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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'88 SEP 21 P4:32

Before the Atomic Safety and Licensing Appeal Board

OFFICE OF REGULATORY  
DOCKETING AND COMPLIANCE  
ENR-1004

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

LILCO'S RESPONSE TO INTERVENORS' MOTION FOR APPOINTMENT OF  
LICENSING BOARD WITH JURISDICTION TO HEAR 1988 EXERCISE ISSUES

I. INTRODUCTION

On September 13, 1988, Suffolk County, the State of New York, and the Town of Southampton (hereinafter "Intervenors") filed a motion in this docket requesting this Appeal Board to appoint a Licensing Board with jurisdiction to hear issues related to the June 7-9, 1988 exercise of the Shoreham Offsite Radiological Emergency Response Plan. Suffolk County, State of New York and Town of Southampton Motion for Appointment of Licensing Board with Jurisdiction to Hear Exercise Issues (Sept. 13, 1988) ("Motion"). In a cover letter forwarding a copy of their motion to the Licensing Board, Intervenors asserted that the existing "OL-3 docket" Licensing Board, which has general jurisdiction to hear all emergency planning matters, may not consider the NRC Staff's September 9, 1988 Motion for Schedule for Litigation of the June 1988 Exercise ("Staff Motion") unless the Appeal Board specifically authorizes it to do so.

Intervenors' motion is invalid and should be summarily dismissed because it is filed in the wrong docket, filed before the wrong tribunal, and seeks the wrong relief. At bottom, the motion is flawed on jurisdictional grounds: it is wrongly premised on the assumption that when the OL-3 Licensing Board was constituted in 1986, jurisdiction

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over exercise-related matters passed for any and all exercises from the OL-3 Board to the OL-5 Board. In fact, when the OL-5 Licensing Board was created, its jurisdiction was expressly limited to issues raised in the 1986 Shoreham exercise. The OL-5 Board acknowledged that limitation on its jurisdiction when it declined to assume jurisdiction over post-1986 exercise-related matters. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-7, 27 NRC 289, 291 (1988). Even intervenors, in a pleading before the OL-5 Board, have acknowledged the Board's limited jurisdiction. See Governments' Views on Whether the Licensing Board Should Retain Jurisdiction of the Exercise Litigation at 3 (Feb. 23, 1988). Thus the Appeal Board's jurisdiction in the OL-5 docket does not extend to issues related to the 1988 Shoreham exercise, and that docket cannot serve as a vehicle for intervenors to try to place their request before the Appeal Board. In any event, the Appeal Board is not authorized to direct the appointment of a new Licensing Board. See 10 C.F.R. § 2.721(a). Therefore, the motion is filed in the wrong forum.

Even within the OL-3 docket, intervenors should have filed their motion with the Licensing Board requesting it, for good cause (to be but not shown), to abstain from ruling on the Staff's September 9 motion to set a schedule for litigation of the 1988 exercise. See NRC Staff Motion for Schedule for Litigation of the June 1988 Exercise (Sept. 9, 1988).<sup>1/</sup> Because intervenors fail to seek such a remedy, and because the motion is filed in the wrong docket and with the wrong tribunal, the Appeal Board should summarily dismiss it.

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<sup>1/</sup> A copy of LILCO's Response to the Staff's Motion, which LILCO is filing today with the Licensing Board in the OL-3 docket, is also being lodged with the Appeal Board as a courtesy.

## II. BACKGROUND

Intervenors' Motion recites a highly selective and largely inaccurate history of the appointment of licensing boards in the Shoreham offsite emergency planning proceeding. At the outset, Intervenors fail to note that in May 1983 the Commission established a separate Licensing Board authorized to preside "over the proceeding on all emergency planning issues." 48 Fed. Reg. 22,235 (May 17, 1983) (emphasis added). It is clear that this hearing notice made the "OL-3" docket the presumptively general jurisdiction emergency planning docket, subject only to specific exemption. See Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175, 1177-78 (1977) (hearing notice issued by the Commission establishes the scope of a Licensing Board's jurisdiction).

Intervenors' Motion also misrepresents the extent to which the jurisdiction of the OL-3 docket was limited in 1986.<sup>2/</sup> On February 13, 1986, LILCO conducted the first FEMA-graded exercise of the Shoreham offsite emergency response plan. One month later, responding to a pleading by Intervenors and in the interest of expediting any exercise litigation on the 1986 exercise, LILCO filed a motion before the

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<sup>2/</sup> That LILCO has refrained from rebutting each factual inaccuracy in Intervenors' Motion should not be understood to suggest that LILCO agrees with Intervenors' account. In particular, with respect to creation of a new Licensing Board in 1986, it is important to observe that LILCO did not initiate petitions to the Commission on the subject of litigation of the 1986 exercise as Intervenors assert. Instead, Intervenors, after being rejected by the Appeal Board, first petitioned the Commission for guidance. See Motion of Suffolk County the State of New York, and the Town of Southampton for Ruling Concerning Proceedings Related to the Shoreham Exercise (March 7, 1986). LILCO's filing with the Commission was in the form of a reply, in which, as described above, LILCO asked the Commission to appoint the members of the existing OL-3 Board to hear the 1986 exercise litigation. In fact, the Board appointed to hear the exercise litigation consisted of the same members who had heard the litigation on the plan.

Second, LILCO does not concur with Intervenors' assertion that the 1988 exercise was necessitated by "LILCO's deficient performance [in 1986] and the passage of time." Motion at 1. LILCO believes that the 1986 exercise was adequate both in scope and substance, and that the bland phrase "passage of time" does not adequately characterize the inexcusably dilatory progress of litigation before the OL-3 Board.

Commission requesting the establishment of a Licensing Board and expedited procedures for litigation of the 1986 Shoreham exercise. See 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). LILCO requested the Commission to appoint a Board composed of members "who have participated in the earlier Shoreham emergency planning proceedings and thus have knowledge of the LILCO Plan and the mammoth record in the case." Id., at 11.

On June 8, 1986, the Commission issued an order, establishing a separate docket (docket 50-322-OL-5) for the 1986 exercise and directing the Chairman of the Atomic Safety and Licensing Board Panel to "reappoint the members of the earlier Board if they are available." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 582 (1986). On June 10, the Licensing Board Panel Chairman, Chief Administrative Judge B. Paul Cotter, Jr., did just that, appointing the members of the existing OL-3 docket Board -- Administrative Judges Margulies, Kline and Shon -- to preside over litigation on the 1986 exercise. See Establishment of Atomic Safety and Licensing Board (unpublished order) (June 10, 1986). This appointment indicated the Commission's awareness of the obvious and important interrelationship of emergency planning and exercise issues.

On October 7, 1986, Judge Cotter sua sponte reconstituted the OL-5 Board by replacing Board Chairman Margulies with Judge John H. Frye, III, and Judge Kline with Judge Oscar H. Paris. (Judge Shon remained a member of both the OL-3 and OL-5 Boards.) Judge Cotter cited schedule conflicts as the basis for the Board reconstitution.<sup>3/</sup> On October 17, 1986, Judge Cotter issued an order clarifying the

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<sup>3/</sup> On October 14, 1986, counsel for intervenors wrote to the Licensing Board Panel Chairman demanding that the reconstitution order be rescinded. See Letter from

scope of the October 7 Order. See Notice of Reconstitution of Board: Clarification (unpublished order) (Oct. 17, 1986).

The OL-5 Board issued decisions on the 1986 exercise on December 7, 1987, and February 1, 1988. See LBP-87-32, 26 NRC 479 (1987); LBP-88-2, 27 NRC 85 (1988). LILCO sought appeal from these decisions on December 17, 1987, and February 12, 1988, respectively.

On March 9, 1988, after soliciting the views of the parties,<sup>4/</sup> the OL-5 Board issued a Memorandum and Order in which it declined to retain jurisdiction over Shoreham exercise-related matters. See LBP-88-7, 27 NRC 289 (1988). The Board's decision, which was never appealed from, had been opposed by LILCO and Interveners, who both asked the Frye Board to retain jurisdiction over any remedial aspects of the 1986 exercise.

### III. DISCUSSION

#### A. Intervenors' Motion Is Filed in the Wrong Docket and In the Wrong Forum

Intervenors' Motion is invalid because it is filed in the wrong docket and with the wrong tribunal. Intervenors filed their Motion with the Appeal Board on the stated assumption that the OL-5 Board has jurisdiction over all exercise-related issues, which passed to the Appeal Board on LILCO's appeal of the Licensing Board's decisions on the

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(footnote continued)

Herbert H. Brown to B. Paul Cotter, Jr. (Oct. 14, 1986). Responding to a subsequent motion filed by Intervenors, the Panel Chairman declined to rescind the reconstitution order. See Suffolk County and State of New York Motion to Rescind Reconstitution of Board by Chief Administrative Judge Cotter (Shoreham Nuclear Power Station, Unit 1), LBP-86-37A, 24 NRC 726 (1986).

<sup>4/</sup> See LILCO's Views on Continuing Board Jurisdiction (Feb. 17, 1988); NRC Staff Response to Board Request for Views of Parties on Whether the Board Should Retain Jurisdiction Over LILCO Corrective Actions (Feb. 19, 1988); Governments' Views on Whether the Licensing Board Should Retain Jurisdiction of the Exercise Litigation (Feb. 23, 1988).

1986 exercise. Motion at 1, 2, 7-9. As described below, Intervenors have misidentified the jurisdiction of the OL-5 Licensing Board and therefore have misfiled their Motion. Intervenors have also failed to show that the Appeal Board has independent authority to direct the appointment of a new Licensing Board.

1. The OL-5 Board's Jurisdiction Was Limited to the 1986 Shoreham Exercise

Intervenors assert, without supporting evidence, that the "plain effect and intent" of the creation of the OL-5 docket in 1986 was to "divest the OL-3 Licensing Board of jurisdiction over exercise-related matters." Motion at 4. This assertion is plainly wrong. It is clear that when the Commission created the OL-5 docket it contemplated that the new Board's jurisdiction would be limited to litigation of the 1986 exercise. The Commission referred to "litigation of emergency planning exercise results," CLI-86-11, 23 NRC at 579, "the exercise proceeding," *id.* at 582, and directed that the Board should "expedite the hearing to the maximum extent consistent with the fairness to the parties, and to issue its decision upon the completion of the proceeding." *Id.* (emphasis added.)

Judge Cotter's June 10, 1986 order appointing the OL-5 Board was explicitly issued in the context of the 1986 exercise and indicated that the new Board's jurisdiction was to be limited to issues "concerning litigation of emergency planning exercise results." June 10 Order at 1. Judge Cotter's clarification of the order reconstituting the OL-5 Board stated even more explicitly the OL-5 Board's limited jurisdiction. That order provided that the OL-5 Board would preside "only in the proceedings related to the emergency planning exercise." Reconstitution Order at 1. That order further provided that the OL-3 Board "will continue to preside in all other proceedings pertaining to emergency planning for the Shoreham Nuclear Power Station." *Id.* at 1-2 (emphasis added).

The OL-5 Licensing Board itself has acknowledged the limits of its jurisdictional grant. In a March 9, 1988 Memorandum and Order, the Board decided that it did not have jurisdiction to review corrective actions that might be taken following the 1986 exercise. LBP-88-7, 27 NRC 289, 291 (1988). The Board recalled that CLI-86-11 had authorized the Board to conduct a proceeding on the 1986 exercise, to issue a decision upon completion of the proceeding, but not to make a finding of reasonable assurance. Declining to retain jurisdiction over remedial exercise matters, the Board concluded that "we have discharged the responsibilities delegated to us by the Commission." *Id.*

Even Intervenors, in a previous pleading, have recognized that the jurisdiction of OL-5 Board was limited to the 1986 exercise. In response to the OL-5 Board's requests for the parties' views on whether the Board should refrain jurisdiction over exercise related issues, Intervenors advised the Board that "only a strained reading of CLI-86-11 could locate a 'mandate' in [CLI-86-11] that the present Licensing Board is required to retain jurisdiction over the next exercise, if and when it occurs." *Governments' Views on Whether the Licensing Board Should Retain Jurisdiction of the Exercise Litigation at 3* (Feb. 23, 1988).<sup>5/</sup>

Since the OL-5 Board had jurisdiction over only 1986 exercise issues, the Appeal Board's jurisdiction in that docket is similarly limited. Since the OL-5 docket does not extend to issues raised by the 1988 exercise, it does not confer jurisdiction on the Appeal Board to consider Intervenors' Motion.

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<sup>5/</sup> Intervenors proceeded to conclude, however, that while there was no "mandate" requiring the Board to retain jurisdiction, such jurisdiction could be retained on the grounds of "judicial economy" and "common sense." *Governments' Views at 3, 4*. This conclusion defies hornbook law: a Licensing Board cannot acquire or manufacture jurisdiction which is not expressly granted. See, e.g., *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-825, 22 NRC 785, 790 (1985) (Licensing Boards "are delegates of the Commission and, on such, they may exercise authority over only those matters that the Commission commits to them.") In any event, this position is at odds with their present position.

2. **The Appeal Board Does Not Have Authority to Entertain Intervenors' Motion**

Section 2.721(a) of the Commission's regulations provides that only the Commission or the Chairman of the Atomic Safety and Licensing Board Panel may establish Licensing Boards. Intervenors provide no justification for their request to the Appeal Board to appoint a Licensing Board. Therefore, their Motion is filed in the wrong forum, totally apart from the limitations of the OL-5 docket.

B. **Intervenors' Motion Seeks the Wrong Relief**

Intervenors' Motion seeks relief which is unavailable. Since the OL-3 Board has jurisdiction over the 1988 exercise, Intervenors' only available remedy is to move the Licensing Board in the OL-3 docket, for good cause shown, to abstain from ruling on the Staff's September 9 motion to set a schedule for litigation of the 1988 exercise. Of course, the good cause showing would have to be addressed to the Board's sound discretion. Whether the litigable issues (if any) growing out of the 1988 exercise should be heard by the existing members of the OL-3 Board or by some other aggregation from the ASLB Panel is a matter to be determined by the exigencies of the situation and the sound discretion of the decision-maker. These exigencies include any remaining and anticipated commitments still facing the OL-3 Board; the expected or necessary pace for the 1988 exercise litigation; the relationship between plan issues and 1988 exercise issues; the relationship (if any) between 1986 exercise issues and 1988 exercise issues; and any other factors affecting the availability of OL-3 Board members.<sup>6/</sup>

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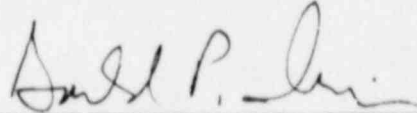
<sup>6/</sup> In the event Intervenors were to file such a motion with the OL-3 Board, LILCO would file a prompt response. For present purposes, it is adequate to note that LILCO vehemently disagrees that the previous existence of two boards with overlapping membership, one of them with jurisdiction over the 1986 exercise (the OL-5 Board) and one of them with jurisdiction over the Plan (the OL-3 Board), contributed materially to the efficiency of litigation of either matter. In fact, the pace of litigation was limited by the availability of common member(s); any other anticipated efficiencies were largely



CONCLUSION

For the foregoing reasons, the Appeal Board should summarily dismiss Intervenor's September 13 Motion urging the Appeal Board to appoint a Licensing Board to preside over any litigation of the 1988 Shoreham exercise.

Respectfully submitted,



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DATED: September 16, 1988

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(footnote continued)

diluted by the duplication and confusion inherent in keeping two boards continuously educated and informed about delicately intertwined matters. Further, LILCO emphatically disagrees with Intervenor's characterization of the current OL-3 Board's ability to process work. Even a cursory review of the record over the past nine months reveals that that Board has been highly productive.

CERTIFICATE OF SERVICE

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

OFFICE OF SECRETARY  
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BRANCH

I hereby certify that copies of LILCO'S RESPONSE TO INTERVENORS' MOTION FOR APPOINTMENT OF LICENSING BOARD WITH JURISDICTION TO HEAR 1988 EXERCISE ISSUES were served this date upon the following by Telecopy as indicated by one asterisk, by Federal Express as indicated by two asterisks, or by first-class mail, postage prepaid.

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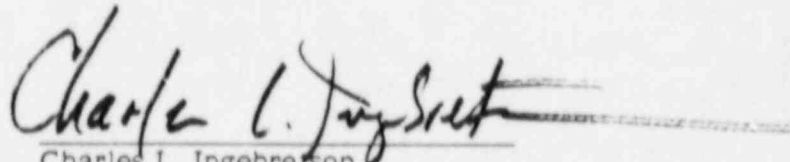
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