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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD '88 SEP 20 P3:59

Administrative Judges:

Christine N. Kohl, Chairman  
Alan S. Rosenthal  
Dr. W. Reed Johnson

September 20, 1988  
(ALAB-901)

OFFICE OF SECRETARY  
DOCKETING & SERVICE

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

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

E. Thomas Boyle, Hauppauge, New York, Lawrence C. Lanpher and Christopher M. McMurray, Washington, D.C., Fabian G. Palomino and Richard J. Zahnleuter, Albany, New York, and Stephen B. Latham, Riverhead, New York, for intervenors Suffolk County, the State of New York, and the Town of Southampton.

Donald P. Irwin, Kathy E.B. McCleskey, and Charles L. Ingebretson, Richmond, Virginia, for applicant Long Island Lighting Company.

Mitzi A. Young for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

On September 13, 1988, intervenors Suffolk County, the State of New York, and the Town of Southampton (hereinafter, "the Governments") filed a motion asking us to appoint a licensing board with jurisdiction to hear issues raised in connection with the June 1988 emergency planning exercise conducted at the Shoreham nuclear power facility. The Governments' motion is prompted by the NRC staff's motion, filed September 9 with the so-called "OL-3" Licensing Board, asking that Board to establish a schedule for the litigation

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of issues arising from the June 1988 exercise. The Governments contend that we -- not the OL-3 Licensing Board -- have jurisdiction over all exercise issues by virtue of the appeals now pending before us from Licensing Board decisions relating to the February 1986 emergency exercise at Shoreham. See LBP-87-32, 26 NRC 479 (1987); LBP-88-2, 27 NRC 85 (1988).<sup>1</sup> Consequently, they believe it is necessary that we order the Chairman of the Atomic Safety and Licensing Board Panel to convene a licensing board to hear issues concerning the latest exercise. Further, they assert that such board should preferably consist of the members of the so-called "OL-5" Licensing Board, which rendered the exercise decisions now before us on appeal, because of the similarity in the issues likely to be raised.

Both applicant Long Island Lighting Company (LILCO) and the NRC staff believe that the OL-3 Licensing Board now has sole jurisdiction over issues relating to the June 1988 exercise, and each questions our authority even to consider the Governments' motion. LILCO and the staff therefore urge us to dismiss or deny the Governments' motion.

At the outset, we assert our "inherent right (indeed, the duty) to determine in the first instance the bounds of

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<sup>1</sup> Today we issued ALAB-900, 28 NRC \_\_\_\_, in which we affirmed the Licensing Board's ultimate conclusion in LBP-87-32.

[our] own jurisdiction." Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980). We note further that, in the exercise of that duty, we have incidental authority to direct such other action as may be appropriate in the circumstances to facilitate the disposition of the proceeding. See id., ALAB-597, 11 NRC 870, 874 & n.9 (1980). Thus, we decline LILCO's suggestion that we summarily dismiss the Governments' motion.

The principal question presented by the Governments' motion is whether jurisdiction over issues raised in connection with the June 1988 exercise lies with the Licensing Board (in general, without regard to the OL-5 or OL-3 designation) or with us. The answer to that question, as in the case of many legal issues, depends on how the question is framed. If the 1986 and 1988 exercises (and the issues that arise therefrom) are considered as entirely separate, unrelated events, agency precedent suggests that jurisdiction over any 1988 exercise issues lies with the Licensing Board. On the other hand, if both the 1986 and 1988 exercises are viewed more broadly, as involving LILCO's attempt to satisfy the Commission's requirement for a pre-license "full participation" exercise (see 10 C.F.R. Part 50, Appendix E, § IV.F.1), we have jurisdiction over issues thus defined. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 NRC 23,

27 (1987) (once a licensing board issues its decision disposing of an issue and appeals are filed, appeal board has jurisdiction over new matters raised in connection with such issue). As explained below, we believe that it is more logical, as well as consistent with our case law, to follow the latter approach -- i.e., to define the issue involved here broadly, as LILCO's compliance with the agency's pre-license exercise requirement. Thus, we conclude that we have jurisdiction to act in the first instance with respect to new issues raised as a consequence of the 1988 exercise.

The Commission's Rules of Practice provide little or no aid in resolving this thorny problem. For, they do not explicitly authorize or address the real source of our dilemma -- the disposition of different issues at different times in the same operating license proceeding by multiple licensing boards, through the issuance of several "partial initial decisions" (rather than one "initial decision"). See, e.g., 10 C.F.R. §§ 2.717, 2.760.<sup>2</sup> Nonetheless, due to the enormous size, complexity, and duration of NRC proceedings, these practices have become essential to effective case management.

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<sup>2</sup> For construction permit proceedings, the Rules specifically authorize separate hearings and partial initial decisions on particular issues. 10 C.F.R. § 2.761a.

This segmented approach to adjudication has spawned some case law to aid our analysis. Similar jurisdictional issues often arise when a party files a motion to reopen the record on an issue that is still at some stage of litigation in the adjudicatory process. We have held that, where "finality has attached to some but not all issues, appeal board jurisdiction to entertain new matters is dependent upon the existence of a 'reasonable nexus' between those matters and the issues remaining before the [appeal] board." Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1979). "Reasonable nexus" in this context means "'a rational and direct link' -- not a total identity or commonality of issues." Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-797, 21 NRC 6, 8 (1985). We have also stressed a practical, common sense approach to the resolution of such jurisdictional problems, taking into account "efficiency in the disposition of the matter at hand and fairness to the parties." Id. at 9 (citing Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983)).

Applying the reasoning of those cases to the matter now before us supports our conclusion that the issue should be broadly defined as LILCO's compliance with the pre-license exercise requirement of Appendix E to 10 C.F.R. Part 50, and that jurisdiction over any new matters raised by the parties

in this regard lies with us, rather than the Licensing Board. That Board completed its consideration of the 1986 exercise with the issuance of LBP-88-2, and the appeal from that decision is pending before us. The parties now seek to establish the schedule for the litigation of any issues relating to the 1988 exercise, which is intended to serve the same regulatory purpose as the earlier exercise found deficient by the Licensing Board. The reasonable nexus between any new exercise issues and those now under appellate review is self-evident. Indeed, the parties have acknowledged as much. Several months ago, when we suggested dismissal of the 1986 exercise appeals as moot, all parties urged us not to take such action, arguing that we should resolve the essentially legal issues raised in those appeals because they were likely to reappear in the next round of exercise litigation. See ALAB-900, supra note 1, 28 NRC at \_\_\_ (slip opinion at 6-9).<sup>3</sup>

Having thus determined that jurisdiction over any new exercise-related issues more properly lies with us, we also decide that the best course is to remand such new issues to the Licensing Board for disposition as expeditiously as

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<sup>3</sup> Although LILCO now strongly asserts that only the OL-3 Licensing Board has jurisdiction over 1988 exercise issues, earlier this year it urged the OL-5 Licensing Board to retain jurisdiction over any such issues, should they later arise. See LBP-88-7, 27 NRC 289, 290 (1988).



possible, consistent with fairness to all the parties. See CLI-86-11, 23 NRC 577, 582 (1986).<sup>4</sup> The Governments' motion, however, additionally asks that we direct the Chairman of the Licensing Board Panel to designate specifically the members of the OL-5 Licensing Board to preside over the litigation relating to the 1988 exercise.

The appointment of individual Licensing Board members to a particular proceeding is beyond the scope of our authority and is committed to the discretion of the Commission or the Chairman of the Licensing Board Panel. See 10 C.F.R. §§ 1.15, 2.704, 2.721, 2.785. Thus, absent Commission action, the Licensing Board Panel Chairman is free to establish and reconstitute licensing boards with whichever individual Panel members he feels are appropriate, subject to review only for an abuse of discretion. See Suffolk County and State of New York Motion to Rescind Reconstitution of Board [sic: Long Island Lighting Co.] (Shoreham Nuclear Power Plant, Unit 1), LBP-86-37A, 24 NRC 726, 728-29 (1986).

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<sup>4</sup> Even if the Licensing Board were to have jurisdiction over these issues, it would not necessarily follow that we lack the authority to decide the Governments' motion. The Rules of Practice expressly empower the Commission to direct the certification to it of any question pending before a Licensing Board. See 10 C.F.R. § 2.718(i). And that authority has been explicitly delegated to us in 10 C.F.R. § 2.785(b)(1). See, e.g., Puerto Rico Electric Power

(Footnote Continued)

The assignment of special docket numbers (e.g., OL-3, OL-5) to different phases of this proceeding, however, is not specifically prescribed by the Commission's Rules of Practice.<sup>5</sup> Nevertheless, "[f]or more effective docket management," the Licensing Board Panel Chairman previously assigned the new OL-5 docket designation to that phase of the Shoreham licensing proceeding instituted by the Commission in CLI-86-11 -- i.e., the litigation of issues arising from the 1986 exercise. 51 Fed. Reg. 27,296 (1986). With the anticipated new round of exercise litigation, this need for effective case management continues. Given the relationship of the 1986 and 1988 exercises (see supra pp. 5-6), we see no good reason to create any more confusion by abandoning the OL-5 designation for the litigation of any new exercise issues in this proceeding. Maintaining the OL-5 designation for all exercise issues is also fully consistent with the Licensing Board Panel Chairman's earlier actions and requires no strained readings of his notices. See, e.g., 51 Fed. Reg. 37,682 (1986) (OL-5 Board to preside "only in the proceedings related to the emergency planning

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(Footnote Continued)

Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153 (1980).

<sup>5</sup> Under 10 C.F.R. § 2.702, the Commission's Secretary "maintain[s]" the official docket for each proceeding. See also 10 C.F.R. § 1.25. Presumably, this could include assignment of docket numbers.



exercise;" OL-3 Board to preside "in all other proceedings pertaining to emergency planning," which "include [non-exercise] issues remanded by the Commission in CLI-86-13, [24 NRC 22 (1986),] and by the . . . Appeal Board in ALAB-832, 23 NRC 135 (1986) and ALAB-847, [24 NRC 412 (1986)]".<sup>6</sup>

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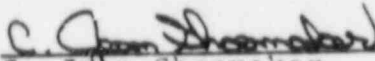
<sup>6</sup> LILCO claims that in May 1983 the Commission established the OL-3 Licensing Board to preside over all emergency planning issues, and thus, the OL-3 docket is presumptively the general jurisdiction emergency planning docket, subject only to specific exemption. LILCO's Response (September 16, 1988) at 3. Relying on an unreviewed decision of the OL-5 Board, LILCO also suggests that the Commission established the OL-5 Board and specifically limited its mandate to 1986 exercise issues. Id. at 4, 6. See LBP-88-7, 27 NRC at 251.

LILCO and the OL-5 Board in LBP-88-7 are incorrect. The Licensing Board Panel Chairman created both the OL-3 and OL-5 "dockets" solely for case management purposes, and assigned members pursuant to his board constitution authority. See 48 Fed. Reg. 22,235 (1983); 51 Fed. Reg. 27,296. The notion that the Commission itself ordered such action with the intent to limit the scope of these "dockets" is without basis. Indeed, in CLI-86-11, 23 NRC at 582, the Commission merely directed the Licensing Board Panel Chairman "to reappoint the members of the earlier [OL-3] Board if they are available," and to expedite the "exercise proceeding." As it turned out, case management concerns warranted the Licensing Board Panel Chairman's creation of the new OL-5 docket, and schedule conflicts required a board reconstitution. See 51 Fed. Reg. 21,815 (1986); id., 27,296; id., 36,619; id., 37,682. Thus, citations to cases holding that a licensing board's jurisdiction is confined to the scope of the proceeding as defined in the Commission's initial notice of hearing are wholly inapposite.

The Governments' Motion for Appointment of Licensing Board with Jurisdiction to Hear Exercise Issues is granted in part and denied in part: proceedings in connection with the 1988 emergency exercise at the Shoreham facility are remanded for appropriate action to the Licensing Board in Docket No. 50-322-OL-5, which may be reconstituted by the Chairman of the Atomic Safety and Licensing Board Panel in his discretion.

It is so ORDERED.

FOR THE APPEAL BOARD

  
C. Jean Shoemaker  
Secretary to the  
Appeal Panel

Dr. Johnson concurs in this decision but was not available to review the opinion.