

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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In the Matter of )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station, )  
Unit 1) )

) Docket No. 50-322-OL-3  
) (Emergency Planning)  
)  
)

GOVERNMENTS' BRIEF ON BIFURCATED APPEAL FROM THE  
SEPTEMBER 23, 1988 CONCLUDING INITIAL DECISION IN LBP-88-24

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Introduction

On September 23, 1988, the OL-3 Licensing Board issued its Concluding Initial Decision on Emergency Planning. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-88-24, \_\_\_\_\_ NRC \_\_\_\_\_ (1988). In that decision, the Licensing Board announced that it was "remov[ing] the remaining litigation obstacles to a full operating license by resolving the matters at issue<sup>1/</sup> in LILCO's favor . . . ." LBP-88-24 at 3. Having, in its opinion, resolved all matters in controversy, the Licensing Board

<sup>1/</sup> These included a pending summary disposition motion filed by LILCO on emergency broadcast system issues, and remanded issues involving the potential for role conflict among the school bus drivers relied upon by LILCO during a Shoreham emergency, hospital evacuation time estimates, and LILCO's "realism" defense to the Governments' claim that LILCO lacked the legal authority to implement its Plan.

authorized the Director of the Office of Nuclear Reactor Regulation to issue to LILCO, upon making requisite findings with respect to matters not embraced in its decision, a license authorizing the operation of the Shoreham facility. Id. at 149.

The Licensing Board clearly recognized that, in order to authorize issuance of an operating license for Shoreham, it was not enough for it merely to resolve, on the merits in LILCO's favor, the issues remaining before it. Standing in the way of such a precise end to the Shoreham litigation was the emergency planning exercise held in June of this year. Indeed, prior to the Board's decision, the NRC Staff and the Governments -- i.e., Suffolk County, the State of New York and the Town of Southampton -- had made known their intent to litigate the results of that exercise, and even LILCO had agreed that hearings would be necessary.<sup>2/</sup>

The Licensing Board, however, removed this obstacle to a Shoreham operating license -- at least in its mind -- by dismissing the Governments, as parties, from the Shoreham proceedings, including any proceeding involving the results of the June exercise. See, e.g., LBP-88-24 at 89, 130 (especially note 39), and 148. This aspect of the Board's decision prompted a

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<sup>2/</sup> See NRC Staff Motion for Schedule for Litigation of the June 1988 Exercise, dated September 9, 1988; Suffolk County, State of New York, and Town of Southampton Motion for Appointment of Licensing Board with Jurisdiction to Hear Exercise Issues, dated September 23, 1988; LILCO's Response to NRC Staff's Motion for Schedule for Litigation of the June 1988 Exercise, dated September 16, 1988.

dissenting opinion from Judge Shon, who labeled the majority's action "patently undesirable, considering the public health and safety matters at issue." See Judge Shon's dissenting opinion, at 12.

Not only was the majority's action "patently undesirable," it was plainly wrong, since the OL-3 Board had no jurisdiction to dismiss the Governments from matters involving the June emergency planning exercise litigation. Indeed, no other conclusion is possible, in light of this Board's September 20, 1988 Memorandum and Order in ALAB-901. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-901, \_\_\_\_\_ NRC \_\_\_\_\_ (1988).

In ALAB-901, the Appeal Board concluded that "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 . . . ." ALAB-901 at 10. Thereafter, on September 22, 1988, the OL-5 Licensing Board issued a Memorandum and Order, adopting a schedule for the filing of contentions in connection with the 1988 exercise, and responses thereto, and setting a date for a conference of counsel. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ASLBP No. 86-534-01 OL (September 22, 1988). Given the direct conflict between the OL-3 Licensing Board's dismissal (in LBP-88-24) of the Governments as parties from the Shoreham exercise proceeding, and the OL-5 Licensing Board's action one day earlier adopting a schedule for the Governments to file contentions in

that same proceeding, there are compelling reasons for this Board to reverse, for lack of jurisdiction, that narrow aspect of LBP-88-24 that precludes the Governments from participating as parties in any litigation involving the results of the June 1988 emergency planning exercise.<sup>3/</sup>

## II. Discussion

At the outset, it should be made clear that, in addition to the narrow jurisdictional issue addressed in this Brief, the Governments intend in their briefs to be filed later to contest significant aspects of the Licensing Board's findings of fact and conclusions of law in LBP-88-24.

While this is not the time to address the many errors of fact and law made by the Licensing Board in LBP-88-24, it is imperative that the Governments promptly seek reversal of that aspect of the OL-3 Licensing Board's decision which bars the Governments from participating as parties in any litigation concerning the results of the June 1988 exercise. The Governments fully intend to contest the results of that exercise, whenever such litigation goes forth. LILCO and the NRC Staff, however, likely will assert that the Governments, having been dismissed from the Shoreham proceedings by the OL-3 Board's decision in LBP-88-24, are

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<sup>3/</sup> In his dissenting opinion, Judge Shon focused this issue by questioning the impact of the majority's dismissal of the Governments on the exercise litigation, in light of ALAB-901. See Judge Shon's dissenting opinion, at 12, n.3.

precluded from participating in any way in any exercise litigation. Indeed, this is the position taken by the OL-3 Board, which concluded that there were no "remaining litigation obstacles to a full operating license" for the Shoreham facility. LBP-88-24 at 3.

The Governments submit that the OL-3 Licensing Board plainly exceeded its jurisdiction, and thus committed reversible error, in dismissing the Governments, as parties, from any proceedings arising out of the June 1986 exercise. The conclusion that the OL-3 Board committed error in dismissing the Governments as parties in the OL-5 proceeding is squarely premised on this Board's decision in ALAB-901, issued only a few days before the Licensing Board's decision in LBP-88-24.<sup>4/</sup>

In ALAB-901, this Board concluded that "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 . . . ." ALAB-901 at 10. The Board thus rejected the position, previously taken by LILCO and the NRC Staff, which had argued that the OL-3 Licensing Board had sole jurisdiction over issues relating to the June 1988 exercise. Id. at 2. Since the OL-3 Board's jurisdiction does not extend to

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<sup>4/</sup> It may be that the Licensing Board's error in dismissing the Governments from all aspects of the Shoreham proceedings, including the anticipated June exercise proceeding, was a result of its erroneously believing that it had jurisdiction over the June exercise. Indeed, Judge Shon's dissenting opinion (at page 12, n.3) strongly suggests that this was the case.

matters relating to the June 1988 exercise, it necessarily follows that that Licensing Board was without authority to bar the Governments, as parties, from any litigation that might result from the exercise. See Hovey v. Elliott, 167 U.S. 409 (1897); Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909); Schulze v. Coykendall, 545 P.2d 392, 218 Kan. 653 (1976) (party cannot be dismissed on claims or issues unrelated to the discovery order willfully violated).<sup>5/</sup>

### III. Conclusion

For the foregoing reasons, the Appeal Board should reverse that aspect of LBP-88-24 that purports to dismiss the Governments, as parties, from any litigation in the OL-5 Docket concerning the results of the June 1988 emergency planning exercise.

Respectfully submitted,

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<sup>5/</sup> The Governments emphasize that their later briefs will demonstrate that the OL-3 Board's ruling dismissing the Governments as parties in the OL-3 proceeding was without legal and factual basis, and was clearly erroneous. Even if there were a basis for the imposition of some kind of sanction against the Governments based on actions in the OL-3 proceeding, however -- and in this case there was not -- that still would not confer jurisdiction on the OL-3 Board to impose sanctions in an altogether separate proceeding pending in a different forum.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the NOTICES OF APPEAL filed by Suffolk County, the State of New York, and the Town of Southampton; GOVERNMENTS' MOTION FOR BIFURCATION OF APPEAL AND FOR EXPEDITED TREATMENT OF JURISDICTIONAL ISSUE; and GOVERNMENTS' BRIEF ON BIFURCATED APPEAL FROM THE SEPTEMBER 23, 1988 CONCLUDING INITIAL DECISION IN LBP-88-24 have been served on the following this 27th day of September 1988, by U.S. mail, first class, except as otherwise noted.

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