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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' OPPOSITION TO LILCO'S SEPTEMBER 28 MOTION
FOR ENLARGEMENT OF BRIEFING TIME

The Governments (Suffolk County, the State of New York, and the Town of Southampton), hereby state their objection to LILCO's Motion for Enlargement of Briefing Time, dated September 28, 1988 (hereafter, "LILCO's Motion").

In the Motion, LILCO requests 10 days to respond to the Governments' six-page Brief on Bifurcated Appeal from the September 23, 1988 Concluding Initial Decision in LBP-88-24 (hereafter "Bifurcated Brief") rather than the three days ordered by the Appeal Board on September 27. LILCO's Motion is an attack on this Board's ruling that there is good cause to grant the Governments' request for expedited treatment of the bifurcated appeal. See Appeal Board Order of September 27, 1988 at 1.1/

1/ Although the Governments asked that replies to the (continued...)

LILCO's attack on the Board's ruling is without basis. Moreover, aside from conclusory assertions that the bifurcated appeal "deserves more than three days' briefing time," LILCO fails to demonstrate why it is unable to submit a responsive brief within the time set by the Board. This failure alone provides sufficient basis for denying LILCO's Motion.

The Governments respond below to the reasons LILCO asserts for its request, and demonstrate that the schedule already set for resolving the narrow issue presented by the Governments' bifurcated appeal is both necessary and appropriate.

1. LILCO ignores undisputed facts which demonstrate the need for expeditious resolution of the issue raised in the bifurcated appeal.

- a. LILCO's Motion fails even to address the need for expedition created by the actions of the OL-5 Licensing Board.

The OL-5 Licensing Board has issued an order which obligates the Governments to take certain actions as parties in the OL-5 proceeding. That order has not been vacated by the OL-5 Board. Therefore, the Governments remain bound to comply with it, by preparing contentions on the results of the 1988 exercise to be filed by October 17.

The OL-3 Board's order in LBP-88-24, however, directly conflicts with the outstanding OL-5 Board's order because the

1/(...continued)

Bifurcated Brief be required by September 29, the Appeal Board gave the parties until 3:00 p.m. on September 30.

OL-3 Board purported to dismiss the Governments as parties to the OL-5 proceeding. The Governments are entitled to an expeditious resolution of this conflict and a clarification of their rights and obligations before they are substantially prejudiced by the conflicting orders which are extant.

b. LILCO's allegation that "there is no basis for Intervenors' allegation of urgency" (Motion at 2), in response to the Governments' statement that NRR is likely to make license findings concerning the 1988 exercise within two to four weeks, must be rejected.

First, contrary to LILCO's accusation (Motion at 2), the Governments' representation is not "unattributed." As stated in the Governments' Motion, it is based on information obtained from the Office of General Counsel, and can be verified by contacting that office. See Governments' Motion at 6.2/

Second, LILCO does not and cannot dispute the following facts, stated by the Governments and found by this Board to constitute good cause for granting expedition on the bifurcated appeal:

(a) LBP-88-24 authorizes NRR to issue LILCO an operating license upon making the requisite findings;

2/ Counsel for Suffolk County has been informed that as of 4:00 p.m. on September 28, the NRC Staff had not notified the Appeal Board that the Governments' representation concerning NRR action is wrong or has changed, in response to the Appeal Board's September 27 order requiring the Staff to provide the Appeal Board with prompt notification of such a fact.

(b) such findings would include findings relating to the 1988 exercise;

(c) there is no basis for believing the Staff would delay longer than two to four weeks in making such findings; and

(d) absent a ruling on the Governments' bifurcated appeal, the Governments would have no opportunity to challenge any such Staff findings.

2. LILCO's argument is based on a mischaracterization of the issue raised by the bifurcated appeal.

The Governments' bifurcated appeal raises one very narrow issue: Did the OL-3 Licensing Board have jurisdiction to dismiss the Governments as parties to the OL-5 proceeding? See Governments' Motion at 1, 3; Bifurcated Brief at 4-6. Contrary to LILCO's assertions, resolution of the bifurcated appeal does not 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. See LILCO Motion at 3. Rather, the question presented is a straightforward one of jurisdiction: Can the OL-3 Board which has found certain of the Governments' alleged actions to be sanctionable (a finding the Governments will challenge in their main appeal on the merits), rule that the Governments are dismissed from the separate OL-5 proceeding, which is pending before a separate OL-5 Board, on a subject -- the results of the

1988 exercise -- which the Appeal Board has found to be outside the jurisdiction of the OL-3 Board?

a. Certainly, the issue raised by the bifurcated appeal is important, as LILCO says. It is not complicated or difficult to address, however. LILCO states no reason for its assertion that it requires 10 days rather than three to prepare a brief in response to the six page brief filed by the Governments.

b. Similarly, LILCO states no basis, and provides no explanation, for its bald assertion that the issue raised by the bifurcated appeal is "so potentially prejudicial" to LILCO that it needs additional time to prepare a responsive brief. See LILCO Motion at 4. LILCO has provided this Board no basis for finding that any potential prejudice to LILCO arising out of the expedited briefing schedule set by the Appeal Board would outweigh the good cause for such expedition which the Board already found the Governments had shown.

c. LILCO's assertion that the Governments' bifurcated appeal "is based on [a] fundamental misconception: that emergency planning exercise litigation takes on a life of its own independent of the fundamental legal issue being addressed, which is whether the emergency plan is adequate" (LILCO Motion at 3, emphasis in original) fails to support the need for additional briefing time.

First, it is not clear what this LILCO statement is intended to mean. LILCO fails to provide any logical nexus,

discussion, or explanation to connect the Governments' brief, the so-called "misconception," and briefing time.

Second, if the intention behind LILCO's cryptic comment is to suggest that there should be no litigation of the 1988 exercise results, that suggestion is wrong. It is beyond dispute that:

-- the regulations require, as a prerequisite to license issuance, findings relating to the results of exercises (10 CFR Part 50 App. E);

-- the regulations require, as a prerequisite to license issuance, findings concerning the implementability of an emergency plan as well as its adequacy (10 CFR § 50.47(a)(2); 10 CFR Part 50, App. E; NUREG 0654);

-- intervenors are entitled to challenge the results of an exercise. (See Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C.Cir. 1984), cert. denied, 469 U.S. 1132 (1985));

-- the 1986 Shoreham exercise did not fulfill the regulatory requirements of Appendix E (See ALAB-900);

-- the 1986 Shoreham exercise revealed that the LILCO emergency plan was fundamentally flawed and that LERO was not capable of implementing that plan to provide adequate protection to the public (See LBP-88-2).

In light of these facts, the decisions which remain in effect finding LILCO's plan and its ability to implement it fundamentally flawed, and the rulings in ALAB-901, it is

disingenuous for LILCO to suggest that there need be no challenge to, or litigation of, the results of the 1988 exercise.^{2/}

3. LILCO's accusations that the Governments' bifurcated appeal shows "disrespect for the NRC process," "is a claim that the Commission's immediate effectiveness review cannot be trusted," and is "an end-run around the Commission's process for immediate effectiveness review," are unfounded.

- a. The Governments' bifurcated appeal is completely separate from the Commission's immediate effectiveness review process, as the regulation governing that process makes clear. 10 CFR § 2.764(g). Indeed, the Commission's explanation of the immediate effectiveness rule emphasizes this fact: "The effectiveness review was intended to be conducted entirely separately from review of any stay requests filed under 10 CFR 2.788 and formal appellate review under 10 CFR 2.762 and 2.786." 47 Fed. Reg. 40536 (Sept. 15, 1982).

- b. The Commission's immediate effectiveness review is expressly limited to public interest considerations. See 10 CFR § 2.764(f)(2)(i). As noted, it is not intended to supplant, or to duplicate, decisions on appeals on the merits under Section

^{3/} It is also disingenuous for LILCO to suggest (LILCO Motion at 2) that the NRC Staff, or FEMA, could take the Governments' place in representing the public in any exercise litigation, in light of the positions taken by those parties in previous litigation. Neither of those parties has the commitment to the interests of the citizens of Long Island that the elected State and local governments have demonstrated.

2.762, or decisions involving issues going beyond the public interest considerations listed in Section 2.764(f)(2).

The Governments are entitled to appeal the Licensing Board's decision in LBP-88-24. They have exercised that right. The Governments are also entitled to seek expeditious resolution of all or part of that appeal, as they have in this case. Notwithstanding their appeal on the merits, however, the Governments will also participate in the Commission's immediate effectiveness review process, as provided by the NRC's regulations. The two are expressly not mutually exclusive.

4. LILCO suffered no harm from the Appeal Board's Order Granting the Governments' Motion.

LILCO asserts that it will seek review of the Board's September 27 Order due to the fact that it was issued ex parte. LILCO Motion at 4. That threat is without substance. In its Motion, which in essence seeks reconsideration of the Order, LILCO presumably makes all the arguments LILCO has regarding the Governments' Motion. And, the Board agreed to consider those LILCO arguments. LILCO does not challenge the bifurcation ruling, and it has now set forth its arguments on the need for expedition. Thus, LILCO has suffered no harm from the Board's original ex parte ruling.

5. Conclusion

For the foregoing reasons and those stated in the Governments' September 27 Motion, the Appeal Board should affirm its Order of September 27 and deny LILCO's Motion for Enlargement of Briefing Time.

Respectfully submitted,

E. Thomas Boyle
Suffolk County Attorney
Building 158 North County Complex
Veterans Memorial Highway
Hauppauge, New York 11788



Lawrence Coe Lanpher
Karla J. Letsche
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
South Lobby - 9th Floor
Washington, D.C. 20036

Attorneys for Suffolk County



Fabian G. Palomino
Richard J. Zahnleuter
Special Counsel to the Governor
of the State of New York
Executive Chamber, Room 229
Capitol Building
Albany, New York 12224

Attorneys for Mario M. Cuomo,
Governor of the State of New York

Stephen B. Latham

Stephen B. Latham
Twomey, Latham & Shea (SL)
P. O. Box 398
33 West Second Street
Riverhead, New York 11901

Attorney for the Town of
Southampton

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

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

Fabian G. Palomino, Esq.**
Richard J. Zahnleuter, Esq.
Special Counsel to the Governor
Executive Chamber, Room 229
State Capitol
Albany, New York 12224

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

E. Thomas Boyle, Esq.
Suffolk County Attorney
Bldg. 158 North County Complex
Veterans Memorial Highway
Hauppauge, New York 11788

Stephen B. Latham, Esq.**
Twomey, Latham & Shea
33 West Second Street
Riverhead, New York 11901

Ms. Nora Bredes
Executive Director
Shoreham Opponent Coalition
195 East Main Street
Smithtown, New York 11787

Hon. Patrick G. Halpin
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Joel Blau, Esq.
Director, Utility Intervention
N.Y. Consumer Protection Board
Suite 1020
Albany, New York 12210

Adjudicatory File
Atomic Safety and Licensing
Board Panel Docket
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

William R. Cumming, Esq.**
George W. Watson, Esq.
Office of General Counsel
Federal Emergency Management Agency
500 C Street, S.W., Room 840
Washington, D.C. 20472

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

Edwin J. Reis, Esq.**
George E. Johnson, Esq.
U.S. Nuclear Regulatory Comm.
Office of General Counsel
Washington, D.C. 20555

Ms. Elisabeth Taibbi, Clerk
Suffolk County Legislature
Suffolk County Legislature
Office Building
Veterans Memorial Highway
Hauppauge, New York 11788

David A. Brownlee, Esq.
Kirkpatrick & Lockhart
1500 Oliver Building
Pittsburgh, Pennsylvania 15222

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Comm.
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, California 95125

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

Mr. Jay Dunkleburger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Mr. Stuart Diamond
Business/Financial
NEW YORK TIMES
229 W. 43rd Street
New York, New York 10036



Karla J. Letsche
KIRKPATRICK & LOCKHART
1800 M Street, N.W.
South Lobby - 9th Floor
Washington, D.C. 20036-5891

* By Hand
** By Telecopy
*** By Federal Express