

7129

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'88 SEP 22 P2:21

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

DOCKET
BRANCH

In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station,
Unit 1)

)
)
)
)

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

NRC STAFF RESPONSE TO INTERVENORS'
MOTION FOR APPOINTMENT OF
LICENSING BOARD TO HEAR 1988 EXERCISE RESULTS

Mitzi A. Young
Counsel for NRC Staff

September 16, 1988

8809260126 880916
PDR ADOCK 05000322
G PDR

DS07

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station,
Unit 1)

}
}
} Docket No. 50-322-0L-5
(EP Exercise)

NRC STAFF RESPONSE TO INTERVENORS'
MOTION FOR APPOINTMENT OF
LICENSING BOARD TO HEAR 1988 EXERCISE RESULTS

Mitzi A. Young
Counsel for NRC Staff

September 16, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)

NRC STAFF RESPONSE TO INTERVENORS' MOTION FOR APPOINTMENT
OF LICENSING BOARD TO HEAR 1988 EXERCISE RESULTS

I. INTRODUCTION

By motion dated September 9, 1988 and filed before the Licensing Board in the OL-3 proceeding, the Staff requested that a schedule be established for litigation of the results of the June 7-9, 1988 Shoreham emergency planning exercise. NRC Staff Motion for Schedule for Litigation of June 1988 Exercise ("Staff Motion"). On September 13, 1988, Suffolk County, the State of New York and Town of Southampton ("Intervenors") filed a motion before the Appeal Board requesting that the Appeal Board "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." Suffolk County, State of New York and Town of Southampton Motion for Appointment of Licensing Board with Jurisdiction To Hear Exercise Issues ("Motion"). For the reasons stated below, the Appeal Board should deny the Motion.

II. DISCUSSION

Intervenors argue that the Appeal Board in this OL-5 proceeding has jurisdiction over exercise-related matters because (1) "the creation of

[the OL-5] 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" and (2) appeals from the rulings of the OL-5 Licensing Board, which "was established for the express purpose of considering exercise-related matters," place exercise-related matters before the Appeal Board. Motion at 1-2. ^{1/}

Contrary to Intervenors' belief, the OL-5 proceeding Board was not created to hear all pending and future exercise-related matters. On May 11, 1983, the Chairman of the Atomic Safety and Licensing Board (ASLB) Panel constituted the OL-3 Board in Shoreham "to preside over the proceeding on all emergency planning issues." Establishment of Atomic Safety and Licensing Board to Preside in Proceeding, May 11, 1983 ("May 11, 1983 Appointment")(Attachment 1). ^{2/} The Commission in CLI-86-11, 23 NRC 577, 579 (1986), directed that a hearing be conducted on the exercise which had been held on February 13, 1986. In their motions that gave rise

^{1/} It is not clear that the Appeal Board has either the authority to act on, or the jurisdiction to consider, the Motion. Under Part 2 of the Commissions Rules of Practice, licensing boards are established or reconstituted only by the Commission or the Chairman (or Chief Administrative Judge) of the Atomic Safety and Licensing Board Panel. E.g., 10 C.F.R. §§ 2.104(d)(2), 2.704(a), 2.717(a), 2.721. See also 10 C.F.R. Part 2, Appendix A. While the Commission's rules provide that the Appeal Board is "authorized to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission," 10 C.F.R. § 2.785, it would appear that the supervisory function of establishing licensing boards would require a specific delegation from the Commission. See 10 C.F.R. §§ 2.785(c), 2.787.

^{2/} The order states that the OL-3 Board was constituted at the request of the licensing board presiding over the Shoreham operating license proceeding and pursuant to the Commission's notice for opportunity for hearing on the Shoreham operating license application, 41 Fed. Reg. 11367-68 (March 18, 1976).

to CLI-86-11, Intervenors and LILCO only suggested that procedures relevant to litigation of the results of the February 1986 exercise be prescribed. 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, at 1, 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 Intervenors' March 7, 1986 "Motion Concerning Proceeding Relating to the Shoreham Exercise," March 13, 1986, at 1, 10 ("LILCO Motion for ASLB Panel"). There is nothing in CLI-86-11 to suggest that the Commission was requesting that a proceeding be instituted to consider any matter other than the specific matters raised by the motions which only involved the February 13, 1986 exercise.

The Chairman of the ASLB Panel clearly indicated that the OL-5 Board was established for that limited purpose. The OL-3 Board was first designated pursuant to the provisions of CLI-86-11 "regarding motions from the Applicant and Intervenors concerning litigation of emergency planning exercise results." Establishment of Atomic Safety and Licensing Board [OL-3], June 10, 1988, at 1 (J. Cotter) (Attachment 2). At that time, there was only one exercise and the order could thus have referred only to the February 13, 1986 exercise which was addressed in CLI-86-11. Subsequently, ASLB Panel Chairman assigned litigation of the 1986 exercise proceeding a new docket number "[f]or more effective docket management." Change of Docket Number, July 24, 1988 (J. Cotter) (Attachment 3). The

OL-5 Licensing Board was later reconstituted ^{3/} and it was clear that the Board as reconstituted would preside "only on the proceedings . . . initiated pursuant to Commission Order, CLI-86-11, 23 NRC 577 (1986)," that is, the February 1986 exercise. Notice of Reconstitution of Board: Clarification, October 17, 1986 (J. Cotter) (Attachment 5); 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, 727 (1986). As stated in LBP-86-37A, the OL-3 docket concerned all other emergency planning 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." 24 NRC at 727.

Thus it is clear that the OL-5 proceeding was not instituted to consider any and all exercise hearings, but only matter specifically relevant to the February 13, 1986 exercise. ^{4/} Rather, the OL-3 and OL-5 phases of the Shoreham operating license proceeding were to expedite litigation over Shoreham consistent with the Commission's Statement of Policy on Conduct of Licensing Proceedings, 13 NRC 452

^{3/} Notice of Reconstitution of Board (October 7, 1986) (J. Cotter) (Attachment 4).

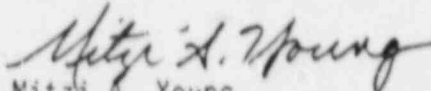
^{4/} The OL-5 Board also recognized that there were limits on its jurisdiction. The OL-5 Board viewed its delegation from the Commission was only to hold an expedited hearing and issue a decision on whether the February 13, 1986 exercise revealed fundamental flaws. Memorandum and Order (Concerning Retention of Jurisdiction), LBP-87-7, 27 NRC 289, 291 (1988). The Board did not believe it was given the authority to make a finding of reasonable assurance. Id.

(1981). Therefore, the OL-3 Board should preside over litigation of the 1988 exercise. ^{5/}

III. CONCLUSION

The Appeal Board should deny the instant motion to designate a licensing board to preside over litigation of the 1988 exercise since, under the May 11, 1983 designation, the OL-3 Licensing Board has jurisdiction to consider matters stemming from the June 7-9, 1988 emergency planning exercise.

Respectfully submitted,


Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 16th day of September, 1988

^{5/} The referral of possible future litigation on the 1988 exercise to another Board would most likely delay the ultimate resolution of the emergency planning issues in Shoreham. The OL-3 Board has before it all remaining admitted issues concerning the adequacy of emergency planning for Shoreham and, as a result, is cognizant of various revisions to the LILCO Plan. In light of the amendment of the Commission's emergency planning rule (52 Fed. Reg. 42080, November 3, 1987) and considerations of judicial economy, the 1988 exercise should be evaluated in conjunction with the consideration of the adequacy of state and local government best-efforts responses. Thus, the OL-3 Board is best suited to preside over litigation of the 1988 exercise.

If the Appeal Board determines that the OL-3 remanded emergency planning issues do not encompass matters raised by the recent full-scale exercise, see Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 n.3 (1979), or that it has jurisdiction to grant Intervenor's Motion, Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-591, 11 NRC 741, 742 (1980), the licensing board should consist of the OL-3 Board members because that Board is charged with evaluating the adequacy of the LILCO emergency plan in accordance with the Realism Rule. If the Appeal Board determines that it has neither jurisdiction nor authority, it should refer this matter to the Commission.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Attachment 2

LONG ISLAND LIGHTING COMPANY

[Docket No. 50-322-0L-3]

[ASLBP No. 83-488-03 OL]

ESTABLISHMENT OF ATOMIC SAFETY AND LICENSING BOARD
TO PRESIDE IN PROCEEDING

Pursuant to delegation by the Commission dated December 29, 1972, published in the Federal Register, 37 F.R. 28710 (1972), and Sections 2.105, 2.700, 2.702, 2.714, 2.714a, 2.717 and 2.721 of the Commission's Regulations, all as amended, and pursuant to the Statement of Policy on Conduct of Licensing Proceedings, 13 N.R.C. 452 (1981), and the request of the Atomic Safety and Licensing Board already established to preside in this operating license proceeding, a separate Atomic Safety and Licensing Board is being established to preside over the proceeding on all emergency planning issues:

LONG ISLAND LIGHTING COMPANY

Shoreham Nuclear Power Station, Unit 1

Construction Permit No. CPPR-95

This Board is being constituted pursuant to a notice published by the Commission on March 18, 1976 in the Federal Register entitled, "Receipt of Application for Facility Operating License, Availability of Applicant's Environmental Report; Consideration of Issuance of Facility

Operating License; Opportunity for Hearing." 41 Fed. Reg. 11367-68
(1976).

The Board is comprised of the following Administrative Judges:

James A. Laurenson, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry R. Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. M. Stanley Livingston
1005 Calle Largo
Santa Fe, New Mexico 87501

B. Paul Cotter, Jr.
B. Paul Cotter, Jr.
Chief Administrative Judge
Atomic Safety and Licensing
Board Panel

Issued at Bethesda, Maryland,
this 11th day of May, 1983.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LONG ISLAND LIGHTING COMPANY

(Docket No. 50-322-OL-3) S4

[ASLBP No. 86-533-01-OL]

ESTABLISHMENT OF ATOMIC SAFETY AND LICENSING BOARD

Pursuant to delegation by the Commission dated December 29, 1972, published in the Federal Register, 37 F.R. 28710 (1972), and Sections 2.105, 2.700, 2.702, 2.714, 2.714a, 2.717 and 2.721 of the Commission's Regulations, all as amended, an Atomic Safety and Licensing Board is being established in the following proceeding:

LONG ISLAND LIGHTING COMPANY
Shoreham Nuclear Power Station, Unit 1
Construction Permit No. CPPR-95

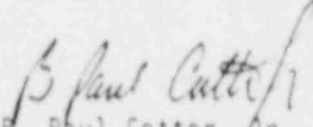
This Atomic Safety and Licensing Board is being designated pursuant to the provisions of a Memorandum and Order issued by the Commission on June 6, 1986 regarding motions from the Applicant and intervenors concerning litigation of emergency planning exercise results. CLI-86-11, 23 NRC (1986). In its Order the Commission directed the immediate initiation of the exercise hearing to consider evidence which intervenors might wish to offer to show that there is a fundamental flaw in Applicant's emergency plan.

The Board is comprised of the following Administrative Judges:

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

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

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


B. Paul Cotter, Jr.
Chief Administrative
Judge
Atomic Safety and Licensing
Board Panel

Issued at Bethesda, Maryland,

this 10th day of June, 1986.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONLONG ISLAND LIGHTING COMPANY
Shoreham Nuclear Power Station, Unit 1
(EP Exercise)

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

[ASLBP No. 86-533-01-OL]

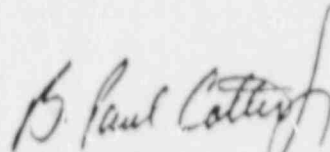
CHANGE OF DOCKET NUMBER

In response to motions filed by Applicant and Intervenors in Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-3, the Commission, in a Memorandum and Order, CLI-86-11, 23 NRC _____ 1986, issued June 6, 1986, directed the immediate initiation of the exercise hearing to consider evidence which Intervenors might wish to offer to show that there is a fundamental flaw in Applicant's emergency plan.

The Atomic Safety and Licensing Board Panel, by Order of June 10, 1986, designated an Atomic Safety and Licensing Board to preside in this matter, which continued to bear Docket No. 50-322-OL-3, issued for the emergency planning proceeding. For more effective docket management, it is necessary to assign a new docket number for this phase of the application proceeding. It is hereby ordered that the docket number to

~~86-533-01-OL~~ 234 298

be used henceforth for the proceeding instituted by the Commission on June 6, 1985, is Docket No. 50-322-OL-5 (EP Exercise).



B. Paul Cotter, Jr.
Chief Administrative
Judge
Atomic Safety and Licensing
Board Panel

Issued at Bethesda, Maryland,
this 24th day of July, 1986.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LONG ISLAND LIGHTING COMPANY

Shoreham Nuclear Power Station, Unit 1

(EP Exercise)

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

[ASLBP No. 86-534-01-OL]

NOTICE OF RECONSTITUTION OF BOARD

Pursuant to the authority contained in 10 CFR §§ 2.721 and 2.721(b), the Atomic Safety and Licensing Board for Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-5, is hereby reconstituted by appointing Administrative Judge John H. Frye, III, in place of Administrative Judge Morton B. Margulies and Administrative Judge Oscar H. Paris in place of Administrative Judge Jerry R. Kline because of schedule conflicts. Administrative Judge John H. Frye is appointed Chairman of the Board.

As reconstituted, the Board is comprised of the following Administrative Judges:

John H. Frye, III, Chairman

Oscar H. Paris

Frederick J. Shon

All correspondence, documents and other material shall be filed with the Board in accordance with 10 CFR § 2.701 (1980). The addresses of the new Board members are:

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

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

B. Paul Cotter, Jr.
B. Paul Cotter, Jr.
Chief Administrative Judge
Atomic Safety and Licensing
Board Panel

Issued at Bethesda, Maryland,
this 7th day of October, 1986.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LONG ISLAND LIGHTING COMPANY

Shoreham Nuclear Power Station, Unit 1

(EP Exercise)

(Docket No. 50-322-0L-5)

[ASLBP No. 86-534-01-0L]

NOTICE OF RECONSTITUTION OF BOARD: CLARIFICATION

By notice dated October 7, 1986, the Atomic Safety and Licensing Board presiding in Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-0L-5 was reconstituted. Because of the multiple issues pending in this proceeding, there has been some confusion as to the intended scope of the reconstitution.

This is to clarify that the reconstituted Board comprised of John H. Frye, III, Chairman; Oscar H. Paris; and Frederick J. Shon will preside only in the proceedings related to the emergency planning exercise, which are being heard under Docket No. 50-322-0L-5 (Emergency Planning Exercise). These proceedings were initiated pursuant to Commission order, CLI-86-11, 23 NRC 577 (1986).

The Board comprised of Morton B. Margulies, Chairman; Jerry R. Kline; and Frederick J. Shon will continue to preside in all other proceedings pertaining to emergency planning for the Shoreham Nuclear Power Station, which are being heard under Docket No. 50-322-0L-3

(Emergency Planning). These include issues remanded by the Commission in CLI-85-13, 23 NRC ____ (July 24, 1986) and by the Atomic Safety and Licensing Appeal Board in ALAB-832, 23 NRC 135 (1986) and ALAB-847, 23 NRC ____ (September 19, 1986).

B. Paul Cotter Jr.

B. Paul Cotter, Jr.
Chief Administrative Judge
Atomic Safety and Licensing
Board Panel

Issued at Bethesda, Maryland,
this 17th day of October, 1986.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD SEP 22 P2:21

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

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENORS' MOTION FOR APPOINTMENT OF LICENSING BOARD TO HEAR 1988 EXERCISE RESULTS" in the above-captioned proceeding were served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, as indicated by double asterisk, by telecopier, this 16th day of September 1988.

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

Alan A. Rosenthal*
Administrative Judge
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. W. Reed Johnson*
Administrative Judge
Atomic Safety and Licensing Board
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Philip McIntire
Federal Emergency Management
Agency
26 Federal Plaza
Room 1349
New York, NY 10278

Joel Blau, Esq.
Director, Utility Intervention
Suite 1020
99 Washington Avenue
Albany, NY 12210

Fabian G. Palomino, Esq.**
Special Counsel to the Governor
Executive Chamber
State Capitol
Albany, NY 12224

Jonathan D. Feinberg, Esq.
New York State Department of
Public Service
Three Empire State Plaza
Albany, NY 12223

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

Stephen B. Latham, Esq.
Twomey, Latham & Shea
Attorneys at Law
33 West Second Street
Riverhead, NY 11901

Atomic Safety and Licensing
Board Panel (1)*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing
Appeal Panel (8)**
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veteran's Memorial Highway
Hauppauge, NY 11788

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

Dr. Monroe Schneider
North Shore Committee
P.O. Box 231
Wading River, NY 11792

William R. Cumming, Esq.
Office of General Counsel
Federal Emergency Management Agency
500 C Street, SW
Washington, DC 20472

Dr. Robert Hoffman
Long Island Coalition for Safe Living
P.O. Box 1355
Massapequa, NY 11758

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Herbert H. Brown, Esq.
Lawrence Coe Lanpher, Esq.**
Karla J. Letsche, Esq.
Kirkpatrick & Lockhart
South Lobby - 9th Floor
1800 M Street, NW
Washington, DC 20036-5891

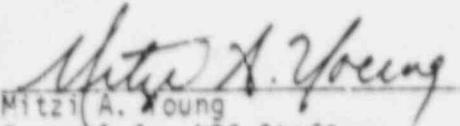
Jay Dunkleberger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, NY 12223

Dr. W. Reed Johnson
115 Falcon Drive, Colthurst
Charlottesville, VA 22901

Ms. Nora Bredes
Shoreham Opponents Coalition
195 East Main Street
Smithtown, NY 11787

Barbara Newman
Director Environmental Health
Coalition for Safe Living
Box 944
Huntington, New York 11743

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


Mitzi A. Young
Counsel for NRC Staff