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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE CLERK
DOCKETING & SERVICE
SECTION

Atomic Safety and Licensing Appeal Board

In the Matter of)
)
LONG ISLAND LIGHTING COMPANY)
)
(Shoreham Nuclear Power Station,)
Unit 1))

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

GOVERNMENTS' MOTION FOR LEAVE TO FILE REPLY

On October 4, 1988, the Governments received two pleadings related to the pending appeal: the NRC Staff Response to Intervenors' Motion for Bifurcation of Appeal and Expedition, October 4, 1988 ("NRC Staff Response"); and LILCO's Answer to Intervenors' Brief on Bifurcated Appeal, October 4, 1988 ("LILCO's Answer"). The Governments do not seek leave to file a response to the NRC Staff Response. That is because the NRC Staff Response fails to address the issue presented in this bifurcated appeal.^{1/}

^{1/} As the title of the NRC Staff Response suggests, the NRC Staff does not address, except in passing (see NRC Staff Response at 9-10), the merits of the jurisdictional issue raised in this appeal but, rather, takes issue with the Appeal Board's September 27, 1988 Order granting bifurcation of the appeal and urges the Appeal Board to determine whether the OL-3 Board was
(footnote continued)

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The Governments do seek leave to address two discrete aspects of LILCO's Answer.^{2/} Good cause is present to permit the filing of this brief reply. The Governments could not have known that the particular matters discussed below would be raised by LILCO; to assist the Board in reaching its decision, the Governments submit that this brief reply is appropriate. The Governments re-emphasize, however, that they seek an expedited decision by the Appeal Board. If the Board believes that consideration of this Reply would materially delay an Appeal Board decision, we

(footnote continued from previous page)
correct on the merits in throwing the Governments out of all proceedings. This Staff position cannot be considered in the context of the instant appeal. The Staff's attempt to redefine the issue on appeal violates the scope of the issue to be considered, as articulated by the Appeal Board in its September 27 Order and as reiterated in the Board's September 29 Memorandum and Order. Neither LILCO nor the NRC Staff sought reconsideration of the Appeal Board's bifurcation decision (LILCO on September 28 sought and obtained a less expedited briefing schedule but did not contest the bifurcation decision). It is thus inappropriate for the Staff in its present filing to take issue with the Appeal Board's decision to bifurcate the appeal.

^{2/} In many respects, LILCO's Answer, similar to the Response filed by the NRC Staff, is non-responsive to the jurisdictional issue which the Appeal Board set for expedited briefing. For example, Section V of LILCO's Answer (pages 14-17) is wholly unrelated to the jurisdictional issue. Similarly, Section I of LILCO's Answer (pages 2-5) purports to set forth "groundrule[s]" (see page 2), but then LILCO violates its own "rules" by seeking to have the Board reconsider its September 29 Memorandum and Order (see page 4). The Governments do not in this filing address LILCO's non-responsive assertions. We emphasize, however, that our silence in no way suggests that the Governments agree with LILCO's characterizations or other assertions. In particular, LILCO's characterizations of the bases of the OL-3 Board's decision (see page 3) and the Governments' alleged motives in seeking an expedited appeal (see page 8-9) are wrong. Further, LILCO's seeming assertion that the instant appeal represents some sort of improper tactic by the Governments has already been rejected by this Board. See Memorandum and Order (September 29, 1988) at 5.

ask that the Appeal Board disregard this Motion and Reply and proceed to a decision.

First, LILCO asserts that if the Governments' appeal is sustained, the NRC in multi-Board adjudications will be deprived of the ability to impose the "ultimate sanction" of dismissal. LILCO's Answer at 4. This is not true. The OL-3 Board is limited to its own jurisdiction in the imposition of sanctions. Yet, under the Commission's rules it could have certified the sanctions issue to an entity with proper jurisdiction. See 10 CFR § 2.718(i). The OL-3 Board, however, ignored the limits to its authority. It must therefore be reversed.

Second, at pages 11-14 of its Answer, LILCO cites certain cases which LILCO alleges to be persuasive in upholding the OL-3 Licensing Board's authority to dismiss the Governments from all proceedings, even those over which the OL-3 Board had no jurisdiction. Because LILCO's Answer fails to disclose pertinent facts concerning those cases,^{3/} the Governments seek leave to demonstrate that the cases cited by LILCO are distinguishable.

1. Branca by Branca v. Security Ben. Life Ins. Co., 773 F.2d 1158 (11th Cir. 1985), modified, 789 F.2d 1511 (1986).

^{3/} LILCO is less than clear as to how persuasive it purports the cases to be. At one point, LILCO states that the cases are "clear precedent" to support the OL-3 Board's action. LILCO's Answer at 10, n.10. Later, however, LILCO states that the cases "may be distinguishable on one ground or another from the Shoreham case." LILCO's Answer at 14.

LILCO fails to disclose that the Federal rules specifically provided that the United States District Court in Florida could impose sanctions for failure of a party to comply with a discovery order issued in the same case by another United States District Court. See 773 F.2d at 1165, citing Fed. R. Civ. P. 37(b)(2). The NRC rules contain no comparable provision. Further, in Branca, the discovery order issued by the Kansas court was clearly directly part of the same case as was pending in Florida. There was no question -- as exists here -- of separate jurisdiction over different issues.

2. Weisburg v. Webster, 749 F.2d 864 (D.C. Cir. 1984). In this case, a single United States District Court had jurisdiction over a single case. For pre-trial purposes, the Court had bifurcated the case into a discovery phase and a phase related to the propriety of certain Freedom of Information Act exemptions. When the plaintiff was found to be in violation of discovery orders in the first phase, the entire case was dismissed. No jurisdictional issue was presented in the case, since a single court had jurisdiction over all phases of the case.

3. Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585 (9th Cir. 1983). In this case, there was a single United States District Court involved which had jurisdiction over an entire proceeding. When it found that plaintiff's conduct was improper,

it clearly had jurisdiction to dismiss the entire proceeding. No jurisdictional issue was presented.

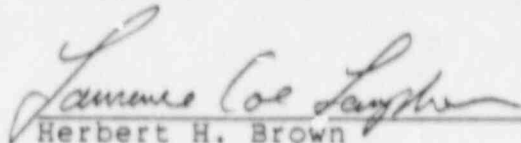
4. Aztec Steel Co. v. Florida Steel Corp., 691 F.2d 480 (11th Cir. 1982), cert. denied, 460 U.S. 1040 (1983). Here, plaintiff's anti-trust action was dismissed for failure to comply with court-ordered discovery. There was no question whether the District Court had jurisdiction to order the dismissal. The Court of Appeals rejected the argument that the dismissal should have been limited to only the two defendants who had propounded interrogatories, rather than against a third defendant as well, based upon a finding that the plaintiff's conduct was so improper that the complete dismissal sanction was appropriate. Again, however, no question of the court's jurisdiction to take such action was at issue.

The foregoing demonstrates that LILCO's cases provide no support for the extraordinary action taken by the OL-3 Licensing Board in the Shoreham proceeding. The OL-3 Licensing Board had no jurisdiction to order sanctions over matters pending before another Board. Neither LILCO nor the NRC Staff has cited any

support for the proposition that the OL-3 Licensing Board had such jurisdiction.

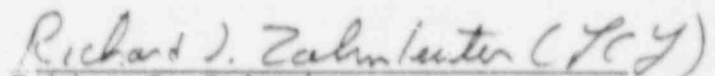
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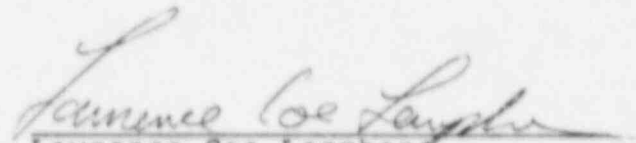
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