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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

ATOMIC SAFETY AND LICENSING APPEAL BOARD '88 SEP 29 P2:42

Administrative Judges:

Christine N. Kohl, Chairman  
Alan S. Rosenthal  
Howard A. Wilber

OFFICE OF THE CLERK  
DOCKETING DIVISION  
September 29, 1988

SERVED SEP 29 1988

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In the Matter of )

LONG ISLAND LIGHTING COMPANY )

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

(Shoreham Nuclear Power Station, )  
Unit 1) )

MEMORANDUM AND ORDER

On September 27, 1988, the intervening Governments (Suffolk County, the State of New York, and the Town of Southampton) separately filed notices of appeal from the OL-3 Licensing Board's September 23 Concluding Initial Decision, LBP-88-24, 28 NRC \_\_\_\_ (1988). That Board concluded, among other things, that the Governments were in default of certain discovery orders concerning the so-called "realism" contentions, and it "dismissed [the Governments] from the proceeding." Id. at \_\_\_\_ (slip opinion at 148). Along with their notices of appeal, the Governments jointly filed a "Motion for Bifurcation of Appeal and for Expedited Treatment of Jurisdictional Issue" and tendered their "Brief on Bifurcated Appeal." The Governments seek to litigate expeditiously the separate issue of "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

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separate Licensing Board." Governments' Motion (September 27, 1988) at 1. For good cause shown, we granted the Governments' motion on September 27 and ordered replies to their already filed six-page brief on the separate jurisdictional issue to be submitted to us by September 30.

Applicant Long Island Lighting Company (LILCO) now seeks a one-week enlargement of briefing time. It cites three reasons for its request. First, LILCO disputes the Governments' claim of urgency. Second, it contends that the issue raised in the Governments' brief is important and raises fundamental, sophisticated questions of first impression that require more briefing time. Third, LILCO notes that it seeks only a total of 10 days to respond, whereas the Commission's Rules of Practice (10 C.F.R. § 2.762(c)) provide for 30 days. See LILCO's Motion for Enlargement of Briefing Time (September 28, 1988).<sup>1</sup> The Governments oppose LILCO's request for more time, while the NRC staff supports it, providing it is accorded a similar extension.<sup>2</sup> As explained below, the reasons on which LILCO bases its motion are without merit.

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<sup>1</sup> LILCO asks for expedited treatment on its motion (received at approximately 2:30 p.m. yesterday), and we have obviously honored that request. See infra note 7.

<sup>2</sup> Although it does not appear to object here to filing its brief at the same time as LILCO, the staff takes the  
(Footnote Continued)

1. The need for expeditious consideration of the narrow jurisdictional issue posed by the Governments' bifurcated appeal is patent. The OL-3 Licensing Board's decision on appeal purports to dismiss the Governments "from the proceeding." Yet one day before that decision, the OL-5 Licensing Board, pursuant to our remand order in ALAB-901, 28 NRC \_\_\_\_ (September 20, 1988), issued an order establishing a schedule for the discrete proceeding now pending before it. That schedule calls for the Governments' contentions to be received by the other parties and the Board by noon on October 17. The OL-3 Licensing Board's majority opinion makes no mention of the seeming conflict between its dismissal of the Governments "from the proceeding" and the OL-5 Licensing Board's prior scheduling order.<sup>3</sup> The OL-5 Licensing Board is obliged, on the one hand, to comply with our remand order in ALAB-901 and to

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opportunity to repeat its view that its "special position" in NRC licensing proceedings customarily warrants the filing of its papers last. We are in general agreement, but point out that special circumstances justify special schedules. We also note that, at the appellate level, there is less justification for affording the staff the opportunity to "finalize" its position; presumably, it has already done so before the Licensing Board.

<sup>3</sup> Judge Shon, who is a member of both the OL-3 and OL-5 Licensing Boards, does refer to this problem in his partial concurrence and dissent in LBP-88-24 (at 11-12). LILCO's motion essentially ignores this conflict and its bearing on the need for expediency.

proceed with the matters before it as expeditiously as possible. See ALAB-901, 28 NRC at \_\_\_\_ (slip opinion at 6-7) (citing CLI-86-11, 23 NRC 577, 582 (1986)). On the other hand, that Board's brethren on the OL-3 Board have now cast a cloud over the OL-5 Board's authority to commence that proceeding and to comply with our order. Responsible case management requires the prompt resolution of such jurisdictional disputes, and, on this basis alone, we conclude that expedition is warranted.

In addition, the OL-3 Licensing Board's decision authorizes the Director of the Office of Nuclear Reactor Regulation (NRR) to issue a full-power operating license for the Shoreham facility. IBP-88-24, 28 NRC at \_\_\_\_ (slip opinion at 149). This license authorization is a direct result of the OL-3 Licensing Board's dismissal of the Governments from the proceeding and determination that the record on all other issues is complete and supports findings in LILCO's favor. See id. at \_\_\_\_ & n.3 (slip opinion at 2-3 & n.3). As LILCO notes, the Board's authorization triggers the Commission's "immediate effectiveness" review under 10 C.F.R. § 2.764(f)(2), and sets the stage for license issuance.<sup>4</sup>

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<sup>4</sup> The imminence of such action is not clear. LILCO maintains that there is no basis for the Government's  
(Footnote Continued)

A motion for a stay is the usual means through which an aggrieved party can seek to defer or thwart license issuance. The unique procedural posture of this proceeding,<sup>5</sup> however, affords the Governments another avenue of potential relief: they can attack the jurisdictional basis for the OL-3 Licensing Board's dismissal of them from the proceeding and thereby indirectly attempt to challenge that Board's license authorization. Furthermore, the Governments are not prohibited from seeking separate, expeditious consideration of that issue. Such a request is no more a sign of "disrespect for the NRC process" (LILCO's Motion at 2) than is LILCO's instant motion for relief from what it perceives as an erroneous and oppressive (appeal) board order. Indeed, jurisdictional issues often warrant separate and early consideration. Given the OL-3 Board's license authorization and the legitimate questions raised

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(Footnote Continued)

representation that NRR is likely to make some licensing determination in two to four weeks. The Governments' Motion (at 6) states that that information was obtained from (an unidentified source in) the Commission's Office of General Counsel on September 26. Our September 27 order asked the staff to advise us if that representation was incorrect, and, to date, it has not done so. See infra p. 8.

<sup>5</sup> As we noted in ALAB-901, 28 NRC at \_\_\_\_ (slip opinion at 4), the real source of the procedural dilemmas in this case is the necessary (and not prohibited) case management tool of using multiple licensing boards in one operating license proceeding to resolve different issues, through several partial initial decisions, at different times.

about the jurisdictional underpinnings of that authorization, expeditious consideration of the Governments' bifurcated appeal is amply justified.

2. Equally unpersuasive is LILCO's argument that the issues raised by the Governments' bifurcated appeal are so fundamental and sophisticated that more time is needed to brief them. LILCO's motion reflects a fundamental misunderstanding of the narrow jurisdictional issue raised by the Governments' expedited appeal -- i.e., whether the OL-3 Licensing Board had jurisdiction to dismiss the Governments from a portion of this proceeding not pending before it. The Governments' instant appeal does not raise issues concerning licensing boards' authority to impose sanctions against parties generally, nor does it "require examination of the merits of the OL-3 Board's sanction ruling or of any alleged acts by the Governments in the OL-3 proceeding or pursuant to their legislative authority." Governments' Opposition (September 29, 1988) at 4. Similarly, it is difficult to understand how the Commission's substantive emergency planning regulations are implicated in the resolution of this jurisdictional issue, as LILCO seems to suggest. In any event, LILCO has failed to explain the nature of the severe prejudice it alleges that it will suffer as a consequence of the expedited briefing of the jurisdictional question.

3. LILCO's final argument -- that it seeks no more than what the Rules of Practice provide -- overlooks certain of those rules. Under 10 C.F.R. §§ 2.711(a) and 2.785(b)(1), we have explicit authority to shorten any time limits prescribed elsewhere in the Rules for good cause. As stated in our September 27 order and reaffirmed here, the Governments have demonstrated good cause for expediting the briefing and consideration of its limited jurisdictional appeal. Further, to borrow LILCO's words, "given the history of this case" (LILCO's Motion at 4), the severe sanction imposed against all three Governments at LILCO's urging, and the OL-3 Board's license authorization order, it was reasonable for LILCO to have anticipated a request for some form of emergency relief as soon as all the parties received the Licensing Board's decision on September 23.<sup>6</sup> Thus, it is somewhat disingenuous for LILCO to suggest that it has only three days to respond to the Governments' (six-page) brief. Nonetheless, because we do not expect it to delay significantly the timing of our decision on the Governments' appeal, we grant LILCO's motion for enlargement in part. All briefs in response to the Governments' Brief on Bifurcated Appeal should be received by us no later than


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<sup>6</sup> We have been advised by Licensing Board Panel staff that counsel for LILCO, the Governments, and the NRC staff picked up copies of LBP-88-24 on September 23.

2:00 p.m. Tuesday, October 4, 1988.<sup>7</sup> In addition, the NRC staff is to notify us and the parties at least 10 days before any licensing action is to be taken pursuant to the OL-3 Board's license authorization.

It is so ORDERED.

FOR THE APPEAL BOARD

  
C. Jean Shoemaker  
Secretary to the  
Appeal Board

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<sup>7</sup> Counsel for LILCO, the staff, and the Governments were notified by telephone of this fact at approximately 9:00 a.m. today.