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LILCO, September 28, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-3
	)	(Emergency Planning)
(Shoreham Nuclear Power Station, Unit 1)	)	
	)	

LILCO'S MOTION FOR ENLARGEMENT OF BRIEFING TIME

LILCO hereby requests that the Appeal Board grant it an additional week (that is, until Friday, October 7, 1988) to respond to the "Governments' Brief on Bifurcated Appeal from the September 23, 1988 Concluding Initial Decision in LBP-88-24," dated September 27, 1988 (hereinafter "Governments' Brief"). LILCO's reasons are as follows:

1. The urgency that the Intervenors allege does not in truth exist.

2. The issue being briefed is important and, contrary to the Intervenors' arguments, needs more than three days' time. LILCO believes that the Intervenors' arguments are based on both a fundamentally incorrect view of the emergency planning regulations and a fundamentally unsound view of a licensing board's authority to enforce NRC rules. Among other things, what is at issue here is whether the NRC's process is to be taken seriously or held in contempt. Such issues deserve more than three days' briefing time. The Appeal Board's order severely prejudices LILCO's ability to respond.

3. LILCO asks only for ten days, the time that the regulations provide to answer a motion. Indeed, under the regulations, LILCO is entitled to 30 days to respond to Intervenors' brief. 10 C.F.R. § 2.762(c).

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I. The Urgency Claimed By The Intervenors Does Not Exist

The urgency to complete Appeal Board review asserted by the Intervenors simply does not exist. The Intervenors argue strenuously that "the issue to be bifurcated should be resolved expeditiously." Governments' Motion for Bifurcation of Appeal and for Expedited Treatment of Jurisdictional Issue at 4 (Sept. 27, 1988) (hereinafter "Governments' Motion"). Their reason is primarily that they must be allowed to litigate the June 1988 exercise because otherwise "there would no party in a position to protect the public's right to have the 1988 exercise and its results scrutinized and, as appropriate, challenged." Id. at 5-6. Further, Intervenors' unattributed allegation that the Staff is likely to make findings concerning the 1988 exercise within 2 to 4 weeks (Governments' Motion at 7), cannot be verified. On September 27 Staff counsel, Mr. Reis, could not corroborate Intervenors' allegation and disclaimed any knowledge as to where it could have come from. Thus there is no basis for Intervenors' allegation of urgency.

The Intervenors have a fundamental misconception of the NRC process. In the first place, their rush to resolve this particular issue is basically an end-run around the Commission's process for immediate effectiveness review, which is expressly designed to identify significant safety issues that would warrant withholding a license pending Appeal Board review. See 10 C.F.R. § 2.764; 47 Fed. Reg. 40535 (Sept. 15, 1982). The Intervenors' attempt to hurry up Appeal Board review is a claim that the Commission's immediate effectiveness review cannot be trusted. It is just another form of precisely what the Intervenors have received sanctions for: disrespect for the NRC process. In the second place, it is simply not true, and it is offensive to suggest, that the Intervenors are the only ones protecting, or representing, the public. Surely the NRC Staff and FEMA (including their 68 exercise evaluators) have that primary role.

II. The Issue Being Briefed is Important

The additional week requested by LILCO is also justified by the importance of the issue. The question is whether the Gleason Board lacked the power (jurisdiction) to implement the Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), in the only way left to it in the face of repeated Intervenor violations of its orders. These same intervenors have, among other things, defied the "Phase I" Board's orders, passed an unconstitutional law making it a crime to participation in an emergency planning exercise, and now defied the -03 Board's legitimate discovery orders. Along the way they have advised potential witnesses to ignore Board-issued subpoenas and have failed to produce important documents in discovery. They now seek to overturn the Board's imposition of sanctions in a hurry, allowing the opposing parties only three days to respond. Expedition is a fine thing, but in this case it does not serve the interests of justice.[1/]

Moreover, the Intervenors' argument on jurisdiction is based on another 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. This issue is fundamental, it is sophisticated, and it is of first impression. It deserves more than three days' briefing time.

The Intervenors argue to the contrary that the issue is not all that complicated and refer to the shortness of their own brief as proof. Governments' Motion at 4. They claim that the issue has already been decided in their favor by ALAB-901. See Governments' Motion at 4; Governments' Brief at 5-6. LILCO will shortly ask for Commission review of ALAB-901, but even without that review LILCO does not concede that ALAB-901 resolves the issue of the -03 Board's authority to impose the sanctions it did. And

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1/ If measures to protect the status quo turn out to be needed at some point, they can be provided by a stay at the appropriate time if the circumstances warrant one.

even if LILCO turns out to be wrong, it should first be given more than three days to brief an issue so potentially prejudicial to it.

III. LILCO Asks No More Than What The Regulations Provide

The Appeal Board's Order of September 27, which was issued ex parte within hours of receipt of Intervenors' Motion, without hearing the views of any parties except the Intervenors, provided only three days for briefs. Under the regulations, 30 days are allowed for filing responsive briefs. 10 C.F.R. § 2.762(c). Ten days are allowed for answering motions. 10 C.F.R. § 2.730(c).

Because of the apparent importance of resolving this issue, LILCO asks less than the amount of time allowed to respond to briefs on appeal, and asks merely for the 10 days permitted for responses to motions (i.e., until October 7, 1988). Since the issue is complicated, important, and of first impression, this seems little enough to ask.

IV. Conclusion

For the above reasons, LILCO requests that the Appeal Board grant it until October 7 to answer the "Governments' Brief on Bifurcated Appeal From the September 23, 1988 Concluding Initial Decision in LBP-88-24." LILCO asks that the Appeal Board give this motion expedited treatment, since briefs are due about 48 hours from now.

LILCO also respectfully notifies the Appeal Board that it believes that the Appeal Board's ex parte granting of Intervenors' Motion to bifurcate the appeal was itself erroneous procedurally and substantively, given the history of this case, and that it intends to seek Commission review of that decision.

Respectfully submitted,

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DATED: September 28, 1988

CERTIFICATE OF SERVICE

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL-3

I hereby certify that copies of LILCO'S MOTION FOR ENLARGEMENT OF BRIEFING TIME were served this date upon the following by telecopy as indicated by an asterisk, by Federal Express as indicated by two asterisks, or by first-class mail, postage prepaid.

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