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LILCO, October 3, 1988

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'88 OCT -5 P4:04

Before the Chairman of the Atomic Safety and Licensing Board Panel

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

**LILCO'S MOTION TO RECONSTITUTE
THE 50-322-OL-5 LICENSING BOARD**

In ALAB-901, 28 NRC ____ (Sept. 20, 1988), the Appeal Board remanded proceedings in connection with the 1988 emergency exercise at the Shoreham facility "for appropriate action to the Licensing Board in Docket No. 50-322-OL-5" Slip op. at 10. The Appeal Board added that this Licensing Board "may be reconstituted by the Chairman of the Atomic Safety and Licensing Board Panel in his discretion." Id.

By this motion LILCO asks the Chairman to exercise his discretion and reconstitute the OL-5 Licensing Board^{1/} to consist of the following members:

- James P. Gleason
- Jerry R. Kline
- Frederick J. Shon

Alternatively, LILCO asks that the OL-3 Board be designated to proceed with this matter.

^{1/} LILCO by no means believes that litigation of the 1988 exercise will be necessary, particularly in light of the decision in LBP-88-24 (Sept. 23, 1988) dismissing the Intervenor from the proceeding. But LILCO thinks it important to proceed with the appointment of an OL-5 board to avoid any delay in case it turns out for any reason that the board has issues to decide. The same desire to avoid delay compels LILCO to refrain from asking the Frye Board to stay its own proceedings pending action on this motion to reconstitute.

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LILCO's reasons are the following:

1. The Board most knowledgeable about the emergency plan is the OL-3 Board consisting of the members listed above.
2. There is no compelling need to retain the same members that heard the litigation of the February 1986 exercise.
3. The 1988 exercise is more clearly related to the current Shoreham Emergency Plan (reviewed through Revision 10) than it is to the 1986 exercise (which was based on Revision 5 of the Emergency Plan).
4. The OL-3 Board whose members are listed above has finished its work and, except for possible proceedings over the 25 percent license, has no more issues to hear.
5. On September 9, 1988, the NRC Staff filed a proposed schedule relating to the 1988 exercise with the OL-3 Board, which the Appeal Board did not consider in its September 20th Order.

I. History of the Case

The practice of dividing the 50-322-OL proceeding into a variety of docket subnumbers and licensing board judges is, as the Appeal Board has said, a "case management tool." There is one "proceeding" here, on LILCO's application for an operating license. All the operating license issues are under Docket Number 50-322-OL, which has included the "health and safety" issues, the "Phase I" (onsite) emergency planning issues, the "Phase II" (offsite) emergency planning issues, the issues remanded by the Appeal Board and the Commission, and the issues over the February 1986 and now the June 1988 emergency planning exercises. Included at various times were issues involving the security plan and the emergency diesel generators.

For most of this proceeding the issues have been decided under the undivided 50-322-OL docket number. For example, 50-322-OL was the docket number on the

Brenner Board's (Judges Brenner, Carpenter, and Morris) decision that the Intervenors were in default of a Board order (LBP-82-115, 16 NRC 1923 (1982)), the same Board's decision that the proceeding should go forward notwithstanding the County's opposition to all emergency plans (LBP-83-22, 17 NRC 608 (1983)), and the same Board's decision on the health and safety issues (LBP-83-57, 18 NRC 445 (1983)).

In May 1983 the Chairman of the Licensing Board Panel established a separate licensing board authorized to preside "over the proceeding on all emergency planning issues." 48 Fed. Reg. 22,235 (May 17, 1983). On February 13, 1986, LILCO conducted the first FEMA-graded exercise of the Shoreham offsite emergency response plan. One month later, responding to a pleading by Intervenors and in the interest of expediting any exercise litigation on the 1986 exercise, LILCO filed a motion before the Commission requesting the establishment of a licensing board and expedited procedures for litigation of the 1986 Shoreham exercise. See Long Island Lighting Company's Motion for Establishment of Licensing Board and Institution of Expedited Procedures for Litigation of Shoreham Emergency Planning Exercise Issues, and Response to Intervenors' March 7, 1986 "Motion Concerning Proceedings Relating to the Shoreham Exercise" (March 13, 1986). LILCO asked the Commission to appoint a board composed of members "who have participated in the earlier Shoreham emergency planning proceedings and thus have knowledge of the LILCO Plan and the mammoth record in the case." *Id.* at 11.

On June 6, 1986, the Commission issued an order to initiate a hearing on the results of the 1986 exercise and directing the Chairman of the Atomic Safety and Licensing Board Panel to "reappoint the members of the earlier Board if they are available." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 582 (1986). On June 10, the Licensing Board Panel Chairman, Chief Administrative Judge B. Paul Cotter, Jr., did just that, appointing the members of the existing OL-3 docket Board -- Administrative Judges Margulies, Kline and Shon -- to preside over

litigation on the 1986 exercise. See Establishment of Atomic Safety and Licensing Board (unpublished order) (June 10, 1986). This Commission direction to reappoint the members of the earlier board, if available, indicated the Commission's awareness of the obvious and important interrelationship of emergency planning and exercise issues. The OL-5 designation for exercise-related papers was made only several weeks later by Judge Cotter, "for more effective docket management." Change of Docket Number (July 24, 1986).

On October 7, 1986, Judge Cotter sua sponte reconstituted the OL-5 Board by replacing Board Chairman Margulies with Judge John H. Frye, III, and Judge Kline with Judge Oscar H. Paris. (Judge Shon remained a member of both the OL-3 and OL-5 Boards.) Judge Cotter cited schedule conflicts as the basis for the Board reconstitution.^{2/} On October 17, 1986, Judge Cotter issued an order clarifying the scope of the October 7 Order and affirming that the OL-3 Board remained responsible for all aspects of Shoreham emergency planning except for the litigation of the exercise. See Notice of Reconstitution of Board: Clarification (unpublished order) (Oct. 17, 1986).

The OL-5 Board issued decisions on the 1986 exercise on December 7, 1987, and February 1, 1988, almost two years after the exercise that was the subject of the litigation.^{3/} See LBP-87-32, 26 NRC 479 (1987); LBP-88-2, 27 NRC 85 (1988). LILCO sought

^{2/} On October 14, 1986, counsel for Intervenors wrote to the Licensing Board Panel Chairman demanding that the reconstitution order be rescinded. See Letter from Herbert H. Brown to B. Paul Cotter, Jr., (Oct. 14, 1986). Responding to a subsequent motion filed by Intervenors, the Panel Chairman declined to rescind the reconstitution order. See Suffolk County and State of New York Motion to Rescind Reconstitution of Board by Chief Administrative Judge Cotter (Shoreham Nuclear Power Station, Unit 1), LBP-86-37A, 24 NRC 726 (1986).

^{3/} The exercise was held February 13, 1986. FEMA's post-exercise assessment was issued April 17, 1986. On June 6, 1986, the Commission ordered "immediate initiation" of the exercise hearing and directed that the proceeding be expedited. Long Island

appeal from these decisions on December 17, 1987, and February 12, 1988, respectively.

On March 9, 1988, after soliciting the views of the parties,^{4/} the OL-5 Board issued a Memorandum and Order in which it declined to retain jurisdiction over Shoreham exercise-related matters. See LBP-88-7, 27 NRC 289 (1988). The Board's decision, which was never appealed from, had been opposed by LILCO and Intervenors, who both asked the Frye Board to retain jurisdiction over any remedial aspects of the 1986 exercise. The Frye Board noted two matters of significance in its decision. First, it lacked authority to make ultimate licensing (i.e., reasonable assurance) findings. Second, even if it theoretically had justification over remedial actions relating to the 1986 exercise, it thought that an independent exercise, itself sufficient for licensing, might be the more advisable course, and it noted that LILCO had chosen that course (in what became the June 7-9, 1988 exercise. Both of these matters cut against the OL-5 Board's retention of jurisdiction over the 1988 exercise. Almost seven months later, the Appeal Board has now held sua sponte that the OL-5 Board was incorrect in LBP-88-7. ALAB-901, 28 NRC ____, slip op. at 9 n.6 (Sept. 20, 1988).

(footnote continued)

Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 582 (1986). On August 1, 1986, the Intervenors submitted 162 pages of contentions. The hearings on the admitted contentions began March 10, 1987, nine months after the Commission's order in CLI-86-11 for expedited hearings, and lasted four months, until June 18, 1987, when the record was closed.

4/ See LILCO's Views on Continuing Board Jurisdiction (Feb. 17, 1988); NRC Staff Response to Board's Request for Views of Parties on Whether the Board Should Retain Jurisdiction Over LILCO Corrective Actions (Feb. 19, 1988); Governments' Views on Whether the Licensing Board Should Retain Jurisdiction of the Exercise Litigation (Feb. 23, 1988).

II. The OL-3 Board Should Be Appointed

A. The Best-Qualified Board Is The -03 Board

The purpose of the 1988 exercise, like that of any full participation exercise, is to illuminate the implementability of the Shoreham offsite emergency plan. Its basic frame of reference is thus the offsite plan, which has been within the jurisdiction of the current OL-3 Board. That Board, more than any other members of the ASLB panel, is knowledgeable about the offsite plan.^{5/} Reconstitution of the OL-5 Board to consist of the current members of the OL-3 Board would be appropriate and conducive to economy of administration of that Board. Alternatively, because the frame of reference is the offsite plan, litigation of any exercise issues should be before the OL-3 Board, which is most familiar with that plan.

B. Reappointment of the OL-5 Board Confers No Advantage

By contrast, reappointment of the members of the OL-5 Board who decided the 1986 exercise issues does not appear to confer any particular advantage and may have some disadvantages. That Board's reference point is the technically moot 1986 exercise, rather than the offsite plan per se and its implementability. Since the 1988 exercise was a full participation exercise intended to show independently the implementability of the Shoreham offsite emergency plan, rather than a remedial exercise hinged to a previous exercise,^{6/} the significance of the 1986 exercise to the current

^{5/} Two of the OL-3 Board's members -- Mr. Shon and Dr. Kline -- have heard all plan-related issues since the inception of the offsite emergency planning docket in 1982. Its Chairman, Mr. Gleason, has sat on a variety of issues going to the theory (realism) and facts (reception centers, school bus driver role conflict, hospital ETES, emergency broadcast system) of the Shoreham plan since his appointment 10 months ago.

^{6/} This view of the 1988 exercise appears to be shared by the Appeal Board, which has suggested that it is apparently subject to de novo litigation, and that the appeal of the 1986 exercise is at least technically moot. ALAB-900 (September 20, 1988) (slip

(footnote continued)

inquiry is secondary at best. As a result, the knowledge of the previous OL-5 panel members of the 1986 exercise does not confer any particular advantage.^{7/} Indeed, the plan has changed in numerous ways since the 1986 exercise. The OL-3 Board is more up-to-date on such changes.

The 1986 exercise, the Appeal Board has found, cannot form the basis for an operating license. If the 1988 exercise were merely a remedial exercise designed to correct defects in the 1986 exercise, then it arguably would be more closely tied to the 1986 exercise and there might be a better case for appointing the OL-5 Board. But, as

(footnote continued)

op.) at 7. Intervenors' position appears similar (if internally inconsistent) that all the events of the 1988 exercise must be evaluated, not only on their own terms but also from the perspective of the 1986 exercise, as though the 1988 exercise were a remedial exercise; but that the 1986 exercise cannot serve in any fashion as a basis for licensing. These matters, in any event, can be determined only by a Licensing Board.

^{7/} More important will be a licensing board's ability to put the 1986 exercise dispassionately into perspective in arriving at a present determination of emergency preparedness at Shoreham. This is underscored by the potentially prejudicial speculation of the OL-5 Board in its second partial initial decision on the 1986 exercise. There, that Board went beyond criticism of LERO's implementation of the communications elements of the Shoreham offsite plan (which had previously been found adequate by the OL-3 Board), to questioning the entire concept of utility plans. The OL-5 ASLB ventured:

It may be difficult for LILCO to cure this fundamental flaw because of the training and experience of the personnel used to implement the Plan. As emergency workers, LILCO personnel are amateurs; this fact may be the root cause of the communication problems. . . . [I]t is questionable whether utility personnel can ever achieve the level of performance that professional emergency workers, such as the police, display. . . . Consequently, the LERO approach is generally and fundamentally unsatisfactory, and it may be inherently so.

LBP-88-2, 27 NRC 85, 120 (1988).

This expression of views by the OL-5 docket Licensing Board may not be sufficient in itself to indicate a legally disqualifying bias. It and similar passages from LBP-88-2 do, however, illustrate the need for any Board with jurisdiction over the 1988 exercise to be able to achieve sufficient detachment from the OL-5 Board's previous decisions on the 1986 exercise to judge the 1988 exercise fairly in its own terms.

noted above, the 1988 exercise was not a remedial exercise but a separate, full participation exercise designed to stand alone.

In short, the OL-5 Licensing Board, which is knowledgeable primarily about the 1986 exercise and not about the plan as it has developed since then, is not the most appropriate board to deal with the 1988 exercise. The most appropriate board to resolve any issues involving the 1988 exercise is the one with the most knowledge about the fundamental issue: the emergency plan. The fundamental issue is whether there is a "fundamental flaw" in the emergency plan. The OL-3 Board has the most knowledge about the emergency plan and thus is most qualified to decide that issue. To the extent experience with the 1986 exercise could be helpful, Judge Shon, who sits on both the OL-3 and OL-5 Boards, can provide it.^{8/}

C. The OL-3 Board Appears to Be Available

Although LILCO does not know what other commitments the OL-3 Board members might have, it appears that they have the time to resolve any remaining exercise issues.^{9/} With the issuance of its Concluding Initial Decision on Emergency Planning,

^{8/} Moreover, reappointment of the OL-5 Board will, if there is any remand of issues resolved by LBP-88-24, result in two boards with overlapping memberships. Initially the OL-3 and OL-5 Boards were identical; then, briefly, Mr. Shon and Mr. Margulies were joint members; for most of the time the only common member has been Mr. Shon. The history of this case shows that this loses multiple boards' principal practical advantage -- the ability to work on multiple issues concurrently -- due to the impossibility of overlapping members' being in more than one place at any given time. In addition, while overlapping membership doubtless equipped each board with some institutional knowledge of the companion docket, the results did not always display the consistency and economy of overall work product that typically characterize the efforts of a unitary Board.

^{9/} All the remanded issues before the OL-3 Board have been decided in LBP-88-24. These are (1) hospital evacuation time and school bus driver role conflict issues, (2) realism/integrity-of-proceeding issues, and (3) EBS.

The OL-3 Board (plus an alternate Board member, Dr. Hetrick) is also responsible, in the OL-6 docket, for any potential litigation on LILCO's 25% license motion. However, LILCO doubts that that contingency bears materially on the present situation. LILCO's 25% power motion has been filed for nearly a year and a half by now, since April 15, 1987. There is no guarantee when the Staff will issue its Safety Evaluation Report. Even then, the issue of the substantive relevance of pending contentions to operation at 25% power is being initially addressed by Dr. Hetrick.

LBP-88-24, on September 23, 1988, the OL-3 Board finished its work on all the issues before it except the 25 percent license application. Given the apparent availability of the OL-3 Board, there is no good reason to have or resurrect a second board.

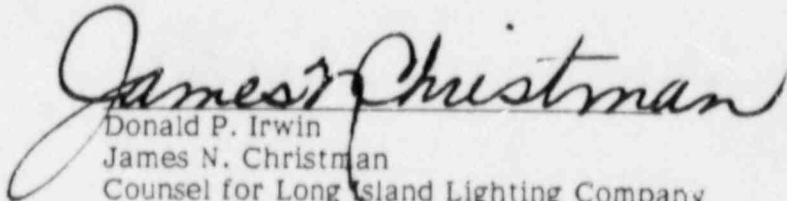
**III. Reconstituting The Board Would
Not Present Any Substantial Problems**

This motion comes at a time when the original OL-5 Board has issued an order, on September 22, setting a schedule for initial further proceedings on the 1988 exercise (filing of contentions and responses, prehearing conference). All that has been issued so far is this single scheduling order, however, and so LILCO is not asking for a redoing of any substantive activities by the OL-5 Board.

Nor was there reasonable time to request reconstitution of the OL-5 Board before its September 22 order. ALAB-901 was issued Tuesday, September 20. It appeared to call for the Chairman of the Licensing Board Panel to identify the members of the OL-5 Board for any 1988 exercise litigation. Instead, the OL-5 Board, which had earlier ruled (incorrectly, the Appeal Board has now held) that it had no more jurisdiction, issued its scheduling order on September 22. At the time the OL-3 Board had not issued LBP-88-24, and no one knew whether any board but the OL-5 Board would be available for proceedings on the 1988 exercise. The September 22 order was served Friday, September 23, by first-class mail without notice to the parties. It did not arrive officially until Tuesday, September 27. Meanwhile, the OL-3 Board decision, LBP-88-24, was issued on Friday, September 23, late in the day. Thus LILCO did not know and could not have known of the availability of the OL-3 Board in time to have requested its appointment before the previous OL-5 Board had acted.

In short, this motion for reconstitution is timely and makes sense from the standpoints of both efficiency and board expertise. LILCO asks the Chairman to exercise his discretion and reconstitute the OL-5 Board as requested herein or to designate the OL-3 Board to proceed with this matter.

Respectfully submitted,


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DATED: October 3, 1988

CERTIFICATE OF SERVICE

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In the Matter of
LONG ISLAND LIGHTING COMPANY *88
(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL

OCT -5 P4:04

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I hereby certify that copies of LILCO'S MOTION TO RECONSTITUTE THE 50-322-OL-5 LICENSING BOARD were served this date upon the following by Federal Express as indicated by one asterisk, or by first-class mail, postage prepaid.

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