Licensing Board should consist of the members of the previous OL-5 Licensing Board, as many of the issues likely to arise in any hearings on LILCO's latest exercise may be similar to or relate to issues that Board has already heard. Further, the prior OL-5 Licensing Board is in the best position to determine whether the deficiencies it found in LILCO's earlier exercise have now been corrected.

^{1/} NRC Staff Motion For Schedule For Litigation Of The June 1988 Exercise (Sept. 9, 1988) ("Staff Motion"). A copy of the Staff Motion is attached hereto.

BACKGROUND

Before an applicant can receive a license to operate above five percent of rated power, it must demonstrate the adequacy of its emergency planning through a full participation exercise of its emergency plan. 10 CFR § 50.47(b)(14) and Part 50, App. E, § IV.F.1. LILCO's first attempt to meet this requirement was its February 1986 exercise.

Following that exercise, LILCO moved the Commission to appoint a Licensing Board to hear issues arising from the exercise.^{2/} The Commission granted LILCO's motion and, recognizing that a Shoreham emergency planning Licensing Board already existed, directed the Chairman of the Atomic Safety and Licensing Board Panel to reappoint the members of that Board, if available. CLI-86-11, 23 NRC 577, 582 (1986). In accordance with those instructions, the Chairman of the ASLB Panel, Judge Cotter, designated the members of the already-existing OL-3 Licensing Board to hear the exercise issues. See Establishment of Atomic Safety and Licensing Board (June 10, 1986).

However, after preliminary proceedings before the OL-3 Licensing Board, Judge Cotter created a separate Licensing

^{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 Intervenor's March 7, 1986 "Motion Concerning Proceedings Relating to the Shoreham Exercise" (March 13, 1986).

Board^{3/} to hear exercise-related matters, which now had their own docket -- the OL-5 docket.^{4/} See Notice of Reconstitution of Board (Oct. 7, 1986).

The plain effect and intent of the creation of the exercise Licensing Board was to divest the OL-3 Licensing Board of jurisdiction over exercise-related matters. Indeed, a clarification issued by Judge Cotter on October 17, 1986 made that abundantly clear. As described by Judge Cotter, the OL-5 Board had jurisdiction over emergency planning exercise matters then existing under the OL-5 docket. The OL-3 Licensing Board retained jurisdiction over the remaining emergency planning issues including "issues remanded by the Commission in CLI-86-13 . . . and by the Atomic Safety and Licensing Appeal Board in ALAB-832" See Notice of Reconstitution of Board: Clarification (October 17, 1986).

A subsequent Memorandum and Order issued by Judge Cotter on November 7, 1986 provided further detail regarding the OL-3 Licensing Board's remaining jurisdiction:

The [October 17, 1986] Clarification noted that the "5" docket concerned the emergency planning exercise proceeding instituted by the Commission on June 6, 1986 . . . while the "3" docket concerned all other issues, namely: (1) the adequacy of the entire emergency plan remanded by the Commission; (2) issues remanded by the Appeal Board; and (3) new motions to reopen the record on several other issues. The Clarification also noted that the two judges replaced in the "5" docket continue to serve on the larger body of issues under the "3"

^{3/} One of the members of the new OL-5 Licensing Board was also a member of the OL-3 Licensing Board.

^{4/} See Change of Docket Number (July 24, 1986) (Judge Cotter).

docket number and that one judge would serve on both dockets.

Memorandum and Order, LBP-86-37A, 24 NRC 726, 727 (1986)
(emphasis in original).

The OL-5 Licensing Board conducted hearings on the exercise issues from early March through mid-June 1987 and issued opinions on December 7, 1987 and February 1, 1988, finding in favor of the Governments on several issues. LILCO subsequently appealed the OL-5 Licensing Board's rulings to this Board. With those appeals, jurisdiction over exercise issues passed to this Board. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501 (1986); 10 CFR § 2.717(a).

In light of the negative findings by the OL-5 Licensing Board and the need to have an adequate full participation exercise within two years of receiving a license to operate above five percent of rated power, LILCO held a new exercise on June 7-9 of this year. FEMA evaluated the exercise and released a report on September 8. One day later, the NRC Staff filed its Motion with the OL-3 Licensing Board to set a schedule for hearing all matters related to the June 1988 exercise.

The OL-3 Licensing Board, however, has no jurisdiction over exercise matters, which are the subject of the OL-5 docket. The OL-5 Licensing Board had jurisdiction over those matters. That jurisdiction has now passed to this Board as a result of LILCO's appeals of the OL-5 Licensing Board's rulings.^{5/} Thus, the NRC

^{5/} The OL-5 Licensing Board did not retain jurisdiction to
(continued...)

Staff directed its motion to the wrong Board, as the OL-3 Licensing Board is without power to consider exercise matters.

The Governments have no quarrel with the NRC Staff that litigation of the results of the June 1988 exercise is warranted. At this time, however, no Licensing Board exists with jurisdiction over those issues. Therefore, the Governments hereby move this Board to order the Chief Judge of the ASLB Panel to appoint an appropriate Licensing Board to hear the issues arising from LILCO's latest exercise.

For reasons set forth in greater detail below, it is the Governments' view that the most appropriate Licensing Board to hear the June 1988 exercise issues is one consisting of the members of the previous OL-5 Licensing Board.^{6/}

DISCUSSION

A. The OL-3 Licensing Board Has No Jurisdiction Over Exercise Issues.

Licensing Boards do not have plenary subject matter jurisdiction in NRC proceedings. Rather, Licensing Boards have jurisdiction over only those matters committed to them pursuant to appropriate NRC procedures. See Duke Power Company (Catawba

5/(...continued)
determine in the future whether LILCO has corrected the deficiencies which the Board found, but noted it was best suited to hear those issues. See Memorandum and Order (Concerning Retention of Jurisdiction) (March 9, 1988).

6/ The Governments will address the merits of the Staff Motion -- i.e., the proposed schedule -- in a separate filing after the Motion has been filed with a Licensing Board with appropriate jurisdiction.

Nuclear Station), ALAB-825, 22 NRC 785, 790 (1985); Consolidated Edison Company of New York (Indian Point, Unit 2), LBP-82-23, 15 NRC 647, 649 (1982). The OL-3 Licensing Board originally had jurisdiction over exercise issues pursuant to CLI-86-11 and Judge Cotter's initial designation of that Licensing Board to hear those issues. That Board's jurisdiction was narrowed, however, when Judge Cotter removed the exercise issues from it and placed that jurisdiction in the hands of a separate and distinct OL-5 Licensing Board.

In light of this transfer of jurisdiction, the OL-3 Licensing Board has lost its authority to hear exercise issues unless and until that authority is reconferred through proper NRC procedures. This Board now has jurisdiction over the exercise issues and would appear in view of that jurisdiction also to have the power to order that a Licensing Board be designated to hear issues relating to LILCO's latest exercise.^{2/} Such a Board must be convened before there can be any further proceedings on exercise matters, including consideration of the merits of the Staff's September 9 Motion.

B. The OL-5 Licensing Board is Better Suited to Hear the Exercise Issues Than the OL-3 Licensing Board

Assuming that this Board takes action to have an exercise Licensing Board appointed, the Governments suggest that the prior

^{2/} See 10 CFR § 2.785. If the Appeal Board determines it does not have such authority, the Governments move this Board to refer the matter of convening a new exercise Licensing Board to the Commission.

OL-5 Licensing Board would be best suited to hear those issues. The OL-5 Licensing Board is most familiar with the legal and factual issues surrounding the Shoreham exercise litigation to date, having dealt with those issues in detail during the course of extensive litigation in 1986-87. Many of those same issues are likely to resurface in any proceeding on the June 1988 exercise, and would be recognized and handled most expeditiously by the OL-5 Licensing Board.

Furthermore, the OL-5 Licensing Board has issued two opinions finding deficiencies in LILCO's 1986 exercise. That Board is thus in the best position to determine whether those deficiencies have been corrected.^{8/}

The OL-3 Licensing Board, on the other hand, is not well-suited to hear the exercise issues. Obviously, the OL-3 Licensing Board does not have the familiarity with the exercise issues that the OL-5 Board has. In addition, the OL-3 Licensing Board already has several matters before it, including disposition of the "realism" issues, disposition of matters relating to discovery matters, a decision on the remanded school evacuation and hospital evacuation issues, and motions for summary disposition on emergency broadcast system ("EBS") matters (with a hearing on the EBS issues if LILCO's motion for summary disposition is denied). If the history of the last year is any indication, these issues are more than enough for the OL-3

^{8/} Indeed, LILCO has argued as much before the OL-5 Licensing Board. See LILCO's Views On Continuing Board Jurisdiction (Feb. 17, 1988) at 3.

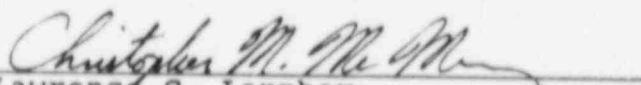
Licensing Board to handle. Indeed, during the last year, the OL-3 Licensing Board has often lagged in issuing detailed opinions. The several-month delay in the issuance of the reception center opinion, finally issued on May 9 of this year -- over nine months after the close of the 11-day hearing -- is only one such example. Thus, if nothing else, efficiency dictates that another Board handle any further exercise matters. For the reasons stated above, the OL-5 Licensing Board would be the best suited for this task.

CONCLUSION

For the foregoing reasons, the Appeal Board should order the designation of a Licensing Board to hear issues related to LILCO's latest exercise. That Board should consist of the members of the previous OL-5 Licensing Board if they are available.

Respectfully submitted,

E. Thomas Boyle
Suffolk County Attorney
Building 158 North County Complex
Veterans Memorial Highway
Hauppauge, New York 11788


Lawrence C. Lanpher
Christopher M. McMurray
KILPATRICK & LOCKHART
1800 M Street, N.W.
South Lobby - 9th Floor
Washington, D.C. 20036-5891

Attorneys for Suffolk County

Richard J. Zahnleuter / Com

Fabian G. Palomino
Richard J. Zahnleuter
Special Counsel to the Governor
of the State of New York
Executive Chamber, Room 229
Capitol Building
Albany, New York 12224

Attorneys for Mario M. Cuomo,
Governor of the State of New York

Stephen B. Latham / Com

Stephen B. Latham
Twomey, Latham & Shea
P.O. Box 398
33 West Second Street
Riverhead, New York 11901

Attorney for the Town of
Southampton

September 13, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF MOTION FOR SCHEDULE FOR LITIGATION
OF THE JUNE 1988 EXERCISE

Pursuant to 10 C.F.R. § 2.730, the NRC Staff hereby requests that the Board adopt the NRC Staff's proposed schedule for litigation of the results of the June 7-9, 1988 emergency planning exercise for Shoreham. As grounds for the motion, the Staff states the following:

1. A full scale exercise of the LILCO Local Off-Site Radiological Emergency Response Plan for Shoreham was conducted on June 7-9, 1988. On September 9, 1988, FEMA, Region II issued a Post-Exercise Assessment, dated September 2, 1988, and provided copies to intervenors. On the same day, FEMA also sent a letter from Grant C. Peterson to Victor Stello that indicated (at 2) that "FEMA has reached a finding of reasonable assurance."

2. In accordance with CLI-86-11, 23 NRC 577, 581 (1986), intervenors may only litigate exercise results which they allege reveal fundamental flaws in an emergency plan. In addition, intervenors are obliged to examine publicly available information which could serve as a foundation for a specific contention. Further, where a contention is wholly dependent upon the content of a particular document, to tender the

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contention with the requisite degree of promptness once the document is publicly available. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468-69 (1982), rev'd in part, CLI-83-19, 17 NRC 1041 (1983).

3. In view of the FEMA finding of reasonable assurance, the absence of any deficiencies in the FEMA report and the extensive background and interchange of information in this case relating to all aspects of emergency preparedness, the Staff requests the Board to establish a schedule which will expedite the resolution of this matter and bring the proceeding to a long awaited end.

Accordingly, the Staff requests that the Board establish the following schedule for any new contentions based on the FEMA exercise report:

NRC STAFF PROPOSED SCHEDULE

October 13, 1988	Deadline for contentions on June Exercise
October 28 and November 2, 1988	LILCO and Staff responses to contentions
November 15, 1988	Prehearing Conference
November 29, 1988	Ruling on Admission of Contentions; Discovery begins on admitted contentions, if any
December 23, 1988	Discovery ends
January 6, 1989	Motions for summary disposition
January 26, 1989	Responses to summary disposition motions

February 7, 1989

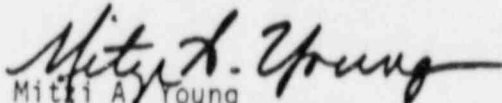
Testimony filed

Ruling on Motions for Summary Disposition

February 27, 1989

Evidentiary hearing commences, if needed

Respectfully submitted,


Mitty A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 9th day of September, 1988

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USNRC

September 13, 1988
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Appeal Board

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

Docket No. 50-322-OL-5
(EP Exercise)

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY, STATE OF NEW YORK, AND THE TOWN OF SOUTHAMPTON MOTION FOR APPOINTMENT OF LICENSING BOARD WITH JURISDICTION TO HEAR ISSUES have been served on the following this 13th day of September, 1988 by U.S. mail, first class.

Christine N. Kohl, Chairman *
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. W. Reed Johnson ***
Atomic Safety and Licensing
Appeal Board
115 Falcon Drive, Colhurst
Charlottesville, VA 22901

Alan S. Rosenthal *
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John H. Frye, III, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Oscar H. Paris
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Frederick J. Shon
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

William R. Cumming, Esq. **
George W. Watson, Esq.
Office of General Counsel
Federal Emergency Management Agency
500 C Street, S.W., Room 840
Washington, D.C. 20472

Fabian G. Palomino, Esq. **
Richard J. Zahnleuter, Esq.
Special Counsel to the Governor
Executive Chamber, Room 229
State Capitol
Albany, New York 12224

Anthony F. Earley, Jr., Esq.
General Counsel
Long Island Lighting Company
175 East Old Country Road
Hicksville, New York 11801

E. Thomas Boyle, Esq.
Suffolk County Attorney
Bldg. 158 North County Complex
Veterans Memorial Highway
Hauppauge, New York 11788

Stephen B. Latham, Esq.
Twomey, Latham & Shea
33 West Second Street
Riverhead, New York 11901

Ms. Nora Bredes
Executive Director
Shoreham Opponents Coalition
195 East Main Street
Smithtown, New York 11787

Hon. Patrick G. Halpin
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Joel Blau, Esq.
Director, Utility Intervention
N.Y. Consumer Protection Board
Suite 1020
Albany, New York 12210

W. Taylor Reveley, III, Esq. **
Hunton & Williams
P.O. Box 1535
707 East Main Street
Richmond, Virginia 23212

Edwin Reis, Esq. **
George Johnson, Esq.
U.S. Nuclear Regulatory Comm.
Office of General Counsel
Washington, D.C. 20555

Ms. Elisabeth Taibbi, Clerk
Suffolk County Legislature
Suffolk County Legislature
Office Building
Veterans Memorial Highway
Hauppauge, New York 11788

David A. Brownlee, Esq.
Kirkpatrick & Lockhart
1500 Oliver Building
Pittsburgh, Pennsylvania 15222

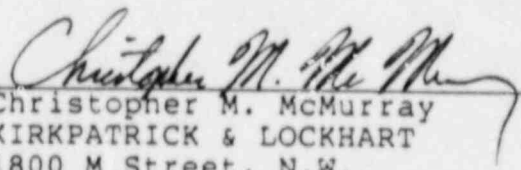
Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Comm.
1717 H Street, N.W.
Washington, D.C. 20555

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, California 95125

Alfred L. Nardelli, Esq.
New York State Department of Law
120 Broadway, 3rd Floor
Room 3-118
New York, New York 10271

Mr. Jay Dunkleburger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Mr. Stuart Diamond
Business/Financial
NEW YORK TIMES
229 W. 43rd Street
New York, New York 10036


Christopher M. McMurray
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
South Lobby - 9th Floor
Washington, D.C. 20036-5891

* By Hand
** By Telecopy
*** By Federal Express