

September 27, 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-3
(Emergency Planning)

GOVERNMENTS' MOTION FOR BIFURCATION OF APPEAL
AND FOR EXPEDITED TREATMENT OF JURISDICTIONAL ISSUE

Simultaneously herewith, the Governments (Suffolk County, the State of New York, and the Town of Southampton) each filed a Notice of Appeal of the OL-3 Licensing Board's September 23, 1988 Concluding Initial Decision on Emergency Planning. Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), LBP-88-24, ___ NRC ___ (1988). The Governments intend to challenge several significant errors of law and fact contained in LBP-88-24, and will do so in briefs filed within 30 days pursuant to 10 CFR § 2.762. By this Motion the Governments seek bifurcation and expedited treatment of their appeal of one basic jurisdictional issue raised by LBP-88-24: whether the OL-3 Licensing Board has the power to dismiss the Governments as parties from the OL-5 proceeding, which is pending before a separate Licensing Board.

I. The Facts

In LBP-88-24, the OL-3 Licensing Board dismissed the Governments as parties from the Shoreham proceeding. See, e.g., LBP-88-24, at 89, 130, 148. This ruling was apparently intended to apply not only to the OL-3 proceeding over which that Board had jurisdiction, but also to other proceedings before other Boards, such as that involving the results of the June 1988 exercise of LILCO's Plan. See id. at 130, n.39; LBP-88-24, dissenting opinion of Judge Shon, at 12. Although dated September 23, 1988, the majority opinion in LBP-88-24 made no mention of the Appeal Board's September 20 ruling that the OL-3 Board does not have jurisdiction over matters involving the 1988 LILCO exercise, and its remand of such issues to the OL-5 Licensing Board. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-901, ___ NRC ___ (Sept. 20, 1988).

On September 22, 1988, pursuant to ALAB-901, the OL-5 Licensing Board issued a Memorandum and Order setting a schedule for the filing of contentions and responses, and scheduling a conference of counsel, in the proceeding on the 1988 exercise. A copy of that Memorandum and Order is attached. Pursuant to the OL-5 Board's Order, the Governments must file contentions concerning the 1988 exercise by October 17.

II. The Issue to be Bifurcated

The Governments seek to have the following issue bifurcated from their appeal of LBP-88-24: whether the OL-3 Board has jurisdiction to dismiss the Governments as parties to the OL-5 proceeding.^{1/}

This jurisdictional issue is straightforward and easily segregable from the other issues to be raised by the Governments' appeals of LBP-88-24. That decision contains many errors involving a myriad of legal, procedural and factual issues. The Governments will address them in their briefs to be filed within 30 days. The specific jurisdictional question which the Governments seek to have bifurcated, however, involves no complicated or disputed facts. Indeed, a ruling on the bifurcated portion of the Governments' appeal would not involve the factual or legal merits of the OL-3 Board's substantive rulings in LBP-88-24. Rather, the ruling sought by this Motion would merely determine whether the OL-3 Board had the jurisdiction to apply its OL-3-based rulings to oust the Governments as parties to a separate proceeding which is currently pending before the OL-5 Licensing Board.

^{1/} The Governments will address in their later briefs other jurisdictional issues raised by LBP-88-24 such as, for example, the OL-3 Board's jurisdiction with respect to matters like LBP-88-2 now pending before the Appeal Board.

Furthermore, the parties, and this Board in ALAB-901, have recently focused on the factual, legal and procedural issues involved in the question of which Board has jurisdiction over the results of the 1988 Shoreham Exercise. In essence, a ruling on the jurisdictional issue would merely require the application of ALAB-901 and the analysis contained in it to the OL-3 Board's action in LBP-88-24.

Attached hereto is the Governments' Brief on the issue of whether the OL-3 Board has jurisdiction to dismiss the Governments from the OL-5 proceeding. Its length is indicative of the straightforward nature of the issue presented. It also demonstrates that expeditious treatment of the issue is both warranted and feasible.

III. The Issue to be Bifurcated Should Be Resolved Expeditiously

Whether the OL-3 Licensing Board has jurisdiction to dismiss the Governments from the OL-5 proceeding requires expeditious resolution for several reasons.

First, the OL-5 Licensing Board, acting in reliance upon ALAB-901, has issued a schedule requiring the Governments to file contentions concerning the results of the 1988 exercise by October 17. The OL-5 Board's Order acknowledges the Governments' status as active parties to the exercise proceeding, who intend to challenge the results of the 1988 exercise in litigation before that Board. The OL-5 Board has ordered the Governments

to take action, including the preparation and filing of contentions, in furtherance of that status. The OL-5 Board's Order, however, is in apparent conflict with the OL-3 Board's decision in LBP-88-24, which purports to dismiss the Governments as parties from all Shoreham proceedings. The Governments need to know, in a time frame which will allow them to properly allocate their resources, which Board's rulings are controlling with respect to the OL-5 exercise proceeding.

Second, the Governments' status in the OL-5 proceeding needs to be resolved expeditiously because that proceeding is of critical importance to the licensing of Shoreham. The 1986 Shoreham exercise revealed fundamental flaws in LILCO's emergency plan which precluded a finding of reasonable assurance that the public could be protected in the event of a Shoreham emergency. Those flaws only came to light as a result of the Governments' challenge to the 1986 exercise results. Indeed, the Governments' participation in the OL-5 litigation helped to reveal that the 1986 exercise itself was flawed and failed to meet the regulatory requirement for a full participation exercise. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, ___ NRC ___ (1988).

In light of these facts, the scope and results of the 1988 exercise must be carefully examined. If the OL-3 Board's ruling that the Governments are dismissed as parties from the OL-5 proceeding were to stand, however, there would be no party in a position to protect the public's right to have the 1988

exercise and its results scrutinized and, as appropriate, challenged. See LBP-88-24, dissenting opinion of Judge Shon, at 12-13. The Governments are prepared to participate fully in the proceeding which the OL-5 Board has begun by its September 22 Order. An expeditious ruling that the OL-3 Board's decision in LBP-88-24 does not invalidate the OL-5 Board's ruling in the OL-5 proceeding is necessary to protect the public's right to challenge the results of the 1988 exercise.

Third, LBP-88-24 authorizes the Director of the Office of Nuclear Reactor Regulation to issue LILCO a license to operate Shoreham upon making any requisite findings with respect to uncontested issues. See LBP-88-24 at 149. According to information obtained on September 26 from the Office of General Counsel, NRR is likely to make license findings concerning the 1988 exercise within two to four weeks. An expeditious ruling on the jurisdictional issue presented by the Governments' bifurcated appeal is necessary to prevent such findings from being made without any opportunity for the Governments to challenge them on behalf of the affected public.

In order to enable the parties and the Appeal Board to address the jurisdictional issue expeditiously, the Governments' Brief on that issue is attached hereto. The Governments have served LILCO and the NRC Staff today, by hand or telecopier, with copies of this Motion, the Notices of Appeal, and the Governments' Brief. The Governments are also available for a telephone conference or oral argument on the issue should the

Appeal Board wish to schedule one, although given the limited nature of the issue presented, the Governments expect that it can be decided on the papers.

IV. Conclusion

For the foregoing reasons, the question of whether the OL-3 Licensing Board has jurisdiction to dismiss the Governments from the OL-5 proceeding -- as set forth in the Governments' Brief submitted herewith -- should be bifurcated from the remainder of the Governments' appeal of LBP-88-24.

In addition, the Governments request that the Appeal Board require any parties wishing to respond to the Governments' Brief to do so by close of business Thursday, September 22, so that the Board can resolve this jurisdictional issue as soon as possible.

Finally, if the Appeal Board does not intend to grant this Motion and to decide the bifurcated jurisdictional issue by early in the week of October 3, the Governments respectfully request that the Appeal Board so inform the undersigned counsel so that the Governments can seek other relief or take additional actions that may be appropriate to protect their interests.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

SERVED SEP 23 1988

Before Administrative Judges:
John H. Frye, III, Chairman
Dr. Oscar H. Paris
Frederick J. Shon

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

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

ASLBP No. 86-534-01 OL

September 22, 1988

MEMORANDUM AND ORDER

On September 20, the Appeal Board sitting in this proceeding issued ALAB-901 remanding the proceeding in connection with the 1988 emergency exercise at the Shoreham facility to this Licensing Board sitting in the "OL-5" docket. We have reviewed the Staff's motion of September 9 to set a schedule in this proceeding together with LILCO's and Intervenors' responses of September 16 and 19, respectively, all of which were filed in the "OL-3" docket.

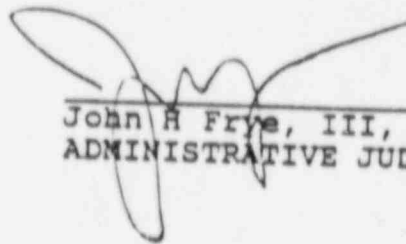
In order to promptly commence this proceeding, we are adopting a schedule for the filing of contentions and

responses thereto, and setting a date for a conference of counsel. Further schedules and procedures for the completion of this proceeding will be set following the conference of counsel.

- Noon, October 17 - Contentions are to be in the hands of the Board, LILCO, and Staff.
- Noon, October 27 - LILCO's response is to be in the hands of the Board, Intervenors, and Staff.
- Noon, November 1 - Staff's response to be in the hands of the Board, LILCO, and Intervenors.
- Noon, November 8 - Intervenors' reply to be in the hands of the Board, LILCO, and Staff.
- 10:00 AM, November 16 - Conference of Counsel, NRC Hearing Room, fifth floor, 4350 East-West Highway, Bethesda, Maryland.

It is so ORDERED.

For the ATOMIC SAFETY AND
LICENSING BOARD



John H. Frye, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
September 22, 1988